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Community Sanctions and Measures in Europe and North America

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Preface

In 1998 the Dutch Probation Service celebrated its 175th anniversary by organizing a series of activities around the theme 'task penalties'. In the Netherlands, this term is applied to those community sanctions requiring the active participation of the suspected/sentenced offender, and are a substitute for custodial sentences. Another feature of these sanctions is that they are focussed on the behavioural change and the reintegration of the offender, and actively involve society in the process. This is especially the case with two sanction modalities developed during the last two decades, i.e. community service and learning/training programmes.

Task penalties were chosen for the anniversary celebrations because to the Service, these penalties are inseparable from probation. Their common roots lie in the remote past, and both evolved and continue to exist because of the existence of prison penalties: probation was established in order to ease the lot of prisoners and to minimize the damaging effects of detention vis-à-vis reintegrating former prisoners. Task penalties – and especially the early form they took, i.e. 'labour punishment' – are explicitly intended to avoid the need for detention. As an historical phenomenon, the task penalty as labour punishment has a tradition extending beyond the history of Dutch probation and the precursors of probation in, for example, France and the United Kingdom. Beginning in the twelfth century, initiatives arose and laws were created in many European countries – such as Italy, Portugal, Switzerland, France and Germany – to settle labour punishments, first as alternatives to sanctions (e.g. fines and fine default detention) and, since the rise of custodial punishments in the eighteenth century, as a direct alternative to prison sentences. In those days, society was not mature enough for the alternative forms of punishments. For lack of viable alternatives, prison sentences developed more and more as the primary and almost automatic response to criminal behaviour. In this sense, the probation system owes its origin to the failure of the task penalty sanction *avant la lettre*.

However, these roles have now been reversed. In the Netherlands and many other European countries, the probation system thanks its existence to the successful revival of the labour punishment in the 1970s and the introduction of other community-based sanctions in the 1980s. Its direct involvement in the innovation of the sanction system and its responsibility for the execution of these non-duress forms of sanction have brought a new élan to the probation system. This has resulted in closing the gap between probation, judiciary and justice departments and a clearer position for probation in the administration of criminal justice. Equally important, it has contributed to probation being more firmly anchored in society.

Nevertheless, this does not mean that the possibilities of community sanctions are being utilized to their full extent. In many countries, legislation restricts the further development of community sanctions, there is a lack of an adequate infrastructure and/or community sanctions have insufficient societal support. More specifically, politicians and judicial authorities do not support community-based sanctions that differ in appearance and objective from traditional custodial sanctions. The best way to reduce prejudice regarding community sanctions, to learn from each other's failures and to experiment with new ideas and possibilities, is to exchange both positive and negative experiences and to compare similarities and differences in legislation and enforcement.

This volume contains the contributions from experts from the USA, Canada, Russia and seventeen Western and Central European countries to the Dutch Probation Service's festive seminar, at which experiences, ideas and factual information were exchanged. However, this volume does not purport to present the last word on the subject of community sanctions and their possibilities, limits and shortcomings. It does, however, provide enough ideas, experiences and information to stimulate the discussions required to promote the further, theoretical and practical development of community sanctions.

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Intermediate Penalties: European Developments in Conceptions and Use of Non-Custodial Criminal Sanctions

HANS-JÖRG ALBRECHT & ANTON M. VAN KALMTHOUT

In view of the abundant use of imprisonment, in Western Europe the question was raised as early as the 1970s whether the range of criminal penalties should be extended by the addition of what today are commonly called intermediate penalties, and what conditions should be established in order to make this type of criminal penalty work. Faced with rising crime rates and thus with increasing numbers of offenders adjudicated and sentenced, virtually all criminal justice systems have been preoccupied since the 1970s with a search for cost-benefit efficient but non-custodial responses to crime other than the summary fine and non-prosecution policies based on conditional or unconditional discharges. A considerable part of these efforts has been devoted to the search for alternatives to imprisonment, which while laying a heavy financial burden on the state does not effectively deter criminals or reduce recidivism. Although resorting to imprisonment as a way to combat increasing crime rates has regained popularity, such policies are associated with enormous costs, as in the case of California where today more is spent on prison and imprisonment than on the higher-education system.

However, the search for intermediate penalties in the 1960s was also fuelled by theoretical arguments that stressed the counterproductive effects of detention practices in terms of stigmatisation and labelling, as well as the then still strong political and public support for rehabilitative approaches to the individual offender. A bifurcated approach developed with an attempt to reserve 'rehabilitative' imprisonment for serious recidivists (in particular

career offenders), while the non-dangerous offender or one-time offender should be eligible for non-custodial criminal sanctions and diverted from the prison system. Furthermore, sentencing theory as elaborated in the 1960s and 1970s strongly advocated the need for a wide range of penalty options thought to facilitate the matching of particular sentences to particular offenders. Putting the focus on individualisation in sentencing partially reflected rehabilitation theory, but was in particular called for by the assumption that personal and individual guilt as expressed in criminal offending could be best accounted for by various sentencing options tailored to the individual case.

Although since the 1970s a wide range of intermediate penalties has been introduced and implemented in Europe (backed up by European minimum rules on the use of non-custodial penalties), there was a powerful re-emergence of imprisonment in virtually all European countries in the 1990s, as illustrated by the 1994 survey of criminal penalties in the member states of the Council of Europe and the prison figures covering subsequent years: European countries report considerable increases in the number of prisoners during the period 1988-1998. The rates of increase of the absolute numbers of prisoners in this period vary between 10% and 60%; only Finland reports decreasing numbers of prisoners. There is therefore plenty of evidence that there is a common trend in criminal sanctions in Europe: the heavy use of imprisonment. This trend started in European criminal justice systems somewhere in the second half of the 1980s/beginning of the 1990s. In the mid-1990s, there was a rather higher rate of imprisonment compared to the early 1980s or mid-1980s. In 1993, average imprisonment rates were around 90/100,000, and even approached 100. These figures have been partially updated for some countries. Germany, for example, reported imprisonment rates at the end of 1996 of somewhat more than 90 (up from 60 to 70 in the 1980s), while Spain reported a dramatic increase, with imprisonment rates of approximately 113 in 1996. In England and Wales the number of prisoners stood at 61,000 in November 1997 (117/100,000) with a projected further increase of some 11,000 over the next decade.

The reasons for these trends are easy to identify. First, there is a trend towards longer prison sentences. In particular drug-trafficking offences attracted long prison sentences in the 1980s as a consequence of get-tough policies in the field of illicit drugs. A crackdown on violent offences and sexual offences also contributed to the increase in the prison populations in Western Europe. The new concern for dangerous offenders – in particular,

rapists and sexual abusers – has increased support for incapacitative sentencing. 'Truth in sentencing' philosophies and 'law and order' policies have become popular in some European countries, and this too has influenced the trend. The zero-tolerance approach has recently spread right across Europe, indicating a new punitive attitude towards petty offenders. Finally, there is a trend towards increases in the size of precarious populations (i.e. populations most likely to be eligible for prison sentences). Precarious groups come especially from immigrant and migrant populations and the long-term unemployed.

Imprisonment rates are also on the rise in Central and Eastern Europe. After a brief but nevertheless drastic decline in the use of imprisonment shortly after the political changes at the end of the 1980s (such decline was also driven by the granting of amnesties), imprisonment is again on the rise. Virtually all criminal justice systems in Eastern Europe experienced major drops in prison rates at the end of 1980s/beginning of the 1990s. However, the fact that sentencing patterns did not change – or despite changing sentencing patterns – changes in crime patterns contributed to the rapidly increasing prison populations in the 1990s. Although the period of decarceration immediately following the process of economic and political transition was part of the general policy of reducing repression, it seems to have been of a short-lived transitional character. One may hypothesise that in Eastern Europe, the lack of alternatives to prison sentences, strong public support for imprisonment, the fear of crime and demands for tough responses to seemingly rapidly increasing crime rates mean that imprisonment rates are continuing to increase.

In light of these trends, the traditional bifurcated approach to crime and criminal offenders – i.e. separating mass crimes and therefore essentially the first-time offender from the heavy and persistent criminal offender – has weakened. It is essentially for this first group that such techniques as diversion and the wide range of community-based or intermediate sanctions were developed, with day-fines, compensation, restitution, probation and community service representing the core non-custodial penalties.

Imprisonment was reserved for serious recidivists, as an *ultima ratio*, and rehabilitative efforts were concentrated within the prison environment. The basic concept behind these policies, which were implemented in the 1960s and 1970s, referred to a dichotomised criminal offender: one not requiring rehabilitation, the other being in need of supervision, care and treatment. It is essentially with respect to this conception of the criminal

offender as well as sentencing philosophies that significant changes occurred during the 1980s and 1990s. The tide of clear-cut philosophies underlying the concept of intermediate penalties is now on the ebb.

Among the crime phenomena that are high on policy agendas today are organised crime, transnational and cross-border crimes, and such new crimes as economic and environmental crimes. Sensitive, highly polarising crimes – such as hate crimes, sexual violence, terrorism and drug crimes – continue to provoke debates on the best responses. Mass crimes have lead to capacity and overload problems, and have contributed to a significant trend towards the simplification and streamlining of basic criminal law and criminal procedure. New types of offenders then have to be considered which are partially linked to new crime phenomenon, e.g. the rational offender, the ethnic and foreign minority offender, and criminal organisations or corporate criminals. With these types of offenders the basic approach adopted in criminal justice systems during the 1960s and 1970s – that is, rehabilitation and reintegration focussed on the individual, sentenced offender – has come under considerable pressure. Instead, the focus is now on organised crime, rational offenders, migrant offenders and foreign offenders. Today in most European prisons, immigrants and drug offenders comprise two of the fastest growing groups.

On the other hand, alternatives to imprisonment have been created and successfully implemented in many parts of Europe. There is clear evidence that day-fines succeeded in the 1960s and 1970s in Austria, Germany, Switzerland, some Scandinavian countries and partially also in France and Spain in replacing to a quite considerable extent particularly short-term imprisonment. Austria and the Federal Republic of Germany introduced day-fine systems in 1975; Hungary followed in 1978, and France and Portugal in 1983. Recently, a system of unit fines was introduced after a series of experiments in England and Wales based on the Criminal Justice Act 1991, which came into force at the end of 1992. However, the introduction of day-fines did not turn out to be successful in England and Wales, and six months after they were introduced, the Home Office announced their preliminary suspension as the judiciary was extremely opposed to the idea of fining offenders according to day-fine standards.

The new French Criminal Code, which came into force on 1 March 1994, has extended the scope of day-fines, which had been rather narrow since the 1983 criminal law amendment. Current revisions to the penal codes of Switzerland (draft), Spain and Poland include the introduction of

day-fine systems. On the other hand, the current draft of a proposed penal code in Belgium retains the concept of summary fines, thereby indicating that the trend towards the extended use of day-fines is not unequivocal. Other European countries – including the Czech Republic, Greece, the Netherlands, Norway, Italy and Iceland – have not incorporated the idea of day-fines into their criminal justice system and are not considering abolishing the system of summary fines. However, fines per se continue to play a major role in the sentencing practices of these countries. Furthermore, some jurisdictions in the United States are currently experimenting with day-fines in order to evaluate the potential for reducing jail overcrowding and easing the burden on probation systems.

So far, Denmark and England and Wales are the only countries to have held serious discussions focused on replacing the day-fine system with a system of summary fines. The Danish discussion took place in the 1970s and there are no signs that a successful movement towards abolition will take place. A review of penal reform debates during the past several decades reveals that there have been other suggestions regarding the development and application of criminal fines, while the concept of 'instalment fines' – a model which combines day-fines with a system of mandatory instalments – has not been introduced into European legislation. The aim of this type of fine is to deprive the offender, for a fixed period of time, of all the income he/she could spare, thereby reducing his/her income to subsistence level. Because the possession of money is perceived to guarantee freedom, it was hoped that an instalment fine would amount to something like partial imprisonment or restricted liberty, since offenders would be deprived of the resources needed for mobility. Another reform designed to improve the fixed-sum fine system has been proposed by the Dutch Commission on Monetary Penalties: it proposes the introduction of fine categories for offences, each with an upper limit depending on the seriousness of the offence. At the same time, there would be a general provision requiring the adjustment of the size of the fine within each offence-specific range, according to the financial circumstances of the offender. The proposal has been approved by the Dutch parliament.

New policies focused on the forfeiture and confiscation of ill-gotten gains have also been considered. While the traditional policies of day-fines and other financial penalties have emerged from the framework of alternatives to imprisonment and rehabilitation, the new confiscation policies are built on a model of the rational offender and on the eliminative ideal in

crime policy. In the rather short history of money laundering and confiscation legislation, illegal profits from drug-trafficking have been a core issue. The interest in strengthening control over the flow of money and in confiscating crime proceeds arose primarily within the context of drug-trafficking and drug-related problems at the beginning of the 1980s, but since then has been extended to the profits generated by criminal enterprises and criminal organisations in general. The confiscation and forfeiture of criminal proceeds are now the state's most powerful weapons in the fight against drug-trafficking and other types of organised crime. It is even argued that such traditional responses to crime as imprisonment and fines alone are ineffective, and that the better alternative is to follow the money trail. Intermediate sanctions and community penalties no longer come into the picture when responses to these types of crime are discussed.

A second pillar in the system of intermediate sanctions as developed and implemented in the 1970s, besides day-fines and financial penalties, is comprised of suspended prison sentences and probation. These sanctions were quite successful as alternatives to immediate imprisonment, in particular during the 1970s and 1980s. As the concept of day-fines is dependent on rather well-off offenders, probation and the suspension of prison sentences have played an important role in replacing imprisonment for offenders not eligible for day-fines because of their economic situation. Although probation and suspended prison sentences are rooted in the rehabilitative idea and have been elaborated and implemented for some time according to such thinking, in the 1980s there was a shift towards attaching punitive and restrictive conditions to probation orders and suspended prison sentences.

Furthermore, community service orders received considerable attention in the 1980s, with several European countries reporting a rather large increase in the use of such orders. Currently, European sanction systems which provide for community service as a sole sanction standardly set the maximum numbers of hours to be imposed by a court at 240 hours. However, some countries have recently increased this maximum to 360-480 hours. Others (e.g. Germany) have not introduced community service as a sole sanction, but have restricted it to being an alternative to default imprisonment or as a special condition within the framework of a conditional waiver or suspended sentence.

Throughout the 1980s the topics of reparation, restitution, compensation, victim-offender mediation or reconciliation received considerable attention

in most Western European countries, and to a considerable extent also in Central and Eastern European countries. International standards have emerged with respect of the role and position of the crime victim within the criminal justice system. The UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, and the Council of Europe's recommendations on the position of the victim within the framework of criminal law and criminal procedure and on assistance to victims and the prevention of victimisation, refer to the new concern for the crime victim, and frame victim policies designed to recognise the crime victim in the system of criminal sanctions. Among the policies derived from the victim' s perspective, restitution (or compensation) and victim-offender reconciliation have in one way or another been incorporated into penalty systems. However, restitution or compensation orders are mostly attached to probation or suspended prison sentences or serve as conditions to be fulfilled in exchange for non-prosecution.

Although numerous experiments with restitution and victim-offender mediation have been carried through and reparation and compensation have been introduced as sole sanctions in some criminal justice systems, many questions have been left open from the viewpoint of both criminal law and criminology. One of the questions which should be addressed at the beginning concerns why restitution suddenly received that much attention in the 1980s and how these grounds may fit into the policy developments in the first half of the 1990s. There are different answers. It is first of all the perspective of the victim that has to be taken into consideration. It has been claimed that the victims of crime are marginalised in the criminal process, which centres on the offender. Indeed, focussing the criminal procedure and criminal penalties on the offender matched legal theory, as prevention either pursued through individual or general deterrence or through rehabilitation or incapacitation represented the main goal of criminal law and its implementation. When rehabilitative efforts and deterrence failed to demonstrate significant effects, the vacuum was filled with a new rationale for responding to the offender, that is, restitution and compensation for the victim. An answer is also provided by cost-benefit considerations, i.e. the burden on the criminal justice system (especially criminal correction) can be reduced by introducing pre-trial restitution as an alternative to regular criminal proceedings and criminal penalties. In particular from the victims policy perspective, compensation and restitution are open to various crime policies. These devices can be used to make the system more punitive or to

demonstrate the offender's accountability. Recently, the punitive aspects of compensation and restitution have been receiving more recognition. From a practical point of view, however, compensation and restitution as a main response or sole penalty lag far behind imprisonment, probation and day-fines.

Finally, various diversionary practices – for example, transaction fines as used extensively in Holland and Germany – are today firmly rooted in the criminal justice system's responses not only to juvenile crime, but also to adult criminal offences.

Electronic monitoring entered the European crime policy arena at the beginning of the 1990s (it had already emerged in the US in the first half of the 1980s). England and Wales, Sweden and the Netherlands were among the first countries to seriously consider introducing such monitoring as a main penalty and as an alternative to pre-trial detention. After some experimentation in these countries, electronic monitoring (essentially as a form of house arrest or home detention) suddenly became an issue of concern in virtually all European countries in 1996-1997.

Several German states (including Berlin and Hamburg), various Swiss cantons, France, Italy and the Netherlands are seriously considering making electronic monitoring an essential element in their justice system. This process certainly should attract research on the spread of concepts of criminal sanctions. Attention should also be paid to the role of technology and industry in propagating the development of specific criminal sanctions. However, the current attraction of electronic monitoring is due to the concern about costs in the criminal justice systems, as well as to its potential to symbolise cost-benefit consciousness and crime politicians' concern for thorough control and supervision.

The new types of non-custodial sanctions to be implemented indicate important changes. While in the 1970s intermediate sanctions were developed within the framework of rehabilitation or diversion (trying to avoid the negative side-effects of imprisonment and other criminal sanctions), sanctions such as forfeiture and confiscation are solely based on the idea of incapacitating rational criminals and criminal organisations and depriving them of all means necessary to keep criminal organisations going. The sanction itself is not so much aimed at the individual offender, but in trying up the resources necessary to run criminal networks.

It follows then that this type of sanction tends to become independent from traditional elements of criminal sanctions, i.e. a concept of guilt and presumption of innocence. On the other hand, restrictive sentences served

in the community (such as house arrest and electronic monitoring) are intended to provide close supervision at minimum cost, whereas the community-bound sanctions of the 1960s and 1970s aimed at the rehabilitation and reintegration of criminal offenders.

The dramatic increase in prison populations throughout Europe raises the question whether the concept of intermediate penalties has been successfully implemented. The debate on such penalties since the 1970s has stressed that the process of implementation is of paramount importance for the success of intermediate sanctions in terms of replacing prison sentences and alleviating the burden on the prison system. It has been argued that unconditional, short custodial sanctions statutorily should be reserved as the *ultima ratio*, and that judges should first take into account non-custodial sanctions when deciding upon the disposition thought to be the most appropriate for criminal offenders. While the *ultima ratio* idea is not new – after all, criminal law in general is the *ultima ratio* in systems of social control – it is nevertheless difficult to present viable methods for implementing this principle into everyday decision-making within the criminal justice system. However, Germany has introduced statutory guidelines regarding the choice between day-fines and short-term imprisonment (laying a rather heavy burden of justification on trial judges resorting to imprisonment), which has proved to be efficient in cutting down short-term prison sentences.

Both research and practical experience indicate that sufficient financial and human resources need to be placed at the disposal of organisations responsible for the implementation of community sanctions, in order for them to be able to fulfil their tasks the same way as prison authorities executing prison sentences. Although probation services and social work units within the criminal justice system have been extended considerably since the 1960s, this trend came to an end in the 1990s when general policies brought about severe budget cuts.

An obvious obstacle to implementing intermediate penalties is pre-trial detention, the use of which has recently increased in many European countries. In fact, the use of pre-trial detention makes intermediate penalties or community sanctions illusionary. The use of pre-trial detention partially reflects 'short, sharp shock policies' (essentially also towards the juvenile offender). The concept of intermediate penalties also indicates the need to develop strict criteria in order to prevent pre-trial detention being abused as a form of pre-trial custodial penalty.

Intermediate penalties need the compliance of the offender; community service, for example, is fully dependent on the offender's voluntary cooperation. However, compensation, probation and other non-custodial penalties also rely on a certain measure of compliance. A core problem in implementing intermediate penalties therefore concerns the question what to do when an offender fails to comply or violates the conditions etc. attached to his/her intermediate penalty. With respect to the intensive supervision of probation clients, research shows that the rate of technical violations has increased sharply compared to ordinary probation programmes. Therefore, reactions to non-compliance with community sanctions should be reconsidered. Technical violations should not automatically lead to the imposition of a prison sentence and should not constitute a criminal offence.

Research on the implementation of intermediate penalties suggests that both the judiciary and prosecutors make intensive use of intermediate sanctions. However, there is a ranking order in the frequency of use of these sanctions. Day-fines and summary fines are the most widely used, followed by probation and suspended sentences. Compensation/restitution and community service come rather low on the list, although according to official accounts of the main penalties meted out, there are some community service and compensation 'bubbles' on the European landscape. These bubbles are due to the fact that most systems use compensation and community service either as attachments or at the end of the enforcement process.

When confronting the success stories of intermediate penalties with the phenomenon of increasing prison populations, one should look at the prison population itself since there have been considerable changes in its composition. European prisons are rapidly filling up with foreign and ethnic minority offenders, drug offenders and violent offenders, and these groups have triggered new policies of physical control. Intermediate penalties do not seem to provide answers to these new developments behind the changes in the prison populations.

To summarise:

- Imprisonment has regained considerable ground in Europe.
- Intermediate penalties originally developed as alternatives to imprisonment do not seem to be counteracting this trend.
- Intermediate penalties have been and still are rather successful in replacing imprisonment, and this can be attributed to theoretical and prac-

tical efforts vested in the implementation stage of intermediate penalties.

- Despite this success, there are certain problem areas in the field of intermediate penalties. The most important ones are the lack of clear conversion rates to make various penalties comparable and – linked to this – the lack of clear policy decisions to define priority areas for specific penalties.
- The concepts and philosophies of intermediate penalties have been subject to important changes. These can be summarised somewhat crudely by the phrase 'from political to economic correctness' and are illustrated by the emphasis on restriction and punishment. While the 1960s and 1970s were preoccupied with rehabilitation and changing the offender for the better, the 1990s focussed on control, restriction and costs.
- The 1990s saw the emergence of new offender groups and new criminal offences. Although this attracted policy concern, these groups are beyond the reach of intermediate penalties. The concepts developed in terms of the organised and the rational offender as well as the transnational and the migrant offender point towards social and legal reactions which aim at physical control, exclusion and (in particular from the viewpoint of confiscation policies) elimination. The changing composition of prison populations in Europe underlines the need to adjust the concepts of intermediate penalties to foreign and ethnic minority offenders as well as drug offenders if intermediate penalties are to again serve as a measure to combat growing prison populations.

Community Sanctions and Measures (CSMs) in Austria*

GEORG MIKUSCH, ARNO PILGRAM

1. Background of the developement of csms in the last 25 years

1.1. Start and trigger of discussions

CSMs became an issue in the course of the great penal law reform (*Große Strafrechtsreform*) which went into effect in 1975 (Stangl 1985). CSMs in Austria have actually been applied for no more than 25 years if juvenile penal law is not taken into account. Austrian penal law was dominated by classical principles until well into the 70s. This resulted in Austria recording one of the highest relative rates of imprisonment in Europe (Kaiser 1983). Furthermore, a deepening gap was emerging between society's growing demand for social mobility (job market, education, political par-

* In accordance with the subject of this paper only the following sanctions applied under the Austrian Penal Code are described:
- Non-custodial sanctions with certain limitations requiring the accused's or the delinquent's co-operation
- Sanctions under the adult penal code, i.e. sanctions for criminal actions committed by persons older than 18.

The following issues are not included in the paper:
- Wider range of alternative sanctions applied in juvenile proceedings
- Conditional dismissals, conditional sentences, conditional release from custodial sentences as well as conditional release from detention as a preventive measure linked to a period of probation without further orders (e.g. probation support or other orders).

It should be borne in mind that in the context of Austrian debates, the measures this paper deals with are not perceived as a distinct class of legal provisions. Because of this, a specific term for these measures is lacking.

ticipation, life style a.s.o.) and a penal policy grossly ignoring any social aspects.

The coalition governments during the post-war and allied occupation periods had obstructed any substantial reforms. It was not until 1971 that the only socialist government succeeded in overcoming the long-term restraint on social reforms. One of the most outstanding reforms then concerned penal law. The professed purposes of the reform were not only to substitute short-term incarceration by fines, but to close certain institutions altogether (workhouses) and to reduce long-term imprisonment. Consequently, alternative penal measures had to be found that would be in accordance with the reform policy. These were initially conditional sentences and conditional release combined with probation and/or orders.

In effecting these CSMs, judicial institutions were consulted and practical experience, gained in work done according to the JGG 1969, was applied. The implementation of health-related measures according to SGG 1971 was originally meant as a response to juvenile drug abuse and the threat of inadequate sentencing in the late 60s. However such measures in fact eventually represented further CSMs for adults as well.

1.2. Changes in the theoretical and political debate, the approach and policy of the CSMs

Politically speaking, the *Große Strafrechtsreform* made the penal law more "humane" (Keller 1979). In reality, the reform had introduced aspects concerning personality, education, and therapy into penal law. The methods offered by social sciences regarding the classification and modification of personality could no longer be ignored in correctional practice. Since then, the preventive measures based on social science methodology have not met expectations. In Austria, however, this applies more to intensive intervention, detention and psychotherapeutic measures (such as the so-called detention as a preventive measure) than to the CSMs. The idea of providing social support for reintegration as a means of prevention is still basically persuasive. Questions posed recently are whether the shortcomings of delinquents have been too heavily stressed in the past, and whether at the same time their potential has been underrated. The next consideration is the degree of monitoring and intervention on the government's part in the punishment of petty crime. Such cases could better be turned over for out-of-court settlement (*Außergerichtlicher Tatausgleich*), or sanctioned by compensation measures at community level.

The principle of "more of the same" has been questioned during the last ten years. "Leaner" and shorter-term measures are being worked out that would have a broader reach. These considerations do not widely represent a revised judicial rationality, but mainly serve administrative and economic purposes, which are becoming dominating factors.

At present, since the penal procedure amendment went into effect in 1999, the prosecutor is in a position to *offer* the offenders an alternative to formal court proceedings. The alternatives range from out-of-court settlement to compliance with certain orders. The idea that personal liability for the offence, the consequences of the act and for oneself (by fulfilling certain duties such as subjecting oneself to education, counselling or therapy) as well as compensational services for the benefit of those affected or the community (community service) is principally to be accepted voluntarily does point to doubts regarding non-judicial decisions on the issue of guilt and penalty. On the other hand, additional intervention measures are being sought as a compromise between simple, non-intervening referral by the prosecutor and formal court proceedings with sentencing.

These so called "intervening alternative measures" range from the simple ruling of a probation period to social-constructive duties and informal sanctions (*"Geldbußen"*). The second category corresponds to CSMs. The suspect is expected to act constructively and is therefore supported constructively in this endeavour by being provided with community work. The mutual moment in this kind of intervention is professional support in community work (mediation, consulting, social therapy).

As such, CSMs on the whole (as also in their traditional form of probation work) tend to be classified within the field of referral. Consequently, the objectives of sanctioning and monitoring as well as the more substantial interventions in the accused's life and livelihood, that can be imposed only by a court ruling, have become secondary. On the other hand, however, this is generally reducing support for offenders to only-short term support while assignments and duties are being carried out.

1.3. Non-punitive aims and punitive qualities of CSMs

The main purpose of CSMs was originally to avoid imprisonment, followed by a tendency to avoid the accumulation of a criminal record altogether. At the same time, particularly due to the principle of legality (*Legalitätsprinzip)*, judicial responsibility was to be maintained regarding responses to criminal actions, albeit non-disruptive responses. The CSMs are meant to

foster a penal jurisdiction that does not exclude certain members of society either symbolically or actually.

With the penal procedure amendment of 1999, the CSMs have given priority to avoiding both formal court proceedings and "aid for the aggrieved parties". Out-of-court settlement is now being embodied in penal law, and all CSMs can be linked to the criteria of compensation.

Whether CSMs as such contain a punitive quality, if and when such measures are linked to (even conditional) sentences, or whether they lack punitive character if, as in other cases, the prosecutor forgoes sentencing or ordering court sanctions, can be answered either theoretically or by the persons involved themselves – something that has hardly been recorded. It is clear that in most cases decisions on CSMs taken by the prosecutors and courts are aimed first of all at sanctioning and punishing. However, such decisions are also to some extent a result of benevolence. Social workers who directly represent and carry out CSMs tend to emphasise the voluntary and supportive aspects more than a criminal court would do. This is largely a result of the special situation in Austria, where CSMs are developed and carried out almost exclusively[1] by an independent organisation engaged in social work, which as such is not directly subject to judicial or political influence.

In today's Austria, the social workers of this institution no longer consider themselves authorities on sentence enforcement and the old slogan "probation support is sentence execution in freedom" is generally negated. The fact that the social workers do not present themselves to the clients as representatives of a repressive system and that the requirements set for their clients are not sanctions of a repressive system, is quite significant. However we cannot say for sure how the persons involved really feel about the professed "joint-effort coalition" between social workers and clients or about the impact of implicit and explicit duties linked with the measures.

[1] Vision [*Leitbild*] of VBSA, Resolution of the General Assembly of 6th June 1997 (reprinted also in the Annual Report of 1997)

2. Csms' legal framework

The issues

- CSMs' legal framework
- Concept and purpose of CSMs
- Legal conditions under which a CSM can be applied by the police, the prosecutor, the examining or sentencing judge
- Description of the severity of the various CSMs
- Legally warranted relation between custodial and non-custodial penal sanctions
- Requirements of the accused or convicted person's consent to CSMs
- Monitoring of the execution of assignments imposed on the accused or convicted person and consequences of failing to adhere to the requirements of an alternative sanction
- Orders to revoke a CSM and legal status of accused or convicted persons
- CSMs combined or applied alongside imprisonment or other forms of correction

will be explained together with the main categories of CSMs.

2.1. CSMs provided for by Austrian criminal law

The CSMs for adults provided for by Austrian criminal law are listed below according to the procedural decisions in which they are applied.

a/ Alternatives under the Code of Criminal Procedure (StPO):
The CSMs community service, probation period with probation support and/or duties as well as out-of-court settlement all are alternative measures according to this code.

b/ Law on Narcotics (SMG):
The CSMs health-related measures and probation support can be applied in drug law proceedings. Procedural decisions can be made subject to the offender's consent to these measures.

c/ Criminal Code (StGB):
The CSMs probation support and orders can be applied within the framework of the conditional suspension of a penalty or of detention as a preventive measure.

d/ Deferred prison sentence:
The CSMs probation support and orders can serve as conditions for certain forms of deferment.

a/ Community service, probation period with or without duties, and out-of-court settlement. Forms of alternative sanctions according to the Code of Criminal Procedure

An (intervening) alternative sanction is defined as a response of the authorities to suspected criminal behaviour that is voluntarily accepted by the accused and that is a substitute for formal court proceedings as well as the possible finalisation of such proceedings by a verdict of guilt. Alternative sanctions are laid down in §§ 90 a to m of the Code of Criminal Procedure.

Criminal proceedings involving adults (assuming that the offence was committed after the age of 18) can be referred under the following circumstances (§ 90 a StPO):

- Dismissal (§ 90 StPO) of the criminal case is not warranted: This condition sets a statutory minimum period for the application of an intervening alternative sanction. If a certain suspicion of an offence is not backed by sufficient evidence; if the offence is subject to the statute of limitation; or, if the offence does not warrant criminal prosecution, proceedings must be discontinued without further responses.
- Comprehensive insight into the facts of the case:
An alternative sanction that causes inconvenience to the accused is only possible if the facts of the case have made it clear that formal criminal proceedings would otherwise be called for.
- Lack of doubts regarding specific or general prevention:
An alternative sanction is only warranted if it is a no less adequate means of preventing the accused or others from committing offences than a penalty would be. It is significant that the careful application of an alternative measure largely meets the requirement to consider prevention.
- Not possible for cases that require jury proceedings:
Alternative sanctions in adult cases are limited to offences assigned to the Magistrates Courts (*Bezirksgerichte*) or to the sole judges at the District Courts (*Landesgerichte*). These include, with single exceptions, offences that carry a sentence of up to 5 years. Consequently, any form of robbery as well as most sexual offences are not eligible for alternative sanctions.

- Lack of substantial guilt:
  The attitude as well as the incriminating moments of the offence that can be unfavourably attributed to the accused must not exceed that of the average case.
- The offence cannot have resulted in the death of a person.

If all these conditions are fulfilled, the public prosecutor must offer the suspect an alternative. If a case has already been assigned to the court, the judge at the hearing is also obliged to consider an alternative sanction. The law distinguishes four forms of alternative sanction that cannot be applied concomitantly. The prosecutor or the judge must decide on the most suitable form. Whether an alternative measure is suitable depends on how the interests of the aggrieved party can best be represented as well as on how repeated offending can be best avoided. The following three forms of diversion include CSMs:

- Community Service (§§ 90 d and e StPO):
  The alternative measure of community service is applied particularly in cases classified as average crime (medium seriousness) and in those cases of repeated offending in which an alternative measure seems more suitable than a prison sentence to convey a sense of values. The measures include doing up to 240 hours voluntary community service and occasionally direct compensation of damage done as well. Usually this form of diversion is usually supervised by an agent (the agency is called upon by the prosecution and is provided by the VBSA). The agent consults both the accused and the institution in which the accused is performing the service.
- Probation Period (§ 90 f StPO):
  This alternative measure includes either a probation period of one to two years or, in addition, the fulfilling of certain duties (particularly to attend courses and/or provide compensation, but also all duties that can be ordered), or probation support (see c/ below).
- Out-of-court settlement (§ 90 g StPO):
  The out-of-court settlement is the alternative measure for offences committed in the immediate social environment or conflicts arising from everyday situations. The out-of-court settlement is the only alternative measure that actively involves the victim. The basis is the offender's willingness to confess to the offence and to face his or her motives and reasons. He/she has to settle the consequences of the offence in an appropriate way (particularly but not exclusively by paying compensation).

If necessary, he/she also has to fulfil all duties that indicate willingness in the future to abstain from the behaviour that had caused the offence. A successful out-of-court settlement requires the victims' consent in cases involving an adult offender. The-out-of court settlement is supervised by a mediator (who is assigned by the head of the local out-of-court settlement office at the request of the prosecutor or the court). The mediator has to discuss his expectations with the victim and to give him or her the possibility to specify his/her interests. With the offender, the mediator explores the willingness to confess to the offence and if necessary to settle the consequences of the offence. The offence should eventually be settled between the suspect and the victim by an agreement including financial means and/or reconciliation. The very aim of the out-of-court settlement is the repair of law and order without penal sanctions, which should be only the public act of last resort.

Every alternative measure requires the offenders' consent and has to be discontinued as soon as he/she demands the institution/continuation of penal proceedings. The moment an alternative measure ends successfully, the penal proceedings must be ended irrevocably. In that case the suspect is - failing conviction - still classified as innocent. Every final alternative dismissal must, however, be kept on the internal register of the judicial authorities for five years.

After the prosecution service or the court has offered an offender an alternative, penal proceedings can only be ruled/continued if the offender demands this, if he/she fails to fulfil the respective duties on schedule or completely, or if penal proceedings are instituted against him or her for another suspected offence.

Every accused person can apply to the court for an alternative measure. If this application is rejected, the accused can appeal to the next instance. Furthermore, an appeal against a penal sentence can be brought on the grounds that no alternative measure had been offered in a case where this could have been warranted.

b/ *Health-related measures and probation support under narcotics law*

If, in addition to certain conditions, an addicted accused or convicted person is willing to subject him or herself to a compulsory, appropriate, feasible, reasonable, and not obviously hopeless health related measure (§ 11 SMG), the law on drugs allows refraining from bringing charges (§§ 12-14

SMG), from initiating penal proceedings (§ 35 and 37 SMG) or the deferment of the enforcement of a sentence (§ 39 SMG).

- Health authorities, school directors and military commanders are not obliged to bring charges for petty drug crime (offences carrying sentences of up to 6 months under § 27 sub. 1. SMG) if the accused subjects him or herself to health-related measures (§§ 12-14 SMG).
- Initial charges linked to the consuming of minor quantities of drugs must be rejected by the prosecution service if the accused is willing to be subjected to a defined health-related measure. This can also be applied to repeated charges, charges related to offences involving only small quantities of drugs or to petty crime directly related to abuse (§ 35 SMG). Charges do not have to be brought on condition that a suspect declares his/her willingness to be supervised by a probation worker (see c/ below).
- The court must/can discontinue proceedings on the same basis as the foregoing.
- The court can defer the enforcement of a sentence for drug offences or drug-related offences of max. 3 years for up to 2 years if the convicted person agrees to subject him/herself to a health-related measure (§ 39 SMG). If the measure proves successful, the court can order conditional suspension under probation for 1 to 3 years (see c/ below).

§ 11 sub. 2 SMG cites some health-related measures that can be applied:

- medical supervision
- medical treatment including addiction therapy and substitution therapy
- clinical-psychological counselling
- psychotherapy
- socio-pedagogical counselling.

The judge, the prosecutor, or the health authorities can decide on the type of health-related measure, but not the institution or the person enforcing the measure. In addition, the judge can order inpatient treatment at a recognised institution if deferred sentence enforcement has been granted under § 39 SMG.

The consent of the accused or the offender is mandatory for any therapeutic measure. When the Narcotics Act went into effect on 1 January 1998, the principle of free choice of therapist was introduced. This in itself makes any imposed treatment or counselling by a certain person or in a certain institution subject to the accused or convicted person's consent.

Prior to this Act, the judge or the prosecutor were authorised to assign an institution or a person to carry out treatment.

The accused or convicted person can be required to present written confirmations on entering into and carrying out such a measure. He/she can either submit these to the prosecutor/judge in person or can assign submission of the confirmations to the institution or person enforcing the measure. The prosecutor/court monitors the execution of the measure by way of the confirmations.

The prosecution service must bring charges after a temporary dismissal of charges pursuant to §35 SMG, and the court must reopen proceedings after a discontinuation pursuant to § 37 SMG if the suspect persistently neglects to comply with a conditional health-related measure or with probation support. The same applies if there is good reason for doubts regarding particular preventive considerations or if a new case is opened involving a drug-related offence.

If a convict granted conditional suspension under § 39 SMG does not adhere to the condition of a health-related measure or if a new case is opened involving a drug-related offence, the suspension must be revoked.

Appeal against a penal sentence can be brought on the grounds that a temporary suspension of proceedings was not granted even though the offence and the circumstances would warrant this. The convicted person can also appeal if an application for suspension has been rejected, a granted suspension has been revoked, or if no final suspension has been conceded after the successful fulfilment of conditions.

c/ Probation support and orders within the framework of conditional suspension of a penalty or of detention as a preventive measure

If both the particular and the general considerations regarding prevention are given, the court must order a complete or partial conditional suspension by means of a probation period of 1 to 3 years (§§43 and 44 StGB). Basically, conditional suspension can be applied to the complete penalty for sentences up to 2 years, or to fines. Partial conditional suspension can be applied to sentences up to 3 years and to fines. If there are substantial extenuating circumstances, conditional suspension can also be ordered for sentences up to 5 years.

Conditional release from prison or detention as a preventive measure is granted on similar terms. The earliest possible conditional release can fol-

low after half of the sentence has been served. After 2/3 of the sentence has been served, the court is obliged to review conditions for release (§46 StGB). Conditional release from a life sentence can be granted after 15 years at the earliest. If the period of conditional release exceeds 3 years, the probation period is 5 years. The probation period for conditional release from life sentence is 10 years.

Alongside a penal sentence, detention in an institution for addiction therapy can be suspended (§ 45 StBG). Release from an institution for mentally disturbed criminals can only be granted conditionally with a probation period of 5 or 10 years (§§ 47 and 48 StGB), whereas the court must review the conditions for release annually. Each conditional suspension or release can be granted on the basis of a probation period alone, or can be linked to probation support or other orders for the period of probation.

If the convict is sentenced for a new offence during the probation period, or does not comply with the conditional order in spite of formal reminder, or persistently refuses to co-operate with the probation worker, and if additional particular preventive doubts are evident, the court must revoke the conditional suspension or conditional release (§ 53 StGB). Before revoking the suspension the court must hear the probation worker, the convicted person and the prosecution service. The convicted person is entitled to file either a complaint or an appeal against a revocation, according to the status of the case appealed (appeals against the Magistrates Court are submitted to the District Court, appeals against the District Court are filed in the 1st instance with the Higher Court (*Oberlandesgericht*). A nullity appeal can be submitted to the Supreme Court (*Oberster Gerichtshof*). In any case the sequential procedure is limited to 2 instances.

- Probation support:

A probation sentence can be applied if considered required or purposeful to prevent the offender from committing further offences. The judge in charge sets the duration of probation support (it may not exceed the probation period).

The practical execution of the supportive work as well as its intensity is up to the probation worker, who is subject to directions from the head of the district probation office (not to the judge in charge). However, the probation worker must report to the judge in charge 6 months after the order was given at the latest and then regularly until the measure is completed. The judge in charge can request additional report, also on defined issues, at any time.

The probation worker builds up a supportive relationship with the client. The purpose of this relationship is to advise and attend the client in his/her various day-to-day problems and to help him/her master his/her psycho-social and financial problems in responsible manner. The probation worker also supports the client in providing for their housing, work, income and in developing a sense of social responsibility. By such means, the client is assisted in finding a manner and attitude that allows them to lead a life that will not be obstructed by any criminal actions in the future (§ 52 sub. 1 StGB).

- Orders:

The judge must impose orders in combination with conditional sentences and release on parole if this is considered necessary or purposeful to prevent the offender from committing further crime. The same procedure also applies to deferred sentence enforcement. § 51 sub. 2 StGB cites some orders that can be imposed:

- to live in certain place, with a certain family, or in a certain institution, or to avoid certain company;
- to abstain from alcoholic beverages;
- to attend vocational training, or to work actively in a suitable profes sion;
- to report each change of job or whereabouts;
- to report regularly to the court or to other authorised offices;
- to recompense any wrong as fully as possible;
- to undergo addiction therapy, psychotherapy, or other medical therapy.

Orders requiring addiction therapy, psychotherapy or medical treatment can only be given with the consent of the accused or convicted person. Orders requiring medical treatment involving surgery are not permitted. This also applies to orders that represent an unreasonable interference in the personal rights of the offender or in his/her life.

The judge can impose additional orders as well as amend or discharge orders during the parole period. The judge imposing the order also monitors its enforcement. If probation support has been ordered in addition, the judge can confer with the assigned probation worker about observations concerning the orders. A probation worker can not be assigned to directly monitor compliance with an order (see 5.2.).

d/ Deferred prison sentence

The court must defer a prison sentence not exceeding 1 year on the convicted person's request if there is no specific risk present and if a deferment

appears preferable to immediate serving of the sentence for professional or economic reasons (§ 6 sub. 1 lit. 2a StVG). If the convicted is not yet 21 years old, the court must also grant deferment for sentences exceeding 1 year if this enables the convicted to complete vocational training or professional education (§ 52 JGG).

The court can impose orders (see c/ above) together with a deferment (§ 6 sub. 3 StVG). If a deferment of more than 3 months has been granted for a sentence concerning an offence that was committed when the convict was under 21 years old, the court can assign probation support (see c/ above) as well (§ 50 sub. 1a StGB).

The court must revoke the deferment if the convict does not comply with the order, if there is a risk of escape or the immediate suspicion of repeat offending (§ 6 sub. 4 StVG). The convict can appeal against the rejection of an application for deferment or against a revoked deferment. If an appeal is not obviously without prospects, the sentence should not be enforced until the appeal has been legally concluded.

The following specific issues were not included in the general description of the CSMs above:

2.2. *CSMs carried out as pilot projects*

Out-of-court settlement in adult crime has been practised on a trial basis by certain magistrates and district courts since 1992. The number of districts applying this model has grown since then and by 1 January 1999, out-of-court settlement was put to use in all court districts (however, still on a trial basis).

Out-of-court settlement was only given legal force upon enactment of the penal procedures amendment of 1999, and the legal scope of its application was extended. For practical purposes, however, the scope became more limited because of new alternative measures. Experimental pilots of other intervening alternative measures such as community services were not carried out (see 7.1.).

2.3. *Official or unofficial guidelines for imposing or refusing alternative sanctions*

Apart from the law and other legal material (government drafts, reports by parliamentary committees) the judicature and the decrees by the Ministry of Justice have had the strongest influence on the practical application of

CSMs. The decrees are mandatory for the prosecutors, who are subject to directions, but not for the independent courts. Within the context of CSMs, the initiating decree on the penal procedures amendment of 1999 (regulations on alternative measures pursuant to the Code of Penal Procedure) should be underlined (JMZ 578.015/35-II 3/1999).

3. Enforcement of the csms

3.1. Authority or institution responsible for the enforcement of CSMs and co-operation with the public prosecutor or court

a/ Alternatives under the Code of Penal Procedure:

The accused him/herself is responsible for the fulfilment of the alternative form of probation without probation support but with other duties, and is monitored by the prosecution service or the court (see 2.1.a/ above).

If singular forms of alternatives involve intervention by social workers (community services, probation period with probation support or requiring course attendance or out-of-court settlement: See 2.1.a/ above), enforcement follows as in cases with probation support (see c/ below).

In order to clarify the conditions for an alternative measure, the prosecutor/court can consult the head of an out-of-court settlement office (§ 90 k sub. 1 StPO). In all forms of alternatives involving social work intervention, the prosecutor/court can request the social worker to inform the suspect of the offer of an alternative measure as well as to supply the required information on his/her rights.

Regarding the alternative measures of community service and a probation period (accompanied by probation support or course attendance) the social worker informs the prosecutor/court whether the offender has accepted the offer. If this is so, the prosecution must withdraw the charges; the court must temporarily discontinue the proceedings and inform the offender of this status. The period for performance of the services or probation starts as of this date. As soon as the community services have been rendered and any required compensation for damage done has been paid, the agent reports to the prosecutor/court. The alternative form of probation period with probation support requires that the probation worker reports according to c/ below.

If a case is referred for out-of-court settlement, the mediator informs the prosecution service/court as soon as an agreement on settlement has been reached and again after the issues of the settlement have been fulfilled completely or on the whole.

b/ Law on narcotics:

Probation support follows as described under c/ below. Health-related measures are carried out by institutions or persons of the accused/convicted person's choice. The prosecution service or the court monitors the measures (see 2.1.b/ above).

The prosecution service/court must receive confirmation of the beginning as well as the process of a health-related measure. The confirmation can be forwarded by the accused/convicted person him/herself or can, on his/her request, be forwarded by the person or institution carrying out the measure. The law on drugs includes regulations on these issues. Some of the health-related measures are subject to the law on psychotherapy and on medical practice as well.

c/ Probation support and orders linked to a conditional suspension of a penalty or of detention as a preventive measure:

The Ministry of Justice can either secure the execution of probation support by its own institutions or assign a private organisation (§ 24 BewHG). Detailed directions on the tasks, activities, rights and obligations of the executing institution as well as of probation workers, mediators and related agents are outlined particularly in the law on probation support (BewHG), but are also dealt with in the Criminal Code and in the Code of Criminal Procedure. At present, the VBSA[2], a non-profit society, is assigned to carry out all such measures across all federal states.

Before probation support is ordered, the judge can consult the head of the probation office in charge in order to discuss whether probation support is appropriate in the particular case. The probation worker reports to the judge after 6 months and again after the period is completed. Furthermore, the judge can call for additional reports at any given time (also regarding specific issues). The probation worker is also obliged to report to the court on their own account should relevant circumstances require this. Compli-

[2] The VBSA will change it's name into "Neustart" (meaning *New Start*) as of 2002.

ance with orders is the convicted person's responsibility, and it is monitored by the court in charge.

d/ Deferment of prison sentences:

The fulfilment of orders and the execution of probation support as well as co-operation follow as described in c/ above.

3.2. Organisation of coaching, support, and reporting activities connected with CSMs

Probation support, out-of-court settlement and the agency services for community service are all carried out by the VBSA. The VBSA is a non-profit society and as such is headed by a honorary board that in turn appoints a professional managing director. The managing director heads the board of executive directors on which both staff members and the heads of the various institutions are represented. In the future, 14 offices throughout Austria will be in operation (these can also establish subsidiaries to meet regional requirements). Each of the offices will offer probation support, out-of-court settlement and agency services for community service (as well as services the VBSA provides that are not within the scope of CSMs). One or more teams of social workers are employed in each office. The head of the office distributes the assigned cases among the employees and supervises their professional work.

As a rule, social workers in both departments are required to have graduated from the Academy for Social Work. In some cases, other adequate education and/or practical experience can be accepted as well. In addition to this, new employees are given comprehensive training, are granted a limited number of cases in the beginning, and are carefully consulted on the initial cases in order to acquire the required know-how. In the first two years of employment the social worker is entitled to coaching; later coaching can be given on request if called for. Subsequent to the initial training, each social worker is entitled to a one-week professional course or programme a year. The teams usually meet once a week (once every 2 weeks is the minimum requirement for scheduled team meetings). These conferences provide a professional exchange as well as team support for each member. A team has up to 12 members.

See 3.2. for information on reporting.

3.3. Are volunteers involved in CSM-work?

Probation can be executed by both full-time professional social workers and by volunteers. Persons who are suitable and ready to engage in social work are added to the list of active workers by the head of the local office. As a rule, a voluntary co-worker has the same rights and obligations when carrying out their work as an employed social worker. At the time being, about one fifth of all cases are handled by volunteers.

Other CSMs do not involve work on a voluntary, honorary basis.

4. Empirical data and evaluation of csms

4.1. Statistics on and scientific evaluation of CSMs

Only the VBSA keeps statistical records on the measures they carry out (probation, out-of-court settlement and arranging community services). No data on the remaining measures is available (see Table 1, appendix).

According to a study carried out on the results of 1997 (Hirtenlehner/Kuschej/Pilgram 1999), the maximum number of cases throughout Austria covered by the heading of probation could be 28,900 out of 76,200 persons sentenced, or of 174,200 accused persons. In fact, only 1.4 per cent of the total potential (compared to 35 per cent sentenced under the Penal Code applicable to juveniles) was covered. The figure for the court district with maximum coverage is 4.1 per cent. (With regard to orders, the same scope of potential could be given, but there is no indication as to the number of cases covered.) The potential of probation support for released prisoners, however, reached 1,344 conditionally released out of a total of 7,529 persons released from prison or from detention as a preventive measure. In fact, 46 of 100 conditional releases were assigned to probation support. With regard to the application of out-of-court settlement in penal proceedings involving adults, the same study renders figures between 1.8 and 5.1 per cent for the court districts serving as examples. The real potential in this field can not be quantified.

A pioneer survey on evaluation of Austrian penal jurisdiction was done with special regard to the relative success of probation compared to other measures applied by juvenile court (Hinsch/Leirer/Steinert 1973), and encouraged probation to be extended to adult jurisdiction as well. Since then no update has been done.

Being a pilot project, out-of-court settlement was closely surveyed from the beginning with regard to its application by judicial bodies, the scope of application, the degree of acceptance by the parties involved, and the results of both mediation and court procedures. The Vienna Institute of Sociology of Law and Crime carried out these surveys (Hammerschick/Pelikan/Pilgram 1994).

The Institute of Penal Law and Criminology at the University of Vienna has published a survey on recidivism after mediation versus after court proceedings. This survey covered persons guilty of bodily harm (Schütz 1999). The Institute of Sociology of Law and Crime has carried out a survey on the effects of both mediation and court proceedings after violent acts, focusing on violence within partner relationships (Pelikan/Hönisch 1999).

No evaluative surveys exist on other CSMs.

4.2. Influences on sanctioning practice in the application of CSMs

The legal introduction of probation for adults coincides with the successful legal aim to apply fines and conditional suspension as well as to reduce unconditional imprisonment pursuant to the *Große Strafrechtsreform* (Burgstaller 1983). In view of the initially limited capacity of probation for adults, the revised jurisdiction can not be said to have been a merit of organised probation. During the first fifteen years after the reform was effected, the number of conditional sentences steadily increased, a fact which is due in part to the activities of probation.

Probation comprises a substantial amount (approx. half) of the support for convicted persons on conditional release. The number of probation clients increased more rapidly until 1990, and has subsequently decreased at a relatively slower pace than the number of conditionally released convicts. Consequently, the relative rate of conditionally released persons receiving probation has steadily been rising. However, probation has not led to a less restrictive release practice.

Out-of-court settlement widened the scope of the legal dismissal of proceedings (nolle prosequi) in the pilot period according to § 42 StGB (hereby replacing penal sentences or formal proceedings). In the beginning it was also used to replace informal dismissals pursuant to § 90 StPO, i.e. it was applied instead of non-interventions (cases that would have been dismissed anyway on grounds of not being worthy of penal measures were

referred for out-of-court settlement). Initially, prosecution bodies that originally displayed readiness to dismiss proceedings according to § 42 StBG naturally showed a higher tendency to prefer out-of-court settlement. Any given regional discrepancy in judicial practice became even more evident in this way. An update on the latter is not available (Hammerschick/Pelikan/Pilgram 1994).

More recent studies, however, have disclosed that the negative correlation in practice between out-of-court settlement and formal proceedings in the courts remains negligible. This is due to the fact that there are many court districts that display great restraint as well as other districts that excel in actively applying both mediation and conviction (Pilgram/Hirtenlehner/Kuschej 2001).

The scope of the alternative measures introduced by the penal procedure reform of 1999 has considerably influenced the number of formal court proceedings. In this context, the CSMs (out-of-court settlement, probation period linked to duties - such as probation support, community service) have not been applied nearly as frequently as other alternative measures like fines and probation periods without any duties (Pilgram 2001).

It should also be stated that the introduction and spread of out-of-court settlements did not negatively influence the number of cases assigned to probation; quite the contrary (Kuschej/Pilgram 1996, 28 pp). Yet there appears to be a shift from out-of-court settlement to community service within the alternative measures.

4.3. Offences and offenders made subject to CSMs

Probation in combination with conditional sentence/release is assigned in nearly all levels of crime. The probation clients tend to be young adults, a high proportion are male and Austrian citizens with (not very many) prior convictions. A considerable number suffer from a high degree of vocational disruption as well as numerous social shortcomings (Kuschej/Pilgram 1996a, 58 pp). Out-of-court settlement is preferably applied in cases involving assault and vandalism as well as for persons without a prior criminal record, i.e. cases that express breaches of "common manners" more than the general rejection of "social norms". Out-of-court settlement records a lower relative rate of juveniles than other CSMs as it is also frequently applied to adults without relevance to sex or nationality. Other than in probation, highly qualified and well-off persons make up a high rate of

those referred for out-of-court settlement. As such these persons do not represent the typical offender (Kuschej/Pilgram 1996, 56pp). There is a strong tendency to apply out-of-court settlement when dealing with typical "private" offences, namely violent crime in partner relations, disregarding the objections brought by the feminist lobby. Health-related measures are limited to drug offences and offenders. No data are available on these and other CSMs.

4.4. Acceptance of CSMs by courts, politicians and the public

The acceptance of such measures and of the executing organisations by the courts, the politicians and the public was clearly demonstrated on the occasion of the 40th anniversary of the Austrian Society for Probation and Social Work. This anniversary was arranged by the department for public relations that was established by the VBSA for such purposes (VBSA 1998b).

CSMs have hardly ever been an issue for relevant court decisions. A supreme court decision of 1984 on rights of appeal, however, declared that the notes taken by the probation worker must be considered confidential matter to which the judge may not have access. This decision did not have any negative influence on the co-operation between the probation office and the courts.

After the change of government, however, a parliamentary inquiry commission was installed in order to examine the response to criminal behaviour in Austria, whether it is reasonable, efficient, and balanced. In this way, the brand new law on alternatives, the alternative CSMs and the limitations of their scope of application have all been the subject of discussion within the framework of the above commission. On the other hand there is a lack of scientific engagement, although some research is being done on issues concerning juvenile jurisdiction (Pilgram/Kuschej 1997)

4.5. Availability of recidivism rates and revocation rates

The general statistic on recidivism as expressed in the criminal record does not differ between probation and non-probation when it comes to conditional suspension. The criminal record does not include out-of-court settlement. Current data on recidivism is only available on out-of-court settlement after bodily harm. The rates on recidivism after out-of-court set-

tlement for those without a previous criminal record is 10%, after being fined 22%. The rates for persons with previous convictions were 30% and 47% respectively (Schütz 1999).

In 2000, 76% of all probation cases (adults) were discontinued due to fulfilment or premature repeal, 9% by revocation due to repeated offence, and 15% on other grounds (mostly accounted for by problem-related court prolonging of the probation period). The reasons for revocation are almost exclusively to be found in serious cases of recidivism. As of yet, no in-depth studies exist on the conditions that are favourable to the avoidance of such revocations.

4.6. Financial means for CSMs compared to the costs of imprisonment

Imprisonment costs (less building costs and investments) amounted to Euro 210,000,000 in 2000. The combined costs incurred for probation (with almost the same number of cases handled as compared to cases subject to imprisonment), out-of-court settlement and other CSMs involving social workers of the VBSA were about one tenth of the amount, less than half of which are attributable to measures carried out in relation to juvenile offences. No exact figures can be given, since it is very difficult to allocate VBSA overheads to individual task fields.

5. Probation

5.1. Functions of probation service with regard to preparing, executing, supervising, and monitoring CSMs

Probation is a CSM in its own right, which in some cases can be imposed together, prior or subsequent to other measures. Probation-care efforts comprise the client's entire environment and may therefore relate to the execution of other CSMs. Any other measures will be taken into account when carrying out a probation programme (see 2.1. a/ b/ c/ and d/). Moreover, the probation worker has the right to give his/her opinion on the nature of imprisonment with regard to his/her client within the framework of proceedings for application for release of unconvicted prisoners in the instances of pre-trial detention or conditional sentence deferments. The pro-

bation worker's opinion is vital, since an expert evaluation of the offender's personality, social integration abilities as well as his/her social environment will determine the grounds for pre-trial detention and produce a basis for assessing a specific preventive prognosis.

The probation service does not have any particular influence on the execution, supervision or monitoring of other CSMs. To some extent, reporting and documentation function as monitoring devices (see: 2.1.a. and 3.1.). A probation worker's written report is by no means a prerequisite for the ordering of alternative measures. Indirectly, a written report can be of some significance as to the choice of measures.

5.2. Work burden of probation officers, effectiveness and counter-productivity of supervision and monitoring by probation workers

Whereas an employed probation worker is not allowed to handle more than 30 clients at the same time, a voluntary probation worker is limited to 5 clients. An average of 25 clients are assigned to a full-time employed probation worker, while a voluntary probation worker has 2 clients.

An important task of probation is to establish a continuous relationship of trust and confidence with the client and to support his or her social integration in order to avoid recidivism (see: 2.1.c.). Monitoring is not the prime task of a probation worker. To this end, the Act amending the Penal Code of 1996, § 52 sub-section 1. StGB, revoked the clause hitherto providing for the explicit monitoring responsibility of the probation worker. Of course, probation still encompasses a social monitoring function based on the fact that in most cases probation is mandatorily imposed. In addition, the probation worker is obliged to inform the court of his/her activities and observations.

In view of the fact that a client's refusal to perform their obligations will lead to revocation of their conditional suspension, the probation worker's observations do have a bearing. The probation worker, however, is by no means obliged to perform excessive monitoring. Despite some monitoring functions still in existence, support for the client and establishing a relationship of trust and confidence are by far the main tasks of probation. This is backed up by the fact that the probation worker is not actually required to report any criminal actions committed by his client and that they can refuse to testify against their client in criminal proceedings.

To this end, probation is not primarily effective as a monitoring device, but rather has to be viewed as a stabilising instrument for the client. Since the conceptional approach of probation comprises controversial elements such as mandatory ordering, documentation and reporting or threat of revocation on the one hand and supporting measures on the other, the performance of individual tasks may become conflictive.

5.3. The right of accused or convicted persons to complain against negative decisions by a probation worker

The probation worker cannot on their own decide any measures that burden the client. Regarding the probation worker's activities, the accused or convicted person is entitled to lodge a complaint with the head of the local probation office (immediate superior) concerning the actions and decisions of the probation worker. However, legislation does not prescribe any means of redress or appeal.

5.4. Involvement of the probation service in new ways of applying CSMs

Probation has, in the past, been engaged in developing CSMs, particularly since out-of-court settlement was originally carried out within probation. Meanwhile, out-of-court settlement has been established as a working field on its own, and has been widely applied. The probation workers are also in charge of arranging for community service that has been prescribed as a CSM for adults since 1 January 2000.

Probation basically views the development of CSMs in a positive way and has made its own contributions. Some details are questioned with regard to priorities, execution standards, accumulation of measures and punitive interpretations and elaboration.

6. Prospects in the near future – revisions, new CSMs

New forms of CSMs are not expected in the near future. The amendment to penal law of 2001, that will most likely be decided on by the Austrian Parliament and go into effect by 1 January 2002, will prescribe probation prolongation after suspended release from life sentences and from institutions for mentally disturbed criminals.

7. Problems waiting to be solved

7.1. The most urgent difficulties and obstacles

In Austria, the CSMs have usually been introduced on an experimental and regional basis prior to any legal regulations and before a measure has been implemented to its fullest possible extent in accordance with the means available. The predominant approach has been to favour the concept of a selected number of measures that guarantee excellent operative quality (probation, out-of-court settlement, health-related measures pursuant to SGG or SMG) instead of offering a vast range of measures that are not equipped with sufficient means (Pilgram 1995). Out-of-court settlement had long since been well organised and widely tried within general penal law (Löschnig-Gspandl 1999) by the time it was legally established and guaranteed within the penal procedure amendment of 1999. Concomitantly, this amendment leaves room for further CSMs (fulfilment of duties, probation support during a probation period, community service), without, however making any funds or resources available in order to efficiently test and carry out documentation on the new measures.

The penal procedure reform of 1999 did not ignore certain risks caused by the detailed range of intervening diversional measures made applicable. These new possibilities could lead to a replacement of the non-directive out-of-court settlement, that leaves the fulfilment up to the conflicting parties, by the more directive and intensively intervening CSMs. Furthermore, punitive responses such as fines could become the preferred measure altogether. To avoid such a development, a comprehensive instructive decree was issued as supplement to the 1999 amendment. The decree describes the characteristics of cases eligible for the various alternative sanctions, hereby stressing the viewpoints of social pedagogic/social work and laying emphasis on accommodating the aggrieved party. In spite of these efforts, there is an evident tendency toward replacement as described above (Pilgram 2001).

Policies that adhere to mandatory punishment as a means of symbolic confirmation of general norms (positive general prevention) do, in their very nature, represent a threat to the existing CSM tradition and judicial culture. Under such circumstances, and with regard to the discussion on minimal penalty and maximum tolerance, the CSMs could very probably be subject to revised definitions and regulations.

The Parliamentary Inquiry Commission, now in session, on " The Response to Criminal Behaviour in Austria, Whether it is Reasonable, Efficient, and Balanced" are not only discussing the relation between the penalty level for different offences but are also posing the question of the maximum severity of offences for which CSMs (alternative forms in particular) should be prescribed. A majority of the experts on penal law are indeed opposed to any restrictions on this point, quite contrary to the political representatives.

The organisational structures of CSMs do not pose a problem at present. The discussion on whether or not probation and those services originating in probation should be taken over by the government as well as on questions regarding the organisational restructuring and decentralisation of probation and related services was resolved in 1994 (Leirer 1996). Since then, a general contract between the VBSA and the Federal Ministry of Justice guarantees the execution of nearly all CSMs in all federal states. In accordance to this contract VBSA, a private organisation, is the sole executor of CSMs (except health-related measures pursuant to the SGG or SMG).

7.2. Realistic and visionary contributions on how the current problems can be solved

A team from the VBSA have submitted a draft for a " Federal Law on Probation and Social Work within Penal Justice", to which both authors of this paper have contributed (VBSA 1998a). The aim of the draft was to convey normatively and in concrete terms that the concept of *penal* justice does not cover the full concept of *criminal* justice. This constitutional article applies to the various forms of social work (the social field) within executive justice. It contains the government's obligations as well as society's claims with regard to support after having incurred a penalty. The article also makes an effort to adequately standardise the relationship between the legal institutions and social work institutions as well as between the social workers and their clients in accordance with the basic principle.

Unfortunately, the prospects of achieving the objective of clearly displaying the constructive programme within penal justice are not very promising at the time being. However we can expect that the growing diversity of legal penal sanctions will, for all practical purposes, lead to a more balanced network of communication between law authorities involved and the institutions engaged in social work. This in turn may help in

finding the most suitable CSMs by basing the choice on more complex considerations regarding social effects and the consequences of their application. The well-known fact that different districts adhere to different views and methods of handling sanctions, alternative measures and support for convicted persons should instead inspire improved documentation and evaluation of CSMs rather than being responded to by administrative guidelines (sentencing guidelines, formal conversion rates etc.).

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Abbreviations:

BewHG	Bewährungshilfegesetz (BGBl Nr. 146/1969 i.d.F. BGBl I Nr. 55/1999) - Probation support law
JGG	Jugendgerichtsgesetz (BGBl Nr. 599/1988 i.d.F. BGBl. I Nr. 19/2001) - Juvenile Penal Law
SGG	Suchtgiftgesetz (BGBl 1951/234) – Drug Law in force till 31.12,1997
SMG	Suchtmittelgesetz (BGBl I Nr. 112/1997 i.d.F. BGBl I Nr. 98/2001) -Narcotics Law in force since 1.1.1998
StGB	Strafgesetzbuch (BGBl Nr. 60/1974 i.d.F. BGBl I Nr. 19/2001) - Criminal code
Stop	Strafprozeßordnung (BGBl Nr. 631/1975 i.d.F. BGBl. I Nr. 113/2001) - Code on Penal Procedures
StVG	Strafvollzugsgesetz (BGBl Nr. 144/1969 i.d.F. BGBl. I Nr. 138/2000) - Pententiary law
VBSA	Verein für Bewährungshilfe und Soziale Arbeit - Society for Probation and Social Work

Community Sanctions and Measures in Belgium*

IVO AERTSEN & KATRIEN LAUWAERT

This overview focuses on community sanctions and measures (CSMs) that are implemented in Belgium for adult offenders. The word 'Community' is used because the offender stays in the community during the execution of these sanctions and measures. The term 'sanctions and measures' indicates that the overview will detail both mechanisms which are imposed before trial by a public prosecutor or a judge to avoid further prosecution or pre-trial detention, as mechanisms imposed by court decision, and mechanisms used after trial to enforce part of the prison sentence in the community.

The first section gives a general overview. The second section begins by presenting the organisational framework that has been set up by the ministry of Justice to execute and co-ordinate the implementation of community sanctions and measures. Then it presents empirical data on the application of some of the CSMs. The third and final section tackles a few discussion points about the present and future of alternative sanctions and measures.

1. The development of community sanctions and measures in Belgium

The introduction and the development of community sanctions and measures have been influenced by the changing perceptions on crime and on how society should react to it. Most of the CSMs currently existing in Belgium were designed according to the way of thinking about crime and crime control, which was predominant at the time they were introduced[1].

* This Text is up-to-date until December 1998

[1] PETERS, T.: Probleemoplossing en herstel als functies van de straf. Panopticon (1996), 555.

Fines are imposed in accordance with the repressive-retributive model. Conditional release, suspension of the sentence, postponement of the execution of the sentence, probation and praetorian probation were adopted in accordance with the rehabilitation model. Penal mediation was introduced in accordance with the victim-oriented model. Some community sanctions and measures, however, have been introduced for mainly very pragmatic reasons, such as the growing overburdening of the courts and the overcrowding in the prisons. This is true for provisional release, transaction and conditional pre-trial release. Some mixed measures have come about partly in accordance with a theoretical approach and partly in reaction to particular circumstances. Victim-offender mediation and electronic monitoring are the reflection of two rather opposite streams which currently influence the criminal justice system: the deliberate choice of policymakers to move towards a restorative justice and the return of a more repressive climate under the influence of certain public events, such as the Dutroux case.

1.1 Community sanctions and measures regulated by the law

1.1.1 The fine[2]

The fine was introduced in the modern Code of Criminal Law in 1867. At that time, punishment was meant to inflict pain and to deprive the offender from illegally acquired advantages. The fine was the main form of punishment that was executed while the defendant was staying in the community.[3]

Provisions 38 to 41 of the Criminal Code are the main provisions regulating the fine. Only a trial judge can impose a penal fine and he can do this for each type of crime for which the legislator has provided a fine as sanction for a criminal offence. The amount of the fine depends on the legal categorisation of the offence. The criminal code always indicates a minimum and a maximum amount. Between these boundaries, the judge can freely determine the exact amount. Doing so he can take into account the objective seriousness of the crime, the kind of crime, the legal past of the offender and his financial capacity. Each time the judge imposes a fine, he also has to pronounce an alternate prison sentence. This alternate sentence

[2] LAUWAERT, K.: De strafrechtelijke geldboete. In: MEYVIS, W. e.a.: Alternatieve maatregelen en straffen. Penologisch vademecum. Heule, UGA 1998, 107-124.

[3] PETERS, T.: Probleemoplossing en herstel als functies van de straf. Panopticon (1996), 555.

will be executed if the offender does not pay the fine that was imposed on him. In Belgium there is no system of day-fines.

The prosecutor's office is responsible for the execution of fines. In practice it is the collector of fines, assigned to the administration of the ministry of Finance, who collects the fine money on behalf of the prosecutor's office. If the convicted person does not pay, different responses are possible, as described in detail in a Ministerial Instruction.[4] The main possibilities are the following:

- the collector accepts payment in instalments;
- the sentence is executed through a bailiff, who can eventually recover the fine through the property of the convicted;
- the case is sent to the prosecutor who can, in extremis, accept payment in instalments or decide to execute the alternate prison sentence.

The financial situation of the convicted is an important factor in the choice of the response. Therefore the police or a bailiff is sent to the convict's house to estimate whether the convicted is solvent. In practice, the alternate prison sentence is rarely executed.

1.1.2 Conditional release[5]

Mainly under the influence of the social sciences, the person of the offender became the focus of attention from the end of the 19th century. Crime control became a matter of removing from society dangerous and 'incurable' offenders. Harmless or occasional offenders received milder punishment, which had to be adapted to their circumstances. In this context the 'conditional release' was introduced by the law of May 31, 1888.[6] After different piecemeal changes, the system of conditional release has been

[4] Algemene Instructie voor het invorderen van geldboeten en gerechtskosten, ministerie van Financiën, 1 juni 1971 en 1 januari 1975, § 35-40.

[5] KELLENS, G.: Les lois des 5 et 18 mars 1998 relatives a la liberté conditionnelle. Journal des Tribunaux (1998), 465-471; VAN KALMTHOUT, A.M. and TAK, P.J.P.: Sanction-systems in the member states of the Council of Europe. Part II. Deventer, Kluwer Law and Taxation Publishers 1992, 412-414.

[6] Wet 31 mei 1888 tot invoering van de voorwaardelijke invrijheidstelling in het strafstelsel, Belgisch Staatsblad 3 juni 1888; PETERS, T.: Probleemoplossing en herstel als functies van de straf. Panopticon (1996), 556.

completely revised in 1998.[7] The new regulation has improved considerably the position of the victim in the conditional release procedure.

Conditional release is a transitional phase between being in prison and complete freedom, during which the convicted person undergoes a 'supervised freedom'. Being released under conditions is a privilege, not a right. Three major conditions need to be fulfilled for a prisoner to be released conditionally. *First*, the prisoner must have served one third of his prison sentence with a minimum of three months. If the sentence was imposed for a repeated offence, conditional release can be granted after he has served two thirds of the prison sentence, with a minimum of six months and a maximum of fourteen years. Prisoners serving a life sentence can be released conditionally after ten years or, when convicted for a repeated offence, after fourteen years. *Second* , the prisoner has to present a 'rehabilitation plan' which shows his willingness to reintegrate in the community and establishes the efforts already made in this regard. *Third*, there must not be counter-indications, which show that a release entails a serious risk for the community or which reasonably obstruct the social reintegration of the prisoner. These counter-indications concern the possibility of rehabilitation of the prisoner, his personality, his conduct during imprisonment, the risk he will commit new offences or the attitude of the prisoner towards the victim(s) of the fact(s) for which he has been convicted.

Unlike previously, when the minister of Justice was competent to decide conditional releases, since 1998 a commission makes the decisions about conditional release. This commission consists of a judge of the court of first instance, an assessor-expert in the execution of sentences and an assessor-expert in social reintegration. No appeal of the decision of the commission is possible. The commission receives advice from the 'conference of personnel', which gathers the prison director and representatives of all the levels of prison personnel. In certain cases of sexual or violent offences or when the effective prison sentence is at least one year the victim will be contacted. The commission will then hear the victim (or his rightful claimant when the victim is deceased) when he/she requests this and can show a legitimate interest. The hearing will only concern the conditions that should

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[7] Wet 5 maart 1998 betreffende de voorwaardelijke invrijheidstelling en tot wijziging van de wet van 9 april 1930 tot bescherming van de maatschappij tegen de abnormalen en de gewoontemisdadigers, vervangen door de wet van 1 juli 1964, Belgisch Staatsblad 2 april 1998 en wet 18 maart 1998 tot instelling van de commissies voor de voorwaardelijke invrijheidstelling, Belgisch Staatsblad 2 april 1998.

be imposed in the victim's interest. The conditions imposed by the commission must promote the social reintegration of the offender, the protection of the community and the interest of the victim. A positive decision will be communicated together with the conditions imposed in his/her interest, to the victim who requests this and who has a legitimate interest. He/she can also be informed of revocation of the conditional release or of changes in the conditions imposed in his/her interest.

1.1.3 Provisional release[8]

Provisional release is another form of releasing prisoners before they have served their full prison sentence. It concerns mainly prisoners with short sentences who cannot benefit from the system of conditional release. This mechanism has never been regulated by any statutory provision, but is a praetorian measure, which has been set out in a number of Ministerial Instructions. It is the minister of Justice who decides provisional releases. Different forms of provisional release have been developed (e.g., in view of grace and for humanitarian reasons). Under the pressure of heavy overcrowding of the prisons the scope of prisoners eligible for provisional release in view of grace has been widened considerably during the 1980s. In 1994 and 1995, 80% of all convicted inmates have been released according to this measure.[9]

1.1.4 Suspension of the sentence, postponement of the execution of the sentence and probation[10]

After World War II the idea that the sentence should be adapted to the person of the offender and should serve his or her reintegration was further implemented. This was done through the introduction, by the law of June

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[8] DUPONT, L.: Handboek Belgisch strafrecht. Deel 2. Leuven, Acco 1990, 632-639; NEYS, A., PETERS, T. e.a.: Tralies in de weg. Leuven, Universitaire Pers Leuven 1994, 346-348.

[9] MINISTER VAN JUSTITIE: Oriëntatienota strafbeleid en gevangenisbeleid. Brussel 1996, 50.

[10] DEMET, S.: Opschorting, uitstel en probatie. In: MEYVIS, W. e.a.: Alternatieve maatregelen en straffen. Penologisch vademecum. Heule, UGA 1998, 79-105; VAN KALMTHOUT, A.M. and TAK, P.J.P.: Sanction systems in the member states of the Council of Europe. Part II. Deventer, Kluwer Law and Taxation Publishers 1992, 406-412.

29, 1964, of the system of suspension of a sentence, postponement of the execution of a sentence, and probation (which consists in the attachment of conditions to one of the two previous possibilities).[11] These modalities stimulate the offender to make amends under the threat of pronunciation or execution of the sentence. The suspension of the sentence prevents the stigmatisation that is inherent in 'not having a blank criminal record'. The postponement of the execution prevents de-socialising effects such as loss of a job, separation from one's family, etc. The attachment of conditions of probation allows the imposition on the offender conduct that will help him to not re-offend and/or to reintegrate. In 1994, the scope of application of these three modalities has been considerably enlarged and the possibility of imposing community service or training as probation conditions was inscribed in the law.[12]

A suspension of the sentence means that the sentence will not be pronounced and the prosecution will be ended provided that the defendant is not sentenced to a criminal punishment or a punishment of at least one month during a probationary period of one to five years following the judgement. The judge can impose a suspension for a sentence of up to five years of correctional imprisonment and when the defendant has previously not been sentenced to a criminal punishment or a prison sentence of more than two months. The suspension of the sentence cannot be imposed without the consent of the defendant. The suspension of the sentence can be revoked if the defendant is sentenced to a criminal punishment or a punishment of at least one month during the probationary period.

The postponement of the execution means that the sentence is pronounced, but will not be executed provided that the defendant is not sentenced to a criminal punishment, or a correctional punishment of more than two months without suspension of the execution, during a probationary period of one to five years following the judgement. The postponement of the execution is possible for sentences of up to five years and when the defendant has previously not been sentenced to a criminal punishment or a prison sentence of more than twelve months. The defendant does not need to consent to it. The postponement of the execution is automatically legally revoked when the defendant is sentenced to a criminal punishment or a cor-

[11] Wet 29 juni 1964 betreffende de opschorting, het uitstel en de probatie, Belgisch Staatsblad 17 juli 1964.

[12] This was done through the wet van 10 februari 1994, Belgisch Staatsblad 27 april 1994.

rectional punishment of more than two months without suspension of the execution during the probationary period.

Probation means that the judge imposes either a suspension of the sentence or the postponement of the execution of a sentence and attaches conditions the offender has to respect during the probationary period. The conditions necessary to impose probation are the same as for a suspension of the sentence or a postponement of the execution. This means that each time the judge imposes either a suspension of the sentence or a postponement of the execution, he can attach probation. When probation is attached the grounds for revocation stay the same, but in addition there can be revocation when the probationer fails to respect the conditions imposed and when the probation commission considers this serious enough to bring it to the attention of the prosecutor. Probation can only be imposed when the defendant agrees to the proposed conditions. It is left to the discretion of the judge to decide which conditions he will impose. The law just indicates the possibility of imposing training or community service and describes under which conditions this can be done. Community service can, for example, be imposed for a minimum of 20 hours and a maximum of 240 hours and has to be executed within twelve months during the spare time of the probationer. For training a maximum duration is not indicated, but it also has to be followed during spare time and within twelve months.

A suspension of the sentence, with or without conditions of probation, can be imposed by the investigating courts and the trial courts (except for the Assize Court). All the trial courts (including the Assize Court) can impose a postponement of the execution of the sentence, with or without probation. The justice assistants for probation and the probation committee are the two entities that monitor the respect of the conditions by the probationer.

The prosecutor, the investigating judge, the investigating courts and the trial courts (except for the Assize Court) may have a justice assistant for probation prepare a social enquiry report. This can be done at the defendant's request or with his consent. When the judge wants to impose training or community service as a condition for probation, a prior social enquiry report is obligatory. The report normally includes information about how the offender views the facts, about his family and his parent's family and about his personal situation (financial situation, previous and current employment, housing, lifestyle, the way in which he spends his spare time, personality). When the report is ordered in view of imposing training or community service, it especially answers whether the defendant is capable of executing training or community service and which kind of work or

course would be suitable, taking into account the possibilities available in the judicial district.

1.1.5 Penal transaction[13]

The mechanism of transaction (provision 216bis Code of Criminal Procedure) was introduced in 1984.[14] A new vision of criminal policy was not at stake here. The transaction had been introduced almost solely to fight backlog in the courts after the political pressure to do something about that problem had escalated. This measure does, however, also serve the interest of the victim.[15] The enlargement of its field of application in 1994 meant a further accommodation of the victim.[16]

In a penal transaction the prosecutor proposes not to prosecute the offender if he/she agrees to pay a certain amount of money for the benefit of the State. If the offender accepts the proposal and pays, the public action is dropped formally. The offender must have compensated the victim before a transaction can be proposed. When the extent of the damage is contested, it suffices that the offender pays the non-contested part of the damage and that he recognises in writing his civil responsibility for the act, which has caused the damage.

A transaction is possible for offences punishable either with a fine only, with imprisonment of up to five years, or with both of those sentences. Moreover the prosecutor must deem that, because the law foresees in the given case only a fine or because he thinks there are mitigating circumstances, he would, in the given case, only claim the imposition of a fine or a fine and a seizure of property. The sum the prosecutor proposes to pay may be no less than 49.5 Euro (10 Belgian Francs, multiplied with – for 1998 – a factor 200) and no higher than the maximum fine provided in that case by the law. The money paid for a transaction is collected by the collector of fines, assigned to the administration of the ministry of Finance.

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[13] DEMET, S.: Minnelijke schikking. In: MEYVIS, W. e.a.: Alternatieve maatregelen en straffen. Penologisch vademecum. Heule, UGA 1998, 21-34.

[14] Wet 28 juni 1984 tot uitbreiding van het toepassingsveld van het verval van de strafvordering voor sommige misdrijven, tegen betaling van een geldsom, Belgisch Staatsblad 22 augustus 1984.

[15] DUPONT, L.: Hoe minnelijk is de minnelijke schikking? Panopticon (1984), 472.

[16] Wet 10 februari 1994 houdende de regeling van een procedure voor de bemiddeling in strafzaken, Belgisch Staatsblad 27 april 1994.

1.1.6 Conditional pre-trial release[17]

In 1990 the Belgian parliament voted for a new law on pre-trial detention.[18] The aim of its introduction was the reduction of the high number of inmates in pre-trial detention in the Belgian prisons. This same law introduced the system of conditional release in its provisions 35 through 38.

Conditional pre-trial release is a measure by which an investigating jurisdiction, an investigating judge or in certain situations a trial judge, instead of locking a suspect up or keeping him in pre-trial detention, decides to leave this person in the community or to release him under certain conditions. It is a substitute measure for the pre-trial detention. A number of conditions need to be present for a magistrate to be allowed to impose a pre-trial conditional release. First of all, the conditions necessary to impose a pre-trial detention have to be fulfilled: The offence has to be punishable with a correctional prison sentence of one year or a more severe sentence. Serious indications of the guilt of the defendant have to be present. The measure must be absolutely necessary for public safety and cannot be taken as a form of immediate punishment or as a means to exert pressure. If the maximum punishment provided in the law for the offence concerned does not exceed fifteen years of imprisonment, there also have to be serious reasons to believe that the suspect, if left in liberty, would commit new offences (felonies or misdemeanours), would try to flee, would try to destroy evidence, or would conspire with third parties.[19]

The law does not give a limited list of conditions the magistrate can impose. But, there are some restrictions. The law itself states that the magistrate has to show that the conditions he imposes serve to prevent that the suspect would commit new crimes, would flee, would try to destroy evidence or would organise collusion.[20] According to the Council of State[21], conditions that concern the physical and/or the psychological integrity of

[17] LAUWAERT, K.: De vrijheid of invrijheidstelling onder voorwaarden. In: MEYVIS, W. e.a.: Alternatieve maatregelen en straffen. Penologisch vademecum. Heule, UGA 1998, 59-78.

[18] Wet 20 juli 1990 betreffende de voorlopige hechtenis, Belgisch Staatsblad 14 augustus 1990.

[19] Art. 16 Wet 20 juli betreffende de voorlopige hechtenis, Belgisch Staatsblad 14 augustus 1990.

[20] Art. 35, §2 and §3 Wet 20 juli betreffende de voorlopige hechtenis, Belgisch Staatsblad 14 augustus 1990.

[21] The Council of State is an official body through which a bill passes for legal advice before it goes to parliament for discussion and vote.

the suspect (e.g., undergo drug rehabilitation treatment) can only be imposed if the suspect agrees to it.[22] The preparatory parliamentary documents indicate that the conditions cannot consist of a true deprivation of liberty. Otherwise the conditional release would not be an alternative for pre-trial detention.[23] Some authors conclude that, for that reason, house arrest cannot be imposed as part of a conditional release.[24] More generally, it is obvious that the conditions cannot go against human dignity as indicated in provision 3 of the European Convention on Human Rights. Finally, the magistrate needs to take into account the legal principles of presumption of innocence and impartiality of the judge. Imposing a measure of reparation (apologies, compensation of damages or restitution of goods) or community service as conditions for a pre-trial release does not seem adequate in this regard. Imposing these measures presumes indeed a (pre-)decision about the guilt of the suspect. Deciding about the guilt of a defendant is a task that belongs to the trial judge, not to the examining magistrate.

The only condition the law refers to specifically is the payment of bail.[25] Bail can be imposed when the judge has serious suspicions that money or security obtained through the offence have been hidden or transferred abroad. This is not a restrictive indication. Bail can also be imposed in other situations. The amount of money to be paid is determined by the judge. Preliminary parliamentary work does suggest, however, some guidelines. In case of tax offences or other economic offences the amount could be proportional to the amount of money that was presumably hidden. Moreover the amount of bail should be adapted to the financial capacity of the defendant and be high enough to discourage him from attempting to evade justice.[26] The complete amount needs to be paid before the defendant can go free. The payment can be done by the defendant or by a third person. Except for bail, the judge determines the duration of the conditions with a maximum term of three months. This term can nevertheless be renewed. Consecutive renewals are possible.

Different instances control whether the offender respects the conditions imposed. When an investigating judge or an investigating court grants pre-

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[22] Advies Raad van State, Parl. St. Senaat 1988-89, nr. 658/1, 64.

[23] Verslag Senaatscommissie, Parl. St. Senaat 1989-90, nr. 658/2, 108.

[24] A dissenting opinion can be found e.g. in VERSTRAETEN, R.: Handboek Strafvordering. Antwerpen, MAKLU 1994, 234.

[25] Art. 35 §4 Wet 20 juli betreffende de voorlopige hechtenis, Belgisch Staatsblad 14 augustus 1990.

[26] Verslag Kamercommissie, Parl. St. Kamer 1989-90, nr. 1255/2, 45.

trial release, the investigating judge is responsible for its control. When a trial judge grants pre-trial release, the prosecutor's office is responsible for its control. In practice, the police do in that case the supervision when the conditions have a character of merely controlling the conduct of the offender (e.g., not leaving a certain area, not consuming drugs or alcohol, keeping away from football games...). When the conditions relate to getting social assistance (e.g., undergoing detoxification, meeting weekly with a social worker), the supervision is by a probation officer, who works personally with the offender or keeps in contact with the social service that works with the offender.

1.1.7 Penal mediation[27]

Since the 1980s, victimology, victim movements and certain public events have led to more attention to the plight of the victim. In addition to providing a quick social reaction to common city crime, this concern was at the basis of the introduction of 'penal mediation' (provision 216ter Code of Criminal Procedure).[28] In penal mediation the prosecutor can propose that the suspect fulfils one or more conditions. If the suspect accepts the proposal and fulfils the conditions, the public action will be officially extinguished.

Penal mediation is possible for offences for which the prosecutor deems a penalty of more than two years of correctional imprisonment or a more severe penalty not necessary. This means that, through application of mitigating circumstances, penal mediation can be applied for offences for which the Criminal Code provides twenty years of (correctional or criminal) imprisonment. The conditions which the prosecutor can propose are the following:

1. reparation of the damages caused to the victim or restitution of certain goods; in this case the prosecutor may convoke victim and offender for a mediation to settle the case;
2. undergo medical treatment or a suitable therapy, if the offender attributes the offence to a disease or to an alcohol or drug addiction;
3. follow a training program of up to 120 hours;
4. execute a community service of up to 120 hours.

[27] AERTSEN, I.: Victim-offender mediation in Belgium: legal background and practice (unpublished paper). Seminar on victim-offender mediation, Popowo, Poland 1998.

[28] Wet 10 februari 1994 houdende de regeling van een procedure voor de bemiddeling in strafzaken, Belgisch Staatsblad 27 april 1994.

The maximum time to carry out the proposed conditions is six months for measures 2, 3 and 4, and undetermined for measure 1.

A deputy public prosecutor has been designated in each court of first instance as liaison magistrate for penal mediation ('mediation magistrate'). He/she is not doing the concrete mediation work, but is responsible for the selection of cases, the supervision of the mediation work and the final session at his/her office. In the public prosecutor's service of these same courts, one or more justice assistants for penal mediation are doing the practical work for the four possible modalities of penal mediation: contacting the parties, preparing the conditions and mediating in cases where a victim is involved and follow-up of the agreements.

While the mediation assistant does most preparatory and mediation work, the mediation magistrate leads the formal session that concludes the procedure. Both the offender and the victim have the right to be assisted by a lawyer and the victim can be represented. The stipulations of the reached agreement or conditions are laid down in an official report (a procès-verbal). When the offender fulfils the conditions, a second procès-verbal is drawn up, stating that the public action is extinguished. If he does not fulfil the agreement, the mediation magistrate can summon the offender to appear in court but he has no legal obligation to do so.

1.2 A factual practice: praetorian probation

'Praetorian probation' is a factual practice of the public prosecutor and has no legal basis. This way of dealing with rather small offences or misdemeanours originated shortly after the Second World War[29] and, although it was the precursor of the system of probation, it continues to exist presently. 'Praetorian probation' means that the prosecutor decides not to sue the suspect, as long as and in so far as he respects certain conditions. It is a kind of conditional dismissal of the case, without an official and binding extinction of the public action. In the latter lies the difference with penal transaction and penal mediation.

Typical cases for 'praetorian probation' are situations where personal, relational or social problems are at the basis of the offence. Undergoing a medical treatment and modifying or dropping certain habits are examples

[29] BEEKAERT, H.: Une expérience de probation. Revue de Droit Penal (1948-1949), 1-21.

of conditions for non-prosecution. No data are available on the use of 'praetorian probation', but we may expect that the application of this modality has declined since the start of penal mediation in 1994.

1.3 New experimental programs

1.3.1 Victim-offender mediation

Three mediation programs in the field of adult criminal law, which do not have a legal framework yet, are to be mentioned. Some of these programs are rooted in a 'restorative' approach to justice and are developed in a close partnership of academics and practitioners.[30] The federal government and criminal justice officials have indicated these 'restorative justice' methods as holding great interest for the future.[31]

'Mediation for redress' started in 1993 as a local program in Leuven and was extended to other judicial districts.[32] The program deals exclusively with crimes of a certain degree of seriousness and operates parallel to prosecution. The central objectives of the program were initially the development of an appropriate methodology for mediation in serious crimes and the verification of the effect of mediation on the sentencing process. The mediator focuses on in-depth communication and exchange (of information) between victim and offender. Through several separate contacts with victim and offender, the mediator carefully prepares a direct meeting. The result of the mediation is laid down in a written agreement, which contains all elements of the material and immaterial restoration. The program operates in a close relationship with the public prosecutor's service and with the investigating judges, but the mediation itself is done independently from the judicial system. The mediators are professionals and their work is organised and supervised by an independent local steering committee, consisting of representatives of all partner-agencies. 'Mediation for redress' is

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[30] PETERS, T. and AERTSEN, I.: Restorative justice. In search of new avenues in judicial dealing with crime. The presentation of a project of mediation for reparation. In: FIJNAUT, C. e.a. (Ed.): Changes in society, crime and criminal justice in Europe. Vol. I. Antwerpen, Kluwer Rechtswetenschappen België 1995, 311-342.

[31] MINISTER VAN JUSTITIE: Oriëntatienota strafbeleid en gevangenisbeleid. Brussel 1996; X.: Krachtlijnen inzake de hervorming van de gerechtelijke organisatie. Brussel 24 mei 1998, 6 (political agreement on police and criminal justice reform).

[32] AERTSEN, I. and PETERS, T.: Mediation for Reparation: The Victim's Perspective. European Journal of Crime, Criminal Law and Criminal Justice 6 (1998), 106-124.

recognised as one of the 'national pilot programs' for alternative sanctions and measures, which implies full financing by the ministry of Justice. The program is run by the Flemish non-governmental organisation 'Suggnomè'.

The second experimental mediation program operates at the level of the police and started in 1996. Recognised as local 'global plan' projects and financed by the federal government, mediation at the police level functioned in about six Flemish cities by the end of 1998.[33] The program is oriented to minor crimes, mostly property offences, and focuses primarily on financial restitution. The mediator contacts both parties and tries - mostly in an indirect way, without organising a face-to-face meeting - to reach a settlement of the damages. When reparation to the victim is made, the prosecutor most often dismisses the case. In this program too, professional mediators who operate within the police service do mediation or within an independent service that has a partnership with the police.

A third experiment is 'community mediation'. It has been operating since 1993 in the city of Huy in a partnership of the public prosecutor, the municipality and the NGO 'Aide et Reclassement'.[34] The program is oriented to petty offences committed between neighbours. The mediation is done by a group of volunteers and is supervised by a professional. An agreement between the neighbours leads to a dismissal of the case by the prosecutor.

1.3.2. Electronic monitoring

The ministry of Justice started an experimental electronic monitoring program in the judicial districts of Brussels, Leuven and Nijvel in 1998.[35] The program is conceived as a way of limiting the execution of prison sentences. The program is regulated by Instructions of the minister of Justice.[36] The program operates exclusively for offenders who are serving a prison

[33] BEMIDDELINGSDIENST ARRONDISSEMENT LEUVEN: Jaarverslag '96. Heverlee, 1997; BEMIDDELINGSDIENST ARRONDISSEMENT LEUVEN: Jaarverslag '97. Heverlee, 1998; VAN GARSSE, L.: Schaderegeling op politieniveau, Pretekst (juli 1998), 12-17.

[34] COTTELEER, F.: Une expérience de conciliation de quartier: conciliat. Cahiers Liégeois de Criminologie 4 (1997), 79-84.

[35] STASSART, E.: Een experiment met elektronisch toezicht in België. Vigiles 16 (1998) (forthcoming); GODEFROID, G. and VAN DEN BERGE, Y.: Electronic monitoring in Belgium (unpublished paper). CEP Workshop on electronic monitoring, Egmond aan Zee, The Netherlands, 15-17 October 1998.

[36] November 24, 1997; March 27, 1998.

sentence of up to three years. The option of organising the program during the execution of the prison sentence is taken in order to avoid netwidening. Low-risk prisoners are eligible for the supervision by electronic monitoring when they come in the final phase before a possible provisional release.[37] The decision for supervision under electronic monitoring is made by the central prison administration, on a proposal by the prison governor. The supervision can last from one to three months and ends at the date of effective provisional release.

Two technical systems are in use experimentally: the voice detector (intermittent surveillance) and the ankle bracelet (continuous surveillance). Extra individual conditions can be added to the supervision program. A social worker has a weekly contact with the offender and provides social support. After finishing the supervision, an extensive evaluation report is written by the prison governor.

2. Implementation and evaluation

2.1 Organisational context[38]

Since the early 1990s the Belgian government has made considerable efforts to promote alternative sanctions and measures, including the introduction of multiple avenues of financing programs for alternative sanctions. Within the ministry of Justice new positions have been created, the staffs working with alternative sanctions and measures have been increased significantly and the department that follows up alternative sanctions has been reorganised.

2.1.1 Two budget lines: 'Global Plan' and 'National Pilot Projects'

Two new budget lines have been opened for the development of projects in which offenders can perform the alternative sanction of community service, training, treatment or mediation: 'Global Plan' and 'National Pilot Projects'.

[37] Contrary to conditional release, provisional release does not require an extensive decision process.

[38] MINISTER VAN JUSTITIE: Oriëntatienota over het strafrechtelijk beleid 1998. Brussel, 1998, 25; BRUTSAERT, M. e.a.: Alternatieve Maatregelen en de werking van de 'SAM' (Steundienst Alternatieve Maatregelen). Panopticon (1998), 378-383; MEYVIS, W. e.a.: Alternatieve maatregelen en straffen. Penologisch vademecum. Volume II. Heule, UGA 1998, 1-11.

2.1.1.a. The Global Plan

The 'Global Plan' is in the first place an employment program of the federal government. At the same time it is part of the government's policy to enhance prevention of crime and security. Its creation was decided by the Council of Ministers on November 18, 1993. The Global Plan has a 99 157 400 Euro budget, of which 6 197 338 Euro is allocated each year to the ministry of Justice in order to finance the development of alternative sanctions and measures.

Cities and towns can conclude contracts with the ministry of Justice and receive money from this Global Plan Fund in order to hire personnel to organise and run projects that execute alternative sanctions. The management budgets must be covered by the cities themselves. The cities and towns can employ these people to organise CSMs in the public services (e.g., work in the local administration, maintenance of parks and sportsfield, help in a youth house) or make them available to private organisations that have experience in the field of alternative sanctions.[39]

The projects are chosen on the advice given by an evaluation and follow up commission, which is established in each judicial district. This same commission also evaluates the projects. The commission consists of a representative of each alternative sanction: one representative of the probation commission (community service), one investigating judge (conditional pretrial release), one or two representatives of the prosecutor's office (penal mediation), and the administrative district's commissioner. The commission president is the local prosecutor. The commission can ask advice from people who have expertise in the field of the execution of alternative sanctions or victim assistance. The organisation of the commissions at the level of the judicial districts is a deliberate choice in order to gather people who know well the local crime problems and the local network of social agencies. In 1998 the Global Plan Fund supported 142 projects in 86 cities all over the country for a total amount of 5 451 752 Euro.

2.1.1.b. National Pilot Projects[40]

A small part of the budget of the ministry of Justice has been designated to subsidise 'national pilot projects'. The projects that receive money are, on

[39] The procedure by which projects must be introduced is regulated by a Royal Decree (Koninklijk Besluit 2 augustus 1994) and by a Ministerial Instruction (Ministeriële Omzendbrief 12 september 1996).

[40] See Koninklijk Besluit 6 oktober 1994, Belgisch Staatsblad 15 oktober 1994.

the one hand, innovative projects in the area of training and treatment, and on the other hand, projects that need specialised personnel because of the kind of activities they run. First, the projects are subsidised in one judicial district. If the results are satisfying, the project is replicated in the other judicial districts, so that the project becomes available all over the country.

The private organisations that run the projects have a direct contract with the ministry of Justice that subsidises, on a yearly basis, personnel and management costs. In 1997, 8 organisations received such subsidies for a total amount of 1 001 891 Euro. The government has decided to increase the budget gradually until the year 2000: 2 975 452 Euro for 1998, 4 463 178 Euro for 1999 and 6 446 813 Euro for the year 2000. Examples of National Pilot Projects are the 'mediation for redress' project, a sensitisation training program for traffic offenders, a sensitisation training program towards victims and a training program for sex offenders.

2.1.2. The department of 'Houses of Justice' within the ministry of Justice

Since 1998 considerable changes have been carried out in the organisational structure of the ministry of Justice. The personnel working in the framework of alternative sanctions belongs to the Department of 'Houses of Justice' (Dienst Justitiehuizen), which belongs to the Directorate-General of Judicial Organisation (Directoraat-Generaal Rechterlijke Organisatie). At the central level of this department, a special cell (Steundienst Alternatieve Maatregelen or SAM) has been created. It follows up all the projects that are financed by the ministry of Justice as Global Plan Projects or National Pilot Projects, develops the criminal policy concerning alternative sanctions and organises sensitisation and information campaigns in this same field.

At the level of each judicial district, a 'house of justice has been set up in the period 1997-2001.[41] The 'houses of justice' are, first of all, an organisational change. They bring together in one 'house' all the personnel that belong to the ministry of Justice, work outside the prisons and assist people who come in contact with the criminal justice system. Representing the alternative sanctions are the following: the probation assistants, the assistants for conditional pre-trial release, the mediation assistants, the assistants who specifically implement community services and the parole assistants.

[41] Decision of the Council of Ministers of August 30, 1996.

Moreover, the house will work towards the following objectives concerning alternative sanctions:

- to make the different possibilities of sanctioning through alternative sanctions more visible;
- to gear the possibilities of implementation of alternative sanctions to the expectations of the magistrates who impose them;
- to develop a better support for and supervision and control of the parajudicial personnel.

In order to bring clarity, the term of 'justice assistant' will be used for all the parajudicial personnel of the Department of Houses of Justice. This term covers, e.g., the probation assistants, the assistants for conditional pre-trial release, the mediation assistants, the assistants who specifically implement community services and the parole assistants. The number of justice assistants has increased significantly.

2.2 *Application and evaluation data*

2.2.1 *General findings*

In Belgium, community sanctions and measures are rarely used compared to what is legally possible. One exception may be the fine, which constitutes about 70% of all sentences.[42] Only the public ministry at the police level applies the penal transaction in a considerable way, and this mostly for traffic offences.[43] At the level of the court of first instance penal transaction remains a rather marginal practice.[44]

2.2.2 *Conditional pre-trial release*

One of the main goals of the law concerning pre-trial detention, which was introduced in 1990, was the reduction of the number of prisoners in pre-trial detention. Conditional pre-trial release was seen as an important tool

[42] For the year 1994 this was 69%, of which 89% was the main sentence. The overwhelming majority of the fines concerns trafic offences (MINISTER VAN JUSTITIE: Oriëntatienota strafbeleid en gevangenisbeleid. Brussel 1996, 24).

[43] MINISTER VAN JUSTITIE: Oriëntatienota strafbeleid en gevangenisbeleid. Brussel 1996, 26-27.

[44] CHRISTIAENSEN, S.: Afdoening buiten proces d.m.v. transactie: een probleemstelling. In: HUBEAU, B. en PARMENTIER, S. (Ed.): De rechter buitenspel. Conflictregeling buiten de rechtbank om. Antwerpen, Kluwer rechtswetenschappen 1990, 59-90.

to realise this aim. The statistical data on the evolution of the pre-trial prison population do not, however, admit much optimism about the effects of the law of 1990. The absolute number of people in pre-trial detention during a given year has grown 29% from 1990 to 1994 (7302 in 1990 and 9430 in 1994). In this same period the average day population in pre-trial detention has risen 47% (from 1366 in 1990 to 2008 in 1994). Giving an explanation of this evolution is not simple. Changes in prison populations are caused by the interplay of a number of mechanisms. Whatever they might be, it is clear that the introduction of conditional pre-trial release has not countered this evolution.[45]

There is very little or no tracking of the use of conditional pre-trial release. From explorative interviews with practitioners we do know, however, that generally, conditional pre-trial release has a very low implementation rate. In most districts the application is limited to one or a few investigating judges and to certain problematic situations such as drug use.[46] A study that explored the first seven months of application of conditional pre-trial release has brought up a number of bottlenecks that contribute to the low application rate:

- lack of clarity of the law;
- deficiency of infrastructure for the implementation of the measure;
- difficult relationships between magistrates and social work agencies;
- lack of possibilities to implement effectively a supervision of the defendant.[47]

Data on the conditional pre-trial release decisions that were referred to the probation service for follow up are presented below.[48] Table 1 shows a rising number of those referrals in the period 1994 to 1997.

[45] SNACKEN, S. e.a.: Onderzoek naar de toepassing van de voorlopige hechtenis en de vrijheid onder voorwaarden. Brussel. Vrije Universiteit Brussel 1996-1997, 5.

[46] DE RUYVER, B. e.a.: Toepassing van de alternatieve afdoening. Een oriënterende studie. Brussel, Koning Boudewijnstichting 1997, 20.

[47] SNACKEN, S.: La liberté sous conditions. In: DEJEMEPPE, B.: La detention préventive. Bruxelles, Larcier 1992, 147-193.

[48] DIENST MAATSCHAPPELIJK WERK STRAFRECHTSTOEPASSING: Evaluatierapport 1995. Brussel, Ministerie van Justitie s.d., 23. Note that this does not concern the total number of conditional pre-trial release decisions taken in Belgium. Also the police and certain social agencies are doing this type of follow up.

Table 1: Number of conditional pre-trial release decisions referred to the probation service

	Number of cases referred
1994	514
1995	609
1996	no data
1997	1209

In 1995 36,6% of the referred cases concerned drug offences, 34,1% concerned property offences, 12,4% concerned sex offences and 11,8% concerned offences against persons.

Table 2 indicates that for 1995 conditional pre-trial release was mainly imposed by investigating judges, less by the investigating courts and hardly by trial judges. Moreover, the decision was mostly taken on the initiative of the (investigating) judge. Requests from the prosecutor or from the defendant to impose a conditional pre-trial release are rather marginal.

Table 2: Initiators and position of the decision maker for conditional pre-trial release in 1995

1995	Investigating judge	Investigating courts	Trial judge	TOTAL
Initiative of the judge	336	201	3	540
Request from the prosecutor	13	13	1	27
Request from the defendant	17	19	6	42
TOTAL	366	233	10	609

In 78,3% of the cases referred in 1995 the conditional pre-trial release led to liberty at the end of the imposed term. In only 6,6% of the cases the measure was revoked because the defendant did not respect the conditions. In 6% of the cases there was a revocation because the defendant committed (a) new offence(s).

2.2.3 *Suspension, postponement of the execution and probation*

The yearly number of sentences with suspension or postponement of execution and certainly with probation is rather limited. In the year 1994 14.758 sentences with postponement of the execution were registered, of which 1435 (10%) accompanied by probation conditions. The number of suspended sentences in the same year was 6146, of which 689 (11%) were with probation.[49] Nevertheless, the total number of probationers has increased significantly in the 1990s, as Table 3 shows.

Table 3: Number of probationers[50]

December 31 of the year:	Number of probationers:
1980	2287
1985	2754
1990	3733
1995	5664
1996	6533
1997	7007

Probation is evaluated as an effective method by the probation officers. They deem the social reintegration of about 60% of their clients successful.[51] There is, however, a broad consensus that probation is under-utilised to a large degree and that it is often used in an inadequate way. In 1991 probation was applied in only 4% of all correctional sentences.[52] Several factors are mentioned to explain this failure:[53] a lack of involvement in the implementation of the law from the side of the judiciary; a lack of clear di-

[49] MINISTER VAN JUSTITIE: Oriëntatienota strafbeleid en gevangenisbeleid. Brussel 1996, 27-28.

[50] DIENST MAATSCHAPPELIJK WERK STRAFRECHTSTOEPASSING: Evaluatierapport 1995. Brussel, Ministerie van Justitie s.d.; STEUNDIENST ALTERNATIEVE MAATREGELEN: Statistische gegevens betreffende de toepassing van alternatieve maatregelen en straffen. Brussel, Ministerie van Justitie 1998.

[51] DIENST MAATSCHAPPELIJK WERK STRAFRECHTSTOEPASSING: Evaluatierapport 1995. Brussel, Ministerie van Justitie s.d.; MEYVIS, W. en MARTIN, D.: Gevangenis en samenleving. Humanisering van de gevangenissen en maatschappelijke aanpak van delinkwentie. Brussel, Koning Boudewijnstichting 1991.

[52] DIENST MAATSCHAPPELIJK WERK STRAFRECHTSTOEPASSING: 30 jaar probatie. Evaluatie en perspectieven. Brussel, Ministerie van Justitie s.d.

[53] MARY, P. et DE FRAENE, D.: Sanctions et mesures dans la communauté. Etat critique de la question en Belgique. Bruxelles, Fondation Roi Baudouin 1997; DIENST MAATSCHAPPELIJK WERK STRAFRECHTSTOEPASSING: 30 jaar probatie. Evaluatie en perspectieven. Brussel, Ministerie van Justitie s.d.

rectives and policy within the criminal justice system; the perseverance of the traditional orientation of the penal system on retribution and deterrence; a lack of adequate education among prosecutors and judges; a very limited use of the possibility of ordering a pre-trial social enquiry report; a negligible number of requests for probation by the suspects themselves and by their lawyers; an understaffed probation organisation and a too high case load (more than 60 probationers per officer). The last mentioned problem might be remedied by a large increase in personnel that has been put through since 1996.

2.2.4 *Penal mediation*

Penal mediation has developed quite fast and in a quantitative way it is successful. This may be explained by the localisation of penal mediation within the prosecutor's office. Tables 4 and 5 provide an overview of cases selected for penal mediation in the first years: from November 1, 1994 (when the law on penal mediation came into force) until December 31, 1997.[54] From these data we can conclude that one mediation assistant deals on average with more than 100 cases a year.

Table 4: Number of cases for penal mediation

	offenders	files[55]
Nov. 1994 - Dec. 1995	5393	4839
Jan. - Dec. 1996	5880	5266
Jan. - Dec. 1997	6738	(-)[56]

[54] DEWULF, C., FIEUWS, E., GOOSEN, T., HANOZIN, C., PIERS, A., SCHEPERS, A., VAN BOVEN, B., VANEMPTEN, N., VANNESTE C. et VERMEIREN, K.: Evaluation de l'application de la loi organisant une procedure de médiation pénale en Belgique du 1er janvier 1995 au 31 décembre 1995. Bruxelles, Ministère de la Justice 1996; DAVREUX, S., DEWULF, C., FIEUWS, E., GOOSEN, T. HANOZIN, C., PIERS, A., SCHEPERS, A., VAN BOVEN, B., VANEMPTEN, N., VANNESTE C. et VERMEIREN, K.: Evaluation de l'application de la loi organisant une procedure de médiation pénale en Belgique du 1/1/1996 au 31/12/1996. Bruxelles, Ministère de la Justice 1997; STEUNDIENST ALTERNATIEVE MAATREGELEN: Statistische gegevens betreffende de toepassing van alternatieve maatregelen en straffen. Brussel, Ministerie van Justitie 1998.

[55] Some judicial files or dossiers contain several offenders.

[56] Data not available.

Table 5: Type of cases in penal mediation (November 1994 - December 1996)

	%
property offences	37,0
violent offences	33,5
drug offences	14,5
Sexual offences	3,0
Other	12,0
Total	100

Table 6 shows which measures or conditions are imposed, in order to obtain an extinction of the public action.

Table 6: Measures applied in penal mediation (November 1994 - December 1996)[57]

	%			%
Only one measure	74,6			
	specification:		reparation	33,7
			treatment	12,4
			training	8,7
			community service	9,9
			other	10,2
Combination of measures	25,4			

To 75% of all offenders the public prosecutor proposed one measure as an alternative sanction. Reparation is the measure most frequently proposed. This concerns primarily a financial settlement with the victim, but also

[57] DEWULF, C., FIEUWS, E., GOOSEN, T., HANOZIN, C., PIERS, A., SCHEPERS, A., VAN BOVEN, B., VANEMPTEN, N., VANNESTE, C. et VERMEIREN, K.: Evaluation de l'application de la loi organisant une procedure de médiation pénale en Belgique du 1er janvier 1995 au 31 décembre 1995. Bruxelles, Ministère de la Justice 1996; DAVREUX, S., DEWULF, C., FIEUWS, E., GOOSEN, T., HANOZIN, C., PIERS, A., SCHEPERS, A., VAN BOVEN, B., VANEMPTEN, N., VANNESTE, C. et VERMEIREN, K.: Evaluation de l'application de la loi organisant une procedure de médiation pénale en Belgique du 1/1/1996 au 31/12/1996. Bruxelles, Ministère de la Justice 1997.

apologies, conditions on how to live together or an exchange of information. In 10% of the cases other conditions were imposed, which are not strictly provided by the law on penal mediation. These are mostly an admonition or a transaction. A combination of two or more measures occurs in 25% of all cases. Most frequent is the combination of reparation and community service (in 6% of all cases) and the combination of reparation and treatment (in 3,5%). Reparation to the victim, as a simple measure or in combination, is applied in 51% of all cases.

For cases that are dealt with by a formal session with the mediation magistrate, the compliance rate with the conditions is very high (around 90% for the different measures together). Table 7 reveals some information about the final judicial outcome.

Table 7: Judicial outcome in penal mediation (November 1994 - December 1996) (in %)[58]

	conditions fulfilled	conditions not fulfilled
extinction of public action	93,0	3,2
dismissal ('sepot')	5,8	7,9
transaction	0	0,4
prosecution	0	46,5
other/no info/not yet decided	1,2	41,2
Total	100	100

Compliance with the conditions, as imposed by the mediation magistrate after the preparatory work by the mediation assistant, is followed by an official extinction of the public action in a large majority of cases (93%). There is, however, a tendency to prosecute those offenders who did not fulfil the conditions (46,5%). But definitive conclusions are impossible, since a large number of files remained undecided or lacked accurate information at the time of evaluation.

Despite the success of penal mediation in a quantitative way, there are important concerns, most of which are formulated by the mediation advisers:[59]

[58] Ibidem.

- The law on penal mediation lacks clear and uniform objectives. Different rationalities underlie the law and its application in practice: to demonstrate a visible reaction to minor offences, to help victims, to restore the confidence of the public in the criminal justice system, and - to a lesser extent - to handle the overcrowding of the prison system.
- Practice shows that penal mediation is highly offender-oriented and tends to confirm unilateral punitive approaches. The first modality of penal mediation (reparation to the victim) is applied in only about 50% of the cases. Reparation concerns almost exclusively the financial aspect of the damage. Mediation is rarely done face to face. The mediation session with the magistrate is often carried out in a moralising way; in most cases there are no victims involved at all. An increased number of failures to respect the combined conditions have been reported.
- Finally, the advisers stress the risk of netwidening. There are indications that penal mediation is primarily applied as an alternative for an unconditional waiver, and not as an alternative to prosecution.

2.2.5 Mediation for redress[60]

The total number of files in the experimental project 'mediation for redress' remains limited: 140 selected cases (files) in the period 1993-1997. This relatively limited number is due to the time-consuming mediation work in this type of cases and the restricted staff (two full time mediators, no volunteers involved). In table 8 the types of cases are mentioned.

When calculating the average number of contacts per file, excluding administrative contacts (making appointments, sending a first information letter, locating a person ...), we find the following figures for 1997: 6 home visits per file; 1,4 meetings at the mediation office; 9,2 telephone contacts; 6,3 contacts by letter.

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[59] Ibidem.

[60] PETERS, T. en AERTSEN, I.: Herstelbemiddeling. In: LAMPAERT, F. (Ed.): Gevangenis en Samenleving II. Brussel, Koning Boudewijnstichting 1994, 165-222; AERTSEN, I. en VAN GARSSE, L.: Tussen dader en slachtoffer: bemiddeling in de praktijk. Onderzoeksrapport herstelbemiddeling periode 1/11/1994-31/12/1995. Leuven, K.U.Leuven, Faculteit Rechtsgeleerdheid 1996; BEMIDDELINGSDIENST ARRONDISSEMENT LEUVEN: Jaarverslag '96. Heverlee 1997; BEMIDDELINGSDIENST ARRONDISSEMENT LEUVEN: Jaarverslag '97. Heverlee 1998.

Table 8: Type of cases in 'mediation for redress' (1993-1997)

	N	%
violent offences	69	49,3
property offences	57	40,7
sexual offences	14	10,0
Total	140	100

Of all cases in 'mediation for redress', 50% results in a written agreement. The contents of these agreements can be categorised as follows: information about the offence, its reasons and circumstances; the personal meaning of the facts and their consequences for the victim, the offender and their surroundings; each party's (changed) perception of, and attitude to, the other party; the issues and possibilities of reparation or compensation; the amount of financial restitution or the way material or symbolic reparation should be done; the preferred reaction from the judicial system. Excuses can be offered and accepted by the other party. The agreement can mention that the victim is prepared to drop the claim for compensation.

Evaluation interviews, after a first experimental period, with involved victims and offenders demonstrate a high degree of general satisfaction with mediation for redress. This result is congruent with what was found in most evaluative researches on victim-offender mediation programs.[61] The Leuven program however showed that mediation in more serious crimes is workable and that it puts specific elements in the communication between the victim and the offender, and also that this kind of mediation offers opportunities to implement a new relationship between the justice system and citizens.

2.2.6 Community service

As was explained above, since 1994 community service can legally be ordered in two ways: as a condition for penal mediation or as a condition for probation. We try to summarise some general findings about the application of community service in the two models together. Table 9 is indicative for the modest, but growing quantitative success.

[61] UMBREIT, M.: Victim Meets Offender. The Impact of Restorative Justice and Mediation. Monsey, Criminal Justice Press 1994.

Table 9: Total number of community service orders[62]

Year	
1994	199
1995	487
1996	1002
1997	1738

For the first years, community service was more frequently applied in the context of penal mediation compared to probation.[63] Community service for more serious crimes within the probation context is scarcely ordered. The probation procedure - where the decision has to be made by a judge - is much longer and more complicated than the one in penal mediation, where the handling of the case is done totally on the prosecutor's level. Community service as condition for a sentence with postponement of the execution has its legal limits, since the postponement must refer to the totality of the sentence.

2.2.7 Training orders

Also, training orders are more frequently applied within the procedure for penal mediation than as a probation condition. Most referred to training programs were drug-related offences. No general data are available for the total use of training orders. An indication for its growth can be found in the execution of training orders via the national pilot projects: 29 cases in 1995, 234 cases in 1996 and 675 cases in 1997.[64] Some problems in the implementation of training orders are mentioned:[65] reserved and punitive attitudes among magistrates and the time lag between the preceding social inquiry and the effective order.

62 STEUNDIENST ALTERNATIEVE MAATREGELEN: Statistische gegevens betreffende de toepassing van alternatieve maatregelen en straffen. Brussel, Ministerie van Justitie 1998.

63 DE RUYVER, B.: Toepassing van de alternatieve afdoening. Een oriënterende studie. Brussel, Koning Boudewijnstichting 1997, 26-27.

64 STEUNDIENST ALTERNATIEVE MAATREGELEN: Statistische gegevens betreffende de toepassing van alternatieve maatregelen en straffen. Brussel, Ministerie van Justitie 1998.

65 DE RUYVER, B.: Toepassing van de alternatieve afdoening. Een oriënterende studie. Brussel, Koning Boudewijnstichting 1997, 27.

An interesting example of a new training program is the project 'Focusing on victims', established in 1995 by the Flemish victim services umbrella organisation.[66] The objective is to sensitise the offender to the consequences of his acts on the victim. The program is organised in small groups of 6 to 8 offenders and consists in 30 hours training. Evaluation by comparison of pre and post assessment reveals positive effects on the offender's attitude.

3. Discussion on further perspectives

3.1 Ambiguous developments

The preceding parts of this overview refer to some fundamental problems regarding the origins, the conceptualisation and the implementation of community sanctions and measures, which have wider applicability than Belgium alone.

First, community sanctions and measures are, overall, used in a very limited way. The reasons for this are not always clear and have to do with a mix of factors. Among these are the attitudes towards and the restricted knowledge about alternatives for police, prosecutors, judges and lawyers. Another aspect is the lack of infrastructure and financial and human resources, necessary for effective implementation. A third reason lies in the weak co-operation between judicial authorities and non-judicial agencies: mutual unfamiliarity, resistance, legal and administrative anomalies, inadequate organisation and co-ordination. A repeatedly mentioned problem concerns the classic, punitive way of thinking shared by different professional groups in the criminal justice system. This sketch of the gradual development of community sanctions must be further nuanced. Whereas Belgium experienced more than three decades of under-utilisation of the legal probation system until now, the new alternative measure of penal mediation has been implemented quantitatively in a fast and significant way within less than two years since legislation. At the same time, the federal government made important advances in the field of community sanctions and measures: since the early 1990s there have been partnerships with municipal authorities, more infrastructure added, a whole range of specific proj-

[66] BROUCKMANS, P. en SCHOOFS, N.: Slachtoffer in beeld. Het experiment voorbij Berchem, Steunpunt Algemeen Welzijnswerk 1998.

ects and pilot programs initiated, specialised personnel hired, information and education provided to the judiciary and an enormous expansion of the budget. Referring to similar evolutions in our neighbouring countries and looking at Belgian statistics for the past years, it is not at all impossible that some of the alternative sanctions or measures will break through in the near future.

But even from the perspective of an increased use of community sanctions and measures, we have to face some fundamental questions. Do we know sufficiently how this multitude of new programs is operating in practice? Which groups of offenders are reached? What are the nature and the quality of the intervention? What about the effects on the persons involved, on their surroundings and on public opinion? How do these alternatives relate to the formal justice system? What is the impact on incarceration rates? For the Belgian situation essential information about most of these questions is missing. There is no doubt about one point: community sanctions and measures do not currently function as an alternative to custody. Their introduction did not curb the increasing prison population rates in Belgium.[67] On the contrary, findings suggest that community sanctions and measures, by the effect of unintended mechanisms, have become one of the facilitating factors for the expansion of the prison sentence.[68] In the near future, we may expect a further increase in the prison population. One indicator is the construction plans for new prisons by the federal government. The building program, adopted at the end of 1996, besides providing for the renovation and further development of old institutions, calls for the construction of 1000 new prison cells.[69] By the end of 1998 the total capacity was to be expanded to 8000 places, whereas this capacity remained around 6000 for many years. The extension of cell capacity contrasts with the initial choice of the minister of Justice to invest resolutely in non-

[67] Incarceration rates, counted on basis of the average daily prison population, augmented steadily since the late 1960s and show a strong expansion in the 1990s.

[68] For an analysis of the relation of alternative sanctions to the prison population during the three last decades in Belgium, see: SNACKEN, S.: Surpopulation des prisons et sanctions alternatives. In: MARY, P.: Travail d'intérêt général et médiation pénale. Socialisation du pénal ou pénalisation du social? Bruxelles, Bruylant 1997, 367- 401.

[69] FEDERALE REGERING: Algemene beleidsverklaring bij de opening van het parlementaire jaar 1997-1998. Meerjarenplan justitie en veiligheid, Brussel 7 oktober 1997.

custodial measures and sanctions and to withhold priority to an extension of prison capacity.[70]

One of the effects of the implementation of community sanctions and measures referred to in the last paragraph is that they may indirectly cause a supplementary prison input, since these alternatives keep a structural or a de-facto link with the prison sentence. This might be the case with Belgium's measures and sanctions of penal mediation and probation because they may impose on offenders who failed to perform their community sanction, a conditional or an effective prison sentence. The provisional conclusion of this paradoxical development seems to be that an increased use of community sanctions and measures goes hand in hand with an expansion of the prison population.

In Belgium, community sanctions and measures are applied mostly for relatively minor offences. The legal conditions for transaction, penal mediation and probation link the applicability of these measures or sanctions to certain upper limits of a possible prison sentence in a given case. And even when the legal range is relatively broad, prosecutors or judges tend to use these alternatives in a restricted way, limiting them to less serious crimes, to first or young offenders, or to petty drug offences. The overall result of this is a 'two-track development'. Community sanctions represent the soft option; they are seen as a favour or a last offer to the delinquent who committed a rather minor crime. 'Serious' cases then, such as violent offences and organised crime, are dealt with in a harsh way, because these cases are not deemed appropriate for a community approach. The evolution of the Belgian prison population - an increase of long-term inmates with sentences of five years and more - seems to confirm this dualism in penal reactions.[71] In any case, practice shows that even community sanctions can be executed in a very punitive and stigmatising way.

As described, community sanctions and measures can operate within the boundaries of a (growing) repressive and controlling climate. Noncustodial sanctions risk functioning as a confirmation of a predominantly re-

[70] MINISTER VAN JUSTITIE: Oriëntatienota strafbeleid en gevangenisbeleid, Brussel 1996, 18.

[71] PIETERS, F.: De alternatieve straffen en maatregelen in de Oriëntatienota. In: PETERS, T. en VANACKER, J.: Van Oriëntatienota naar penaal beleid? Leuven, K.U.Leuven, Faculteit Rechtsgeleerdheid 1997, I.10; SNACKEN, S.: Surpopulation des prisons et sanctions alternatives. In: MARY, P.: Travail d'intérêt général et médiation pénale. Socialisation du pénal ou pénalisation du social? Bruxelles, Bruylant 1997, 382.

tributive approach, with the inherent consequence of netwidening.[72] Penal mediation and probation are highly illustrative of this in Belgium. They may develop to tools of a re-penalisation of small offences, in the context of a criminal justice system that keeps its essentially retributive character. After all, legislation and further initiative from the government have been influenced strongly by political concerns, after the success of extreme right parties in the 1991 elections.[73] Government and parliament responded to public frustration and distrust by creating new forms of fast, visible reaction to petty crime.

3.2 *The need for a new approach*

During previous decades, a new element has entered in the debates on crime and criminal justice: the attention to victims of crime. This was totally new in criminal justice policies, compared to the unilateral orientation to the offender in both the traditional repressive and rehabilitative models. This evolution might have far reaching consequences. In all western societies the care for victims of crime is present now, sometimes in a pronounced way. Victimology and the victim movement indubitably have affected the way society and penal systems react to crime. The recent laws on penal mediation (1994) and penal transaction (1994) have clearly been influenced from this perspective. The Belgian Code of Criminal Procedure as modified in 1998 and the new Law on Conditional Release (1998) also integrate the position of the victim in their procedures. Talking about sanctions or alternative sanctions without taking into account the position of the victim has become hardly possible.[74] The victim is also represented in the European Rules on community sanctions and measures[75], where Rule 30 stipulates: *'The imposition and implementation of community sanctions and measures shall seek to develop the offender's sense of responsibility to the community in general and the victim(s) in particular'*. The interest of the

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[72] PETERS, T.: Probleemoplossing en herstel als functies van de straf. Panopticon (1996), 555-569.

[73] MARY, P. et DE FRAENE, D.: Sanctions et mesures dans la communauté. Etat critique de la question en Belgique, Bruxelles, Fondation Roi Baudouin 1997, 46-48.

[74] DIGNAN, J. and CAVADINO, M.: Which model of criminal justice offers the best scope for assisting victims of crime? In: FATTAH, E. and PETERS, T. (Ed.): Support for crime victims in a comparative perspective, Leuven, Leuven University Press 1998, 139-168.

[75] Council of Europe Recommandation R(92)16.

victim as well as the importance of community involvement is also stressed by the U.N. Standard Minimum Rules for non-custodial measures.[76] Whereas it is clear that concern for the victim cannot be denied in the conceptualisation and the development of community sanctions and measures, it is amazing to find that this issue is often not discussed in many gatherings about alternative sanctions.

There is, of course, the risk that the attention to the victim and the strengthening of his position within criminal justice procedures again reinforce the retributive justice model. Therefore, a balanced approach is needed, which guarantees the right concern for the victim, the offender and the society. This new model might be found in the concept of *'restorative justice'*. Restorative justice is not a new sanction, measure, or a program. Restorative justice refers to a set of principles and values, which represent a specific way of defining crime and elaborating adequate social reactions. Crime is no longer seen as a violation of abstract state rules, but as a conflict, which causes harm to people and relations. Within this rationale, the answer of the criminal justice system should primarily focus on the needs of victims and local communities. Restorative justice is *'a process whereby parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future'*.[77] It may be clear that this approach is referring to a new - and at the same time a very old - paradigm, that leaves both the retributive and the rehabilitative model behind. This 'third way' grew out of the interchange between practice and theory.[78]

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[76] The so-called Tokyo-Rules (1990). For example Rule 1.2.: *'The Rules are intented to promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society'*. The rights of the victims are mentioned in several Rules, dealing with the legal safeguards, pre-trial dispositions and the avoidance of pre-trial detention, sentencing dispositions and conditions of non-custodial measures. Rule 8.1. on sentencing dispositions stipulates: *'The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate.'*

[77] MARSHALL; T.: *Restorative justice. An overview* (unpublished), Great Missenden 1998, 1.

[78] Scholars in criminology and other social sciences, mostly in the Anglo-Saxon world, contributed to the development of a conceptual framework of restorative justice. Amongst them are authors as H. ZEHR, B. GALAWAY and J. HUDSON, M. UMBREIT, D. VAN NESS, T. MARSHALL, M. WRIGHT, J.P. BONAFÉ-SCHMITT,

Until now, restorative justice found its major expression in the practice of mediation between victim and offender. Mediation is based on the support of a neutral and qualified third person who initiates the communication between both parties (face to face or indirect). The main topics of the communication are: defining and redefining of what happened from the point of view of the victim and the offender, considering the consequences of the act and searching for concrete reparation. Victim-offender mediation is much more than a guided negotiation for financial restitution. Although the majority of mediation programs deal with young or first offenders, who committed minor crimes, the experience of mediation in cases of violent and more serious crime is growing.[79] The implementation of these programs is not limited to the pre-trial phase where mediation is seen as a way of diversion, but is realised parallel with prosecution or even after the sentence. In this sense, victim-offender mediation does not function necessarily as an alternative. Again, this approach instead represents a specific way of thinking about crime and criminal justice in its consecutive phases. But from a realistic standpoint, we must admit that this promising perspective is far from being fully realised, when we compare developments in this field in several countries.[80] And, as we referred to above in the Belgian situation, not all mediation programs are embedded in the theoretical framework of restorative justice. Sometimes they are the expression of dominating punitive approaches or mixed models, where there is some place for retribution, rehabilitation and reparation.

In mediation programs for more serious crimes, as the Belgian 'mediation for redress' project, the face-to-face communication between the victim and the offender is a powerful tool, which may provoke sincere changes in personal attitudes and social culture. The encounter concentrates also on the judicial outcome, given the fact that both parties are conscious of the inevitable summons to court. Victim and offender discuss and exchange opinions on a desirable and reasonable penal reaction. With this discussion one transcends the exclusively inter-individual level of the me-

E. WEITEKAMP, ... But also theoretical criminologists exercised an important influence on the restorative justice movement: N. CHRISTIE, E. FATTAH, J. BRAITHWAITE, ...

[79] AERTSEN, I.: Mediation bei schweren Straftaten: ein Schritt zu einer neuen Rechtskultur? In: X, Jahrbuch für Rechts- und Kriminalsoziologie '98, Baden-Baden, Nomos 1999 (forthcoming).

[80] There is, in particular for victim offender mediation, also a need to complete the legal framework and to elaborate legal guarantees for parties involved in the process.

diation and puts the problem in a broader social context. Introducing the subject of sentencing in the mediation process allows parties to rethink earlier (often very stereotypical) statements. Expressing and transferring their fully discussed opinion on the penal reaction gives both parties a chance to play an active and constructive role in the criminal justice decision making process. Stated this way, mediation results not only in a horizontal dialogue between the offender and the victim, but also in a vertical communication between the parties on the one hand and the trial judge on the other hand.

From this point, mediation is much more than the individual handling of a conflict between a victim and an offender. Mediation in the context of restorative justice is a way to restore peace under the law, to pacification in a concrete social environment. Therefore, it is really important – as practice demonstrates – to widen the scope of mediation and to give, not only to the direct involved parties but also to supporting or other persons and relevant social agencies, the opportunity to participate in the process. New developments with 'family group conferences'[81] and 'sentencing circles'[82] demonstrate the viability of involving larger groups of the local community, even in the penal decision making process. In this model, it is the community itself that attributes meanings, owns its conflicts and helps to shape in a concrete and constructive way its sanctions and penal measures. This may be an idealistic but not utopian perspective,[83] which is totally different from an approach where the 'alternative' sanction is imposed and executed by a state authority, with the only fundamental novelty being that it no longer takes place in prison. This discussion indeed concerns underlying objectives and principles. What do we want to happen in the way community sanctions and measures are implemented in general: that they are executed merely *in* the community or that they are realised with an active participation *by* the community?

[81] ALDER, C. and WUNDERSITZ, J.: Family Conferencing and Juvenile Justice. The Way Forward or Misplaced Optimism? Canberra, Australian Institute of Criminology 1994; HUDSON, J, MORRIS, A., MAXWELL, G. and GALAWAY, B.: Family Group Conferences. Perspectives on Policy and Research, Monsey, Willow Tree Press 1996; ROBERTS, A.W. and MASTERS, G.: Group Conferencing: Restorative Justice in Practice. Minnesota, Center for Restorative Justice and Mediation 1998.

[82] STUART, B.: Building Community Justice Partnerships: Community Peacemaking Circles. Ottawa, Department of Justice of Canada 1997.

[83] FATTAH, E.: Some reflections on the paradigm of restorative justice and its viability for juvenile justice. In: WALGRAVE, L.: Restorative Justice for Juveniles. Potentialities, Risks and Problems. Leuven, Leuven University Press 1998, 389-401.

The restorative or 'participatory' justice model starts from the option to appeal at first to the problem-solving capabilities of all involved. Alternative sanctions and measures in general, even when they do not involve the victim directly, can be conceptualised according to this underlying principle. When (1) room is made for the personal involvement of the offender, the victim and their families and communities, (2) the crime problem is seen in its social context, (3) a forward-looking problem-solving orientation is present as well as (4) a flexibility of practice, we may call the approach a restorative one.[84] It makes a lot of difference whether, for example, community service has been imposed in an impersonal, routine or even authoritarian way, or whether it involves the offender, the victim and other concerned people in its decision-making process and performance. Restorative justice involves not only local communities in the process, but also the wider society, by preparing and organising sanctions with the help of social and educational agencies and, for example, also volunteers as much as possible.

Community sanctions and measures do not only require appropriate legislation and a consistent penal policy at different levels. If we want to make them really effective, we must also deal with basic rationales and attitudes. Restorative justice principles offer a framework to develop *non-custodial* sanctions towards real *community-based* sanctions and measures. This perspective may make community sanctions function, in the long run, as a real alternative.

[84] MARSHALL; T.: Restorative justice. An overview (unpublished), Great Missenden 1998, 1.

Community Sanctions and Measures in Canada

A Review of the Use of Custody in Canada's Young Offender System
and the Development of a Community-Based Program
for High-Risk Young Offenders[1]

ALAN W. LESCHIED & ALISON CUNNINGHAM

Continuing to do business in the same way will inexorably lead to further crowding and degraded prison conditions, program effectiveness and security measures... The current strategy of heavy and undifferentiated reliance on incarceration as the primary means of responding to crime is not the most effective response in many cases, and is financially unsustainable.[2]

1. Introduction

Administration of justice in Canada has followed the path of most countries in emphasizing the use of incarceration to an ever-increasing extent. Concerns have been expressed not only about the cost but also the questionable effectiveness of imprisoning a proportionately large number of offenders. In the spring of 1998, the Commissioner of the Correctional Services of Canada convened a world conference to study the issue. This followed a

[1] Portions of this chapter were previously printed in the European Journal on Criminal Policy and Research. The authors gratefully acknowledge the funders of the MST project: Ontario's Ministry of Community and Social Services and the National Crime Prevention Council of the Department of Justice. A copy of the first year-end report on the Ontario evaluation of Multisystemic Therapy can be found on the web site of the London Family Court Clinic (www.lfcc.on.ca).

[2] *Rethinking Corrections*, A Discussion Paper Prepared for the Corrections Review Group, 1995, Government of Canada, obtained through the Access to Information Act and cited in Church Council on Justice and Corrections, 1996: I.

meeting of senior Canadian government officials 18 months earlier who, upon reviewing the increasing reliance of custody in the context of other service and demographic trends and costs, concluded that the country could not support these trends either financially or in the spirit of effective service delivery. This observation is no less true in the youth justice system.

The challenge for policy advocates and service providers would appear to be in achieving a balance between the desirability of the lower costs associated with alternatives to custody while being mindful of the community's demand for safety and the high profile nature of criminal justice issues. While these challenges may seem demanding and complex, criminal justice professionals are fortunate in having an extensive literature on which to draw in providing policy direction for the development of community-based intermediate sanctions that are mindful of both goals of cost-effectiveness and community safety. There is some indication of the government's response to this issue in recent proposals for reform of the Young Offenders Act and the associated processes for youth justice (Department of Justice, 1998). This review of the Canadian situation will focus on levels of custody use and factors that influence the use of custody in the youth justice system. An alternative to the use of custody for young offenders is described in considerable detail as an example of how the evidenced-based literature can guide practice in service selection by appropriately targeting those most likely to be consumers of the most costly services and intrusive services.

2. Youth crime and youth justice in Canada

The 1996 International Crime Victimization Survey found that Canada had levels of crime close to the average of ten other western industrialized countries, with 25% of respondents reporting victimization in the previous year from among a

selected list of crimes (Besserer, 1998). Compared with a larger list of 34 countries, Canada was in the bottom third. Like some western nations, such as the United States, the officially recorded crime rate in Canada has been falling in recent years. In 1997, it declined for the sixth consecutive year, going down 5% over 1996 to what is virtually the same rate as that of 1980 (Kong, 1998). Since the peak year of 1991, there has been a 19% decline in the rate at which crime is reported to the police. Despite these numbers,

Canadians regard the crime rate as too high and the fear of crime has not dropped (John Howard Society of Alberta, 1997).

The number of crimes known to the police to have been committed by youths is also on the decline. In 1997, the rate of young people charged with criminal offences fell 7% from the previous year, including a 12% decline in property offences and a 2% decline for violent offences (Kong, 1998). Other 1997 figures pertaining to young offenders – i.e. those who were at least 12 but fewer than 18 years of age when the offence was committed – are:

- 15% of all people charged with violent offences were under 18;
- 20% of young offenders charged with a criminal offence were charged with a violent crime and 53% were charged with a property offence;
- compared with other forms of violent crime, robbery is more likely to involve young people: almost 40% of persons charged with robbery were youths, over the past decade, the rate of female youths charged with violent crimes has increased twice as fast as for male youths;
- 54 youths were charged with homicide in 1997, five more than in 1996 and slightly above the decade average of 49 per year (Kong, 1998).

Such declines are reflected in the workload of the nation's youth courts. The rate at which young people have been appearing in court has fallen for five years, most especially for property offences where the number of youth court cases now correspond with slightly more than 2% of the youth population, a drop of 20.6% over four years (Statistics Canada, 1998). Declines are mostly confined to property offences because rates for violent crimes were basically unchanged. Overall, the rate of youths appearing in court per 10,000 youths dropped 8.5% between fiscal years 1992-93 and 1996-97. Using rates is important because post-war demographics are such that the age distribution of the Canadian population varies over time, most recently with the maturing of the so-called echo boom (born 1980 to 1995), the children of the enormous 'baby boom' cohort born between 1945 and 1960 are entering the "crime prone age" (Correctional Service of Canada, 1998).

Half of youth court cases involve crimes against property (mostly minor thefts and burglaries) while only one in five cases involve an interpersonal offence such as assault or robbery. A significant proportion of offences involve what are called administration of justice charges, where a youth has not abided by a condition of release or sentence. The five most common

offences (minor theft, burglary, failure to comply with a court disposition, minor assault, and other non-compliance offences such as failure to appear in court) together comprise 60% of all cases.

The operation of Canadian youth courts is governed statutorily by the federal Young Offenders Act (YOA) and the Criminal Code. These two statutes define criminal offences and the procedures used to prosecute them. Despite these federal statutes being in force across the whole country, the operation of youth courts varies considerably among the ten provinces and two northern territories. This situation can be traced back to the constitutional division of powers, agreed to in 1867, that gave provincial governments the responsibility for the administration of justice by operating most police forces, most courts and correctional institutes for all young offenders and most adults (see Cunningham & Griffiths, 1997). In many ways, Canada has 12 different justice systems in consequence. This begins at the charging stage. Although there is no correspondence with provincial crime rates, the rate at which youths are charged varies from 10% of the youth population in Saskatchewan to less than 3% in Quebec (Department of Justice, 1998).

In youth court, cases end with an adjudication of guilt - a conviction after trial but more commonly a guilty plea - 68% of the time (Statistics Canada, 1998). Rates of conviction vary from 49% in Yukon to 90% in Prince Edward Island (Statistics Canada, 1998). The wide inter-provincial variation is commonly attributed to differences in how diversion programmes operate, some of which come into play after a charge has been laid and result in stays of proceedings or other pre-adjudication charge termination. For youths, the sentencing options (called dispositions) are listed in the Young Offenders Act. Options in essence include custody (open, closed, or both), community supervision (probation, community service order) or measures with no correctional intervention (fine, discharge, compensation orders). Orders for community services and restitution are often embedded in probation orders. Non-compliance would therefore comprise the new offence of breach of probation making them more easily enforced than if they stood alone as dispositions.

While a key intention of the YOA was to extend due process protections to youths as they were processed by the courts, vestiges of the former welfare-based juvenile system remain in four areas: 1) caps on sentence maxima significantly lower than for adults; 2) key emphasis on probation as a correctional measure; 3) limitations on the publication of the names of

offenders; and, 4), record destruction requirements. In addition, sentencing judges are clearly encouraged to consider individualized sanctions rather than attend purely to the severity of the offence.

2.1 Statement of Principle from the Young Offenders Act

It is hereby recognized and declared that

(a) crime prevention is essential to the long-term protection of society and requires addressing the underlying causes of crime by young persons and developing multi-disciplinary approaches to identifying and effectively responding to children and young persons at risk of committing offending behaviour in the future;

(a.1) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;

(b) society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour;

(c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;

(c.1) the protection of society, which is a primary objective of the criminal law applicable to youth, is best served by rehabilitation, wherever possible, of young persons who commit offences, and rehabilitation is best achieved by addressing the needs and circumstances of a young person that are relevant to the young person's offending behaviour;

(d) where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences;

(e) young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of Rights and Freedoms or in the Canadian Bill of Rights, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms;

(f) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families;

(g) young persons have the right, in every instance where they have rights or freedoms that may be affected by this Act, to be informed as to what those rights and freedoms are; and

(h) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate.

This Act shall be liberally construed to the end that young persons will be dealt with in accordance with the principles set out above.

2.2 *The Sanction system in Canada*

Nationally, probation is the most serious disposition in 51% of cases and custody in 34%, followed in frequency by community service (6%), fine (5%), and absolute discharge (2%). Since these data were collected, conditional discharge has also become a sentencing option. Other options, which comprise 2% of the most serious dispositions, include compensation to victim, seizure, forfeiture, essays, apologies and counselling programmes. These figures represent only the most serious measure ordered, even though in many cases dispositional options are combined. For example, a probation term may follow after release from custody or victim compensation may be a condition of probation. There is some variation in these figures depending on the most serious offence at conviction, as can be seen in Table 1.

Table 1: Most Serious Disposition per Case by Category of Most Serious Charge per Case

	Interpersonal		Property		Other Crim. Code		Drugs/Narcotics		YOA**	
Secure Custody	2123	15.1%	4613	13.1%	2769	22.1%	280	7.8%	1985	21.6%
Open Custody	2185	15.6%	5865	16.6%	2740	21.9%	326	9.0%	2386	26.0%
Probation	8530	60.8%	20022	56.8%	4717	37.7%	1991	55.2%	2659	28.9%
Fine	219	1.6%	1144	3.2%	889	7.1%	452	12.5%	738	8.0%
Compensation	13	0.09%	172	0.5%	7	0.06%	14	0.4%	11	0.1%
Community Service Order	484	3.5%	2254	6.4%	646	5.2%	243	6.7%	954	10.4%
Absolute Discharge	220	1.6%	671	1.9%	194	1.6%	208	5.8%	154	1.7%
Other*	249	1.8%	501	1.4%	557	4.4%	91	2.5%	303	3.3%
TOTAL	14023	100%	35248	100%	12519	100%	3605	100%	9190	100%

* 'Other' includes detention for treatment, restitution, prohibition, seizure, forfeiture and other dispositions such as essays, apologies and counselling programmes.

** Includes failure to comply with disposition and failure to comply with undertaking [to appear in court].

Source: Compiled from data in Canadian Centre for Justice Statistics, 1998

It would appear that community-based, or non-custodial, dispositions comprise two-thirds of those handed down by youth courts, with probation being the most frequently imposed. Terms of probation can also be ordered to

follow release from custody. Provincial probation officers supervise probationers for terms that can be as long as two years, as determined by the judge. In 1996-97, only 22% were for more than 12 months (Statistics Canada, 1998). Probation as a stand-alone disposition was most common in cases involving minor assault, motor vehicle theft, and trafficking in drugs. Standard conditions of probation include keeping the peace and being of good behaviour. Optional conditions can include attending school, seeking and maintaining employment, or living at home or with an adult the court deems appropriate.

Custodial disposition resulted in 34% of cases that ended in conviction (Statistics Canada, 1998). As can be seen in Table 1, a custody disposition is most likely to be ordered when a young offender has violated an order of the court, such as when a condition of a probation order is breached. Custody was the most common disposition for being unlawfully at large (89%), escape from custody (88%), manslaughter (87%), aggravated assault (79%) and robbery (57%). Custody sentences as a proportion of convictions range from 25% in Alberta to 48% in Prince Edward Island. Ontario - Canada's most populous province - has a custody rate of 41%.

2.2.1 Juveniles

The maximum length of a youth custody sentence is typically two years but, after some public outcry, amendments to the Young Offenders Act have permitted longer sentences in some cases such as murder. However, custody sentences are typically short. In 1996/97, 29% were for one month or less and 46% from one to three months. Moreover, there is some evidence to indicate that the length of custody sentences is shortening (Statistics Canada, 1998). Cases with sentence lengths of three months or less now comprise 75% of all custodial sentences, up from 71% in 1992/93. Such figures are matched with decreases in the longer sentences. This trend is observed for both open and closed custody sentences. It is important to note, however, that youth custody sentences are not subject to remission, either statutory or earned. Early release from a custody term is possible under some circumstances by applying to a judge for a review of the sentence.

Young offenders sentenced to custody will generally serve their terms in a stand-alone facility for youths, although there are a few places where adults and youth are co-located with strict separation between the two. Provincial governments operate all young offender facilities. The Young Offenders Act differentiates between open and closed custody but each prov-

ince is free to operationalize those concepts. At the discretion of the sentencing judge, the term can be served in a closed custody facility, an open custody facility, or a specified combination of both. About half of all youths sentenced to custody are sentenced to begin the term in a closed facility. An unknown proportion of them will graduate to an open facility at a set point in the sentence, to facilitate reintegration into the community. The other half serve their entire sentences in an open facility.

Closed custody facilities can look very much like adult prisons or they can be like treatment centres. Open custody facilities, typically less secure, can be group homes or even foster homes. The geographical dispersion of the Canadian population makes it a challenge for authorities to operate facilities in all areas so that youths can be confined in or near their home communities. To achieve this end, many facilities are operated under contract with non-profit service providers such as the Salvation Army, the John Howard Society, the Elizabeth Fry Society and the Saint Leonard Society.

Philosophically, there is an anticipation that youth and adult courts would function differently, especially in the disposal of cases. Traditionally, there has been a belief that early intervention or more treatment-based interventions would be provided for youths compared to adults. Data, however, would suggest otherwise. The offence profile for both youth and adult is fairly similar. The most common offences in adult court - impaired driving, minor assault, minor theft and failure to appear in court - which together constitute almost half of cases in provincial courts (Carrière, 1998)[3] are similar to the most common offences in youth court except for the prevalence of impaired driving. Second, the rates of conviction are similar. The Adult Criminal Court Survey of Statistics Canada found that cases processed through the adult provincial courts ended in an adjudication of guilt 64% of the time (Carrière, 1998), similar to the rate of 68% observed in youth courts (Statistics Canada, 1998). Rates of conviction for adults vary from 60% in Nova Scotia to 81% in Prince Edward Island (Carrière, 1998) so it may be the case that there is less inter-provincial variation in at least some aspects of adult court processing.

[3] Available statistics on adult courts and sentencing are limited to the provincial courts, which hear the majority of cases. The superior courts (courts which have absolute jurisdiction over serious offences, such as murder and several other indictable offences) are not represented. It could be assumed, therefore, that the rate of incarceration reported here would be higher if data from these courts were included.

Overall, sentencing patterns in youth courts are remarkably similar to those in the adult provincial courts except that probation is somewhat more common and fines are rarely used. For adults, the options are spelled out in the federal Criminal Code and apply equally across the country. As with youth court, community-based sanctions are by far the most commonly used sentences, particularly probation (41%) and fines (44%). Other options include absolute discharge (where a conviction is registered but the offender retains no criminal record), conditional discharge (which has the same effect after a period of probation), suspended sentences (essentially a period of probation), restitution/compensation, and community service order, which together account for 49% of convicted cases. To increase their enforceability, restitution and community service are usually embedded in a probation order, so the true extent to which they are used is obscured.

The most notable difference is the infrequent use of fines in youth court while fines are one of the most common sentences in adult court. Less use of fines are made in the youth courts, probably because of the lower likelihood that young people have access to large sums of money. In addition, there are no mechanisms to enforce the payment of fines in youth court. For adults, fine default can result in imprisonment, a factor of great concern in provinces where fine defaulters comprise a significant proportion of the prison population. Fine-option programmes operate in some provinces so that fined offenders can perform community service work to discharge their obligation. The rates at which cases end with sentences of imprisonment are virtually identical, 33% for adults and 34% for youths. For adults in provincial court, the proportion of cases of conviction that end in incarceration varies from a high of 50% in Prince Edward Island to a low of 21% in Nova Scotia (Carrière, 1998). The rate at which adults are incarcerated varies from seven per 10,000 in the two Maritime Provinces of Nova Scotia and Prince Edward Island to a high of 75 per 10,000 in the Northwest Territories (Robinson et al., 1998) where the crime rate is the highest in the country.

2.2.2 Adults

Sentencing patterns in the two levels of courts are remarkably similar despite a stark difference in statutorily defined sentencing philosophy. A package of amendments to the Criminal Code, in 1995, affirmed that, where adults are concerned, "a sentence must be proportionate to the severity of the offence and the degree of responsibility of the offender." This

statement may provide some focus for judges who are confronted with the multiple and often conflicting potential goals of sentencing: deterrence (specific and general), rehabilitation, incapacitation, and denunciation. Judicial precedence is the greatest definer of sentencing, moderated by long-acknowledged mitigating and aggravating factors. Since 1995, aggravating factors have statutorily included these three factors: motivation by prejudice or hate, if the victim was a spouse or child, or if a position of trust or authority was abused. Other factors that affect sentencing decision-making are plea-bargaining and how judges perceive public opinion.

A few minimum sentences have survived Charter challenges. A second or subsequent conviction for impaired driving is one such offence. In addition, the use of a firearm during the commission of an offence carries a minimum sentence of one year in prison for the first offence and three years for subsequent offences (to be served consecutive to any sentence given for the offence itself). There are also a few mandatory sentences, such as the obligatory life sentence for first and second-degree murder. Parole eligibility is delayed for 25 years in the case of first-degree murder. This sentence dates back to 1976 when capital punishment was formally abolished. It was last used in 1961. The murder rate before and after the abolition of capital punishment was so stable that any deterrent effect of the death penalty did not seen to operate in Canada.

Three-quarters of adults under correctional supervision are in the community, either on probation or parole. The number of adults in prison, on probation or parole on any given day in 1996/97 was 38% higher than a decade before that, but down slightly from the peak in 1993/94. Generally, the number of people under community supervision is rising faster than the number of people in prison. Probation services are the responsibility of provincial governments. Probation terms for adults can be as long as three years, at the discretion of the sentencing judge, and can stand alone or follow a prison sentence of less than two years. There are usually conditions embedded in probation orders, standard ones such as keeping the peace and being of good behaviour, or individualized ones such as victim restitution or attendance at a drug treatment programme. Most probationers report periodically to a probation officer. The interval between appointments will be set by the probation officer and may well increase over time. Probation is also used for those who serve intermittent prison sentences (to govern the periods when they live outside the institution) and those who receive conditional discharges or suspended sentences. This, combined with the fre-

quency with which it is ordered as a sentence, means that it is an extremely common correctional measure. There are approximately 100,000 adult probationers at any one time in Canada and the use of probation has risen faster than the use of imprisonment (Reed and Roberts, 1996).

A handful of federal offenders, those categorized as highly dangerous, will serve the entire sentence behind bars. The vast majority of inmates, however, will be released earlier, typically at the one-third mark, to serve the remaining portion of the sentence under community supervision. Such releases are conditional and subject to revocation. Federal offenders are subject to the supervision of parole officers employed by the Correctional Service of Canada or under contract with CSC. Provincial parolees are supervised by provincial parole officers in three provinces and by federal parole officers in other jurisdictions. Increasingly, the use of parole release is being supplanted in favour of a system of so-called temporary absences - which, despite their name, can be for long periods that extend to the end of the sentence - granted at the discretion of correctional officials (Cunningham & Griffiths, 1997).

A new sentencing option drawing some critical scrutiny is the conditional sentence. If the offender is sentenced to less than two years in prison, the judge can order that the person serve all or part of the term at home, subject to supervision and liable to imprisonment if stipulated conditions are not met. Some of those conditionally sentenced to prison will be subject to electronic monitoring. Because it is a new option, practice with it is limited and little is known about how the courts are applying it. When sentences of imprisonment are handed down in adult court, jurisdiction over the offenders is shared between two levels of government in an anachronistic arrangement that dates back to 1867. Offenders receiving prison terms of less than two years serve their time in a provincial correctional facility in the province where the offence occurred. Sentences of two years or greater make the offender the responsibility of the federal Correctional Service of Canada, which operates facilities across Canada. In 1995/96, there were 114,562 admissions to provincial prisons and 4,402 to federal prisons (CSC, 1997). The median length of a provincial sentence is 31 days (Reed and Roberts, 1998) so the population turnover is high. On any given day, there are about 37,000 adult Canadians behind bars, representing 17 inmates per 10,000 adult Canadians (Robinson et al., 1998). The vast majority of Canadian prisons operate slightly below design capacity (Robinson et al., 1998).

Correctional officials in Canada are clearly concerned about the high rates of imprisonment. Arguments for limiting the use of imprisonment focus on its ineffectiveness and cost. The majority of adult offenders - the three-quarters who are subject to community supervision on probation or parole - used 12% of total revenues spent on adult corrections. In other words, the one-quarter behind bars utilizes almost 90% of the resources. While the number of those going into provincial institutions has levelled off in recent years, the number of federal admissions continued to increase, spiking up in mid-decade but now levelling off to the historically stable rate of growth of 2.5 to 3% annually (Correctional Service of Canada, 1998). Reasons for the increase in federal penal population are often traced to legislation that encourages either higher or longer sentences. For example, in 1976 minimum sentences for murder were raised from 7 - 10 years to 10 - 25 years. Ever since, the number of lifers (those serving life sentences but who could be released after serving the minimum sentence) has grown steadily. In the early 1980s, a number of reforms made it easier to bring sexual offences cases to court; this was followed by a dramatic rise in sex offence admissions. It has recently become possible, and publicly popular, to detain some offenders to the end of their warrant expiry date rather than release them conditionally (Correctional Service of Canada, 1996). Another factor is the decline in the grant rate for parole, also in part related to public dissatisfaction with conditional release. Other changes are the mandatory minimum sentences for some offences involving firearms, increasing rates of transfer of youths to adult courts where they are liable for longer sentences, the expansion of the list of offences for which inmates can be denied conditional release, and high-risk offender legislation. Changing demographics and the rise of new crime categories (e.g. organized crime, high-technology crimes and white-collar crimes) are also expected to add to the numbers of the federal penal population (CSC, 1998), which are predicted to rise 2.5 to 3% per year until at least 2007 (Boe, 1997).

2.3 How does Canada compare to the United States?

A trap we Canadians often fall into is to be satisfied with the status quo because we compare so well to the American situation. While the number of youths being charged in Canada is on the decline, the American figure increased 7% between 1994 and 1995 (Sickmund, 1997). Mauer (1997) cal-

culated the American rate of adult incarceration as 600 per 100,000 population, or second only to Russia in the list of 59 countries he examined. By comparison, Canada was 24th with a figure of 115 per 100,000 population. Put another way, the US, with roughly ten times the population (268 million to 30 million), has roughly 45 times the number of adults behind bars and under sentence (1.7 million to 37,000).

In the US, adult penal populations have been rising through the 1990s and, if current trends persist, will reach two million by the year 2000 (Sentencing Project, 1998). For every 100,000 Americans (of all ages), 445 were under sentence in a state or federal prison (Gilliard & Allen, 1998). Looked at another way, one in every 117 males and one in every 1,852 females were sentenced federal or state offenders in 1997. If jail sentences and remands were factored in as well, the numbers would be higher. It is anticipated that eight out of ten African-American males will spend some time in either jail or prison (Bonczar & Beck, 1997; see also Miller, 1996). The growth in the prison population is the equivalent of adding 1,177 more prisoners each week than are leaving. One consequence is that 19% of federal and 15 - 25% of state facilities operate above the design capacity of the facilities. Another consequence is that direct expenditures on prisons are spiralling ever upward with no reversal in sight.

Maur (1998) of the Sentencing Project in Washington, DC, has linked the increased use of imprisonment in North America to four distinct trends: the shift from offender-based to offence-based sentencing; decreased emphasis on rehabilitation; shift of resources to institutions; and limited consideration for non-custodial sentencing options. Other explanations for the rate of increase include the proliferation of high mandatory minimum sentences (particularly for drug offences), 'three-strikes] laws, and 'truth in sentencing' laws, which typically require an offender to serve at least 85% of a sentence before conditional release (Sentencing Project, 1998). Indeed, the number of violent offenders in the federal system is small and dropping, being supplanted by those convicted of drug, weapons and immigration offences (Gilliard & Allen, 1998).

3. Factors influencing custody rates for youths

A combination of factors can provide understanding of the rapid increase in the rate of increased use of custody in Canadian youth justice. These would include public attitudes towards community safety, federal-provincial cost

sharing arrangements, the rise in the importance of accountability, the shift in mandate for the probation service, and the lack of alternatives made available to the courts. Linking many of these factors has also been the shift in the fundamental premise in managing youth who are in conflict with their communities.

3.1 Public attitudes towards community safety

Recent evidence reported by Baron & Hartnagel (1996) suggests that the public's fear of crime, conservative values and victimization experience are useful predictors of attitudes in support of the use of custody for young offenders. When asked as part of the International Crime Victimization Survey (Besserer, 1998), Canadian respondents, along with those from the UK and the US, overwhelmingly choose imprisonment as the most appropriate sentence for a burglar convicted for the second time. Legislators are clearly aware of these public attitudes (Department of Justice, 1998; National Crime Prevention Centre, 1998).

3.2. Federal-Provincial cost sharing

The federal government shares costs with the provincial and territorial governments for such areas as bail supervision, alternative measures programmes (i.e. diversion), post-adjudication detention and custody. Initially, the cost sharing was 50/50 but annual federal contributions were frozen in 1989, meaning the federal share declines each year as provincial costs increase. As it turns out, three-quarters of the federal contribution is directed towards custody and custodial programming. Provinces with low custody rates receive proportionately less federal money (Department of Justice Canada, 1998).

3.3 Shifts in the importance of accountability

Youth justice administration in Canada dramatically changed in orientation with the proclamation of the Young Offenders Act (YOA) in 1984. While changes in implementation over the years had varied the administration of youth justice, the original legislation of 1908 - the Juvenile Delinquents Act - governed justice for young people without major fundamental change for almost three-quarters of a century. Critics of the YOA suggested that

this new legislation heralded an increasing emphasis on the incarceration of youth (Markwart & Corrado, 1989). Growing concern by policy makers about the 'drain' on financial and human resources to support the expanding use of custody is but one major contributor to the renewed emphasis on community-based interventions.

3.3.1 *Early attempts at juvenile justice implementation*

The guiding philosophy behind the design of a youth justice system is important to consider in appreciating on-going dissatisfaction with what is perceived by many in the public, as a 'soft' on crime approach to young people (Bala & Corrado, 1985). Contemporaneous with other Commonwealth jurisdictions and the United States, Canada created a separate system of youth justice with the enactment of the Juvenile Delinquents Act (JDA) in 1908. It took many years for the JDA to be used outside a few urban centres (Hatch & Griffiths, 1991) but it gradually took hold. The JDA dictated that young people should be responded to not as criminals but rather as 'misguided' children in need of 'guidance and assistance' requiring the judge to take the role of a kindly parent in redirecting the behaviour of errant youth.

This approach to governing so-called delinquents – those who had committed criminal offences but also those thought likely to do so – provided judges with close to unfettered discretion in applying a disposition that, while not necessarily being a 'just' responses to misdeeds, would 'fix' the prevailing problem. Such problems include the social, economic and moral conditions that promoted misbehaviour. Hence, their eradication could be conceived as broadly as possible, and include family, school and neighbourhood factors. No consideration need be taken of proportionality as a sentencing principle or of the protection of civil liberties of the youth.

3.3.2 *Reform in the 1960s to 1980s*

In the early 1960s, it was recognized that reform of the juvenile system was necessary. Three major influences can be identified as fuelling the debates that spanned two decades and culminated in the 1984 proclamation of the YOA. The first was the growing recognition that young people needed to be afforded protection under the law to ensure their rights were not being violated at any stage of the proceedings from questioning at arrest through to sentencing (Bala, 1998). This concern grew from the observation that the

flexibility afforded by the JDA was being misused to justify more intrusive punishments than an adult would garner for the same behaviour. Second, there was increasing scepticism about the effects of social re-engineering to reduce conditions that were thought to influence the misbehaviour of some young people (Martinson, 1974, Leschied & Gendreau, 1986). Simply put, there was essentially no empirical evidence that the efforts of the juvenile court had been followed by anything other than steady increases in youth crime.

Third, there was recognition that the offence of 'delinquency' was too broad, encompassing, as was often observed, every act from spitting on the sidewalk to murder. It was felt that violations of the criminal law required a different response from actions and situations that, while 'disturbing' to many, were not criminal. These behaviours, called status offences, included (depending upon the province) incorrigibility, sexual immorality, running away and truancy. In other words, there was a need for separate processes to address the concerns for child welfare as opposed to concerns for law violation (Wilson, 1998).

3.3.3 Basic Tenets of Young Offender Law Revisions

In practice, many of the key features of the paternalistic juvenile court had been abandoned in most areas (Bala & Corrado, 1985) and never used in others (Griffiths & Hatch, 1991), so the changes heralded by the YOA were slight in some areas but substantial in those places that still operated according to the letter of the JDA. The Young Offenders Act was different in several key ways: it abolished status offences and pertained only to violation of federal criminal statutes, raised the lower age of criminal responsibility from seven to 12, created a uniform maximum age of 17 (a change of two years in some provinces, one year in others, and none in Quebec), encouraged the use of legal representation, permitted only determinate sentences and set two years as the maximum length of a custody sentence. The intent of the drafters was to extend legal protections to young people while holding them more accountable for their actions than may have been the case under the JDA. In sum, three prevailing principles can be seen as guiding and finally influencing the YOA. These included: 1. protection under law for the rights of youth in insuring access to legal counsel, 2. making accountability for behaviour a guiding principal for decision-making, and 3. attempting to strike a balance between the need to make young peo-

ple accountable for their behaviour while coincidentally providing appropriate guidance and direction.

Comment around the time of implementation in 1984 suggested that in the least the guiding principles were confusing and indeed conflicting in their pursuit of a just system of law for youth (Reid & Reitsma-Street, 1984; Thomson, 1982). Additional early concerns suggested that the reforms might have mimicked changes in young offender law in the United States that provided the groundwork for rapid increases in youth incarceration in that country (Leschied & Gendreau, 1986). Data from the mid-1980s revealed the effects on incarceration of the reforms in the YOA. In several studies, placement in custody in Ontario (Canada's most populated province) showed signs of doubling the rates of training school committals under the JDA (Leschied & Jaffe, 1986; 1991). In other provincial jurisdictions, similar trends were being noted (Markwart, 1992).

Despite reporting of the early effects of YOA reform, public attitudes continued to hold that the youth justice system, similar to the adult system, was soft on crime and more emphasis was needed to make the punishment fit the crime (Baron & Hartnagel, 1998; Sprott & Doob, 1997). In this spirit, at least four significant revisions were made at different intervals that reflected public demand for a tougher law (see Bala, 1998). Data on trends in sentencing under the YOA supported the belief of many justice professionals that the use of custody had become a 'runaway train' in the justice system (Archambault, 1991).

3.4 Shifts in mandate of the probation service

Another factor that can be seen as influencing the high rates of custody is the decline of probation as a true intermediate sanction. The original intent of the probation service when it first appeared in Canada 100 years ago was clearly to operate as an intensive measure for offenders who would otherwise be sent to prison. In other words, probation was to be an intermediate sanction that emphasized a supportive and helpful response to youth or adults convicted of a serious offence. Especially because early reformers became disenchanted with what they had seen as the promise of institutionalization, probation became the lynch pin of the juvenile court (Hatch & Griffiths, 1991).

However, as the role of probation has evolved, it now mimics the 'long arm of the court' in monitoring compliance with court orders. The unrestricted case loads and the primacy of the surveillance function have changed

probation from the social work function originally envisioned to one of reporting to the court breaches of court orders. This being true, sentencing judges no longer see probation as an effective alternative to custody.

3.5 Lack of custody alternatives

In summary, sentencing judges in the youth courts have few dispositional alternatives that can be resorted to with confidence when an offender poses a risk to the community. This, along with the redirected emphasis of much of the human and financial resources committed to the young offender system towards custody, has restricted the development of intermediate community-based alternatives to the court.

4. Responses to the over-reliance on youth custody

4.1 Governmental approach

The irony of the emphasis placed on custody is this: these 'deep-end' services are the most costly, but nowhere in the relatively meagre research on the effects of institutionalization is there empirical support that custody is an effective way to reduce youth crime and increase public safety. Canada is not experiencing the rapid construction of prisons evident in her close neighbour the United States, but the rate at which incarceration is used is higher than in many other Western nations (Maur, 1997; Correctional Service of Canada, 1997). While the general public seems to support more of the 'get tough' approach, both levels of government (federal and provincial) appear to be interested in lowering the use of custody, in part because of the enormous cost and the drain it makes on funds available for community-based resources.

The Standing Committee on Justice and Legal Affairs (1997), a group of parliamentarians charged with reviewing the implementation of the YOA, held hearings at 23 sites across the country. One of their conclusions was that Canada uses imprisonment in response to youth crime more than many other countries. The bulk of financial resources devoted to youth in conflict with the law in this country has gone to build and operate custodial facilities... This over-reliance on the formal justice system and imprisonment is an enormous drain on public dollars, introduces minor offenders to more serious, persistent offenders, stigmatizes offenders and reinforces criminal identity in a deviant subculture. Moreover it fails to deter youth crime (p.

35). In addition, there is little doubt that community safety is enhanced by custody as it is used. Nationally, more youths are incarcerated for administration of justice offences (the most serious offences in 36% of cases where custody is a disposition) than for interpersonal offences (17%). Such offences include failure to comply with a disposition (mostly breaching conditions of probation), failure to appear in court, escaping custody and being unlawfully at large (Statistics Canada, 1998). Numerous attempts are currently underway to bring youth justice administration in Canada more into balance. These attempts draw on restorative justice principals and community-driven responses addressing the causes of youth crime as well as victim involvement in providing more 'satisfying justice' experiences for all concerned parties.

4.2 Attempts at providing alternative measures, intermediate sanctions and custody alternatives

The YOA is cognizant of the need to provide the least intrusive intervention possible at various stages in the proceedings. This recognition is reflected in the mandated use of alternative measures and community service orders for offenders committing acts of a minor nature; the imposition of probation for community monitoring of compliance with the terms spelled out by a judge; and bail supervision for youths who would otherwise be held in a detention centre for the duration of the court proceedings. Yet, as Bala (1998) has suggested, legislation alone is not a solution in curtailing the use of custody. Probation continues to be the disposition of choice, with judges making orders to a greater extent than competing choices. It is in the *proportion* of custody orders relative to the overall number of youths being processed through the justice system that is both driving the high cost of 'deep-end' services and restricting the development of suitable alternatives (Doob, 1997). For example, the cost of a single custody bed is two and a half times the average yearly salary of a probation officer.

4.2.1. Considerations in the development of increasing community alternatives

Currently in Canada, there is interest in developing alternatives to the formal justice system and in increasing the range of choices for high-risk young offenders at the disposition stage when custody would be the obvi-

ous next step in legal processing. Borrowing primarily from developments in Australia and New Zealand and practices known to Canada's First Nations People, alternatives to formal court processing have been given impetus in recent proposals for juvenile justice reform (see, for example, Department of Justice, 1998). Examples of such court diversion programmes include police cautioning, family group conferencing and circle sentencing (Standing Committee on Justice and Legal Affairs, 1997). Proposals such as these are targeting youths who have committed minor offences in order to capitalize on the naturally occurring strengths in a community of committed volunteers. Additionally, these proposals support police discretion in avoiding the use of court for youths who are generally considered as low risk for subsequent offending. In many cases where such diversion programmes are applied, no formal charge is laid. In the Sparwood Youth Assistance Programme in British Columbia, for example, "Crimes are dealt with without laying charges, the setting is informal, both the victim and the offender are involved in coming to a resolution, and the offender is not sentenced to custody" (Purdy, 1997).

4.3 Developing Intensive Community-Based Services for Higher Risk Youths

While considerable emphasis is being given to 'front-end' services primarily targeting lower risk offenders, there is also support for developing services addressing the needs of higher risk cases that would otherwise be heading towards a custody disposition. Justification for community-based services must first have, as its yardstick, the ability to deliver cost-effective service that does not compromise the community's safety. A key intention of the Department of Justice (1998) with its proposed framework for youth justice reform is to lower the rates of custody ordered in Canadian youth courts. This cannot be accomplished through law reform alone. Members of the public in general, and sentencing judges specifically, must be convinced of several things. First, incapacitation through custody may protect the public in the short term but not in the long term. Second, there are viable community-based alternatives to custody that can both protect the public in the short term and reduce recidivism in the long term. Third, the expensive option of custody will not 'purchase' as much reduction in offending as these other non-custodial sentencing options. Providing empirical evidence of these three factors is the intent of the study discussed here.

This review outlines the choice of Multi-systemic Therapy (MST) as a viable alternative to custody for high-risk young offenders and the implementation of a clinical trial of MST in four Ontario communities.

4.4 *Systemic and Programmatic Requirements for Effective Service*

Meta-analytic reviews of the outcome literature support the desirability of providing programmes that are related to the causes of crime (Andrews et al., 1990; Lipsey & Wilson, 1998; Gendreau & Goggin, 1996). Sanctions provided independent of appropriate rehabilitative efforts fail to demonstrate significant reductions in offending. These reviews have given rise to a clearer understanding of both the systemic requirements for the delivery of effective service and the programmatic requirements for the provision of meaningful reductions in youth recidivism.

Andrews et al. (1990) identified the importance of matching the intensity of service to the relative risk and need of individual offenders. This Risk Principle of Case Classification, a useful means to allocate service, suggests that intensive services are more meaningfully delivered to high-risk youths, while low-risk youths can be safely assigned to less intensive services such as community service, fines, restitution and low-level community monitoring. Inappropriate matching of service to risk level will, accordingly, be seen as an ineffective, non-productive use of services that can further the criminogenic risk of some youths (Andrews et al., 1990). There is evidence to suggest that in the province of Ontario sentencing judges are inclined to place in custody a disproportionate number of youths who would be assessed as low risk for further offending (Hoge, Andrews & Leschied, 1995). Differential association theorists would warn that placing low-risk offenders with high-risk offenders could well adversely affect the formers risk for re-offending.

Lessons learned, therefore, from the meta-analysis on systemic variables in effective programming for youth corrections suggest that:

- Lower risk cases can be safely assigned to less intensive services.
- Higher risk cases are more effectively dealt with in more intensive services.
- The differential assignment of youth according to risk is critical.

Accordingly, a spectrum of services to address youths at all levels of need and risk would be a desirable characteristic of any youth correctional system.

Researchers have also addressed the programmatic components of correctional interventions for youth by identifying the content and quality of effective programmes (for a detailed review, see Andrews, Leschied & Hoge, 1992). Components of effective programmes are assessed in relation to their ability to meaningfully reduce recidivism within the targeted group. Programmes assessed as effective tend to be those that systematically assess risk in clients, use the risk principle of case classification, adopt programme orientations known to be effective, employ well-educated and well-trained staff, monitor programme integrity and adherence to the intervention model used, and rigorously evaluate the extent to which programme goals are met. Cognitive-behavioural interventions are often identified as having the greatest promise in reducing recidivism when compared with other programming orientations (e.g. Vennard, Sugg & Hedderman, 1997).

The literature for effective service in youth justice served as the starting point in developing a strategy in Ontario. The search for an alternative to custody for high-risk youth began with the understanding that any service model considered had to match the eight integrity issues summarized by Andrews et al. (1990). According to these authors, a coherent and empirically defensible model:

- empirically links interventions with desired outcomes;
- assesses risk and need levels of clients and targets them for intervention;
- has a detailed programme manual outlining the discreet steps involved in the intervention;
- ensures that therapists have structured and formal training in relevant theory and practice;
- ensures that therapists are supervised in a meaningful manner;
- assesses the therapeutic process as delivered to monitor the adherence to key principles and the employment of techniques claimed to be employed;
- conducts assessments of intermediate changes in values, skills or circumstances of clients that are presumed to relate to desired outcome(s); and,

- associates the level and intensity of intervention to risk, need and responsivity.

The MST approach represented a community-based option that parallels many of these characteristics.

5. The multi-systemic therapy approach

5.1 What is MST?

The Family Services Research Centre developed MST at the Medical University of South Carolina. It was apparent to them that mental health services for serious young offenders were minimally effective at best, extremely expensive and not accountable for outcomes. They reviewed the research literature and looked for interventions with documented success in shaping good outcomes for anti-social youths. They also noted which interventions, some of them quite popular, had no empirical support. This process of discarding ineffective techniques while gleaning those most effective means that MST is more an amalgam of best practices than a brand-new method.

MST adopts a social-ecological approach to understanding anti-social behaviour. The underlying premise of MST is that criminal conduct is multi-causal; therefore, effective interventions would recognize this fact and address the multiple sources of criminogenic influence. These sources are found not only in the youth (values and attitudes, social skills, organic factors, etc.) but also in the youth's social ecology: the family, school, peer group and neighbourhood. The needs of youths are understood by assessing the 'fit' between them and their immediate social context, a relationship that is seen as adaptive or functional as well as bi-directional. Treating youths in isolation from these other systems means that any gains are quickly eroded upon return to the family, school or neighbourhood. In fact, it is a key premise of MST that community-based treatment informed by an understanding of a youth's ecology will be more effective than costlier residential treatment. This is true even when youths who are bound for residential treatment or custodial placements because of the seriousness of their conduct or emotional problems are selected as candidates for MST.

The MST process begins with the identification of the problem behaviours, a task that involves the whole family. In other words, parents are key

figures in identifying treatment targets. Examples of these behaviours include non-compliance with family rules, failure to attend school, failure to complete schoolwork, substance abuse, disrespect to authority figures, and assault behaviour. While the focus is on the elimination of problem behaviours, this is accomplished in great measure by building on strengths. So the assessment process also involves identifying the strengths in the youth and his or her family, which can include athletic ability, a trusting relationship with an extended family member or teacher, warmth and love among family members, or a hobby.

The next step is an assessment of the factors in the youth's ecology, which support the continuation of the problem behaviours and the factors that operate as obstacles to their elimination. These factors may be a found in any sphere of the youth's ecology or the linkages among them, so therapists go to the school, spend time with the peer group or speak with members of the extended family. Examples of these factors might include poor discipline skills on the part of the parents or teachers, marital discord, parental substance use, lack of supervision, peer reinforcement of problem behaviours, a neighbourhood culture which condones violence or encourages anti-social values, low commitment to education, chaotic school environment, poor parent-to-school communication, or financial stresses experienced by the family.

By identifying the 'fit' between the problems and the broader systemic context, MST workers are defining both the targets of intervention and the indicators of whether the measures undertaken have been effective. A therapeutic strategy should produce observable results in the problem behaviour, otherwise the strategy is revised. In other words, positive changes in the behaviour (e.g. school attendance) are used as an indication that the intervention (e.g. parent contacting the school daily) is on the right track. Failure to achieve positive changes requires a reassessment of the fit and plainly indicates the need to try a new approach. The MST service providers are ultimately accountable for overcoming barriers to change. Blaming language such as 'sabotage', 'resistance' and 'intractable problems' are not permitted. In fact, diagnostic labels of any type are discouraged in favour of a perspective that focuses on challenges and strengths.

MST is designed to be an intense but short-term involvement that can result in the generalization of treatment gains over the long term. The frequency and duration of contacts will decrease over time, being intense in the beginning but lessening as improvements are observed. No social serv-

ice intervention can last forever, so the ultimate goal is to empower the family to continue with the strategies and interventions that were successful. An important goal in this process is to foster in the parents or another caregiver the ability to be good advocates for their children and themselves with social service agencies and to seek out supportive services and networks. In other words, parents are encouraged to develop the requisite skills to solve their own problems rather than rely on professionals.

MST is a highly individualized, flexible intervention tailored to each unique situation. In other words, there is no one recipe for success. Instead, there are nine principles that guide intervention:

1. The primary purpose of assessment is to understand the 'fit' between the identified problems and their broader context.
2. Therapeutic contacts should emphasize the positive and should use systemic strengths as levers for change.
3. Interventions should be designed to promote responsible behaviour and decrease irresponsible behaviour among family members.
4. Interventions should be action-oriented and focused on the present, targeting specific and well-defined problems.
5. Interventions should target sequences of behaviour within or between multiple systems that maintain the identified problems.
6. Interventions should be developmentally appropriate and fit the developmental needs of the youth.
7. Interventions should be designed to require daily or weekly effort by family members.
8. Intervention efficacy is evaluated continuously from multiple perspectives with providers assuming accountability for overcoming barriers to successful outcomes.
9. Interventions should be designed to promote treatment generalization and long-term maintenance of therapeutic change by empowering caregivers to address family members' needs across multiple systemic contexts.

The MST-specific training augments the education and experience therapists bring from their chosen fields (usually social work or psychology). Several randomized and quasi-experimental studies of MST have been conducted in the United States and others are now under way (see Borduin, 1995; Henggeler et al., 1996; Henggeler, 1997; Henggeler et al., 1998). MST has been demonstrated to reduce rates of criminal activity (officially recorded and self-reported), institutionalization and drug abuse. MST inter-

vention is also successful at engaging and retaining families in treatment and encouraging completion of substance abuse programming. It can result in improvements in family functioning and cohesion. These results are notable in a field where successes are few and far between, but are especially remarkable because MST has been effective in inner-city urban areas, among youths with serious criminal records, youth identified as high risk to re-offend, and among economically marginal families and those with long histories of unsuccessful interventions.

An American study by the Washington State Institute for Public Policy (1998) rated MST as the most effective and cost efficient of the 16 programmes analysed. Each programme followed youths until the age of 25. None eliminated offending but 15 of the 16 documented lower rates of recidivism among programme participants compared with control youths. After subtracting the cost of the MST intervention itself, MST saved taxpayers on average $7,881 (US) per youth for services associated with criminal behaviour, such as incarceration. The cost of the intervention was recouped after two years. In addition, the reduction in crime was associated with $13,982 in savings to potential victims of crime. Five of the programmes reviewed did not reduce crime enough to pay for themselves and none generated the level of savings linked to the MST intervention.

5.2 The Ontario Implementation of MST

MST is being implemented in four communities in Ontario, with the cooperation of nine community agencies. The London Family Court Clinic coordinates both the implementation and the research in association with MST Services Inc of Charleston, South Carolina. The study began in April of 1997 and will conclude in 2001. MST Services Inc provides initial and on-going training to MST workers and clinical supervisors.

The review by the Washington State Institute for Public Policy (1998) concluded with the observation that most programmes designed to reduce crime are never evaluated. As the Institute (1998: 2) stated: "Some interventions may be working and we don't know it, while others may not be effective yet absorb scarce tax dollars that could better be directed towards effective programmes." This was the same conclusion reached after an exhaustive review of 3 billion dollars' worth of crime prevention programmes sponsored by the US Department of Justice (Sherman et al., 1997), which determined that few studies met the threshold test for scientific rigour. Most so-

called evaluations were little more than descriptions of the programme under study and so added nothing to the debate about 'what works.'

In contrast, the Ontario implementation of MST follows not only the programme integrity issues and knowledge transference challenges of implementing a complex and rigorous set of programme goals, but is also heavily invested in evaluation. An experimental design is used, with random assignment of qualifying cases to either the MST condition or to other services available in the local area. To qualify for the MST trial, referred youth must be rated as having a high or very high chance to offend in the future, a designation made in part on the basis of past criminal conduct but also with consideration of family characteristics, school factors and peer associations. A battery of psychological tests is administered at intake before the random assignment is conducted. Parents and teachers also complete standardized forms. Those families not assigned to MST will carry on with the treatment plan that would have been devised were there no MST. Many of the youths in both groups are on probation. It is anticipated that 400 youths will receive MST before the end of the project and their progress and outcomes will be contrasted with those of 400 control youths.

The psychological tests are re-administered at discharge from MST or, in the case of the control group, after five months. Intermediate target areas (i.e. areas known empirically to be related to offending rates among youth) will be assessed along with outcomes related to re-offending rates, service utilization rates and cost effectiveness. The youths in both treatment and control groups will be tracked until 2001. Adherence to the MST model is also being measured (see Henggeler et al., 1997). The overall goal is to determine whether MST can be an effective alternative to custody by controlling risk to the community in the short-term as effectively as other penal sentences, reducing the recidivism of high-risk youth up to three years after discharge from MST, and reduce that rate at which MST recipients are placed outside the home in penal, child protection and therapeutic settings. Among the hypotheses are those:

- recipients of MST will be less likely to commit criminal offences during the follow-up period than are a control group of youths who did not receive MST,
- those who drop out of MST will be more likely to offend than those who complete MST,
- recipients of MST who offend will do so after a longer offence-free period than youths from the control group,

- recipients of MST who offend will commit less serious offences than those who did not receive MST, and
- recipients of MST who do offend will spend less time in custody than those who did not receive MST.

The study has high ecological validity in that the youths are identified by referral sources as being those youths in the local area who present the greatest challenge to current services. Unlike many programmes, MST does not screen out treatment-resistant youth or those with serious criminal histories, with the exception of sex offenders.

The methodology employed here accommodates three different information needs. First, the evaluation charts *outcomes*. Put simply, an evaluation should be able to document the degree of success in achieving stated goals. The benefits of outcome evaluation include accountability to funders, consumers and the public. This information also contributes to the knowledge base in the area of prevention. Outcomes need to be comprehensive and long lasting. That is, the benefits of the programme should not only be observed in the short term but also sustainable over time. Another goal of MST is to decrease the services utilized by such youths. It is here that programme outcomes can be related to cost-effectiveness and service utilization rates.

Second, the evaluation will monitor programme delivery to ensure treatment fidelity, a *process* evaluation. Programme integrity is crucial to any test of a programme, in order to be able to unambiguously relate outcomes to the programme as defined. It is also important to be attentive to the possibility of programme drift and to intervene when it is observed. Especially with a best-practice model compiled from the literature, as with MST, drifting from that practice may dilute the success of the programme overall.

Third, the design will accommodate the need for *comparative* information, specifically the portability or transferability of the programme components to any community and for use with any defined group. Comparative information is best gathered by implementing the same programme in several areas. Not all programmes, even those with demonstrated positive outcomes, work equally well in all communities. The four participating sites vary in terms of population size and density, urbanism, ethno-cultural profile, proximity to major centres, and sophistication of social service infrastructure.

6. Summary

In the context of Canadian juvenile justice reform, community-based alternatives for high-risk young offenders using MST would be most consistent with the goals of cost-efficient and effective service and is consistent with the principles of the administration of justice to youth. The major challenge for service providers and policy advocates is to view the use of intermediate sanctions in youth justice processing as being more concerned with community safety than vested in punishment, consistent with the underlying principles of the Young Offenders Act. The momentum of the debate in young offender services indicates three major conclusions: 1. that positive outcomes are best achieved by targeting the needs of high-risk youth, 2. that community safety is promoted by addressing the problems of youth in their natural environments, and 3. that effectiveness is best achieved using services with clear track records of positive outcomes as identified in rigorous outcome evaluations. It follows that the MST implementation project in Canada could herald a revised look at the mission to effectively service youths at risk and communities in need while stemming the trend towards continued reliance on custody.

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Community Sanctions and Measures in the Czech Republic

JANA VÁLKOVÁ

1. Introduction

The 20th century has been an unusual epoch in regard to the frequency, speed and extent of unprecedented social change, a phenomenon that has accelerated in the second half of the century. These changes are reflected in, inter alia, a permanent state of anomie and its manifestations. This phenomenon has not, of course, spared the Czech Republic, especially since the political, social and economic changes of November 1989. One consequence of this was an explosion of crime and its brutality, and the spread of criminal activity (the number of first offenders, primarily juveniles and young adults under 22, has increased steadily). In the Czech Republic, the sharp growth in crime rates peaked in 1994. At the same time, there emerged criminal activities we had hitherto lacked any or almost any experience of, such as drug trafficking and kidnapping, extortion and murder of entrepreneurs, and new forms of economic and financial crimes, including extensive tax evasion; all these crimes are often associated with organized crime.

There are a number of reasons for the growth of crime, and these have acted – and still are acting – simultaneously, thus amplifying their impact. Which are the most substantial ones? After the fall of the previous regime in 1989, the state apparatus – primarily the, until then, essentially omnipotent police force – was temporarily paralysed. It is a common revolution-related phenomenon, as any revolution is always accompanied by disorganization of the power apparatus, its insecurity and worry, and frequently also by an aversion to performing its power functions (in the Czech case,

an aversion to tackling crime). Not only the police and other power sectors but also citizens found themselves in a new situation in which they had difficulty orienting themselves. The society's value system hitherto in force, although often artificially upheld, was suddenly no longer applicable.

A new, generally recognized value system to fill this vacuum was in the process of being gradually created at that time. All of this occurred after the, until then, ever-present state control over the life of society and the citizens had vanished. Some people simply confused their newly regained freedom with anarchy, and found, as they still do, the meaning and goal of life in the largest possible consumption and acquisition of property for whatever price and by whichever means. The opportunities to gain legal or illegal profits have undoubtedly been great; good examples of this are the huge transfers of assets within our society that have occurred - and are still occurring. The dark side of the phenomena associated with open borders, freedom of travel and the hitherto unconceivable migration includes the penetration of the country by out-of-state criminal structures, better opportunities to evade the law, and the internationalisation of crime. All of this has resulted in overburdening the criminal justice system's bodies and disproportionately lengthy criminal proceedings. The necessary personal changes at all levels within this system only further exacerbated matters. Our prisons have become formidably overcrowded and a repressive correctional policy has failed. It is therefore necessary to develop more efficient and cost-effective methods of punishing and solving criminal cases.

The potential of community sanctions and measure (CSMs) is gradually becoming recognized. It is a certain paradox that this is occurring at a time when the calls from a frightened public - and also from a segment of professionals - for stricter judicial repression have intensified, and discussions have been started about the reintroduction of capital punishment (abolished in 1990), stricter prison rules, severe unconditional sentences, and a concept of broader self-defence, etc. Given the situation, this attitude is logical and pragmatic. In this respect, firstly certain significant amendments to the Criminal Procedure Act have occurred, followed by changes of the Penal Code. The notions of extending a range of CSMs gained intensity notably in 1993 in connection with penal legislation reform. The already mentioned unwarrantable increase in the prison population and the overall inefficacy of imprisonment has propelled this discussion. According to statistical data from the Czech Ministry of Justice, a total of 59,777 persons were sentenced in 1997. A suspended sentence remains the most frequently imposed

punishment (66.2% in 1997), followed by a prison sentence (23.3%; mostly short-term sentences of less than a year). A fine ranks third (7.9% in 1997); 2.7% of offenders were ordered to carry out community service; 3.1% of punishments were waived, and another type of sentence was imposed on 0.8% of offenders[1].

On 8 January 1998, 21,707 persons were in prison in the Czech Republic, of whom 7,817 were in pre-trial detention. The Republic has one of the world's highest coefficients of prison population per 100,000 inhabitants, i.e. 217 inmates per 100,000[2]. The financial costs of the standard system of punishments, with prison sentences topping the bill, were significant in bringing about the intensive discussion on its efficacy. According to data provided by the Prison Service General Directorate, each prisoner costs taxpayers $ 10 - 12 per day. The costs of building of new prisons amount to more than $ 7,000 per inmate. Further, an important factor in the discussion on the need for an intensive introduction of CSMs was the search for effective tools with which to get a grip on the large number of criminal matters handled by the courts, and to harmonize the Czech concept of penal policy with that of the European Union. On an ongoing basis, property crimes, usually minor ones, dominate the overall extent of crime (up to 75%). It is exactly this category of perpetrators for whom the traditional suspended sentence (without supervision) seems to be ineffective; but at the same time, the consequences of their offences or the degree of their depravity do not necessarily demand their isolation from society. Therefore, in such cases CSMs are considered to be the most suitable and most fitting type of punishment. It is expected that the imposition of CSMs will bridge a gap between the suspended sentence and probation order on the one hand and imprisonment on the other. The relatively poor range of punishments that existed up to that time has begun to be enriched with new CSMs, which, in comparison with a prison sentences, are not as stigmatising, do not remove the perpetrator from his/her natural social environment, and appear to be more effective and less costly.

Obviously, the punitive aspects must be included in this type of punishment, the most important of which is represented by an element of supervision; since 1998, it can be imposed on the offender as a part of some

[1] CRIME STATISTICAL YEARBOOK (Statisticka rocenka kriminality). The Ministry of Justice of the Czech Republic, 1998.

[2] CZECH PRISON SERVICE STATISTICS (Statistika Vezenske sluzby CR). The Prison Service General Directorate of the Czech Republic, 1998.

CSMs. The fact that community service has to be performed in the offender's leisure time and without remuneration is also considered to be of punitive character. By restricting his/her personal freedom and leisure time, and directly or indirectly causing him/her material losses, those CSMs additionally fulfil the function of deterrence and retribution.

2. Legal framework of CSMs

The gradual introduction of new CSMs is taking place within the framework of the complete recodification of the criminal law, on both the substantive and procedural level. From the very outset these endeavours have been motivated by, inter alia, an effort to create conditions for the settlement of those disputes which the criminal law is unable to solve through the current means of penal repression. This applies to the introduction of alternative ways of criminal procedure and to CSMs. The individual amendments to the Penal Code and the Criminal Procedure Act - the most important of which (from the point of view of CSMs) have been effected through Acts 292 of 1993 (conditional discontinuance of criminal prosecution), 152 of 1995 (community service and mediation) and 253 of 1997 (supervision imposed on the offender within a certain CSM) - have incrementally contributed to the implementation of a new concept of criminal law.

The issue of CSMs is understood on two levels in the Czech Republic:

a) substantive law level - in the sense of alternatives to prison sentences (imposed as a separate punishment);

b) procedural law level - consisting of the deployment of so-called diversions, primarily a conditional discontinuance of criminal prosecution and mediation. Both measures thus represent alternatives to criminal prosecution as such, and not just to imprisonment. Of the punishments listed in the Penal Code (section 27), only a suspended sentence, a suspended sentence with supervision, community service and a fine may be viewed as full-fledged CSMs. These punishments may be imposed separately or in combination with other punishments specified by the Code: i.e. loss of honorary titles and decorations; loss of military rank; prohibition of activities; forfeiture of property; forfeiture of possessions; expulsion or prohibition of residence. No fine, however, may be imposed alongside forfeiture of property. In practice, CSMs are only rarely combined with other punishments; a

fine is most frequently combined with a suspended sentence. Only a judge within the court proceedings may impose these punishments determined by the Penal Code.

2.1 Diversion

Three forms of diversion from the standard ways of criminal proceedings are incorporated in the Criminal Procedure Act:

1. Criminal order, included in previous penal legislation, and reintroduced in the Criminal Procedure Act.

The criminal order is a form of simplified criminal proceedings. A judge may issue it without handling a case in a trial, if a matter of fact can be reliably established based on existing evidence.

2. Conditional discontinuance of criminal prosecution (Sections 307 - 308 of the Criminal Procedure Act)

The provision entered into effect on 1 January 1994. It is allowed provided that:

- the offender has committed a crime punishable by a term of imprisonment not exceeding five years,
- the accused agrees to it,
- the accused has provided compensation for the damage caused by the crime or has made an agreement with the injured party concerning compensation, or has made any other necessary measures to compensate for such damage, and
- there are reasonable grounds to consider this measure to be sufficient in view of the personality of the offender and the circumstances of the case.

A public prosecutor or a judge may make the decision about conditional discontinuance of criminal prosecution. The probation period is fixed for a term ranging from six to twenty-four months. Suitable restrictions during the probationary period may be imposed on the defendant. If the offender makes an agreement with the injured party about compensating for the damage, the court shall order the offender to pay compensation during the probationary period. In case of failure to fulfil the conditions imposed on him/her, the relevant authority shall decide whether to initiate a prosecution, if necessary, before the end of the probationary period.

3. Mediation (Sections 309 - 314 of the Criminal Procedure Act); the provision entered into effect on 1 September 1995. It can be applied if:

- the crime is punishable by imprisonment for a term not exceeding five years,
- the accused during the trial pleads guilty to the offence with which he/she is charged,
- the accused provides compensation for the damage caused by the crime, or he/she undertakes necessary measures to pay compensation, or he/she atones for the damage caused by the crime in another way,
- the accused deposits with the court a sum of money for the benefit of the community,
- both the accused and the injured party give their approval to this procedure, and
- the court considers such settlement of the case to be sufficient.

All forms of diversion are due to the legislators' endeavour to make criminal proceedings faster and more simple and effective, not only in cases of less serious offences but also in those of medium seriousness. This may be deduced from the fact that the gravity of criminal offences eligible for diversion has been determined by a term of imprisonment not exceeding 5 years, which applies to all alternatives. Strengthening the position of the aggrieved party - aiming at the fastest and most realistic compensation possible for the loss caused by the crime - was the next important objective which motivated the introduction of mediation and the conditional discontinuance of criminal prosecution.

The legal arrangement of the aforementioned was based on a postulate that they would be also applied as an alternative to imprisonment. On the one hand, their introduction was supported by the findings on the ineffectiveness of (primarily short-term) prison sentences and on the other hand by idea that these new ways of handling criminal cases would enable the accused person's behaviour to be steered in a desirable direction and therefore restrict his/her propensity for re-offending.

2.2 CSMs in the Czech penal legislation

The following CSMs have been incorporated into Czech penal legislation.

2.2.1 Suspended sentence with supervision (Sections 60(a), (b) of the Penal Code), entered into effect on 1 January 1998

Under the provision of Section 58, par. 1 of the Penal Code, the court may conditionally suspend the execution of a sentence not exceeding three years

if it imposes a supervision order on him/her. (Generally the court may suspend on probation the execution of a penalty involving a term of imprisonment, if in view of the offenders personality - in particular his/her previous life, the environment in which the offender lives and works, and the circumstances of the case - it has grounds to believe that the purpose of punishment will be achieved without the execution of penalty). The court shall fix a probationary period of between one and five years, which shall begin on the day on which the verdict becomes final. The court may impose on the probationer suitable restrictions or suitable obligations aimed at making him/her lead an orderly life; as a rule, it should also order him/her to compensate to the best of his/her ability for the damage caused by his/her crime. If the probationer with supervision has led during the probationary period an orderly life and has fulfilled the conditions imposed on him/her, the court shall declare that the offender has satisfied the court; otherwise it shall order the execution of the penalty, if necessary, during the probationary period. If the court declares that the probationer has satisfied the court, he/she shall be viewed as having fulfilled the obligations and shall be considered as not having been convicted. If the court decides that the penalty is to be executed, it shall at the same time determine the manner in which the penalty is to be executed.

2.2.2 Suspended sentence (Sections 58 - 60 of the Penal Code), enacted by Act 86 of 1950

This sentence is, in its essence, very similar to a suspended sentence with supervision; it lacks only an element of supervision.

2.2.3 Fine (Sections 53 - 54 of the Penal Code), enacted by Act 86 of 1950

Section 53 states:

(1) The court may impose a fine of between 2,000 and 5,000,000 Czech crowns (approx. EUR 58 to EUR 144,500) if by his/her premeditated criminal activity the offender acquired or attempted to acquire material gain.

(2) In the absence of the conditions set out in (1) above, the court may impose a fine only if:

 (a) the present Code so permits,

(b) it is imposed for a crime punishable by imprisonment for a period not exceeding three years and if in view of the nature of the committed crime and the possibility of reforming the offender a penalty of imprisonment is not imposed at the same time.

(3) A fine may be imposed as a separate penalty if in view of the nature of the committed crime and the possibility of reforming the offender no other penalty is required for achieving the purpose of punishment.

(4) The court may decide that a fine can be paid in instalments.

Section 54 states:

(1) When determining the size of a fine, the court shall take into consideration the offender's personal situation and property; it shall not impose a fine if it is obvious that it cannot be paid.

(2) The sum accruing from a fine shall go to the state.

2.2.4 Community service (Section 45 of the Penal Code and Sections 335 - 340(b) of the Criminal Procedure Act), entered into effect on 1 January 1996.

Community service may be imposed on the offender provided that:

- the offender has committed a crime punishable by imprisonment for a term not exceeding five years, and
- in view of the nature of the crime committed and the offender's personality; there are grounds to believe that the purpose of punishment will be achieved without serving imprisonment.
- a convicted person may be required to carry out unremunerated work for between 50 and 400 hours for the benefit of the community. Community service must be carried out within one year from the date the order was issued.
- the court may also impose suitable restrictions on the defendant. If the defendant does not lead an orderly life or if he/she intentionally fails to fulfil the conditions of the community service order (CSO), the court shall convert the community service or its remaining part into imprisonment. The offender is obliged to serve one day of imprisonment for each two hours of the remaining part of this sanction.

The CSMs specified by the Criminal Procedure Act and the Penal Code are applicable to both adult and juvenile offenders.

All the aforementioned CSMs and forms of diversion were enacted into penal legislation directly, without any previous experimental verification whatsoever (the principle of legality precludes this method of verification). The offender's consent is not required for imposition of any of the mentioned CSMs (unlike the forms of diversion). In a draft of new penal legislation, it is envisaged that the defendant's consent will become a necessary prerequisite for the imposition of a CSO. The current practice is that in the pre-trial stage, the probation officer is in touch with the perpetrator who is under consideration for a CSO, and, inter alia, he/she ascertains the perpetrators view on the possible imposition of this punishment.

It is entirely within the judge's discretion to determine whether certain conditions and/or obligations should be imposed on the offender within the framework of individual CSMs. The judge takes into consideration a pre-trial report on the offender's life circumstances prepared by a probation officer, and he/she also rules on the specific form and nature of the CSMs. The relevant staffs of the local authority, in collaboration with the probation officer, are responsible for the implementation of CSOs. The probation officer monitors the fulfilment of conditions and/or obligations, which are a part of the suspended sentence with supervision. He/she also supervises whether the offender complies with the conditions and/or requirements imposed on him/her along with a suspended sentence without supervision (if any). If no conditions, restrictions and/or requirements are imposed, no one monitors the offender's lifestyle during the probationary period. It will be only after the end of the probationary period that the court finds out whether or not the convicted person has led an orderly life or committed any new crimes. Based on its findings, the court decides whether the offender has passed his/her test or not. If the offender has not complied with the conditions, restrictions and/or obligations imposed on him/her, the court decides whether or not to convert a suspended sentence. In practice, the court usually orders the execution of a suspended sentence. The situation is similar for a CSO: failure to meet all conditions related to it mostly results in conversion of this penalty (one day of imprisonment for each two hours of the whole penalty or remaining part). In case of failure to pay a fine, the court imposes a substitute penalty of imprisonment for a term of up to two years. However, a substitute penalty may not exceed, even together with an imposed prison penalty, the maximum term set for the respective crime by the present Penal Code (Section 54, par. 3). Generally speaking, there is no automatic conversion of any CSM into a prison penalty if any imposed

condition and/or requirement whatsoever is violated. The court takes into consideration the reasons for such failure on a case-to-case basis. However, as already mentioned, most CSMs are converted.

Only the court may make a decision on the revocation of a CSM. The offender has the right to appeal against revocation to the appellate court. The legal rules applicable to CSMs guarantee the basic rights of offenders. The offender's legal position is also adequately guaranteed. It should be noted that the legal position of the offender is much better ensured by Czech penal legislation in comparison with that of the injured party. Due to the short period that CSMs have been in effect, no official or unofficial guidelines dealing with their application or rejection have so far appeared.

3. Implementation of CSMs

Only the judicial authority may make a decision about the imposition of CSMs.

Probation officers - all of whom are civil servants paid by the state - are charged with implementing of the CSMs. As far as a CSO is concerned, probation staff is responsible for organizing the performance of this penalty in close cooperation with local authorities. These authorities have at their disposal a list of work possibilities that may be ordered. These are mostly related to cleaning (primarily the streets); jobless people are usually not interested in such work, which is why there is no reason to fear that CSOs are detrimental to the unemployed.

So far there are no official regulations specifying the tasks and duties and rights and obligations of the implementing body. No volunteer workers are involved in the implementation of CSMs. In the Czech Republic, there is simply no tradition of volunteers working with offenders. The only experiment using volunteers in after-care (in the early 1970s) was a total failure and no involvement of volunteers in the implementation of CSMs is envisaged in the near future.

4. Empirical data and evaluation of CSMs

Because CSMs were introduced only recently, the assessment of their impact on society - including the evaluation of their efficiency and shortcomings, as well as of any obstacles hindering their better functioning - will only be possible later on. So far, only two research projects focused on this

topic have been carried out; namely, that into the conditional discontinuance of criminal prosecution (1996) and that into CSOs (1997). At present, a survey dealing with mediation is being conducted. The Institute of Criminology and Social Prevention in Prague has carried/is carrying out all three projects. What we have at our disposal are mostly practical and empirical data on the conditional discontinuance of criminal prosecution. It may be concluded from the research that despite a certain professional confusion about its application, this measure has become firmly rooted in practice and its use has become widespread. Public prosecutors have already applied conditional discontinuation of criminal prosecution in several thousands of cases. The research on CSOs has shown that in the first year of its introduction in the Czech Republic (1996) it was applied in more than 800 cases; it was applied in 2,509 cases in 1994; 3,402 in 1995; 4,328 in 1996; and 5,012 in 1997. More widespread use has been hampered by the lack of work opportunities for convicted persons. After initial hesitation and, presumably, reluctance on the part of judges towards this type of punishment, it is undergoing an ever-increasing extent of application.

So far we have no data regarding the number of perpetrators upon whom a CSO was imposed and who then committed a new offence. Nor is anything known about the number of cases revoked by courts, and what types of punishment the CSMs were substituted for. These sanctions and measures are usually revoked because of violation of conditions imposed on the offender. In regard to a suspended sentence, this generally occurs when a probationer commits a new crime; as for a CSO, it is revoked if the defendant fails to complete it to the full extent. Experience has shown that the large majority of CSOs are successfully completed. In the probation officers' view, most offenders have a positive attitude towards this type of punishment. This experience is based on informal interviews with offenders, which are held as a part of the court's preliminary proceedings investigating the possibility of imposing a CSO. In fact, there is only one criterion of the CSMs' success; i.e. whether or not re-offending by the convicted person has occurred. In general, it may be stated that the application of CSMs has been increasingly accepted by both professionals and the public, compared to a low acceptance rate when first introduced. A certain degree of success has been achieved by overcoming the professionals' and the public's reluctance to accept any institutes hitherto unknown to them, which had caused the initial mistrust of the judicial authority concerning the possibility and efficacy of sanctions and measures.

Although citizens have called for harsher repression, various public opinion surveys have concluded that if they were to play the role of a fictitious judge they would impose less severe penalties on offenders compared to those imposed by real judges. The public would doubtless accept the CSMs discussed in this paper in a larger extent if they had more information about them. However, prior to the enactment of the CSMs, no information campaigns were undertaken and the situation remains very much the same even today. The public has had only a minimum of opportunities to learn in a serious manner about the practical functioning of CSMs. The majority of politicians, however, favour repression, in line with the views declared by the public.

The discussion of this issue has continued among scholars, especially in relation to the work in progress on the new penal legislation. Their attitude towards CSMs has been mostly positive. These people are representatives of a theoretical front which is endeavouring - through lectures, appearances in the media or articles in professional journals and daily papers - to elucidate the purpose of CSMs in an objective way, and to show their pros and cons to citizens, criminal justice system representatives and politicians. In addition, training courses for public prosecutors and judges are being held on a regular basis where, besides the general aspects of CSMs, the specific cases of their application are discussed. Due to the newness of all new types of CSMs (i.e. community service and suspended sentence with supervision), their application has not yet been significantly reflected in the structure of sentences being imposed; a suspended sentence (without supervision) is still the most frequent one, followed by a prison sentence and a fine. In this respect, the introduction of various forms of diversion (i.e. conditional discontinuance of criminal prosecution; mediation, criminal order) appears to be an important accomplishment because other forms of handling a case have effectively substituted standard criminal proceedings.

As mentioned, only those criminal offences punishable by imprisonment for a term not exceeding 5 years are eligible for the application of CSMs. Obviously, this includes a considerable range of crimes, primarily property crimes, but also less serious violent and sexual offences. CSMs are primarily reserved for juveniles and/or first offenders. In general, they are imposed on perpetrators who are justifiably considered to be less dangerous and do not need to be isolated from society; whose offence seems to be only an isolated incident; where there are justifiable grounds to believe that

there is little probability of re-offending; and where the injured party is likely to be compensated for the damage caused by the crime.

In decision-making concerning whether or not to impose a CSM, the judge always relies on a pre-trial report on the offender's personal and social circumstances. The Penal Code sets the basic eligibility criteria related to the imposition of CSMs; the sentence to be imposed is then up to the judge's discretion. Generally speaking, CSMs may be imposed on any offender who meets the criteria specified by law. In practice, however, CSMs are somewhat less frequently imposed on habitual offenders.

Pursuant to the Czech Criminal Procedure Act, the aggrieved party plays no role in decision-making concerning the imposition of CSMs (the penal legislation does not recognize the term 'victim'). Vis-à-vis the perpetrator, the injured party is entitled to claim compensation for the damage caused by crime. However, the injured party does not have the right to make a statement about the penalty to be imposed, nor does the penal legislation make it possible for the injured party to appeal against the verdict if the sentence is deemed to be too lenient. The implementation of CSMs is primarily funded from the state budget. Funds are firstly allocated to operating the probation service (primarily, paying the salary of probation officers); local authorities fund the implementation of community service. Nobody has yet compared the costs of CSMs to those of imprisonment, because the former have not yet been calculated.

5. Probation Service

The probation service began to be developed in relation to the process of extending the range of CSMs when it became evident that the implementation of some of them was unthinkable without the involvement of probation officers. Pursuant to government Resolution 341 (15 June 1994), the posts of probation officers were established at district and regional courts as of 1 January 1996. Probation officers are employees of the relevant courts; organizationally, they are included in the courts' administration and paid from the budget provided by the Ministry of Justice.

The activity of probation officers comprises the professional provision of enforcement of CSMs, whose implementation requires an individual approach and the skilled guidance of accused persons. In a certain partnership with judges and in close collaboration with other institutions within and outside the criminal justice system, they participate in handling relevant

cases heard in criminal proceedings. In addition, they fulfil the irreplaceable role of mediators in the process of reconciliation offender and injured party.

5.1 Stages of activities

The probation officers activities are accomplished in two stages:

5.1.1 The pre-sentencing stage Court assistance

This is focused on gathering information about the accused and his/her family, social and employment background, or, eventually, on the provision of other source materials that are important for selecting the most suitable and appropriate procedural procedures and for decision-making about the case. Court assistance represents one of the possibilities of 'information service' for criminal justice system bodies, the primary objective of which is to reinforce the individual-merit approach to solving criminal cases. While gathering information about an accused person, a probation officer gets in touch with him/her upon the request of the judge (or public prosecutor) and discusses with the defendant, after obtaining his/her approval, matters related to his/her social and family situation.

The probation officer may also contact individuals from the client's social surroundings (e.g. family, school, employer, friends and other persons recommended by the client). The probation officer then turns this information into a concise report. This report also provides the probation officer's view of the case, including a professional assessment of the chances for further educational influence to be exerted on the accused. The report is submitted to the court as part of the basic material for its decision-making. The pre-trial report constitutes a precondition for the imposition of CSMs. The accused person and his/her lawyer have the right to peruse the file that the probation officer keeps on the accused and to express their opinion on its content. The opportunity to learn more about the motivation of the accused and his/her view of a possible alternative approach to solving the case seems to be a big advantage of putting the probation officer in touch with the accused person prior to a trial.

The probation officer may thus discuss the individual steps to be undertaken as a part of probation activities. In addition, the problems (if any) of the accused that need to be addressed may be cleared up in advance.

a) Early assistance: consists of working with the accused prior to meritorious decision-making especially in regard to the substitution of pre-trial detention by binding over, pursuant to Section 73(1)(b) of the Criminal Procedure Act. Here, the activity of probation officer consists of supervising the behaviour of the accused and assisting with his/her reintegration into society.

   By its nature, early assistance is very similar to probation supervision; it is usually accompanied by gathering information about his/her personality, and family and social circumstances. Based on this information, the probation officer elaborates his/her report, which is then submitted to the court. It includes an evaluation of the course of cooperation between the accused and the probation officer, and the opinion about the chances for a further educational influence to be exerted on the offender. Early assistance is supposed to be a bridgehead for subsequent work within the probation framework after the court pronounced a judgement.
b) Mediating the alternative settlement a case: applied when the probation officer's activity is focused on mediating reconciliation between the accused and the injured party during the criminal proceedings. This measure is aimed at settling the conflict between the parties and reaching an accord concerning the manner of their reconciliation. The probation officer also prepares various basic materials about the offender regarding making use of alternative ways of the proceedings in the individual cases and regarding decision-making (conditional discontinuation of criminal prosecution and mediation).

5.1.2 The post-sentencing stage Probation supervision

This can be applied within the framework of a suspended sentence with supervision and conditional waiver of punishment with supervision. It may be also ordered in case of a simple suspended sentence when the court imposes on the perpetrator an obligation to maintain contact with the probation officer during the probationary period. Within these restrictions (under Section 59(2) of the Penal Code), the court may decide about probation supervision also in case of conditional discontinuance of criminal prosecution and community service. These activities are still in their initial phase and practically no experience with them is available.

a) Community Service Order: see p. 18.

5.2 Characteristics of Probation Service activities

The integration of the repressive element of penal measures with the element of education and prevention is considered to be a basic, common connecting link of all activities implemented by probation officers. The initial experience with the introduction of the probation service has shown that the practice itself has suffered from a lack of unity, and that at present the operations of the probation service may be characterized on two levels:

1. Standard (traditional) concept of the probation service

   This includes the above-described probation activities performed by skilled, post-graduate workers or workers with a higher level of education in the field of social work, special pedagogy, psychology or law. However, out of the total number of 88 probation officers, only 12 have attained such qualifications.
2. Administrative and technical arrangement of CSMs and forms of diversion in criminal proceedings

The court staff who in the past dealt with completely different agenda performs this agenda. In this case, the probation officer function is combined with another one (usually that of court clerk). In general, these 'probation officers' have simply ensured the performance of community service in an administrative manner, or monitored the convicted person's lifestyle during their probationary period. The 'real' probation officers (i.e. the 12 fully qualified ones) work closely with judges or public prosecutors (if the imposition of conditional discontinuance of criminal prosecution or mediation is considered). The representatives of the judicial authorities notify the probation officers of eligible cases in which the imposition of CSMs can be taken into consideration. The probation officers then contact the accused persons and begin gathering information about them and their families. These 12 probation officers have been charged with some other additional tasks by judges or public prosecutors. They are making use of services provided by probation officers to a larger and larger extent, and, in general, consider their activities to be very useful. On the other hand, it must be mentioned that the views about the effectiveness and usefulness of their work have in large depended on the initiatives undertaken by every single one of them. It is precisely the probation officers themselves who shape, to a certain degree, the attitudes of judicial authorities towards CSMs.

The workload of each probation officer ranges from 5 to 90 clients a year, depending on whether they simply monitor the performance of com-

munity service or are engaged in implementing all available types of CSMs. Compared to 1996, probation officers handled 50 percent more cases in 1997. This increase seems to be a constant trend. Up until now, there have been no complaints from convicted offenders regarding the way CSMs are implemented. If such complaints do arise, they will be dealt by the court, which imposed them. The probation service is only an implementing authority; it does not make any binding decisions.

The development of the probation service currently faces the following limitations:

- there is no legislative arrangement or framework specifying the probation officers' activities and their position within the judicial system;
- there is no probation service act specifying its tasks, rights and obligations and determining its powers;
- there are no guidelines setting up uniform procedures for probation officers;
- no qualification or professional requirements have been specified for probation officers;
- probation officers' activities focus only on proceedings before the court; their more systematic engagement in the preliminary proceedings is hampered to a large extent by relatively complex relations between courts and district public prosecutors, which restricts the service's effectiveness as far as accelerating criminal proceedings is concerned (primarily in a case of application of diversion);
- the current work methods make it impossible for probation officers to specialize within the framework of individual spheres of their activities;
- being posted at different courts, probation officers have practically no opportunity to share and exchange their professional experiences;
- inter-ministerial collaboration in the field of penal policy is insufficient and as yet no clear penal policy priorities have been set up;
- both professionals and the general public have been insufficiently informed about the purpose, aims and tasks of the probation service;
- there is no fruitful, professional discussion or exchange of experiences concerning the CSMs;
- there is minimal political interest in the issue of CSMs in general, including the problems of the probation service;
- there is no adequate infrastructure to facilitate and ensure probation activities as related to the implementation of CSMs.

Experience shows that the nationwide introduction of probation officer posts on 1 January 1996 was not, due to conditions at that time, sufficiently effective with respect to certain organizational and staff limits. The attitude of many courts towards the introduction of probation officer posts was strictly formal. The current model seems to be of low effectiveness and is insufficient from a long-term perspective. In the near future it will be necessary to:

- Re-evaluate the importance and significance of a mere administrative process ensuring the implementation of CSMs, and of forms of diversion within the criminal proceedings. The emphasis of these probation officers' activities should be put on more intensive psychosocial work with offenders.
- Make use of the already achieved practical experiences and results as the basis for a verification process and the incremental introduction of a full probation service. This mode should converge with the standard probation service concept comparable with the standards in advanced democratic countries. A full probation service should be completed before or at the same time the new criminal legislation comes into effect.
- Test on an experimental basis the functioning of the probation service model in its most complex form at select model workplaces (four or five). These model workplaces should be sufficiently staffed. Based on the careful evaluation of the findings and experiences, the overall concept and final development of an optimal, nationwide probation system should be completed. The model workplaces should be established at those courts, which have the most skilled and experienced probation officers. Each should be staffed by at least two skilled, fully qualified staff members (a probation officer and a mediator specializing in settling disputes between offenders and injured parties) plus an employee charged with the administrative and technical matters related to the probation service's tasks (a so-called probation service assistant). This would facilitate a division of labour and the verification of various forms of specialization on the one hand, and team work on the other.

The model workplaces should aim at:

- Obtaining the knowledge and experience required completing the development of a new probation service system, including its organizational, legislative and personnel arrangements.

- Verifying the individual activities of probation officers and mediators as much as possible.
- Developing the methodical work procedures for the particular areas of activity.
- Verifying the application of diversion in preliminary proceedings (i.e. at a district public prosecutions level).
- Developing cooperation with external specialists.
- Verifying the possibilities for introducing parole, in cooperation with the Prison Service and other bodies dealing with social prevention.
- Verifying the possibilities for harmonizing and interconnecting the activities of probation officers and mediators with those of organizations specialized in the field of social prevention and crime prevention, through inter-ministerial collaboration.
- Preparation and verifying the special resocialisation programmes for the given groups of probation service clients (including day-centres) in cooperation with other governmental and non-governmental social prevention organizations.

The Ministry of Justice has approved the establishment of model workplaces, the suitable courts have been already identified, and the launching of their activities is expected in the near future. Although cooperation between probation officers and the institutions implementing the social prevention programmes is just beginning, it seems to be flourishing. This is because in order to fulfil the purpose of CSMs it has become necessary to create the appropriate and suitable conditions for individual work with the accused, his/her family and the widest social surroundings, and for the implementation of the various social prevention programmes, primarily focussed on strengthening his/her social skills, developing his/her personality, obtaining necessary job skills or on drug/alcohol treatment of the accused.

In this respect, it is worth mentioning a joint project prepared by probation officers of the Prague district courts and of the Prague regional court, the Prague Social Prevention Centre, and the Etheum Foundation (Foundation for Systematic Studies, Research and Models of Dealing with Social Pathological Phenomena). The project is focused on continual group work with offenders. The estimated duration of the project is 18 months. Besides regular group sessions, the project will consist of three-week programmes. The obligation to participate in these programmes will be imposed on those offenders who are on probation (with or without supervision) or within a

conditional discontinuance of criminal prosecution (with or without supervision), as the appropriate limitation and/or restriction during their probationary period.

6. Expectations for the next future

As stressed, the penal reform has not yet been completed and this fact forms the perfect climate to continue mulling over CSMs. Scholars and practitioners continue to discuss whether and if so in what way to amend the penal legislation, and by which types of penalties. Politicians are less concerned about this issue, and seem to be waiting for ready-made drafts submitted for their approval. On this point, they are taking only a modicum of initiative.

Further legislative changes are expected, primarily with regard to making use of other alternative ways of proceedings. However, these changes can only occur (at the earliest) after the overall recodification of criminal procedure has been completed. The appropriate legislative commission has recommended that next to the already existing special types of criminal procedure, some new ones should be enacted:

- Simplified criminal proceedings for crimes where such is justifiable due to their nature and gravity, where the parties do not dispute the facts unless there are reasonable doubts about their veracity.
- Motion to proceedings concerning so-called flagrant offences, i.e. those of simple facts, heard without any preliminary proceedings by the court.
- Criminal proceedings initiated by the injured party for offences where prosecution of the offender is not in the public interest, but where nevertheless the injured party will have the right to initiate such (private prosecution).

Some changes and amendments are envisaged also for the field of substantive law. Regarding community service it is considered that this will become a necessary and suitable alternative to imprisonment, provided that the accused gives his/her approval or he/she does not reject it basically. This is why, from the point of view of cooperation between the accused and the authority implementing the CSMs, the opinion of accused concerning this sanction should be required. Without being sure, as far as a suitability of imposing a CSO on a certain defendant is concerned, the positive results with its application can be hardly expected. Therefore, it

will be necessary to ensure a more effective collaboration with *fully qualified* probation officers. Later, the adequate conditions will have to be created so that the work with the accused is not formal, but presents truly effective assistance with regard to his/her social reintegration into society. That is why collaboration with the staff of other social prevention institutions (e.g. with social workers) will be *conditio sine qua non* both at the stage of identifying the suitable cases eligible for imposition of a CSO and at the stage of its performance.

The enactment of some other institutes with the elements of probation can be expected. The following CSMs are those that have primarily been considered: conditional release, conditional waiver of the remaining part of prohibition of activity; prohibition of residence with supervision; various ways of partial restriction of personal freedom (house arrest, weekend detention or after-work detention); furthermore, the measures substituting detention (mostly for the juvenile offenders); various forms of court caution and admonition; briefly those institutes associated with the activities that fall under the type of probation called early assistance. In addition, the possibilities of combining certain CSMs with a suspended sentence have been contemplated.

As regards conditional release, conditional waiver of the execution of the remaining part of prohibition of activity or prohibition of residence with supervision, these are the last three specific institutes hitherto not treated by Czech legislation. Supervision by a probation officer should fulfil two functions in relation to the above-mentioned measures. Firstly, to make it possible that, for eligible persons, the period spent in prison can be shortened and substituted by intensive supervision. The other function would cover cases where a prisoner cannot be released even after serving half (or two-thirds, for more serious offences) of his/her prison sentence because he/she is not eligible for conditional release unless such is combined with supervision. This function of supervision consists of somewhat prolonging the period of monitoring the released person's behaviour, yet this supervision is carried out by milder means than would be the case in a prison. As for the decision-making about a conditional release with supervision (parole), probation officers should have at their disposal the data from the comprehensive report about a prisoner and about implementing the individual's resocialization programme. This information – supplemented by observations by the probation officer at the place of residence concerning the possibility of specific, individual resocialization activities – should become a ba-

sis for the court decision-making at the place of execution of the prison sentence about possible conditional release with supervision (parole).

In regard to a court order, probation officers should participate significantly in collecting the evidence, which will enable the judge to prove the facts of case in a reliable way and to decide upon the punishment.

7. Problems to be solved

A number of serious tasks need to be solved in connection with the implementation of CSMs. It is necessary to grasp this unique opportunity offered by the current reform of penal policy and to judge carefully which CSMs would be suitable, adequate and realistic to enact in the future, with respect to our conditions. A more effective penal policy requires drafting coherent and consistent sentencing guidelines that will enable a more uniform approach by individual judges when imposing CSMs. Such guidelines are entirely lacking. In this connection, it is necessary to pay attention to the existing discordance concerning a judgement on the significance of the criteria for application of the CSMs. Some experts call for their more precise specification, which is, in their opinion, necessary for the more standard use of those sanctions. On the other hand, other academics and/or practitioners deem such detailed criteria to be an obstacle to or a limitation of their appropriate and effective application in individual cases. It is fully within judicial discretionary power whether or not in a concrete case to >still impose the alternative. The judges thus represent a significant factor influencing the imposition of various sanctions. Moreover, the penal philosophy of an individual judge reflects the functions of sentence and the preference of that judge.

The introduction of CSMs has equipped courts with a wide range of punishments, each of which allows a large degree of desired individualization of punishment, thus reflecting the degree of adequacy in relation to the gravity of the offence. However, what is urgently needed is the introduction of a hierarchy of punishments in a such way that it will not be necessary to always impose a prison sentence but rather another, more severe type of CSM should its conditions be violated (performance of intensive supervision should reveal such violation). Moreover, it is necessary to ensure that CSMs become a real alternative to imprisonment and that they are not imposed only when imprisonment is out of the question anyway. In practice, there are no community service projects or other non-custodial sentences, which would take into consideration the needs of the individual offender.

So far we still lack programmes that would include, as well as punitive elements, those elements contributing to the acquisition and/or development of social skills by the offender, which in turn would help him/her to better reintegrate into society. At the same time, all activities being developed in the course of the implementation of CSMs must be coordinated and systematic.

The implementation of CSMs must be based on a systems approach. The efficacy and adequacy of individual CSMs must be scientifically analysed and evaluated. There can be no effective implementation of CSMs without the establishment of a conceptual probation service system. Its purpose and objectives need to be established. The aim of all CSMs lies in the intensive supervision of the perpetrator, and the quality of such supervision will influence the effectiveness of those sanctions. However, the quality of supervision is, inter alia, conditional on the number and quality of probation officers.

In this respect, the envisaged Probation Service Act should specify in a binding manner, inter alia, qualification requirements for probation officers. They are mainly expected to have managerial/organizational and legal/administrative abilities and skills. The traditional social/legal skills are in less demand. Supervision includes elements of enforcement and strict control, which beyond any doubt impinge upon the convicted person's rights, including the restrictions of his/her personal freedom. Probation officers have to be endowed with a proper degree of formal authority and executive powers derived from judicial powers. At present, probation officers lack such powers.

The probation officers_ activities are, by their character, absolutely different from work methods and job consent of ordinary social workers [3]. Therefore, a different professional profile of these officers is required. A social worker is primarily concerned with his/her clients' social rehabilitation. Vis-à-vis their clients, they represent emotionally involved, equal partners rather than the rigorous and rationally thinking and acting superior authority that a probation officer is supposed to be. As regards the socially rehabilitative tasks performed by probation officers, they consist primarily in his/her uncompromising guidance of the offender towards accountability for

[3] A social worker is an employee of the district authority (department of social welfare). He/she is primarily involved in after-care. There are more than 160 of those workers in the Czech Republic. In addition, there are social workers specialized in the juvenile offenders under 18.

his/her behaviour, his/her self-control and self-discipline by the systematic demand to comply with all conditions and restrictions imposed on him/her.

In some cases, cooperation between probation officer and social worker from the penitentiary will be necessary within continual care, especially in cases where the convicted person has pressing personal and/or social problems, which go beyond the realistic capabilities and competencies of probation officer. This mutual cooperation needs to be more efficient and better coordinated. In relation to building up the probation service, it will be necessary to determine whether and if so in what sense to differentiate between probation officers (e.g. whether or not to differentiate between probation officers and mediators who should become specialists entirely within the sphere of settlement of dispute between two parties, including in civil cases).

It is unrealistic to expect that volunteers will soon be involved in the implementation of CSMs, especially as regards their participation in the supervision of offenders. However, the importance of their share in such activities is undisputed, which is why it is desirable to pay attention to finding out the effective ways of getting volunteers involved. The development of a civic society (something that still does not exist in the Czech Republic) would very much help in this respect. Last - but not least - it will be necessary to focus more on informative campaigns explaining the purpose, meaning and aims of the probation service. Better information would be beneficial to both professionals and the general public, as well as to politicians. Unless this step is taken, more favourable acceptance and further development of CSMs can be hardly expected.

Table 1: Number of persons in pre-trial detention and prison (as at end of year)

	1990	1991	1992	1993
Pre-trial detention	4.172	5.373	5.965	7.810
Prison	4.059	7.357	8.002	8.757
TOTAL	**8.231**	**12.730**	**13.967**	**16.567**

1994	1995	1996	1997	1998*
8.828	8.000	7.887	7.817	7.239
9.925	11.508	12.973	13.890	14.750
18.753	**19.508**	**20.860**	**21.707**	**21.989**

*) as on 31 July 1998
Source: General Prison Service Statistics

The influence of the 1990 amnesty and a total decrease in sentenced offenders (primarily in 1990) should be taken, inter alia, into account.

Table 2: Sanction policy 1990-1997

YEAR	1990		1991		1992		1993	
SANCTION	Abs. no.	%	Abs. no.	%	Abs. no.	%	Abs. no.	%
Total sentences	16,520	100	27,837	100	31,016	100	35,148	100
Of women	1,472	11.0	2,529	9.1	2,809	9.1	3,083	8.8
Waiver of Sentence	449	2.7	989	3.6	1,345	4.3	1,782	5.1
Fine	2,042	12.4	3,317	11.9	3,548	11.4	4,587	13.1
Reformatory sentence*	1,363	8.3*	-	-	-	-	-	-
Suspended sentence	7,254	43.9	15,060	54.1	18,439	59.4	20,200	57.3
Other	90	0.5	222	0.8	258	0.8	340	1.0
Imprisonment	5,322	32.2	8,249	29.6	7,246	23.9	8,239	23.4
Length of imprisonment								
< 1 year	2,236	42.0	3,872	46.9	3,903	52.6	4,285	52.0
1-5 years	2,845	53.5	4,069	49.3	3,263	43.9	3,635	1
5-15 years	231	4.3	304	3.7	251	3.4	307	3.7
15-25 years	10	0.2	4	0.05	9	0.1	12	0.2
Life sentence	1	0.1	0	0.0	0	0.0	0	0.0

*) Abolished in 1990.

Table 2: Continued

YEAR	1994		1995		1996		1997	
SANCTION	Abs. n.	%	Abs. n.	%	Abs. n.	%	Abs. n.	%
Total sentences	51,930	100	54,957	100	57,974	100	59,777	100

Of women	4,445	9.6	4,588	8.4	5,245	9.0	5,416	9.1
Waiver of sentence	1,177	2.3	1,232	2.2	1,693	2.9	1,863	3.1
Fine	5,648	10.9	4,978	9.1	4,734	8.2	4,703	7.9
Community service*	-	-	-	-	N/A.		N/A.	
Suspended sentence	33,554	64.6	35,724	65.0	37,018	63.9	37,191	62.2
Other	416	0.8	470	0.9	92	0.2	488	0.8
Imprison.	11,128	21.4	12,552	22.8	13,377	23.1	13,934	23.3
Length of imprisons.								
< 1 year	6,606	59.4	7,722	61.5	8,290	62.0	8,757	62.8
1-5 years	4,119	37.0	4,312	34.4	4,501	33.6	4,560	32.7
5-15 years	394	3.5	506	4.0	554	4.1	587	4.2
15-25 years	8	0.1	12	0.1	28	0.2	26	0.2
Life sentence	0	0.0	0	0.0	4		4	

*) as on 1 January 1996
Source: Statistics of the Ministry of Justice

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Community Sanctions and Measures in Denmark

BRITTA KYVSGAARD

1. Introduction

To understand the Danish penal system one should know that the minimum age of criminal responsibility is 15 years and that the system does not include status offences or a juvenile justice system. All offenders above the age of 15 are dealt with within the same penal system and according to the same Criminal Code. The community sanctions and measures (hereafter called CSMs) discussed in this paper thus in principle concern all offenders.

The Danish name for the Probation Service is Kriminalforsorgen i frihed, which directly translated means "Criminal care in freedom". This name can be said to be more adequate than the English equivalent, as the Danish Probation Service supervises and controls most sanctions and measures that keep the offender in society. Probation is thus a minor part of all CSMs. Organisationally the Probation Service is related to the prison system in the Danish Prisons & Probation Service, which is a part of the Ministry of Justice. The Danish Prisons & Probation Service therefore includes local prisons, local probation centres and the central management, the Department of Prisons & Probation.

2. The development of CSMs over the last 25 years

CSMs are not new phenomena: parole and probation have been a part of the criminal justice system for many years. In the mid-1970's, however, a debate started over new forms for CSMs, triggered by the 1977 publication of an official report on alternatives to incarceration. The aim of the 1977 report was to point out means that are capable of reducing the use of imprisonment and thereby "continue the development towards increased use

of non-incarcerating sanctions", as stated in the terms of reference for the working party that drew up the report.[1] Reference is further made to the international discussion on CSMs and to the European Council report from 1975 on Alternative Penal Measures to Imprisonment. The discussion on new CSMs developed at a time when the criminal-political climate was rather liberal and the dominating idea was that the prison population should slowly decrease.

Now why should the prison population decrease? The reasons given in the 1977 report are:

1) Humanitarian considerations. Incarceration is painful and puts a strain on the inmate.
2) The negative effect of incarceration. Imprisonment is harmful and may lead to a negative development of the personality. Moreover, imprisonment has not been proved to have a greater crime preventive effect than community sanctions, in fact, on the contrary.
3) Proportionality. Property crimes, which are often punished with incarceration, today are not see by the public as very serious and should therefore be met with more lenient sanctions.
4) The economy. Incarceration is a costly affair compared to CSMs.

These are more or less the same arguments that are characterizing the current debate on CSMs, though the most important argument concerns the harmful effect of imprisonment. A more hidden but very powerful argument is, however, economics, as cost benefit aspects influence the decisions on new measures and strategies. Besides pointing at reduction of the length of imprisonment as a means to reduce the prison population, the 1977 report also suggests new sanctions, community service and night imprisonment. However, only community service has since been put into practice.

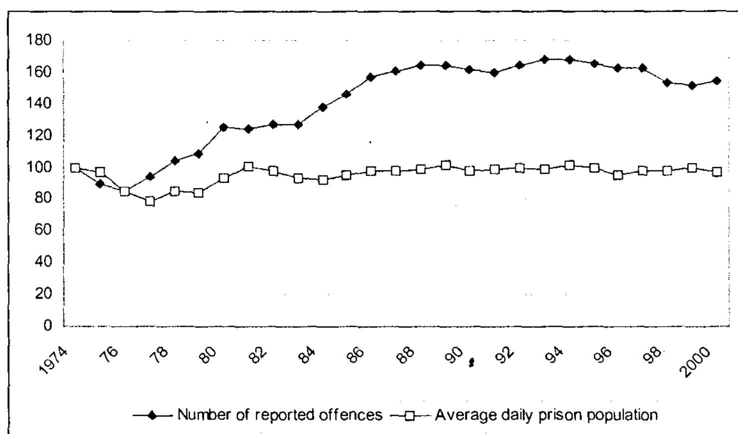
During the 1980s, little happened regarding CSMs. This is presumably due to changes in the criminal-political climate as a stricter one in the 1980s replaced the liberal attitude of the 1970s. Furthermore the commonly known attitude of 'nothing works' has also influenced the discussions in Denmark and led to a pessimistic view of the possibilities of achieving positive effects of treatment and other forms of interventions.

This pessimistic view, however, has radically changed during the 1990s. In the last 10 years, many new CSMs have been introduced and tried out on an experimental basis. This development has also been influenced by inter-

[1] Report no. 806, 1977, p. 7.

national criminological research, including especially the new meta-analyses on the preventive effect of treatment, intervention and rehabilitation. The results of these studies have led to a new optimism and an interest in finding new ways and means for dealing with offenders. Looking back, it can be said that the 1977 report on alternatives to incarceration did not achieve its goal, because there was no reduction in the use of imprisonment. The average daily prison population has thus been rather stable for many, many years. On the other hand, there is no doubt that the use of CSMs in general has had an effect as they, together with de-penalisations, have helped keep the prison population at this steady level. As shown in Figure 1, the number of reported crimes has increased while the prison population has remained constant.

Figure 1: The number of reported Criminal Code offences and the average daily prison population, 1974 – 2000. Index.



3. The status of the present CSMs[2]

While discussions on CSMs are new, some of the CSMs are – as mentioned above – quite old. The CSMs used in Denmark will here be introduced in chronological order.

[2] Special sanctions for mentally disordered offenders will not be discussed as they relate to the question of criminal liability and do not aim at reducing the use of imprisonment.

3.1. Parole

Parole was first introduced in the Criminal Code of 1873, but at that time only as an exception. Parole became the principal rule with the Criminal Code of 1930. Today approximately 75 per cent of all inmates with a conviction involving a minimum of three months in jail are released on parole when they have served two-thirds of the term of imprisonment. In addition, 5 per cent are paroled earlier, as release on parole under special circumstances is possible after having served half the sentence. This means that parole today is the normal way of release from prison as opposed to a special means of grace or a reward for good behaviour.

The legal provisions regarding parole are laid down in Section 38 in the Criminal Code. According to this section is it the Minister of Justice - or the body to whom he entrusts the right - that decides on parole. In practice, the staffs in the prison where the offender is serving the sentence take most decisions on parole and on conditions for parole. If parole is denied, the case has to be presented to the Department of Prisons & Probation. Parole is conditional upon the parolee not committing any punishable act during the parole period, which normally does not exceed three years. The typical length of the parole period is two years. As a further condition, it may be laid down that the parolee during the whole or a part of the parole period is subjected to supervision and must lead an orderly life.

Today, supervision is given to a little more than 50 per cent of parolees, normally for 6 months or one year. The purpose of supervision is to reduce the risk of recidivism through helping and controlling the offender. Supervision is therefore only given to parolees who are at risk of reoffending and are in need of the services supervision offers. Besides supervision, so-called special conditions may be imposed according to the rules contained in Section 57 of the Criminal Code. These are, inter alia, conditions on treatment for drug and alcohol abuse, or psychiatric treatment. The parolee may also be placed in an institution, a foster home or a hospital, but only for a period not exceeding the remaining period of the prison sentence. Approximately 40 per cent of parolees under supervision have special conditions attached to their release. A probation officer from a local probation centre carries out supervision and the control of special conditions. Whereas parole without supervision does not require the consent of the offender, parole with supervision does so as the offender has to agree on the conditions imposed.

Violations of the conditions attached to parole or other types of CSMs are very common.[3] A study has shown that around 60 per cent of parolees have violated the obligations connected with supervision.[4] Minor violations (such as not meeting with the probation officer as agreed upon) will not result in a formal sanction. Only in case of continuous violations or of violating conditions such as anti-abuse treatment may the case be submitted to the Minister of Justice (in practice, the Department of Prisons & Probation). The Department then issues a caution, changes the conditions or, in special circumstances, recalls the inmate to serve the rest of his/her prison sentence. This, however, happens rather seldom. In 1997, only 29 parolees on supervision were recalled to the prison because they violated parole conditions. Through the implementation of a new Act on Enforcement of Sentences July 1st 2001 parolees were given the right to bring such a decision to the courts.

3.2. Suspended sentence

The suspended sentence was introduced in Denmark in 1905. Two forms of it exist: with or without a fixed penalty. In case of the former, the serving of the sentence is suspended and remitted after a probationary period of normally 2 years, while in case of the latter the fixing of the punishment is suspended and, similarly, remitted after the probationary period. Suspended sentences are imposed by a judge and according to Sections 56 – 61 in the Criminal Code. According to Section 56, a sentence can be suspended if the court finds it "unnecessary that the penalty should be executed". Today a little over 40 per cent of all prison sentences for Criminal Code offences are suspended. The conditions that can be attached to a suspended sentence are the same as those that can be attached to parole. Approximately one-fifth of offenders on suspended sentences are subjected to supervision.

The judge decides the conditions attached to suspension of the sentence at the time of conviction. In practice, the judge acts upon the recommendations given by the local probation centre. Their recommendations are based

[3] Here only violations of the obligations connected to supervision and of special conditions will be discussed. Violations of the fundamental condition for parole, i.e. the condition of not committing any punishable act during the parole period, are treated differently from other violations, as the parolee will be charged and the case settled in court.

[4] Britta Kyvsgaard: *Kriminalforsorg i frihed – mellem omsorg, hjælp og kontrol* (The Probation Service: between care, help and control). Copenhagen, 1998.

on a pre-sentence report, which the centre prepares in order to determine the needs of supervision and of special conditions for the accused. Formally, suspended sentences with supervision do not require the consent of the offender, but in practice the pre-sentence report will include the question of the motivation of the offender and thereby also the willingness of the client to be subject to supervision. If the offender violates the conditions, the court takes action. According to Section 60 of the Criminal Code, the court can decide to issue a caution, change the conditions or prolong the period of the suspended sentence, or decide that the prison sentence has to be served. As for parole, violations of conditions attached to suspended sentences seem pretty normal, whereas revocations are rare.[5] A suspended sentence can also be combined with a fine. In approximately 15 per cent of all suspended sentences, the offender is also fined. Finally, suspended sentences can be combined with imprisonment, which is the case in around a tenth of the suspended sentences.

3.3. Withdrawal of charge

If the offender has made an unreserved confession - one which can be confirmed by available facts - the public prosecutor can decide to withdraw the charge on certain conditions in accordance to the Criminal Justice Administration Act, Section 722. This has been possible since 1919, when the Criminal Justice Administration Act was introduced. Conditions, however, were not introduced until 1933.

Like parole and a suspended sentence, the withdrawal of a charge is conditional upon the offender not committing any punishable act during a period of up to (normally) three years. If the offender does not comply with this condition, the case can be reopened and a punishment can then be imposed. The same goes for non-compliance with other conditions. It is the public prosecutor who decides to reopen the case.[6]

Nearly all of the withdrawn charges that entail supervision and similar conditions pertain to young offenders below the age of 18 when committing the crime, as young age in itself is a reason for having a charge withdrawn. The idea is that young people as far as possible should escape the more severe types of punishment.

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[5] There is no statistical information available on the number of violations and revocations. The study mentioned above (Kyvsgaard, 1998) shows, however, a fairly similar violation and revocation rate for suspended sentence and for parole.

[6] The number of revocations is unknown.

Besides the conditions that apply to suspended sentences, young offenders can have a charge withdrawn on the condition that they enter into a so-called youth contract. This new type of condition, introduced in 1998, implies that the offender, his/her parents and the social authorities prepare a contract, which typically obliges the offender to participate in certain activities, for instance to finish a training programme. The conditions have to be approved by the court. In 2000, conditions were attached to 15 per cent of the charges withdrawn.

3.4. Alternative ways of serving sentences

An amendment to the Criminal Code, introduced in 1973, implies the possibility of serving a sentence in institutions other than prisons. Today, this possibility forms part of the new Act on Enforcement of Sentences.[7] According to Section 78 of this Act, a person sentenced to imprisonment may serve the whole or a part of the prison sentence in a hospital, in family care or in an institution if the person is in need of special nursing or care or in case of other special circumstances like advanced age or bad health. Offenders below 18 years of age must serve an imposed prison sentence in an alternative way unless urgent considerations in enforcing the law oppose this.

It is the Prisons & Probation Service that decides these cases, while the local probation centre assists in planning the alternatives. Permission to serve a sentence in an alternative way is granted mostly in case of treatment for drug abuse. Of the total of 326 alternative placements in year 2000, 146 were motivated by drug abuse and 98 by young age. The length of the prison sentence determines the length of the stay in the alternative institution, but there are no limitations on the length of a sentence served alternatively.

During the stay in the institution, the local probation centre that also controls the fulfilment of obligations by the offender supervises him or her. In case of non-compliance, i.e. unauthorized departure from the institution of treatment to which they have been committed, the offender will be returned to a prison to serve the sentence. It is the Danish Prisons & Probation Service that decides on revocations and there are no possibilities to appeal this decision. As for parole, the offender must be notified of a recommendation for revocation and has the right to present her/his case.

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[7] Brought into force July 1st 2001.

Consent to serve a sentence in an alternative way is not formally required but is indirectly given, as the offender will not be offered the possibility to serve the sentence alternatively if he/she does not wish to do so.

3.5 Community Service Order (CSO)

This was introduced on an experimental basis in 1982 and was made statutory in 1992. Community service is not a sanction but a condition that can be attached to a suspended sentence. Here it will be discussed separately, as it differs from the other conditions, which can be connected to a suspended sentence. CSO is imposed by the court according to the Criminal Code, Sections 62-67. Section 62(1) says: "If a suspended sentence, in accordance with the rules in Sections 56 and 57 in this Act is considered insufficient, the court may suspend [...] the sentence on the condition that the convicted person perform a term of community service." That a suspended sentence is not considered sufficient means that it is not of an adequate punitive nature. CSO must therefore in principle only be applied in cases that would otherwise not be punished with a prison sentence. CSO was, as mentioned, proposed in the above-mentioned 1977 report on alternatives to incarceration. The reasons for reducing the use of imprisonment, given in the report, are thus the ones behind the introduction of CSO.

The main field for CSO is determined to be property crime (except robbery) and joy riding, while violence and drug-related crimes in a few exceptional cases can be settled by CSO. In recent years, however, an increasing number of assault cases have been settled by CSO.

Due to the fact that it initially was expected to be difficult to find suitable workplaces for the fulfilment of the community service, drunken driving and other Traffic Code violations were excluded from the scope of the act. An amendment, that entered into force on July 1st 2000, changed this. This amendment also implies a lowering of the minimum number of hours of community service, from 40 to 30 hours. The maximum remains 240 hours.

CSO may also be combined with a fine or a short prison sentence. In case of drunken driving, CSO is always supposed to involve a fine. There are no statutory limitations on the use of community service, but normally it is used as an alternative to prison sentences of up to 1½ year. Furthermore, there is no conversion order between imprisonment and CSO. It is the judge who decides on the number of hours of community service.

Prior to the court trial, however, the offender has to be found suitable for CSO. This is determined through a pre-sentence report, which the local

probation centre prepares. Offenders with abuse problems and with long lasting unemployment are less likely to be found eligible. The offender's motivation for successfully completing a CSO is included in this report, and is therefore the offender's informal consent. Supervision by the local probation centre is obligatory for a CSO. Supervision also entails a duty to check up on the fulfilment of the obligation to work at certain times. If the offender does not turn up for work as agreed or otherwise violates the conditions of the order, he or she will be reported. Minor first-time violations might lead to a warning from the Prisons & Probation Service, while more serious violations will be handled by the court. The court can then, in accordance with Section 66(1) of the Criminal Code, decide to impose a prison sentence or to uphold the suspended sentence, possible in conjunction with an extension of the period of community service and the probationary period. If the court decides to impose a prison sentence, it has to take into account the extent to which the convicted person has already performed the CSO. Approximately 10 per cent of the CSOs are revoked.

The number of CSOs has, independent of the widening of the scope of the law in 2000, more than doubled in the last 6-7 years. In 2000 CSO was imposed in 2348 cases of which 1235 concern the Traffic Code. The development the first 7 months of 2001 indicates a continuous growth in the use of CSO. In general, CSO is regarded as a meaningful alternative to incarceration, especially among the public. A study on the public attitude to crime and punishment has demonstrated that the public is more willing than judges to sentence an offender to community service.[8]

3.6. Treatment programme for people sentenced for drunk driving

Since 1990 those persons convicted of drunk driving who are in need of treatment for alcohol abuse have had the possibility of avoiding a prison sentence, provided they submit themselves to treatment for alcohol abuse for at least a year. After one year of successful treatment, the offender has to pay a fine and the prison sentence will then be rescinded. During a trial period (1990 – 1994), this arrangement included sentences of up to 40 days of imprisonment, whereas when the arrangement was made permanent in 1994, the upper limit was increased to 60 days.

[8] Jørgen Goul Andersen: *Borgerne og lovene* (The citizens and the laws). Aarhus Universitetsforlag, 1998.

Until July 1st 2000 the legal framework of this arrangement was a circular issued by the Danish Prisons & Probation Service who also administered the conversion of the prison sentence in accordance with the regulations on conditional pardoning. As a consequence of the above-mentioned introduction of CSO for drunken driving, the court has taken over the power to decide in these cases. The court thus decides whether the drunken driver is in need of treatment or whether CSO is a more suitable disposition.

This decision is, inter alia, based on a report from the local probation centre, which also supervises fulfilment of the obligations. Local alcohol clinics or similar institutions, however, normally undertake the treatment for alcohol abuse. In case of non-compliance with the treatment obligations, the court takes action in accordance with the same rules as for suspended sentences. 25 per cent of the drunk drivers on treatment do not comply with the conditions for participating in the treatment programme.

The fear that the transfer of the decision-making power to the courts would result in fewer drunken driver being sentenced to treatment has clearly been proved false. Before this amendment, around 1,000 persons yearly started the treatment programme, while so far it seems as if the number will now increase to 1,500 people yearly.

3.7. Treatment programme for drug abusers

A treatment programme as an alternative to incarceration for drug-abusing offenders was introduced in 1995 on an experimental basis. The experiment includes three regions in Denmark and is due to be completed not later than at the end of 2002. As an alternative to a prison sentence of 6-12 months, a judge can impose a suspended sentence with treatment for drug addiction. In two of the regions, the treatment lasts for a year, while in the third region it lasts for two years. As in the case of community service, the probation centre prepares a pre-sentence report on the offender's suitability for this treatment programme. It is, however, a committee consisting of the local probation centre, the treatment unit and the local social services which finally decides on the offender's eligibility for the programme. Formally, consent is not required, but the question of whether the offender wants to be submitted to the treatment programme will be included in the report made by the Probation Service. As in the case of community service it is the local probation centre that supervises fulfilment of the treatment obligations, while the court decides on the question of revocations.[9]

[9] The revocation rate is not known.

It has proved more difficult than expected to get suitable participants into the treatment programme. Especially the programme lasting two years has had difficulties in attracting participants. Until the end of May 2000, 146 persons had participated in the programme in the three regions.

An evaluation of the three first years of experimentation has shown that even though the attrition rate is quite high (more than 50%), it is still lower than those found in studies on drug addicts in other types of residential institutions. Furthermore, the general situation of participants has improved due to the treatment, and no relapse into crime has occurred during treatment.[10]

3.8. Treatment programme for sexual offenders

This programme, which started on an experimental basis in the autumn of 1997, generally aims at intensifying the treatment efforts with regard to sexual offenders. The experiment contains two programmes, one of which is beside the point here as it concerns treatment during incarceration and parole. The other programme, however, involves treatment as an alternative to incarceration.

The programme embraces the offenders whose sexual offences have not included any kind of violence or coercion and who are expected to be sentenced to between 4 months and 1 year of imprisonment. The treatment programme thus primarily aims at offenders who have committed incest or offences against decency. A committee consisting of representatives from the institutions in charge of the treatment of the offenders and from the Prisons & Probation Service decides on the eligibility of the offender. The evaluation of eligibility also includes whether the offender has admitted his/her guilt for the crime he/she has been sentenced for. If these conditions are fulfilled, a judge may decide to suspend the sentence on the condition that the offender undergoes treatment and is supervised by the Probation Service for a period of normally 2 years. The treatment period is expected to consist of an introductory stay of 3-6 months in a halfway house, outpatient treatment for approximately one year in a special sexologist treatment institution, and finally supervision by the Probation Service for an additional 6 months, possibly with conditions of treatment. The Probation

[10] Anette storgaard: *Behandling i stedet for fængselsstraf til nogle kriminelle stofmisbrugere* (Treatment as alternative to imprisonment for criminal drug abusers). Socialministreriet – Justitsministeriet, October, 2000.

Service, however, also monitors compliance with the treatment obligations during the early stages of the programme. As for consent, the same applies as stated for CSO and treatment for drug offenders, as it is given indirectly rather than formally. A court decides revocations.

A preliminary evaluation has demonstrated that until April 2000, 86 offenders were found eligible for the treatment programme. A final evaluation will be carried out, including a measurement of the preventive effect of the treatment. The treatment programme was, however, made permanent after the end of the experimental period in 2000.

3.9. A new sanction for young offenders

On the 1st of July 2001, a new sanction was introduced, intended for offenders under the age of 18. A number of serious crimes, recently committed by young offenders, have questioned the effectiveness of the existing sanctions and led to this new one. It is debatable whether the new sanction really is an alternative to imprisonment as it entails incarceration in other forms of institutions.

In short, the new sanction is composed of three phases, which together last 2 years. It starts with placement in a closed residential institution, followed by a placement in a normal – open – residential institution. Together the placements in institutions may not exceed 1½ years, of this one year maximum in the closed institution. The last phase is supervision after release, the length of which depends on the time spent in institutions. It is expected that the offender will be subjected to intensive treatment and training during all three phases. The new sanction is meant for young offenders who have committed serious offences, and as an alternative to prison sentences between 3 months and one year. The new youth sanction is imposed by the courts.

3.10. Stationing and furlough

The prison may permit an inmate stationing and furlough, i.e. permission to stay outside the prison 24 hours a day or only during the daytime. In both cases, permission is normally given during the last part of the prison sentence and normally for a period of less than three months. For stationing, a period of up to 4 weeks is more common. Stationing and furlough takes place with reference to the offender's work or participation in educational programmes outside the prison. Stationing is primarily given in cases

where it is not possible in practice to implement arrangements for leave. The purpose of stationing and furlough (as well as of other types of leave from the prison) is to strengthen the inmates' possibilities to maintain contact with relatives and friends and the world outside the prison. Furthermore, the idea is that it will make the transition from prison to freedom easier and help reduce the risk of re-offending.

To obtain stationing or furlough, the inmate must have been sentenced to at least 5 months of imprisonment. If an inmate is convicted of a dangerous offence or previously has committed a crime during a leave, the police must be consulted before leave without an escort can be granted. This is also the case if the inmate previously has escaped or committed an offence shortly after release from prison. If the conditions and regulations for stationing and furlough are violated, the permission will be revoked. The prison authorities will – in cooperation with the place in charge of the stationing and leave – check that the conditions are fulfilled. The prison decides on revocations. Although the statistics concerning non-compliance during leave do not distinguish between the number of violations related to stationing and those related to furlough, generally non-compliance is rare: in 2000, only in 4.4 per cent of all types of leave did the offender not fully comply with the obligations connected with his/her leave. Also in 2000, permission for stationing was given in 412 cases, while inmates left the prison for work or educational purposes a total of 23,435 times.

4. Implementation of the CSMs

As is evident from the descriptions given above, the Probation Service plays an important role in the implementation of CSMs. In cooperation with the prison authorities, the Probation Service participates in the preparation of a parole with supervision while the Probation Service has responsibility for implementation, supervision and control. With regard to suspended sentences, the Probation Service prepares, implements, supervises and controls the offender. The Probation Service is furthermore involved in the preparation, supervision and control of the measures concerning alternative ways of serving sentences and community service. The situation is similar to that for the treatment programmes for drunk drivers, drug addicts and sexual offenders. However, the Prisons & Probation Service is not responsible for the treatment programmes, as the treatment programmes offered to offenders in principle correspond to the ones offered to other citizens.

The Probation Service is, on the other hand, not involved in stationing and furloughs, withdrawal of charge, and the new youth sanction. The prison authorities are responsible for the former, while the social authorities are responsible for supervising young offenders as well as for the residential institutions for young offenders. The arrangements, which can be implemented by the social authorities as regards supervision of young offenders, are to be found in the Social Services Act. Among other things, there is a possibility to give the young offender or his/her family practical or pedagogical support in the home, to give the young offender a supervisor, or to place him or her in an institution, a foster-home or other suitable place. The duration of and the possibilities to appeal a decision on a placement outside the home are also regulated in the Social Services Act. Below more comprehensive information on the Probation Service will be given. The tasks and obligations the Probation Service has concerning the supervision of offenders are regulated in a circular issued by the Prisons & Probation Service.

5. The Probation Service[11]

In order to keep in close contact with offenders, the Probation Service has 23 local probation centres spread over the country. Each county has a centre; counties with big towns or cities have more than one. In total, the probation centres have 300 employees, including both probation officers and administrative clerical staff. Probation officers are normally social workers. Earlier many volunteers, i.e. lay, fee-paid supervisors, took part in the supervision, but today probation officers supervise 99 per cent of clients. Fee-paid workers, however, frequently prepare the pre-sentence reports, which are drawn up in connection with almost all CSMs. On average the caseload of a probation officer is 30-35 clients, including parolees as well as other offenders from the above-mentioned categories. The circular on supervision clarifies, inter alia, the aim and intensity of the supervision, and the procedure to be followed if the offender does not comply with the conditions. Other tasks are also mentioned in the circular.

The client has the right to complain to the central Department of Prisons & Probation. The complaint may concern negative decisions of the Probation Service as well as other issues related to supervision. Supervision

[11] Information (in English) on the Danish Prisons & Probation Service is also available on the Web:
http://www.kriminalforsorgen.dk/uk_web/index.html

normally lasts for one year. When it starts, the probation officer has an obligation to draw up an action programme, clarifying the goals, which have to be reached during the supervision. The programme is drawn up in cooperation with the client and is reviewed every three months. The central element of supervision is dialogue with clients. Meetings with client are most intensive at the beginning of the supervision period, as the client normally has many problems to be settled at that time. Besides talks and interviews, the probation officer tries to help the client improve his/her social situation. The Probation Service does not have any funds at its disposal, but can help the client to apply for and obtain help from other social authorities. Furthermore, the probation officer may help the client in achieving treatment for alcohol or drug abuse.

The strength of the Danish Probation Service is its relatively low caseload compared to that of social workers within the general welfare system. This enables probation officers to devote more time to the client and to help with acute problems. It is also an advantage that the Probation Service does not grant welfare support or other social benefits, as the intermediary and coordinating function which the Probation Service has can provide a breeding ground for a better relationship of trust between client and probation officer. Often, probation officers will function as an advocate in relation to the client, as they are taking care of the client's interests towards other authorities. It should be noted that the majority of clients dealt with by the Probation Service are dependent on welfare benefits. An evaluation of the Probation Service shows that approximately 75 per cent of clients find the supervision useful.[12] The clients have primarily found it helpful to have someone to talk to about personal problems, but many have also been helped with more concrete social problems.

6. Statistics and research concerning CSMs

6.1. Developments in the use of CSMs

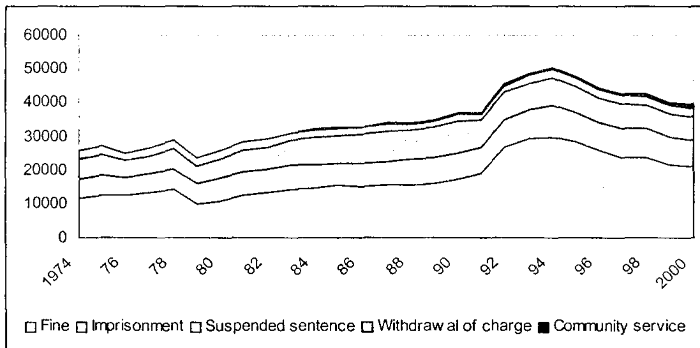
Figure 2 shows the development of sanctions in Denmark since 1974[13] for Criminal Code offences. As can be seen, the most important non-custodial sentence is a fine, and the increase in the total number of sanctions is pri-

[12] The evaluation includes parolees and clients with a suspended sentence (Kyvsgaard, 1998, op. cit.; see also Britta Kyvsgaard: Supervision of offenders. *Journal of Scandinavian Studies in Criminology and Crime Prevention, vol. 1: 73-86, 2000).*

[13] Due to changes in the statistics, comparisons over a longer period are not possible.

marily due to an increased use of fines. A suspended sentence is the second most important non-custodial sentence.[14] While earlier the number of prison sentences was equal to or below the number of suspended sentences, the number of prison sentences now exceeds the number of suspended sentences handed down. At the same time, the number of suspended sentences characterized as community sanctions (i.e. suspended sentences with supervision) has decreased. While supervision was attached to around one-third of all suspended sentences in 1980, it happens in only approximately one-fifth of cases today.

Figure 2: Sanctions for Criminal Code offences, 1974 – 2000.



There have been some fluctuations in the yearly number of charges withdrawn, but without any clear tendency towards either a rise or a fall. A decrease has, however, happened for the number of withdrawal of charges with a condition of supervision. The decrease, which amounts to 70 per cent between 1980 and 2000, is partly due to a general decrease in the number of young offenders and partly to a decrease in the use of withdrawal of charges for young offenders.

Only in the most recent years has the introduction of community service started to influence the sanction pattern, as the use of community service has steadily increased. Out of all suspended and unsuspended prison sentences for Criminal Code violations, community service amounted to around 3% in the beginning of the 1990s while in 2000 it was 7%. The preliminary figures from 2001 reveals that this percentage will increase

[14] Suspended sentences with community service are excluded from the number of suspended sentences.

somewhat this year. As mentioned, the number of suspended sentences as well as the number of withdrawals of charges, including supervision and similar measures, have, however, decreased, indicating that, all together, the number CSMs for penal code offences used in the pre-trial and trial stage has decreased over the years.

As for Traffic Code offences, the situation is quite different. In 1980 more than 9,000 short prison sentences were imposed for drunken driving and other Traffic Code violations. In 2001 it is expected that this figure will be a great deal below 1,000, especially due to the abovementioned amendments in 2000.

Some of the post-trial CSMs for Criminal Code offenders have also increased. So is the case for offenders offered an alternative way of serving a prison sentence and for stationing and furlough. The most important 'backdoor' CSM, parole, goes in the opposite direction as an increasing number of offenders are denied parole and as fewer parolees are supervised. In 1974, 88 per cent of all inmates were released on parole with supervision and in the late 1990's it was around 50 per cent. At the same time the number of offenders denied parole has increased from 7 to 21%.

In general, the development shows a tendency towards stagnation or decrease in the use of the 'old' types of CSMs, while growth is seen in the use of the new types.

6.2. Recidivism studies and evaluations

In Danish studies, recidivism is normally defined as new convictions for offences punishable by more than a fine committed within two years after release from a prison sentence or after a non-custodial sentence. Using this criterion, the recidivism rate for parolees on supervision is nearly 60 per cent.[15] According to an evaluation of the system of serving sentences in alternative ways, the recidivism rate is much lower among this group of offenders, i.e. 44 per cent.[16] For suspended sentences with supervision the recidivism rate is around 40 per cent.[17] Offenders with a community service order have, however, the lowest recidivism rate, as it is around 20 per cent.[18]

[15] Kriminalforsorgens Statistik 1999 (The Danish Prisons & Probation Service, Statistics 1999).

[16] LISBETH HANSEN & PETER LOEVGREEN: *Paragraf 49, stk. 2 afsoneres kriminelle karriereforløb* (The criminal careers of prisoners serving their sentece in an alternative way). CASA, Copenhagen, 2000.

[17] See note 15.

[18] See note 15.

The tradition of scientific evaluations is unfortunately rather poor in Denmark. Studies on the type of offenders found eligible or not eligible for community service have been carried out, but do not include measures on the effect of the CSO compared to incarceration. Although an ex post facto study on the effect of treatment for drunk drivers indicates a lower rate of recidivism among drunk drivers treated for alcohol abuse compared to those not treated[19], the study suffers from problems of comparability between the treatment and the control group. The case is similar for the above-mentioned evaluation of the arrangement for serving sentences in an alternative way. An evaluation study based on interviews with supervised offenders[20] shows that most offenders find supervision useful. Furthermore, most think that supervision helps them in not re-offending. Whether this impression is correct or not can probably only be verified by the use of experimental methods. Based on cost-benefit analyses, however, there is little doubt that community sanctions are better than imprisonment. A calculation on costs at community service thus has shown that compared to a prison sentence the cost of community service is around one-third.

6.3. Crime, criminal policy and the general influence of CSMs

Compared to many other European countries, Denmark has been in the very favourable situation of maintaining a fairly constant level in the prison population in spite of an increase in the number of reported Criminal Code offences. The average numbers of prisoners has been rather stable since 1950 while, on the other hand, the number of Criminal Code offences has increased by 400 per cent. Within the last twenty years, the increase in the number of reported offences has, however, been more moderate and there has not been an increase in registered Criminal Code offences since the middle of the 1980s (cf. Figure 1).

As indicated earlier and as shown in Figure 2, the discrepancy between the development of the prison population and Criminal Code offences can hardly be explained by an increased use of CSMs. Instead the discrepancy is partly due to criminal-political changes and partly to changes in sentencing policy. In the field of Criminal Code offences, the most important reform was the decriminalisation of property offences in 1982. At the same

[19] Poul Henning Larsen: *Spritbilister 1979-1994* (Drunk drivers, 1979-1994). Danmarks Statistik, 1997.

[20] Kyvsgaard, 1998 and 2000, op. cit.

time, the possibility for parole was extended to include shorter sentences. Concerning the sentencing policy, fines are now more often imposed (see Figure 2). All together, the number of prison sentences increased by approximately 33 per cent from 1974 to 2000, while non-custodial sanctions increased by 57 per cent. As is clearly by Figure 2, fines first and foremost cause the latter.

As mentioned, there is no doubt that the recent sharp increase in the use of CSMs for drunken driving and other types of Traffic Code offences have had a great impact on the use of prison sentences for Traffic Code violations, while the impact of CSMs in relation to Criminal Code offences is less certain. Politically, however, CSMs are of huge importance as they symbolize innovation and hope for a better future.

7. The future

The present Danish criminal political trend can be characterised as a re-emergence of rehabilitation. This is reflected in the many new types of CSMs that have been started within recent years. This trend will undoubtedly continue and, primarily, treatment and other types of community measures during imprisonment or in relation to non-custodial sanctions can be expected to increase in both types and scope. Community sanctions, especially community service, will probably also continue to expand as nothing indicates that the upper limit has yet been reached.

An upper limit most likely exists as regards community sanctions. As they require the offender to be capable of fulfilling certain obligations, the offender must lead a relatively stable and quiet life in order to be found eligible for a CSM. Today, however, many offenders have huge social problems and – not least – abuse problems, and this might form an obstacle for the expansion of community service and other CSMs. Many CSMs are also directed towards the same group of offenders and can be said to compete and overlap.

A risk of negative side effects is another problem with an increased, but selective use of CSMs. When the socially best off among the offenders get community sanctions or very short prison sentences, the result is a more impoverished prison population and a damaging and hardening effect on the prison environment. More aggravated conflicts between prison staff and inmates as well as between inmates have already been seen, and a tougher prison environment might result in restrictions and reduction of rights for inmates.

In order to counteract the risk of polarisation among offenders and tougher prison regimes it is therefore a challenge to find CSMs directed towards the most badly situated offenders. The new treatment programme for drug addicts can be said to have taken up this challenge but much more of the same kind is needed. It is of great importance that all offenders have the possibility of benefiting from the new positive trends in criminal policy and not only the lucky few.

The development and use of Community Sanctions in England and Wales

SUE REX

1. Introduction

Despite repeated attempts to provide a conceptual framework for community sanctions and measures in the English jurisdiction, it has to be said that – ninety years after the introduction of the probation order and fifty years after other community options began to proliferate – their place in the Criminal Justice System remains unclear and uncertain. As a result, it seems "not entirely fanciful to envisage the straight probation order withering away into a backwater used only for minor offences" (Mair 1997: 1225). There is no doubt that what has made this kind of prediction possible is the two decades of instability which have followed the decline of the rehabilitative ideal in the 1970s, during which non-custodial sanctions have been the victims of sequential 'fashions' as regards their objectives. The lack of a sustained 'idea' about community sanctions has generated a degree of complexity and confusion that now seems almost impossible to overcome.

This paper starts by tracing the broad shifts in recent thinking about community sanctions, before turning to a discussion of the legal framework and rationale for community orders. It then considers how these orders are administered in practice, mainly by the probation service, and the empirical evidence about the effectiveness of that practice - lately the subject of renewed interest. Discussion of these questions will raise a number of issues, on which the concluding section of the paper will seek to reflect in looking to the future prospects for community sanctions in England and Wales.

2. Conceptualising Community Sanctions: Their place in the Criminal Justice System

The debate about community sanctions was activated by the conjunction of a loss of faith in 'treatment' (on both ideological and empirical grounds) with a resources crisis over what was seen as an alarming growth in the prison population[1]. During the preceding era of penal-welfarism that had begun in the late 19th century (see Garland 1985 for a fuller analysis), the value of probation work with offenders was taken for granted. It was even described by Radzinowicz (1958) as "the most significant contribution made by this country to the new penological theory and practice". Yet, twenty years later, the head of the Home Office Research Unit was to ask whether these kinds of activities should "simply be abandoned on the basis of the accumulated research evidence" (Croft 1978). A debate had started - in academic, policy and practice circles - and has raged ever since.

2.1 Alternatives to Prison or Punishments in Their Own Right

Denuded of welfarist aspirations, the only way in which penal sanctions could be conceptualised was in terms of *punishment* - a framework in which community sanctions have struggled to find a role. Initially portrayed as 'alternatives to custody' (prison being seen as the 'real' punishment), when that strategy failed to make the desired impression on the rising prison population their status was changed to one of 'community sentences' (that is to say, as 'punishments' in their own right).

Of the three contributory factors in the demise of rehabilitation - ideology, empirical evidence and financial constraints - the 'alternatives to custody' movement was born from a coalition of the research evidence and a wish to conserve resources. It had effectively started in 1967 with the introduction of the power to suspend a sentence of imprisonment. That power was followed by the introduction of community service in 1972 and probation day centres (placed on a legislative footing in 1982), all sharing the aim of encouraging sentencers not to send people to prison (though the status of 'alternative to custody' was specifically conferred by statute only

[1] Expanding crime rates caused the prison population to increase threefold (from 11,100 to 32,500) between 1938 and 1968 despite a lower proportionate use of custody by the courts (BOTTOMS 1987).

upon the suspended sentence). The rationale was that, if nothing worked, the best option was the one that diverted the offender from custody and helped to keep the prison population within reasonable bounds (as well as avoiding the damaging effects of imprisonment for that particular individual).

Research was very quick to reveal why the 'alternatives to custody' failed to have the desired impact on the prison population[2]. Despite the legislative requirement that a suspended sentence should only be imposed where the court otherwise would have sent the offender to prison, courts were shown to have used the suspended sentence in cases where they otherwise would have imposed - not custody - but probation or a fine[3]. This meant that only about half of suspended sentences were estimated to have replaced custody. Even during its experimental stage, Pease (1985) found that the same was true of the community service order (much less explicitly an 'alternative to custody'). The impact was compounded by the tendency for a court breaching someone for failing to comply with a non-custodial order to imprison that person in the mistaken belief that it was activating the custodial sentence which had been replaced by, say, the community service order (people thus being drawn into custody who might otherwise never have received a custodial sentence)[4]. Despite these difficulties, the concept of the 'alternative to custody' played a key role in the 'juvenile justice movement' of the 1980s, contributing to a considerable reduction in custodial sentences for juvenile offenders that clearly influenced the government's thinking in relation to the sentencing of adults[5].

The 'neo-classical revival' in Western sentencing philosophy (embodied in the 'justice model') which was caused by the third strand in the critique of 'treatment' - ideology - was eventually to lead to the fully-fledged 'just deserts' thinking adopted in the British government's policies of the late 1980s and early 1990s[6]. The government's adoption of this set of ideas arose from its realization that only a radical rethink was likely to offset the

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[2] Which continued to rise to reach 46,200 in 1985 (see BOTTOMS 1987).

[3] BOTTOMS (1981).

[4] See BOTTOMS (1987), and MCIVOR (1990) who found that those *rejected* for community service because they were thought unlikely to comply with the terms of the order also tended to be those at greater risk of a custodial sentence in the first place. In other words, it was the rejection of the 'bad risks' which undermined the order's ability to divert offenders from custody.

[5] See the 1988 GREEN PAPER *Punishment, Custody and the Community* (Cm. 424).

[6] Desert theory is explained fully by VON HIRSCH (1993).

tendency for community sanctions to replace each other rather than custody, so achieving a substantial reduction in the prison population[7]. Experience had shown that it was not enough to remind courts that non-custodial options offered a cheaper alternative to custody. The popular (and judicial) perception that they were simply not 'tough enough' needed to be addressed, and sentencers needed to be persuaded that community orders imposed restrictions sufficient for the kinds of offences that might currently result in a custodial sentence.

The government's strategy in relation to community sanctions was expressed in the 1990 white paper 'Crime, Justice and Protecting the Public' (Home Office 1990) and implemented in section 6 of the Criminal Justice Act 1991 (described below). That provision was actually very radical in taking desert thinking to its logical conclusion by applying it to non-custodial options. Doing so involved renaming such options as 'community sentences' to mark their status as punishments in their own right (rather than as alternatives to custody) and re-conceptualising them in terms of the restrictions they placed on offenders' liberty. It also meant making the probation order, the archetypal penal welfare disposal, a sentence of the court rather than a welfare-oriented substitute for punishing an offender - an attempted shift in conceptualisation that has proved to lack practical conviction.

2.2 *From punishment to protectionism*

In the event, the approach in the 1991 Act survived for a very short period. Although it appeared initially to have the desired effect on the use of custody[8], by May 1993 a set of "swarming circumstances" (Worrall 1997) was causing the government to plan to dismantle it in quite significant respects - as it did in the Criminal Justice Act 1993, implemented in August 1993[9]. In

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[7] The 1988 GREEN PAPER fearing that the prison population would reach 70,000 by the year 2000, as it now seems certain to do.

[8] According to Table 7B of CRIMINAL STATISTICS FOR ENGLAND AND WALES 1995, the proportionate use of custody for indictable (more serious offences) dropped from 15 per cent immediately before the implementation of the 1991 Act in October 1992 to 12 per cent afterwards, while the proportionate use of community penalties rose from 22 to 24 per cent.

[9] As well as the abolition of the unit fine (based on the idea of the Continental day fine), the 1993 Act reversed the prohibition in the 1991 Act against regarding an offence as more serious by virtue of the offender's record.

part, the government's change of heart was a response to evident judicial resentment at the attempt in the 1991 Act to curb sentencing discretion[10]. However, an equally powerful influence was the advent of an undeniably more punitive sentencing climate that had already begun to take hold at the time the 1991 Act was implemented[11].

The mid-1990s could be seen as a period that lacked a clear governmental approach to community sanctions (as a result of which the use of custody has flourished)[12]. However, very recent government policy under the new Labour administration seems to be driven by a desire to strengthen the credibility of community sanctions as part of its crime prevention strategy, particularly in relation to young people[13]. Here, the emergence of more optimistic research evidence about the effectiveness of rehabilitation[14] has helped to shift the focus onto the ability of community sanctions to protect the public from the 'risk' of further offending. Rehabilitationism has, in effect, pushed desert off the community penalty agenda[15]. Few people now seem likely to take much interest in von Hirsch's (1990) warning that it is easy for enthusiasm for credible community options that appear less severe than imprisonment to overshadow the fact that these orders themselves impose restrictions that should be justified by reference to the gravity of the offence.

[10] As encapsulated by the Lord Chief Justice in a speech to the Scottish Law Society on 21 March 1993 in which he famously referred to the Act as a judicial 'straight jacket' (see ASHWORTH 1995).

[11] See BOTTOMS (1995), GARLAND (1996) and WORRALL (1997) for fuller analyses.

[12] On the one hand, the then Home Secretary was declaring that 'prison works' (in a speech to the Conservative Party Conference in October 1993). On the other, a consultation paper proposed a single integrated 'community sentence' with the stated aim of increasing public confidence in non-custodial options (HOME OFFICE 1995a) - an idea which the government subsequently dropped (HOME OFFICE 1996).

[13] See HOME OFFICE (1997A), discussed later.

[14] See MCGUIRE & PRIESTLEY (1995) for one of the main summaries of what has become known as the 'What works?' literature in North America and the UK.

[15] The government's 1997 WHITE PAPER proposing reform of youth justice (Home Office 1997a) making no reference to the 1991 Act as it applies to community sentences.

3. The Framework for Community Sanctions and Measures in England and Wales

3.1 Legal Status and Obligations

In spite of its partial dismantling in 1993 and further undermining since, the Criminal Justice Act 1991 remains the formal legal framework for the sentencing of offenders to community and custodial sanctions. In effect, it divides offences into three hierarchical bands: those for which a fine or discharge is sufficient; those which are 'serious enough' to warrant a community sentence, and those which are 'so serious' that only custody can be justified. Custody cannot be combined with community sentences (though early release provisions allow for a measure of supervision following an offender's release from prison), but the community orders can be combined with each other and imposed at the same time as a fine and/or compensation order[16].

Applying to the immediate band of offences for which community sanctions can be used, section 6 requires the sentencer to select the most *suitable* community order, in which the restrictions on liberty are *commensurate with* the seriousness of the offence. The intention behind this two-pronged test seems to be that desert will dictate the size of the penalty, and suitability will then dictate the form it takes (community service if reparative, and probation if rehabilitative)[17]. As I have argued elsewhere (Rex 1998), however, a lack of political and judicial commitment to the desert principles underlying the Act has meant that this is not the way it has been interpreted and implemented in practice.

[16] With the exception of probation and community service, which can only be combined in the form of a combination order for a single offence.

[17] This arrangement would be consistent with the approach recommended by WASIK & VON HIRSCH (1988) for applying desert principles to non-custodial options. Consistent with their hypothesis that desert addressed the severity of the penalty, not its particular form, WASIK & VON HIRSCH suggested that, provided the gravity of the offence determined how severely the offender was punished it was possible to base the choice between two or more equally 'deserved' sanctions on other grounds, such as crime prevention. That was how contemporary commentators understood the idea behind the legislation: 'presumably that the court should consider which of the orders of roughly the same severity might meet the needs of the offender...an element of rehabilitative thinking...remain[ing] part of a non-custodial sentencing, but within a deserts-based framework' (ASHWORTH 1992: 254).

The main community sanctions and measures available in the English jurisdiction, then, are those which section 6 of the Criminal Justice Act 1991 defines as community 'orders' eligible for inclusion in a community 'sentence'. They are set out below, together with the age-ranges to which they are applicable and the nature and length of the legal obligations that they can involve.

(i) *probation order* - available for age 16 and over; can be imposed for a minimum of 6 months and a maximum of 3 years during which time the offender is required to attend appointments with a probation officer and receive home visits; additional requirements can be imposed relating to accommodation, activities and treatment for a mental condition or drug/alcohol dependency;

(ii) *supervision order* - a similar type of order available for age 10 and under 18;

(iii) *community service order* - available for age 16 and over; can be imposed for a minimum of 40 hours and a maximum of 240 hours during which the offender is required to perform unpaid work supervised by probation personnel;

(iv) *combination order* - available for age 16 and over; introduced in the Criminal Justice Act 1991, it allows at least 1 year probation (plus the full range of additional requirements) to be combined with between 40 and 100 hours of community service;

(v) *attendance centre order* - available for age 10 and under 21; requires attendance at a centre, usually run by police officers, to undertake activities such as physical training and car maintenance for a maximum of 24 hours for age under 16, or 36 hours for age 16 to 20 inclusive;

(vi) *curfew order*, enforced by electronic monitoring - available for age 16 and over; also introduced in the Criminal Justice Act 1991, it requires the offender to stay at a specified place (usually his/her home) for between 2-12 hours per day; can be imposed for a maximum of 6 months.

Of the above, all but the last two are administered by the Probation Service, which decides how the obligations fixed by the court are carried out in practice (e.g. what type of unpaid work is performed in fulfilment of a community service order; how a condition to undergo treatment for drug or alcohol dependency is met). The order is not directly supervised by the court, although greater judicial involvement was an idea the government flirted with before introducing local 'demonstration projects' aimed at improving liaison between probation personnel and sentencers and the sen-

tencers' confidence in community sentences (about which they would be better informed)[18]. In delivering community penalties, the probation service has more recently been required to develop its use of partnerships with the independent sector (i.e. both private and charitable/voluntary organizations) to provide, for example, drug and alcohol treatment or aspects of programmes to address offending behaviour (Home Office 1992). The current Three Year Plan for the Probation Service requires probation services to spend 7 per cent of their budgets on such partnerships (Home Office 1997).

With the exception of the attendance centre order, community orders used to require the explicit consent of the offender. However, this requirement was abolished by the Crime (Sentences) Act 1997. The rationale was that the need for the offender to consent could be seen as derogating from the authority of the court. The "key issue is not consent at the point of sentence but the offender's willingness to comply throughout the sentence" (Home Office 1995: Para 11.4). On this, the government seemed to have a point in arguing that consent in court in fear of a prison sentence may not be a good guide. Its approach is not inconsistent with the Council of Europe's rules on community sanctions and measures (Counseil de L'Europe 1994), where Rule 31 requires consideration to be given to whether an offender is prepared to cooperate and comply with a sanction, but does not require his or her explicit consent.

3.2 *Rationales for Community Sanctions*

The first part of this paper described broad shifts in the conceptual framework for community sanctions in England and Wales. This section now considers the rationale for the main types of community order in more detail. In effect, these are the probation order and the community service order, since the combination order combines the two, whilst the attendance

[18] The 1995 GREEN PAPER, concerned at a lack of judicial and public understanding of and confidence in the disparate community penalties, proposed a single 'integrated' community sentence whose contents would be determined by the courts and on which probation services would be encouraged to provide feedback reports to court. In the event, the government was persuaded (in its 1996 WHITE PAPER) that "the current range of community orders already provided a sufficient range of options" and that a single integrated sentence was unnecessary. In opting instead for demonstration projects, it predicted that their effect would be to increase the range of requirements of supervision and a speedier return to court of offenders who failed to comply with the order.

centre order is a somewhat anomalous disposal with very limited availability for adult offenders[19]. The following section will then address the curfew order, so far implemented only on a trial basis.

3.2.1 Probation order

The *probation order* was the first non-custodial option to be introduced in the English jurisdiction. It dates back to 1887, when the Probation of First Offenders Act enabled courts to release first offenders on probation, although the power of supervision was not introduced until the Probation of Offenders Act 1907. The task of the probation officer was to "advise, assist and befriend" the offender in the hope that this would help to reform or rehabilitate him or her. With its origins in the work of police court missionaries, the emphasis of probation intervention was initially on religious 'moral reclamation', which was gradually superseded by 'scientific' psychoanalytical casework during the first half of this century[20].

Traditionally, then, the probation order was a welfare-oriented substitute for sentencing an offender. Its transformation in the Criminal Justice Act 1991 to a sentence of the court, though based on the recognition that it "necessarily ... imposes certain restrictions on the offender's freedom of action as a punishment"[21], has been difficult for sentencers and practitioners to swallow. Despite a greater emphasis on its restrictiveness, the objectives of the probation order, as laid down by section 8 of the Criminal Justice Act 1991, remain rehabilitative. The sentencing practice outlined later in this paper is certainly indicative of a desire by magistrates still to use probation to 'help' offenders with high social needs but whose offences are arguably too trivial to justify the intervention of the Probation Service[22].

3.2.2 Community service order

The *community service order*, introduced experimentally in 1973 as a result of concerns about the rising prison population and disenchantment with

[19] See MAIR (1997) for a short discussion of the 'minimal' role played by the attendance centre order, in which he estimates that attendance centres for the older age group deal with only 1,000 offenders each year.

[20] See MCWILLIAMS' quartet of articles in the Howard Journal (1983, 1985, 1986, 1987) for a fuller discussion of the early and later history of the Probation Service.

[21] BOTTOMS (1989).

[22] As found by HM INSPECTORATE OF PROBATION (1993) in its inspection of the impact of the 1991 Act.

treatment, has always enjoyed a somewhat ambiguous position (Worrall 1997). "Philosophical confusion" (Mair 1997) about community service was intrinsic in its origins in the report of the Advisory Council on the Penal System (1970) recommending its introduction, which suggested that it could act as punishment (a 'fine' on the offender's time), as reparation to the community which might simultaneously help to rehabilitate the offender, and as an alternative to custody.

Although the first community service schemes were intended to act as an alternative to custody, the failure to specify this in legislation resulted in considerable confusion and inconsistency in the use of community service in practice, contributing to its use as a substitute for other non-custodial options rather than prison (see McIvor 1992). Despite these difficulties, community service has proved a very popular sentence, its mixed penal objectives enabling it to appeal to a wide range of people and to be applicable to a wide range of offenders. More recently, and especially since the Criminal Justice Act 1991, it is its role as a straightforward punishment which has been emphasized, and sentencing practice (see below) suggests that it is in decline in the face of renewed interest in rehabilitation.

3.2.3. Experimental Schemes: Curfew Orders with Electronic Monitoring

Introduced in the Criminal Justice Act 1991 as a sentence that would impose significant restrictions on offenders' liberty (i.e. with a focus on punishment), the curfew order is an interesting case because the government decided to contract private companies to administer the sentence rather than to give that responsibility to the Probation Service. In effect, it is the first privately contracted community sentence in the English jurisdiction. It has not yet been introduced on a national basis.

So far, curfew orders have been used in a series of trials, in the first of which (preceding the 1991 Act) they operated in 1989-1990 as a condition of bail. Trails of curfew orders as a sentence only became possible when the Criminal Justice and Public Order Act 1994 enabled electronic monitoring to be introduced in specified localities. They began in July 1995, initially in Manchester, Norfolk and Reading, and later extended to the whole of Greater Manchester and Berkshire. At the end of 1997, the Home Office published a report on the second year of the trial (see Mortimer & May 1997) and announced a further extension to West Yorkshire, Cambridgeshire, Suffolk and Middlesex. Given its experimental status, it is

worth reporting briefly on early experience of the curfew order in England.

Although initial take-up was slow (83 orders in the first year of the trial), 375 orders were made during the second year. It is still a rarely used sentence compared with probation and community service orders, but a future rapid expansion might be predicted on the basis of experience in the US[23]. The use of curfew orders, and for whom, will be analysed - along with sentencing patterns for other community sanctions - later in this paper. Their sentencing practice does, however, accord with views expressed by magistrates in a sentencing choices survey, in which curfew orders were seen as alternatives to custody and at the higher end of community sentences. In the report on the first year of the trial[24], interviewed magistrates had been initially sceptical of the value of electronic monitoring, but seemed gradually to have been won over by the fact that violations were detected immediately and offenders brought back to court quickly. This has helped to persuade them that curfew orders offered a clear and severe restriction on liberty that did not totally disrupt offenders' lives.

Offenders interviewed for the first report of the current trial spoke highly of the monitoring staff and were quite positive about their experience on the order, to which they had consented to avoid prison and which the majority had found to be genuinely restrictive of their liberty. Their families and partners were generally very positive about the order as it allowed offenders to stay out of prison and keep their jobs, though one mother commented that she would not tag a dog as it was so demeaning.

Generally, probation officers have not been enthusiastic about electronic monitoring, which they have tended to see as intrusive and as infringing civil liberties (a resistance which contributed to the government's decision to use private contractors, since the Probation Service declined initially to have anything to do with it). However, probation officers were seen as becoming more helpful towards the end of the first year of the trials, and, as Mair argues, their future involvement seems "necessary to help those offenders on curfews to cope with any difficulties encountered" (1997: 1215). Although private contractors' staff provided this kind of help informally during the trials, that arrangement (for which they receive no training) does not seem sustainable as the take-up of orders increases.

[23] In 1986, just seven states had any electronically monitored home confinement programme and a total of 95 people were monitored; by 1990, 47 states had programmes monitoring around 12,000 people (see RENZEMA 1990).

[24] MAIR & MORTIMER (1996).

4. Administration of Community Sanctions and Measures

4.1 The Role of the Probation Service

As stated above, the Probation Service is the main agency responsible for supervising adult offenders in England[25]. Such is its influence that George Mair has argued, in relation to the attendance centre and curfew orders, that "for community sentences to be successful, they would seem to need the positive involvement of the probation service ... as a basic minimum" (1997: 1216). A large part of this influence operates through pre-sentence reports ('social enquiry reports' until 1992) in which probation officers make proposals to sentencers as to how offenders could be dealt with in the community.

The Home Secretary is responsible to parliament for the work of the Probation Service and the Home Office provides 80 per cent of its funding, 20 per cent coming from local authorities. Since 1993, the Home Office has produced annual Three Year Plans for the probation service that has been subject to cash limits on its expenditure (the Three Year Plan for 1997-2000 reporting total central government funding for 1996/7 to amount to £392m). Yet the probation service actually consists of 54 county-based local probation services, each managed by an area Probation Committee comprising magistrates, judges, local authorities and independent representatives. This dual central-local system of accountability, typical of criminal justice agencies, is increasingly seen as anachronistic, and the government is now in the process of seeking views on proposals to transform the Probation Service into a national agency whose employees would be civil servants (Home Office 1998).

Each local probation service is currently managed by a chief probation officer (though this is certain to change with the introduction of a national agency run by a chief executive), with - depending upon its size - a deputy and a number of assistant chief probation officers. Geographical or functional teams of professionally qualified probation officers are managed by senior probation officers, and often assisted by an employed but unqualified probation services' officer as well as probation service voluntary asso-

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[25] Although probation officers supervise some young offenders aged under 18, most supervision of juveniles is carried out by social workers employed by Local Authority Social Service Departments.

ciates – ordinary members of the public who help out with a variety of tasks such as transport.

Details of the average costs of the main community orders are provided in Probation Statistics, which estimated that the average *annual* cost of a probation order in 1996/7 was £2,200 and a community service order £1,700 (Probation Statistics 1996). Although clearly speculative at this stage, the report of the second year of the curfew order trials estimated that, in the event of national implementation, the average cost of each order would be around £1,900 (Mortimer & May 1997). The report noted the difficulty of making a direct comparison with the cost of custody, but pointed out that the *monthly* costs of imprisonment varied between £1,400 and £2,000 (£24,000 annually) depending on the nature of the accommodation.

4.1 The functions and training of the probation officer

The main functions of a probation officer are to prepare pre-sentence reports to courts and to supervise offenders given a probation order with or without additional requirements. Probation staffs also supervise offenders on community service and those sent to Probation and Bail Hostels. In relation to offenders sentenced to custody, probation officers perform a 'throughcare' role, both within prison (under 'contract' to the prison establishment) and by supervising offenders on licence or parole. According to Probation Statistics, the average number of people supervised by each probation officer in 1996 was 27.7, and the average court order caseload 15.6 - though these obviously provide only a rough measure of workloads, which will vary considerably as between different areas and individual officers. Probation Statistics 1996 note that workload has increased since 1992, particularly between 1994 and 1996 as the number of probation officers has fallen.

Considerable controversy has arisen over the appropriate training for a probation officer. Consistent with their traditional role of "advising, assisting and befriending" offenders, probation officers have until recently been required to have a professional social work qualification, obtained at a higher education institution (a university). However, in 1995 the Home Secretary (Home Office 1995b) announced the repeal of the legal requirement for a social work qualification, essentially on the basis that it conflicted with the criminal justice role of the probation officer. Instead, training was to 'on the job' within a competence-based framework and with no university involvement.

Following considerable protest about professional de-skilling, the Labour administration has made arrangements for training to be provided, from October 1998, through a two-year university and practice-based course, leading to a qualification equivalent to an undergraduate degree. This may not satisfy those who believe that probation officers need to deploy the social work skills of valuing offenders as unique, worthwhile and self-determining individuals with the capacity to change if they are to help offenders resolve the personal and social problems which underlie their offending (see Worrall 1997, Williams 1995).

4.2 Regulating Supervision: National Standards

Since 1989 (initially for community service), how the Probation Service carries out its functions has been laid down in National Standards (most recently, Home Office et al. 1995), which cover all areas of probation work: pre-sentence report; probation orders, community service orders; combination orders; the management of probation hostels; and throughcare for prisoners. Dealing with frequency of contact, record-keeping and the enforcement of community orders, National Standards can be seen - depending on one's viewpoint - either as providing much needed accountability for and consistency in the practice of individual probation officers, or as an assault on their professional autonomy (Worrall 1997). Comprehensive National Standards were first introduced in 1992 (Home Office et al. 1992) to coincide with the implementation of the Criminal Justice Act 1991, and the more rigorous version, produced in 1995 - as Mair (1997) points out - without any evaluation of the impact of the original, was undoubtedly part of the government's attempted strategy of enhancing the credibility of community sentences in an increasingly hostile world[26].

In effect, National Standards lay down the obligations imposed on offenders serving community orders. For example, an offender on probation is expected to see his or her supervising officer weekly during (or at least

[26] For example, the new NATIONAL STANDARDS required that a pre-sentence report proposing supervision should contain an outline supervision plan, and - in a number of individually quite slight but collectively quite significant respects - tightened up the requirements of supervision. Thus, the initial appointment between probationer and probation officer was 'in all cases' (rather than 'whenever possible') to take place within 5 working days; and the probationer 'should' (rather than 'where practical and appropriate') attend a minimum of 12 appointments in the first three months.

12 times within) the first three months, followed by fortnightly for the following three months. They also provide for how that contact is to be managed, so that the first appointment should take place within 5 days of the making of the order, and within 10 working days the probation officer should have drawn up a supervision plan in consultation with the probationer which sets out a programme to tackle relevant needs and problems, addresses his or her motivation, pattern of offending and risk of re-offending, and identifies a time scale for achieving each objective (Home Office et al. 1995, pp. 19-20).

One of the matters referred to in National Standards is the requirement for a complaints procedure for offenders supervised by the probation service. Here, too, there has been a shift in emphasis between the 1992 and 1995 versions of the Standards. As Worrall (1997: 73) points out, the statement in 1992 that offenders "should have access to a fair and effective complaints system if they are dissatisfied with the service they receive" (Home Office et al. 1992: 3) is absent from the more recent version.

4.3 Enforcing the Sentence

One of the main areas covered by National Standards is what happens when an offender fails to comply with the requirements of a community order. The Standards expect the failure to be followed up promptly (normally within two working days), and the offender warned in writing if it seen as amounting to an unacceptable failure to comply. Other than in exceptional circumstances, breach proceedings should be instituted following a third failure (in practice, usually to attend an appointment) without an 'acceptable' explanation, a term which clearly lends itself to a variety of interpretations. The offender will then be returned to court, which has the power either to allow the order to continue and to impose a trivial penalty for the breach (such as a fine or short community service order), or to revoke the order and sentence the offender afresh for the offence (see Criminal Justice Act 1991, Schedule 2). The court is required to take the offender's progress on the order into account, and much will obviously depend on the timing of the breach, the offender's attitude and whether the probation service wants the order to continue (there being a high level of concordance between breach officers' recommendations and court decisions[27]).

[27] See ELLIS et al. (1996).

The breach has to be proved before the magistrates' court (which can commit the offender to be dealt with by the Crown Court that made the original order, and must do so for an order made by the Crown Court to be revoked); the offender can plead not guilty to the breach and has a right to legal representation. Where a magistrates' court revokes an order and sentences the offender afresh for the offence, he/she has a right of appeal against that sentence (just as against any sentence imposed by magistrates) to the Crown Court.

Inconsistency (and therefore unfairness) in breaching offenders remains an issue, although National Standards are seen as having brought about more consistent practices. As Worrall (1997) points out, probation officers are notoriously reluctant to take breach action (being inclined to see a failure to comply as a breakdown of the therapeutic relationship or the consequence of the offender's chaotic lifestyle). Annually, 4 per cent of probation orders are terminated for a failure to comply, compared with 14 per cent of community service orders (where a failure is perhaps a more straightforward and less personal matter)[28]. A Home Office survey of the enforcement of community sentences (Ellis et al. 1996) revealed tensions between probation officers' and community service staffs' approaches to breach in relation to combination orders, with probation officers' being seen by CS staff as allowing extra leeway for offenders on combination orders. However, at 10 per cent, the proportion of probation elements in a combination order being terminated annually for failure to comply seems closer to community service than to probation practice[29]. Although sentencing statistics (see below) suggests that an average offender sentenced to a combination order will be similar to one sentenced to probation, breach rates are much higher for combination orders. It is perhaps too early to tell whether this is because of the additional demands of a combination order or due to differential enforcement practice[30].

[28] See PROBATION STATISTICS FOR ENGLAND AND WALES 1996.

[29] PROBATION STATISTICS FOR ENGLAND AND WALES 1996.

[30] According to CRIMINAL STATISTICS 1996, 36% of offenders serving combination orders were breached compared with 12% of probationers (and 28% of offenders serving community service orders).

5. The Empirical Evidence

5.1 Renewed Interest in Research and Evaluation

Data about the enforcement of community orders begins to illuminate what happens on the ground in probation practice, an issue in which interest has recently been revitalized by more promising research findings. In effect, British thinking about the efficacy of rehabilitation has come full circle since the pessimism of the 'nothing works' era that precipitated the decline of treatment. Chiefly responsible for that change has been the advent of, mainly North American, meta-analytical studies which aggregate the findings of a number of different evaluations of rehabilitative programmes to achieve statistical significance. McGuire & Priestley (1995) were amongst the first to derive, for a British audience, a set of principles about effectiveness from these sorts of studies, heralding a period of intense interest in 'what works' in probation practice[31].

These ideas have been embraced by probation policy-makers and managers, despite academic reservations about the reliability of meta-analytical methodology and warnings that "our understanding...is still embryonic of what works, with which offenders and under what conditions, in reducing offending behaviour" (McIvor 1997: 13). Surveys have suggested, however, that the 'what works' principles have not necessarily been well understood or applied, or their impact systematically evaluated, in practice[32]. Of course, it would be a great deal to expect of a service blighted for twenty years by the loss of its "transcendent justification" (McWilliams 1987), a

[31] Summarized, these principles are: (i) the *risk* principle that intensive programmes should be directed at offenders with a statistically high likelihood of reconviction; (ii) programmes should focus on offenders' *criminogenic* (crime-related) needs; (iii) programmes, and working styles, should be *responsive* to offenders' learning styles (usually active and participatory); (iv) more effective programmes are based in the *community*; (v) treatment methods need to be *multi-modal* (broad-based), capable of meeting the variety of problems encountered by offenders; (vi) programmes should have *integrity*, so that the methods should relate to clearly identified aims.

[32] As revealed by two recent national surveys of probation programmes: HEDDERMAN et al. (1997), and ELLIS & UNDERDOWN (1998). Though finding examples of excellent practice, the latter found only 4 examples of programmes that had been fully evaluated and identified several requirements: for a shared, evidence-based, model of programme design; for more guidance on the structured assessment of offenders for programmes; for more systematic monitoring of programme delivery; and for a strategy to enhance outcome evaluation.

period during which non-custodial options were seen, first as means to divert offenders from custody in which their 'content' was irrelevant, and then as punishments in which their 'content' were the restrictions they imposed on offenders' liberty, now to be rigorous about the effectiveness of the work it actually does with offenders. It is perhaps no wonder that enthusiasm for and expectations of these ideas have tended so far to exceed their practical implementation.

The Home Office has now taken some initiative in encouraging probation services to develop and evaluate the effectiveness of their practice. Following a national survey of probation programmes by Her Majesty's Inspectorate of Probation (Ellis & Underdown 1998), an 'Effective Practice Guide' is, at the time of writing, on the point of publication. A recent circular to chief probation officers (Home Office Probation Circular 35/98) requires them to produce a strategy to ensure that offenders are supervised in accordance with effective practice principles, and invites them to submit proposed 'Pathfinder' programmes, which will be developed and evaluated for national implementation with the assistance of the Probation Studies Unit[33]

One of the main means of evaluating the effectiveness of community programmes is to collect information on the reconviction of offenders who have served a particular order or attended a particular programme, and to compare their recidivism rates with similar offenders sentenced to other disposals (including custody) and with recidivism rates predicted for them[34]. A number of probation services have now had reconviction studies carried out (see e.g. Oldfield 1996), and the Home Office's Key Performance Indicator (KPI) 1 for the Probation Service requires actual reconviction rates for people subject to community orders to be maintained below predicted rates (see Home Office 1997). Although the measurement of reconviction is fraught with methodological difficulties and needs to be approached cautiously and critically[35], it nonetheless has to be accepted as

[33] Part of the Centre for Criminological Research, Oxford University, and funded jointly by the Home Office and probation services.

[34] For example, the Offender Group Reconviction Scale (OGRS) (see COPAS 1995), which was calculated on the basis of the reconvictions of large samples of offenders sharing similar characteristics.

[35] See LLOYD, MAIR & HOUGH (1994), whose report on a comparison of reconviction following prison, community service, probation, and intensive probation concludes that there appeared to be little to choose between them. One problem here is that by grouping together all programmes of a given type, national reconviction

the one standard measure against which community programmes can be tested and compared with custody. It seems highly probable that interest will continue to be taken in, and the British probation service continue to be held to account as against this kind of data, whatever its imperfections.

Another area in which interest has intensified more recently is the perspective of offenders subject to probation intervention. Research studies and evaluations of community programmes commonly collect offenders' views of their experience of the programme and its impact on their likely further offending, and some studies have been devoted to offenders' views[36]. One such study is 'Offenders on Probation' (Mair & May 1997), which interviewed over 1,200 probationers (a response rate of 61 per cent) about their perceptions of the helpfulness of probation in tackling problems and stopping further offending. This revealed a high level of satisfaction on the part of those whom the probation service supervises (or at least those who had responded to the survey). Nine out of ten respondents thought that their current probation order was fairly or very useful, and there was as much emphasis on practical help or advice with specific problems as there was help with staying out of trouble. Even then, nearly three-quarters of respondents said that being on probation had helped them to understand their offending behaviour, and almost two-thirds said that they thought being on probation would help them to stay out of trouble in the future.

5.2 Cognitive-behavioural techniques

Of the findings emerging from research, one of the most influential in terms of its impact on British probation practice has been the efficacy of cognitive-behavioural techniques in reducing offending behaviour. In a re-

data can conceal possible differences that may make one version of the programme more effective than another.

[36] Particular attention has been paid to offenders' understandings of probation, with mixed conclusions. Quite a number of research studies have found that offenders understand that probation is intended to reduce the likelihood of their offending again, and that the majority of offenders believe it to have achieved that purpose (DAVIES 1979; DAY 1981; MANTLE 1994; REX 1997), but this is by no means a universal finding. In a fairly early study of 30 young adult male probationers in the first six weeks of their order, WILLIS (1983) reported that most regarded probation as primarily about the provision of social work help, and the probationers interviewed by MERRINGTON (1997) and BEAUMONT & MISTRY (1996) saw probation more as a source of help than of control or punishment - though some also related it to reducing their offending.

cent survey, Hedderman & Sugg (1997) found that most probation services have implemented programmes with a cognitive or cognitive-behavioural dimension. However, there was little systematic monitoring or evaluation of these kinds of techniques; and staff felt a lack of understanding of the broader psychological theories and practices that underpin cognitive-behavioural therapy.

These kinds of findings may help to explain the disappointing results of one of the most thorough, and thoroughly evaluated, British programme to use these techniques: STOP (Straight Thinking on Probation) in Mid Glamorgan[37] Unfortunately, the promising findings of the first year (in terms of lower rates of recidivism amongst those completing the STOP programme, compared with their predicted rates and similar offenders sentenced to other community options) were not sustained in the second year. The researchers attribute this to the need for offenders to be appropriately allocated to the programme and for the learning to be adequately reinforced and followed up in individual supervision - both important lessons for probation practitioners[38] Along with the original architects of these kinds of programmes, they also point to the need for "work on the thinking and behaviour of people who are at a high risk of further offending [to be] complemented by attempts to assist them with the problems they encounter in their everyday lives in the real world"[39].

5.3 *Using the Orders: Offenders and Offences*

One major aspect of evaluation necessarily concerns what use sentencers make of community sanctions, in terms of the offences for which they are imposed and upon what types of offenders. On this, George Mair (1997) draws a detailed analysis from two official national statistical sources: Criminal Statistics for England and Wales, and Probation Statistics for England and Wales. That analysis concludes with 1995, the latest year for

[37] Based on the 'Reasoning and Rehabilitation' programme developed by ROSS in Canada with the aim of 'modifying the impulsive, illogical and rigid thinking of the offenders and teaching them to stop and think before acting, to consider the consequences of their behaviour, to conceptualise alternative ways of responding to interpersonal problems and to consider the impact of their behaviour on other people, particularly their victims.' (ROSS et al. 1988: 31).

[38] RAYNOR & VANSTONE (1997).

[39] ibid: 39.

which figures were then available; in discussing the material below, I shall update it with the 1996 figures which have since been published.

Appendix I provides figures for the number of offenders sentenced to the range of disposals for indictable (more serious) offences since 1973. What this shows is that the *number* of probation orders increased considerably between 1973 and 1983 and stabilized during the 1990s, and their *proportionate* use from 7 per cent to 11 per cent. Following an increase in the use of community service orders in the early 1990s, they now seem back on a downward trend, both in terms of *numbers* and *proportionate* use (9 per cent in 1996). The combination order has taken off quite rapidly, to reach 3 per cent of all sentences for indictable offences in the mid-1990s. But the really striking trends are apparent in the use of custody and the fine, the latter declining sharply during the period to 28 per cent of sentences for indictable offences and the former rising sharply since the early 1990s to 21 per cent. What this does *not* suggest is that the development of community sanctions has had any sustained impact on the use of custody, though there is evidence that the Criminal Justice Act 1991 did initially achieve its objective of reducing reliance on imprisonment[40].

Mair (1997) notes some striking trends in the use of community penalties for summary offences (the least serious offences, where the fine still predominates). For example, summary offences accounted for 17 per cent of probation orders in 1973, but one-third in 1995 (nearly 35 per cent in 1996). As Mair points out, "a continuation of this trend would - in the long run - marginalize the [probation] order [by reinforcing] the idea that [it] is not a feasible option so far as serious offenders are concerned" (1997: 1206). A similar picture applies to community sęrvice, where summary offences accounted for 37 per cent of orders in 1995 (38 per cent in 1996); and to combination orders (originally presented by the government as appropriate for serious offenders[41]) 40 per cent of which were made for summary offences in 1995 and 1996. The inevitable conclusion is that not just

[40] According to Table 7B of Criminal Statistics 1995 (not produced in the 1996 volume), the proportionate use of custody for indictable offences dropped from 15 per cent immediately before the implementation of the Act to 12 per cent afterwards, while the use of community penalties increased from 22 to 24 per cent. These trends were not maintained. By August 1993 the use of custody was beginning to increase again, and it was the fine and discharge which appeared to be losing out to community penalties (see REX 1998 for a fuller analysis).

[41] See HOME OFFICE (1990); HOME OFFICE et al. (1992).

the probation order but also the whole range of community sanctions faces marginalisation in Britain.

Trends in the offences for which the various community orders have been used are consistent with this picture: a considerable reduction in the use of both probation and community service for offences of theft/handling and burglary; and evidence that the combination order may be replacing those orders (particularly community service) for these offences (Mair 1997). Around a third of those sentenced to the new combination order have been convicted of theft/handling, and around a quarter burglary offences, while violence accounts for 13-14 per cent of combination orders. The use of both probation and community service for violence has increased in percentage terms over the last two decades. But, over that period, burglary and theft/handling have dropped as a percentage of community service orders from over a quarter to less than 15 per cent and from over a half to less than 40 per cent, respectively (there are similar, but less marked, reductions in the case of probation). Conversely, however, there has been an upward trend in the use of probation, and less so community service, by the Crown Court for indictable offences (though this seems to be dropping off more recently), which Mair explains in the case of probation by reference to the increased number of orders to which additional requirements have been attached[42].

That pattern (i.e. that probation is now being used both for less serious *and* for more serious offenders) perhaps helps to explain its increased use *both* for more offenders who have served custodial sentences *and* for more offenders who have no previous convictions. Here, the proportion of offenders commencing probation who have previous experience of custody has increased from 24 per cent in the early 1980s to around 40 per cent now (though the 1990s are seeing a slight decline). The figures are similar for combination orders, as are the proportion of offenders commencing both orders with no previous record (18 per cent and 17 per cent, respectively). The equivalent trends for community service are worrying, though, with

[42] A trend which has intensified since the introduction of the Criminal Justice Act 1991 (emphasizing the *restrictions* contained in community orders) and applies to the probation element in combination orders as well as to probation orders. From around a quarter in the early 1990s, the proportion of probation orders which carry additional requirements increased to 29 per cent immediately after the introduction of the Act and was 31 per cent in 1996; the proportion of combination orders with additional requirements rose from 17 per cent in 1994 to 22 per cent in 1996. (See PROBATION STATISTICS 1996).

the number of offenders with custodial experience falling from 40 per cent in the early 1980s to 24 per cent in 1996 (the exact obverse of the position for probation) and the proportion with no previous record now standing at 32 per cent.

There have also been changes in the gender and age of the offenders sentenced to probation and community service. Whilst there has been a gradual reduction in the percentage of probation orders made upon female offenders (from around a third in the early 1980s to under 20 per cent in the mid-1990s), there has been only a very slight increase (from 6 to 7 per cent) in the proportion of community service orders made upon women. Its welfare origins means that probation has always been popular for women offenders, but community service still seems to be regarded as particularly suited to men despite policy efforts to develop its use for women (see Barker 1993). Mair (1997) seems right to suggest that the reduction in the proportion of both probation and community service imposed on young offenders aged 17-20 is a possible consequence of more punitive attitudes towards that group of offenders.

Although the relative low usage of the curfew order limits analysis, the early indications are that sentencers are acting in accordance with their views and using the order at the higher end of community sentences (see Mortimer & May 1997). Offences most commonly resulting in orders in the second year of the curfew order trial were: theft and handling (28%), burglary (19%), and driving whilst disqualified (17%). Compared with probation and combination orders, slightly more experienced offenders were being sentenced to curfew orders: only 12 per cent lacked previous conviction and just under half had previously experienced custody.

6. The Future: Problems and Prospects

Following this necessarily brief account of the current legislative and administrative arrangements for community sanctions and how they operate in practice, what kind of future do they face? In addressing that issue, this concluding section starts by describing radical provisions passed this summer by the English legislature.

6.1 Legislative Change

These legislative changes are contained in the Crime and Disorder Act 1998. Proposals for the Act were included in the government's white paper

'No More Excuses: A New Approach to Tackling Youth Crime in England and Wales' (Home Office 1997), designed to end the 'excuse culture' surrounding youth crime (which the white paper argues is predicated upon a false assumption that young offenders will grow out of offending if left to themselves). Pointing out that a disproportionate amount of youth crime is committed by a hard core of persistent young offenders, the white paper presents the youth justice reforms as aiming to "focus efforts on preventing offending, on early and effective intervention to stop children and young people being drawn into crime and, if they are, to halt their offending before it escalates" (1998: 8). More fundamentally, the white paper incorporates notions of restorative justice in proposals for longer-term change to the culture of the youth court to make it "more open and accessible, engaging offenders and their families more closely and giving greater voice to the victim" (1998: 3).

Originating, then, in proposals directed at youth crime, the Crime and Disorder Act 1998 introduces a number of new community orders, some of which will also apply to adult offenders, which are being piloted in certain areas from September 1998 before national implementation in 2000/2001:

- a Drug Treatment and Testing Order, available for offenders aged 16 and over, which can be imposed for between 6 months and 3 years;
- a Reparation Order, available for young offenders (aged under 18), which will require the offender to make up to 24 hours' worth of reparation either to the victim or to the community at large;
- an Action Plan Order, again available for young offenders, which will require the offender to comply with a supervised three-month action plan imposing certain requirements as to his/her behaviour and whereabouts for the period of the order.
- What is particularly novel about the Act is the provision of new orders that combine civil and criminal powers in an attempt to prevent anti-social behaviour escalating into crime (again, to be piloted from September 1998):
- most contentious is the Anti-Social Behaviour Order (ASBO), a civil order for which the police or local authority can apply in relation to an individual or several individuals aged 10 and over whose behaviour is anti-social (i.e. causes 'alarm, distress or harassment' – a term borrowed from the Public Order Act 1986 – to someone outside the individual's household). The minimum duration of the order is two years, and its breach without reasonable excuse is a criminal offence carrying

a maximum of 5 years imprisonment. Although intended to be "used to put an end to persistent and serious anti-social behaviour which can make life a misery for a community" (Home Office 1998b: 4), ASBOs have been criticized for the scope for discriminatory action against unpopular residents inherent in giving "local officials an extensive...discretion effectively to criminalize a wide range of non-legal conduct" (Ashworth et al. 1998: 14);

- a Child Safety Order can be imposed by a magistrates' family proceedings court upon a child under the age of ten who has, for example, committed an act which would be an offence if the child were over the age of criminal responsibility. The order can last up to three months (exceptionally, twelve) during which period the child will be supervised to ensure that he/she receives appropriate care, protection and support and is subject to proper control;
- a Parenting Order can be imposed by a criminal, civil or family proceedings court when, for example, it makes an anti-social behaviour or child safety order, or where a child or young person has been convicted of an offence. The order can require the parent(s) or guardian to attend counselling sessions for up to three months and impose requirements to exercise control over the child for up to twelve months. Failure without reasonable excuse to comply with the order is an offence carrying a fine of up to £1,000.

These provisions will pose important challenges for the probation service, which will be involved directly in dealing with youth crime (hitherto primarily the responsibility of local authority social services departments). The 1998 Act establishes that the principal aim of the youth justice system is to prevent offending by children and young people, and places a responsibility on local criminal justice agencies, including probation services, to cooperate with local authorities in providing youth justice services. The emphasis is on inter-agency partnership, with local authorities being required to establish youth offending teams (YOTs) comprising a social worker, a probation officer, a police officer and representatives from the local health and education authorities, which will be tasked with coordinating provision to deal with youth crime and performing certain functions under the Act. Much clearly remains to be learnt from the imminent piloting of these provisions, but they seem likely to create considerable scope for confusion - if not dispute - about the respective roles and responsibilities of the various criminal justice agencies.

6.2 *Finding a place for the Probation Service: A Search for 'Values'*

The Crime and Disorder provisions are merely the latest in a series of changes over the last two decades that have had a profound influence on the work of the probation service. Its consequent move away from a social work base has prompted debate about the service's proper role within the criminal justice system and the principles that should inform its work in the 1990s. There are those who still adhere to the importance of "valuing clients as unique and self-determining individuals" with the capacity of change and with rights of confidentiality (Williams 1995), though others (Nellis 1995) argue that the probation service should finally stop seeing itself as a social work agency.

Perhaps more significant that their disagreement over the current relevance of social work values is the recognition on the part of those debating its future that the probation service is part of a criminal justice system with responsibilities to the wider community. Williams (1995) acknowledges the need for a greater emphasis on the protection of victims and potential victims. Both Nellis (1995) and James (1995) see the probation service as operating within a framework of restorative justice, though James takes issue with Nellis' focus on individual offender-victim mediation as ignoring the probation service's necessary inter-dependence with the rest of the criminal justice system. He argues for a more corporative approach to restorative justice that is capable of being embraced by all criminal justice agencies, and recognition by the probation service that it does not monopolize the moral high ground. For James, the problem that needs to be tackled is not so much that the philosophy of 'crime control' around which the criminal justice system is now coordinated is antithetical to rehabilitation, as that fewer and fewer offenders are being deemed 'suitable' for rehabilitative intervention.

Worrall (1997) shares James' (1995) concern about the exclusionary impact of criminal justice practices. However, she sees "playing at 'restorative justice' and 'mediation' in a society as grossly unequal as ours" as wholly inadequate to deal with the problem of crime, when what is needed is the "political will to invest in human, social and cultural capital" (1997: 150). Like James, Worrall does not see the probation service as having the monopoly on caring for offenders and urges the service to form genuine partnerships with other organizations that share its traditional ethos.

7. Conclusions: A Future for Community Sanctions?

Whatever its wider role, it seems highly likely for the foreseeable future that the probation service will continue to be the main agency responsible for delivering community sanctions. If, as Mair (1997) fears, community sanctions come to be marginalized in the English criminal justice system through their use for increasingly minor offenders, the probation service must also face the prospect of marginalisation. Probation managers and practitioners may even be contributing to their own fate by allowing the effectiveness agenda to override proportionality to the extent that community penalties slide 'down tariff' against a still rising prison population (62,000 at the end of 1997) and a continuing decline in the use of the fine.

It is always easier to identify the problem than to prescribe the solution. One important factor is undoubtedly an abiding attachment to prison in the English jurisdiction, for cultural reasons that are beyond the scope of this paper (see Garland 1990). Some commentators (Worrall 1997; Ward & Lacey 1995) call for a conception of justice in which *custody* is seen as the alternative. However, making custody the penalty of last resort was in effect what the Criminal Justice Act 1991 failed to achieve, and it is hard to see how, in the current climate, community penalties can easily be uncoupled from "their unequal and subordinate relationship with custody" (Worrall 1997: 151). Mair actually sees the continuing rise in the prison population as "the one bright light on the horizon for community penalties...which may revert to their recent task of providing alternatives to custody" (1997: 1225). Yet he is surely right to doubt for how long such a strategy could be sustained - especially in the absence of any discussion (let alone consensus) about the point at which the size of prison population becomes intolerable.

The real objection to seeing community sanctions as alternatives to custody is that it fails to define them in their own terms. Recent history should dispel any doubts about the difficulties of developing a clear and sustainable conceptualisation of community sentences. However, its inauspicious start should not detract from the possibility that the framework in the Criminal Justice Act 1991 may actually provide a starting point in seeking to strike a balance between the extent to which community orders restrict offenders' liberty and their suitability for individual offenders (because of the opportunities they offer for rehabilitation or reparation). Both seem necessary components of community sanctions. Indeed, too great an emphasis on one at the expense of the other has two undesirable conse-

quences. The first is an unhelpful comparison with custody (against whose punitive qualities community penalties cannot, and perhaps should not, compete); the second is the use of probation resources for minor offenders whose crimes do not warrant that level of intervention.

I have argued elsewhere (Rex 1998) that, when the 1991 Act was implemented in October 1992, one mistake was to place too great an emphasis on the restrictions, which a community order imposed on offenders' liberty. Too little attention was paid to what might be gained from the order, which might make it suitable for a particular offender. However, since then, the probation service has learnt (is still learning) much about what community programmes can achieve and what makes them effective. The danger that needs to be avoided is for a focus on effectiveness to lead to the creation of unrealistic expectations, or to the jettisoning of the principle of proportionality. What should be attempted is undeniably more difficult: to use a greater understanding of what community programmes can entail (Ashworth & von Hirsch 1997) to strike an appropriate balance between restrictiveness and effectiveness and to identify the unique contribution that community sanctions can make to the criminal justice system. We might then have some prospect of attaining clarity and purpose as to how we want to develop community sanctions in the future.

Appendix I:

Offenders Sentenced for Indictable Offences 1973-96 Thousands)

Sentence	1973	1983	1991	1993	1994	1996
Probation	23.8	34.0	34.3	30.7	34.8	33.1
Community Service		31.4	29.5	32.8	32.9	28.3
Combination Order				6.1	8.1	10.2
Fine	173.6	199.3	118.7	102.9	98.2	84.6
Discharge	43.2	58.7	64.7	66.1	63.7	54.8
Custody	41.2	69.8	48.9	46.6	53.0	65.4
Suspended Sentence	20.8	29.8	21.1	2.7	2.4	2.6
Other [1]	35.9	38.9	18.8	18.8	20.5	21.0
Total	338.5	461.9	336.0	306.7	313.6	300.3

Source: Mair (1997) and Criminal Statistics 1998.

[1] Includes supervision orders, attendance centre orders, care orders (mostly made on juveniles), and partly suspended sentences of imprisonment.

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Community Sanctions in Finland

TERTTU UTRIAINEN

1. Ideological Background

Traditionally, and even in this present decade, the system of criminal punishments in Finland has comprised strikingly few alternatives. The 1889 Criminal Code provided for two types of imprisonment: in a penitentiary or in prison. Added to these, of course, was a system of fines. The first committee report (1875) had proposed punishment by confinement, but this alternative was never implemented.[1]

It was natural that a criminal code that emphasized general prevention should have a restricted range of punishments. However, this tendency persisted even as special prevention became more popular. A shift in focus to special prevention came to Finland from Germany in the early 1900s but did nothing to diversify the range of punishments used. Imprisonment did take on new forms, however: in 1918 a law inspired by the emphasis on special prevention at that time was enacted providing for suspended sentences. In 1940, juvenile prisons were established with the enactment of a law on juvenile offenders. Earlier, in 1931, provisions were enacted for the isolation of dangerous recidivists.[2]

Although the ideology of treatment never gained much of a foothold in Finland, the negative experiences of it in the United States, England and the Nordic countries were used to justify a return to general prevention in

[1] ANTTILA, I: Vapausrangaistusten lajit. p. 73-74. In: Rikosoikeuden juhlavuonna 1989.

[2] UTRIAINEN, T: Rikosten rangaistukset ja muut seuraamukset. 2 ed. p. 20. Helsinki 1992.

the 1970s. Neo-classicism emphasized fairness, proportionality, predictability and equality in the choice of punishment. The same offence was to carry the same penalty. In keeping with the principles of general prevention, efforts were again made to keep the range of punishments small.[3] Yet the 1970s - a time when neo-classical views were being implemented in Finnish legislation - also marked the advent of the ideas of community service and mediation. Community sanctions made their ultimate breakthrough in Finland in the 1990s, when community service was established on a permanent basis and mediation was recognized in legislation.

2. Alternatives to Imprisonment

Although community service and mediation came to Finland relatively late, alternatives to imprisonment had been explored and debated throughout the 1980s. The impetus for this concern was the severity of punishments imposed in Finland in relation to other Nordic countries. Moreover, imprisonment was considered inherently detrimental to the future of the offender, and it was not seen as having any preventive effect. The overall aim was to reduce the prison population and to lower the duration of terms of imprisonment.

In 1987, a working group set up by the Ministry of Justice ultimately explored alternatives to imprisonment; the options included punishment by confinement, combined punishments, cautions, supervision, community service, mediation and an extension of provisions allowing a waiver of measures. The working group took a critical stance on combined punishments (i.e. a combination of unconditional and conditional sentences) as well as on sanctions requiring control. On the other hand, their position on cautions was favourable, as was their view on community service, mediation and the expansion of waiver provisions.[4]

Legislative reforms succeeded in lowering the level of punishments and the prison population. In keeping with neo-classical principles, the proposal submitted by the Criminal Law Project in 1989 emphasized that a prison

[3] KOSKINEN, P: Kohti 2000-luvun rangaistusjärjestelmää. p. 130-131. In: Kohti 2000-luvun rikosoikeutta. Helsinki 1994.

[4] Vankeusrangaistuksen vaihtoehdoista, Rikoslakiprojektin ehdotus. p. 20-21, 29-30, 43-44, 55-56, 67-68, 78-79, 110-112. Oikeusministeriön lainvalmisteluosaston julkaisu 4/1987. Helsinki 1987.

sentence should entail only the loss of liberty. The project working group adopted the view that developing the content of the punishment could not eliminate the detrimental aspects of imprisonment.[5]

More recently, however, increasing attention has been paid to the content of prison sentences at the same time, as the attitude towards social sanctions has become more positive. This new trend can be explained by the fact that till 2000 fewer and fewer offenders were sentenced to prison terms in Finland; however, the sentences of those in prison are on average longer than they were twenty years ago. Most offenders serving long prison sentences have been convicted of violent or drug-related crimes. Prison sentences today are twice as long as they were in the mid-1970s (Figure 1).

The advent of community sanctions in Finland has thus prompted increased interest in reforming the content of prison sentences. The point of departure is the fact that some 60% of those who serve a first term in prison commit another offence, and recidivism among those who have served two or more prison terms is 75%. The preventive effect of a prison sentence is thus very slight. Many long-term prisoners are in fact alcohol-dependent, habitual criminals who should have an opportunity while in prison to acquire the skills they need to manage better in everyday life.[6]

Due to the influence of the classical tradition, the view of treatment in lieu of punishment in Finland has been a critical one. Treatment was proposed as an alternative form of punishment in conjunction with the reform of sexual offences in the 1990s, but opposition led to a compromise whereby in the future programmes of treatment will be carried out while offenders are serving their prison sentence. In contrast, since 1993 the Criminal Code has contained a provision (Criminal Code 50:7) stating that the charges and conviction can be dropped in the case of drug offences in which offenders commit themselves to a programme of treatment. Offenders may also serve part of a community service order in a substance-abuse treatment programme.

Electronic monitoring has also been debated in Finland, but no practical applications of the technique are available for evaluation as yet. In this case, as in general, Finland has opted to wait and see what kind of experiences the Swedes have with this new sanction.

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[5] Ibid. p. 1.

[6] Selvitys pitkäaikaisvangeista, p. 5-6, 27-28, 51-52. Vankeinhoitoasiain neuvottelukunta. Julkaisu nro 10. Helsinki 1997.

Fines have always made up the bulk of the punishments imposed in Finland. A fine has not been regarded as an alternative to imprisonment; in fact, it has been a principal punishment since the Middle Ages. In 1995, for example, fines comprised 95% of all punishments, with a majority imposed in a summary procedure. Most fines imposed in Finland are day fines, but fines for traffic violations may be also imposed. One indication of the dominant position fines have is that in 1995, for example, most (62%) of the punishments imposed in trials were fines. The proportion of unconditional prison sentences was 11% and suspended sentences 22%. In the same year, 5% of all punishments took the form of community service.[7]

As mentioned above, recent debate in Finland has concentrated on reducing the use of imprisonment. There has been no interest whatsoever in diminishing the position of fines. On the contrary, the use of fines as punishments for drunken driving and crimes against property has been encouraged. To date, community service has in fact been regarded primarily as an alternative to imprisonment, although its status between fines and imprisonment may of course change in the future.

3. The Concept of Community Sanctions

Descriptions of the Finnish system of punishments generally do not speak of community sanctions. That the concept is a rare one in Finland can be attributed to the situation described above, in which classicism dominated ideologically and a prison sentence was officially seen as entailing the loss of freedom and no more. The concept of community sanctions was introduced into the debate in Finland in 1991, when Kari Vanhala published an article describing the process by which the minimal provisions for community sanctions were drafted in the Council of Europe.

At that time, Vanhala described community sanctions as sanctions, which make it possible for a convicted offender to remain a member of the community. The sanctions imposed serve to restrict the offender's freedom through conditions or obligations, with provisions made for controlling the terms thus set. In Vanhala's view, fines and cautions fell outside the scope of the concept of community sanctions; the control measures, which sought to ensure payment by the offender of fines or damages, did meet his crite-

[7] LAPPI-SEPPÄLÄ, T: Rikollisuustilanne 1995-1996. p. 166. Oikeuspoliittisen tutkimuslaitoksen julkaisuja 143. Helsinki 1997.

ria, however. On the other hand, Vanhala excluded both the social contract system applied at the time in Denmark to offenders under the age of 18 and the system of mediation used in Norway, for neither was a system applied by the courts. Among the other sanctions satisfying his definition, however, were house arrest, electronic monitoring and parole.[8]

The definition of a term in conjunction with the system of punishment is not, in my view, important in the same sense as it is when dealing with general doctrines of criminal law. Where the system of punishment is concerned, definition of terms is largely just a matter of categorization. Until the 1990s, the debate in Finland centred chiefly on finding alternatives to imprisonment, although there were some who advocated developing the content of punishments.[9] In the Finnish context, 'non-custodial' was in fact more fitting a term than 'social' to describe the sanctions under consideration.

In my view, community sanctions comprise those sanctions which make it possible for a convicted offender to remain a member of the community and which have some social content or which in practice allow a prison sentence to be served without incarceration and thus enable the offender to become or remain a member of his or her social community.

As regards the Finnish system of punishments, I would not consider fines as social sanctions, because fines have historically been a principal punishment alongside imprisonment. In the Finnish system, it is at present impossible to serve a prison sentence imposed for non-payment of fines in the form of community service, for example. The situation may of course change in the future. In Finland it is also impossible (unlike in Greece, for instance) to convert a prison sentence into a fine.

My present definition of community sanction in Finland would include parole, in which the latter part of an unconditional prison sentence is served at liberty, and suspended sentences, in which the punishment is served wholly or in part at liberty. The two together could be termed traditional alternatives to imprisonment, because they are well-established parts of the Finnish system of punishments: parole dates from the enactment of the first criminal code in 1898, and probation was introduced in 1918. The other forms of punishment, which would qualify as community sanctions in the

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[8] VANHALA, K: Yhteisöllisten rangaistustenvähimmäissäännöstöä valmistellaan Euroopan neuvostossa. Uusi Kriminaalihuolto 3/1991. p. 10-13.

[9] UTRIAINEN, T: Kriminaalipolitiikka on politiikkaa. Virkaanastujaisesitelmä Lapin korkeakoulussa 18.11.1988.

Finnish system in my view, are community service and juvenile punishment, inasmuch as both seek to integrate the offender into the working community. I would also include mediation among the community sanctions, because it binds the offender to a community process which seeks to deal with the offence in a manner acceptable to both parties and with due consideration for the victim. In the Finnish system, mediation is connected with the courts in that the prosecutor or court withdraws charges or the court waives sentencing. I also consider electronic monitoring a community sanction, because it is an express effort to avoid imposing an unconditional imprisonment and to ensure that the offender remains in his or her immediate community, most often his or her home. As mentioned above, electronic monitoring is not in use at present in Finland, but the option has been discussed.

4. Traditional CSMs

4.1 Parole

Parole and suspended sentences can be considered the traditional forms of community sanction in Finland. Back when the Criminal Code was first enacted, an opportunity for parole was attached to both a term in a penitentiary and imprisonment. The conditions for being granted parole have varied over the years. Originally, eligibility for parole required that an offender had been sentenced to at least three years' imprisonment. A prisoner sentenced to a life term could be granted parole after serving twelve years in prison. Parole could thus be considered an integral part of the progressive system. Through 1921, decisions regarding parole were made by the Judicial Department of the Finnish Senate and then the Supreme Court. In 1921, these decisions became the responsibility of the Ministry of Justice.[10]

The progressive system was abandoned in Finland in the 1970s, and a transition was made to a single type of imprisonment. Despite this development, there was interest in retaining parole on the grounds that it shortened prison sentences and contributed to better order in the prisons.

At present, offenders with fixed-term sentences may be granted parole if they have served two-thirds or, under special conditions, half of their sentence; they must serve a minimum of 14 days in prison, however. No parole

[10] ANTTILA, I: 1989 p. 75.

is granted in the case of life sentences. An offender sentenced to life in prison may only be released by a presidential pardon, which is generally granted after 12 to 14 years.

The Ministry of Justice or the Executive Board of the prison concerned makes parole decisions. A decision of the Board may be appealed to the Ministry of Justice, but no appeal against decisions by the Ministry is allowed. In other words, the decision is administrative in nature. Prisoners must be given an opportunity to be heard when their cases are being decided. A decision to grant parole may include provisions for supervision. Supervision is imposed in only some one-fifth of all cases, with a private individual, the Probation Service or the police acting as supervisors. In over half of all parole cases, the Probation Service (Table 1 and Figure 2) handles supervision.

Parole may be revoked for parolees who commit a new offence or commit an infraction during the probationary period. If loss of parole occurs because of a new offence, the courts deal with the matter. In general, crimes punishable by a fine or less than three months' imprisonment do not result in revocation of parole. The courts also decide loss of parole due to conduct infractions, with the demand for such action being made by the parolee's supervisor. When offenders return to prison, they begin to serve the remainder of their sentence. Normal appeal procedures apply to the decisions of the court in matters of parole.

4.2 Suspended sentences

The first law in Finland providing for suspended sentences came into force in 1918 following the Civil War; its purpose at the time was to release some of the people sentenced after the War from war camps. The 1918 law was predicated on the principles of special prevention. The current law, which came into force in 1976, is based on general prevention, however; it provides that sentences carrying a prison term of less than two years can be suspended if no considerations of general prevention suggest the contrary. In addition, prison sentences for persons under 18 years of age are generally suspended sentences. A suspended sentence may carry with it a compulsory fine. This is in practice the only combined punishment in use in Finland.

At present, Finnish courts specify the length of a sentence in their decisions, but also declare whether the imprisonment is to be conditional for a

particular probationary period, which are currently one to three years. A new court determines potential loss of a suspended sentence; that is, the one dealing with a new offence committed during probation.

Suspended sentences have also been important in reducing the prison population, and to that end the scope of such sentences has constantly expanded in recent decades. This has been virtually the only alternative, given a system of punishments that allows only fines and imprisonment. Twenty-five years ago, the prison population in Finland was among the highest in the Nordic countries and Western Europe, i.e. over 7,000 on a daily basis. The figure is currently some 3,000 prisoners daily, which represents the average in the Nordic countries.[11]

At present, just under 60% of all prison sentences are suspended sentences (Table 2 and Figure 3). Over half (54%) of these are imposed for driving under the influence of alcohol. There is a certain connection between whether the sentence imposed on an offender is a suspended sentence and the length of the imprisonment involved. As the length of the imprisonment increases, the proportion of suspended sentences decreases. The two-year upper limit referred to earlier has practical significance here: of all prison sentences up to that duration, nearly every second individual sentence is a suspended sentence (Figure 4).[12]

5. Development of the Present CSMs

5.1 Community service

Owing to the influence of the classical tradition I have described, Finland began experimenting with community service later than most other countries. The implementation of community service was thought to violate the principle of equal treatment for all offenders. These doubts faded with time, however, and attention shifted to the potential benefits of community service, such as the socialization of offenders and the opportunity to better integrate them into society (Table 3). There is still some discussion, however, about whether work can be used as a punishment in a Lutheran society, with its high regard for work, and, in particular, when the rate of unemployment is so high. This discrepancy has been addressed with arguments

[11] KOSKINEN, P: 1994 p. 130-131.
[12] LAPPI-SEPPÄLÄ, T: Rikollisuustilanne 1995-1996. p. 170-173.

asserting that it is not the work involved in community service which constitutes the punishment but the restriction of the offenders' freedom, which imposes limitations on how they may use their leisure time.[13] Community service in Finland began on an experimental basis in 1991 in four regions and spread the following year to cover nearly a third of the country. The experimental phase lasted five years, from 1991 to 1996 (Figure 5). On 1 January 1997 community service was adopted as a general form of punishment throughout the country.

An offender can be sentenced to community service as an alternative to up to eight months of imprisonment. Community service is not restricted to particular types of crimes, types of offenders or to the degree of recidivism. It requires the consent of the offender and the expectation that he/she will be able to complete the service imposed. Between 20 and 200 hours of community service may be ordered in lieu of up to eight months' imprisonment. The conversion follows a progressive scale, whereby 14 days' imprisonment corresponds to twenty hours of community service, and eight months' imprisonment to two hundred hours of service. The offender generally carries out the work assigned twice a week for two to four hours at a time.

Unlike imprisonment, which is supervised by the Prison Administration working under the Ministry of Justice, the enforcement of community service was overseen by an organization working outside the jurisdiction of the public enforcement authorities, that was, the Probation Service. The Probation Service was a public association whose activities were on the decline until it discovered a worthwhile focus for its efforts in community service. This responsibility has since been confirmed for the Service through legislation. The Probation Service, which is now a department in the Ministry of Justice, carries out assessments of the applicability of community service and submits these to the court. The Probation Service also secures placements and supervises enforcement of community service orders.

The swift adoption and acceptance of community service can be explained by the economic benefits it brings vis-à-vis imprisonment. The current cost of keeping an offender in prison for one day is estimated at FIM 600, whereas the cost of an hour of community service work according to the Probation Service budget is FIM 210-220. If we compare the cost of enforcing a six-month prison sentence to that of enforcing the correspond-

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[13] MAJANEN, M: Kohti 2000-luvun rangaistusjärjestelmää - vankeusrangaistuksen vaihtoehdot. p. 143. In: Kohti 2000-luvun rikosoikeutta. Helsinki 1994.

ing 180 hours of community service, we discover that the latter alternative costs some 11 - 15% of the former.[14]

An offender sentenced to do community service can be placed with a public corporation, public association or other non-profit corporation or foundation, in other words, a state, church or public charity, foundation of association. Typical placements include work in hospitals, nursing homes, and institutions for the handicapped, homes for the aged, sports organizations and day-care centres.[15] If an offender does not adhere to the community service plan or other conditions of the community service order, the Probation Service issues him/her with a verbal or written warning. He/she is then informed that violating the terms of the order will result in a notice being sent to the public prosecutor. Serious crimes or working under the influence alcohol lead to revocation of community service and to notification being sent to the public prosecutor. The number of such revocations has been relatively small (e.g. 13% in 1993). If the prosecutor is of the opinion that community service should be converted to imprisonment, he/she presents a request to this effect to the court. The court then changes the remaining period of service to imprisonment, the minimum duration of which is four days. Decisions of the court can be appealed to the Court of Appeals in the customary fashion.

In 1993, the Ministry of Justice set up a working group to determine the right of persons sentenced to imprisonment and community service to appeal against decisions by executive authorities. The working group proposed that an offender sentenced to community service should have the right to appeal confirmation of his/her service plan or a written warning. Its proposals also included the setting up of a board to deal with these appeals, but no such body has yet been established.[16]

5.2 Mediation

The idea of mediation came to Finland in the late 1970s under the influence of publications and visits by Nils Christie and Louk Hulsman. At the same time, more attention was being paid to the status of victims of crimes. Church welfare and social services authorities involved in work with pris-

[14] ESKOLA, E: Yhdyskuntapalvelu. Tutkielma. p. 21-22.

[15] HERTZBERG, V: Yhdyskuntapalvelu - vankilan vaihtoehto. In: Uusi kriminaalihuolto 2/1994 p. 22-25

[16] Vangin ja yhdyskuntapalveluun tuomitun muutoksenhakuoikeus, 1995 p. 89.

oners highlighted the importance of mediation. In contrast, judicial authorities were not initially active in promoting mediation. Mediation of crimes and civil actions in Finland was begun on an experimental basis in the southern part of the country in 1983, with funding provided by the social services authorities and later continued as a research with funding provided by the Academy of Finland.[17] Recommendation NoR (87) 18 of the Council of Europe also did much to encourage a more favourable attitude towards mediation.

In Finland, mediation was adopted very rapidly in comparison to community service, the principal reason being that it was initiated outside the system of justice. Similar experiments were begun in both England and Norway in the period 1982-1984. The significance and practical implementation of mediation was debated, and agreement was certainly not immediately forthcoming. Numerous options presented themselves, e.g. Anglo-American trial practice in which an attempt is made to resolve the dispute before notification is made to authorities, and diversion solutions, used primarily on the Continent, which employed mediation during consideration of charges either before determination of guilt or before sentencing.[18]

Mediation of offences began on an experimental basis in 1983 in the form of community mediation, whose idealistic goal was to resolve disputes at the grassroots level outside the system of justice. Very soon, however, the project became an agent-based cooperation with authorities and took on the aspect of social work. At present, the mediation procedure is independent but does involve cooperation with authorities. Without their active contribution, mediation could not have spread as rapidly and extensively as it has.[19] Mediation has been adopted throughout the country despite initial suspicions that it would extend state control to new areas or areas in which it was not needed, or that it would privatise crimes and conceal them from the public eye and from the sphere of criminal justice. Information on the mediation procedure was widely disseminated and a positive image of the procedure was promoted.[20] At present, mediation is or-

[17] IIVARI, J: Rikosten ja riitojen vaihtoehtosovittelu refleksiivisen oikeuden konseptiossa. Helsinki 1991.

[18] WALLS, G: Sovittelu ja refleksiivinen oikeus. Virallisen vastaväittäjän lausunto. Oikeus 1991:4. p. 372.

[19] IIVARI, J: Sovittelu rikosten ja riitojen vaihtoehtoisena ratkaisuna. p. 1-10, 84-91. Oikeusministeriön vankeinhoito-osaston julkaisuja 2/1985. Helsinki 1985.

[20] JÄRVINEN, S: Rikosten sovittelu Suomessa. p. 5-6. STAKES. Tutkimuksia 21. Jyväskylä 1993.

ganized primarily through social services and child welfare boards and covers essentially the entire country. In some areas, municipalities have contracted to purchase services from associations that engage in mediation.

Mediation can be regarded as a free civic activity to an extent, because participation in the procedure is voluntary for mediators, offenders and victims alike. Municipalities also have free reign to organize mediation, as they deem best. Also contributing to the mediation procedure are private organizations and organizations such as the Red Cross, whose principal work activities lie in other sectors of society. Mediation has become particularly popular in larger communities and is now available to some three-quarters of the Finnish population. Some of the smaller municipalities do not yet have access to mediation.

The number of offences and disputes referred for mediation is not very high, i.e. 3,000 - 4,000 cases annually. The principles involved in mediation make it more important than the number of mediated cases would suggest, however, for in most communities the police inform the mediation office of all offences committed by persons under the age of 18. Initiatives for mediation also come from the parties themselves and social services authorities. Mediation also strengthens civil society: over 1,000 people have been trained as mediators alone. Through their participation in the procedure, the mediators themselves have an opportunity to influence the activities and development of an entire community or residential district.[21]

It has also been emphasized that mediation offers an opportunity to deal with moral feelings during the process. The official system of justice has been criticized as being faceless and not giving due consideration to people's feelings. Mediation offers the offender an opportunity to assume moral responsibility for his or her actions and the victim an opportunity to forgive the offence. This is possible because mediation is more informal and free than the formal, rigid judicial process. Clearly, it is easier for the offender to admit and express remorse in the course of mediation than at a trial.[22]

What happens in practice in mediation is that the parties in a criminal or civil action meet through the agency of an impartial mediator. Mediators are trained volunteer workers. The aim of mediation is to settle the criminal

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[21] KONTULA,O:Rikosten sovittelu yleistynyt tuntuvasti. OHOI. Oikeushallinnon tiedotuslehti 5/1996. p. 16-19.

[22] TAKALA, J-P: Moraalitunteet rikosten sovittelussa. p. 1, 78, 95-96. Oikeuspoliittinen tutkimuslaitos 151. Helsinki 1998.

or civil matter and to agree on damages without putting the offender on trial. If agreement is reached, the injured party withdraws any claims, which he/she may have pursued through the courts. The procedure emphasizes assumption of personal responsibility by the offending party for the wrongful act and for any damage caused. An agreement concluded through mediation is binding and official; it may also be confirmed in court, which ensures its enforceability. A settlement reached through mediation generally involves payment or work, or a simple apology. Mediation is seen as having increased offenders' motivation to provide compensation in practice as well, as indicated by the fact that some 85% of the mediation agreements reached are fulfilled.

The normative basis of mediation was unclear for a long time. Although in 1991 there was still no mention of mediation in legislation, the arguments presented for the partial reform of the Criminal Code cited participation in mediation as an example of an offender trying to mitigate or eliminate the effects of his/her offence in a way that justifies a waiver of measures. In the Finnish criminal justice system, it is precisely waiver provisions, which link mediation with the system of sanctions; in other words, when an agreement is reached through mediation, the police may waive measures, the prosecutor may drop charges, and the court may remit sanctions. Even after 1991, the relation between mediation and the legal system was vague, because mediation had not been mentioned anywhere in the legislation. In order to rectify this situation, on 1 February 1997 specific mention was made pertaining to the police, the public prosecutor and the courts that one basis for waiving measures is the successful conclusion of a mediation agreement between the offender and injured party. It was these provisions that ultimately linked the judicial authorities and the voluntary mediation system.

The legislative reform concerning mediation came into force at the same time as the juvenile punishment experiment. Mediation and juvenile punishment are related issues as one half of all cases mediated involve offenders less than 18 years of age. This in turn has to do with the fact that it is often the police who suggest mediation as an alternative. The percentage of offenders over 20 years of age in all mediated cases was 40%. Typical offences are assault, damage to property and theft.[23]

[23] KONTULA, O: Rikollisuustilanne 1995-1996. p. 218-222

5.3 *Punishment for juveniles*

The 'juvenile punishment'-experiment began on 1 February 1997 and will run until 31 December 2001. It is being tried out in seven regions and its purpose is to replace some of the present suspended sentences. Juvenile punishment comprises youth service and supervision. The duration of the service is 10 - 60 hours, and the work is unpaid work comparable to that performed in community service. Juvenile punishment also includes tasks designed to promote the young person's social skills. The duration of supervision is 4 - 12 months. As in the case of community service, the Probation Service oversees enforcement of juvenile punishment. Until now we have had only a few cases concerning juvenile punishment.

Juvenile punishment was adopted to address the lack of non-custodial punishments in the Finnish system of sanctions. When they accumulate and are implemented, suspended sentences have often resulted in long periods of incarceration. Another problem was that community service could not be used in the case of young offenders, because in the Finnish system it may only be used in place of unconditional prison sentences. Yet, unconditional imprisonment is highly exceptional when offenders are under the age of 18. These circumstances prompted the creation of juvenile punishment as a form of community service for young offenders. Juvenile punishment may be used in the case of offences committed by persons under the age of 19, meaning that those ordered to do youth service are between the ages of 15 and 17.

During the three-year trial period (1997-1999), youth service will consist of supervised, unpaid work carried out in a municipal youth workshop or organized through the Probation Service. Youth service comprises two work programmes operating under the headings Youth & Substance Abuse and Youth & Society. The programmes are run as collaborative efforts of social, child welfare and youth services. They seek to commit youth to society, teach them a regular and moderate way of life and impart skills, which will enable them to better cope with the demands of everyday life.[24]

It will be interesting to see how the juvenile punishment experiment is received. In any event, the very attempt to implement such an option signals a change of direction in Finnish criminal policy. The special privileges

[24] HERTZBERG, V: Nuorisorangaistus on rangaistus, ei terapiaa. OHOI. Oikeushallinnon tiedotuslehti 5/1996. p. 20-21.

long reserved for young offenders have gradually disappeared, as the same advantages were extended to all offenders. With juvenile punishment, young offenders are again being afforded special attention when the system of punishments is reformed.

Community Sanctions and Measures in France*

ANNIE KENSEY

1. The development of community sanctions and measures in France in the last twenty-five years: survey of criminal policy

An examination of criminal policy during the last thirty years shows a certain discontinuity, which has led to certain types of community sanctions and measures having difficulties in establishing themselves within the system of sanctions. It was after the Second World War that alternative measures to imprisonment were developed in France. In the environment of the predominantly humanist ideology, which prevailed at the time, more humane forms of sanction than imprisonment were demanded, particularly those more adapted to petty crime (child delinquency orders, penal reform).

In the 1950's the emphasis, under the influence of the Christian democratic movement, was placed on humanisation and individualisation in penal treatment for the protection of the new society. Questioning the concept that prison, on moral grounds and protection for society, was the sole form of punishment, led to a diversification of the modes of sanction. From that point on the sanction had to take into account the personality of the offender with a view to (using the terminology of the time), making amends and being reintegrated into society. Thus, 1958 was the year of the reform of the criminal procedure, the creation of the *juge d'application des*

* This article has been translated by RAY RUSHE. This text was written before the probation and reintegration penitentiary services (SPIP) reform. See part 6 the presentation of the actual reform which was implemented during 1999 and 2000.

peines (special judge for the implementation and supervision of sanctions, hereinafter referred to as the JAP) and probation committees. The suspended sentence with conditions attached requiring the offender to complete specific obligations under supervision i.e. to give the offender his liberty subject to certain conditions; to be put to the test - *mise à l'épreuve* - (hereinafter referred to as a suspended sentence with conditions attached), was introduced. The main idea was to develop a method of dealing with offenders in the non-custodial sector in which support and supervision was provided whilst the offender was completing obligations imposed upon him, as opposed to a simple suspended sentence that did not require any practical constraints.

From 1970 it is interesting to note the politicisation of legal debate, which before then had been the reserve of the initiated. Shifts in criminal policy clearly showed the politico-electoral stakes of penal policy[1]. At the beginning of the 1970's, serious prison rioting articulated the hardship of the inmates and prison personnel. In September 1972, an Act came into force creating the commission for the application of sentences (*Commission d'application des peines,* hereinafter referred to as the CAP), situated in each prison institution. This law also introduced important changes to the system of serving sentences and to the conditions necessary for allocating day release; requirements for the granting of prison leave were also widened. In December 1972, an Act was passed setting out a sentence reduction scheme in order to encourage the efforts of inmates towards good behaviour and rehabilitation and to enhance conditions leading to the granting of release on licence. These improvements did not defuse tension in prisons for either the personnel or the inmates.

The prison reform of 1975 marked the end of a period of prison violence. The " reform of 1975 " was centred around three main points: the improvement and liberalisation of prison conditions, the relaxation of the means of supervising sentences and the division of prison institutions into three categories (reintegration-oriented prison centres with a liberal prison regime, top security prisons which continued under the old regime and institutions with reinforced security). But from 1975, this policy, which was seen as liberal, came up against a concerted press campaign. The reformist discussion was progressively taken over by a law and order debate. Police statistics were used as an irrefutable argument concerning the increase in

[1] FAGET, J : Bulletin du CLCJ, 1st February 1997.

criminality and the need to follow a law and order policy[2]. Two Acts were passed: the first in 1978 created an irreducible tariff sentence; the other, passed in1981 and titled " security and liberty ", was aimed at the top level of the sentencing scale for certain offences and also extended the system of rapid court procedures. This Act made the granting of prison leave and release on licence more difficult.

The elections of 1981 with a socialist majority was accompanied by a search for a new doctrine based partly on a return to the policy of protection of society of the 1950's. The death penalty was abolished (Act of 9th October 1981). The Act of 10th June 1983 repealed fourteen Articles of " security and liberty " (though tariff periods were kept), and, most importantly, introduced three new substitute sentences as alternatives to imprisonment: the immobilization of one or more vehicles, " day-fines " and community service for the benefit of the local community or associations.

Some of the provisions had a strong symbolic significance: thus the community service sentence characterised on the one hand the development of the idea of redress and on the other the recourse to national unity by society's involvement in taking responsibility for criminal behaviour[3]. The emergence in the 1980's of a policy of prevention should also be recognised. This consisted of the setting up of local community and departmental councils dealing with the prevention of offending, thus included the issue of security in local council discussions. In 1986 a right wing majority replaced the socialist majority. Two new Acts were introduced: the tariff period was increased from 20 to 30 years for certain crimes, and the possibility of reducing sentences was curtailed. During this period, the administration was confronted by a serious problem of prison overpopulation. Since 1982 the growth in prison population had resulted mainly from the increase in the average length of imprisonment, due to the effect of the increase in the number of sentences pronounced, while the number of new inmates tended on the other hand to stagnate and even to decrease from 1987. This simple quantitative analysis of prison overpopulation is fundamental in determining solutions to the problem. Nevertheless, the politicians did not take these mechanisms into account responsible: the excessive use of remand was of course condemned, but the most important priority was the building of more prisons. A construction programme for 15,000 new places was finalised.

[2] FAUGERON, : La crise des prisons françaises 251, 1991.
[3] SALVAT, X : Bulletin du CLCJ, n°2, Avril 1997.

With the new political change in 1988, the programme was reduced to 13,000 places. The new themes announced by criminal policy makers evolved around the principle of rehabilitation and the expansion of convicted persons into the non-custodial sector. The Act of 9th July 1989 developed amongst other features, recourse to rapid pre-sentencing reports; it stressed the need to give grounds for a decision before judgement; it reduced remand time limits; it allowed in certain cases the adjournment of sentencing.

For the last thirty odd years therefore, a phenomenon of fluctuating penal policy can be observed. Debate on community sanctions and measures have thus been distended between two philosophies: a humanist philosophy and a more repressive philosophy. These philosophies have predominated in accordance with the government in power. Currently, the predominant philosophy is relatively humanist, the main objective being the reintegration of offenders into society and the avoidance of the social exclusion which may result from imprisonment. The main objective being research into diverse responses (e.g. the development of a penal form of mediation) to the diverse types of offending (e.g. juveniles, serious offences).

According to the reasoning of the new criminal code of 1994 *(nouveau code pénal 1994)*, imprisonment must not remain " the basic if not exclusive principle in the system of sanctions ". New provisions have given the court a very wide choice of sanctions as alternatives to imprisonment, for example community service (better adapted), disqualification from driving, interdiction from issuing cheques. Imprisonment thus became one form of sanction amongst many and no longer the point of reference. The court is now obliged to give special grounds for its decision if it decides to give a sentence of imprisonment. The judge has wide powers of intervention (to dispense with a sanction, adjournment of sentencing together with an supervision order against the defendant), but also to supervise the serving of the sentence (split serving of the sentence, broader conditions for day release). Moreover, the new criminal code includes a sentence of up to 30 years in serious criminal matters instead of 20 years, as was the case before.

As we shall see in part 4, a certain amount of statistical data reveals that the alternatives to prison work quite well. The development in the 1980's of alternative policies to imprisonment was accompanied by a reduction in prison admissions. The problem of prison overcrowding however had not been resolved because of an increase in length of prison sentences. At the same time we were witnessing the release on licence becoming a relative

rarity. Therefore, even if in general there was a relaxation in the granting of community sanctions and measures, in the custodial sector especially, there was a hardening of policy. This was the result of superimposing a discourse favourable to the alternatives to imprisonment (whether remand or prison sentences) with judicial practices, which still made prison sentences the yardstick and the fine the most commonly applied sanction. Finally, in the political context of the modernisation of the probation and rehabilitation service, the Prison Service has set out a large scale reform in 1998 which is described in part 6 (the reform of probation and reintegration penitentiary services). In order to emphasise the opening of these services, this reform will provide the dynamic for the policy of reintegration by better integrating them into policy group.

2. Legal framework for community sanctions and measures

For a long time the Prison Service was solely responsible for the implementation of prison sentences. Today, alongside the Prison Service is a judicial representative, the JAP who was instituted by the code of criminal procedure in 1958. The code provides for the intervention of the JAP not only inside prisons in order to supervise and to personalise the serving of prison sentences, but also outside prisons for the implementation and supervision of measures in the non-custodial sector such as release on licence, suspended sentences with conditions attached, community service or deferred sentences with conditions attached.

The JAP's jurisdiction is nevertheless very different according to whether he is dealing with convicted persons in the custodial or non-custodial sectors. It should be emphasised that the JAP never works alone: he takes into account in his decision making the opinions given by the commission for the application of sentences (CAP) for the custodial sector, and appoints the probation and release aid committees *(comité de probation et d'assistance aux libérés,* hereinafter referred to as CPAL[4]*)* in the non-custodial sector.

2.1 Sentence planning

According to the Code of criminal procedure, the JAP has to determine, within the parameters prescribed by the law, the main terms of the of-

[4] Soon : probation and reintegration penitentiary services (services pénitentiaires d'insertion et de probation), see part 6 the presentation of the actual reform.

fender's treatment in prison. This is his role in all prison institutions situated within his territorial jurisdiction, whether they be top security prisons, reintegration oriented centres, remand centres or specialised institutions. As a rule, before making his decisions, the JAP must consult the CAP. The JAP chairs this commission, which sits in each prison institution. It is composed of the Chief prosecutor (*procureur de la République),* and the governor of the prison institution as of right, together with members of the management of the prison institution, the chief prison officer, a representative of the prison officers, prison tutors and social workers, the prison doctor and a psychiatrist. The JAP may order that the inmate be present at the hearing. But the law does not prescribe the presence of a lawyer or adviser. The CAP has only a consultative role. To plan the prison sentence the JAP has a whole range of measures available to him, some of which are decided by the JAP alone (splitting the sentence or suspended sentence); others require the JAP to consult with the CAP (reduced sentences, granting leave, exterior placement, day release or release on licence). These last three measures will be explained, as they require certain obligations, which demand the active cooperation of the offender.

2.1.1. Exterior Placement

Essentially, this measure allows an inmate within the last three years of his sentence to follow an activity or professional training, to follow an educational course or a medical treatment without being subject to continuous surveillance by the Prison Service. Within this context the Prison Service may also organise work groups involved in for example restoring public buildings or looking after green belts. These are generally paid activities linked to training courses.

2.1.2. Day release

Day release is a measure which allows the convicted person to be remuneratively employed, to follow further studies or a vocational training course, an internship or temporary employment outside the prison institution without continuous surveillance with a view to his future reintegration into society, or, to be able to contribute to his family life or follow a course of medical treatment. This may be granted from the beginning of his sentence or whilst serving it. Day release may be granted by the court or decided by the JAP in which the offender was sentenced for a term equal to or less than one year in prison.

2.1.3. *Release on licence*

Release on licence is a measure which may be accorded an offender sentenced to a prison sentence who shows " real evidence of social reintegration ", when he has served half of his sentence, or, in case of recidivism, two thirds of his sentence. Those serving life sentences must have completed 15 years in prison. If the sentence is not accompanied by a tariff, release on licence may be allowed when the period of imprisonment served by the offender is at least equal to the time he has left to serve.

When the prison sentence does not exceed 5 years, the JAP upon the advice of the CAP agrees release on licence. Beyond 5 years, the decision is taken by the Minister of Justice, on the proposal of the JAP after taking advice from the CAP[5]. It may precede day release or a probationary exterior placement. Release on licence may also be accompanied by special conditions, as well as measures of assistance and supervision intended to facilitate and confirm the rehabilitation of the convicted person. The JAP implements these measures with the assistance of the CPAL in the non-custodial sector. The duration of parole is at least equal to the duration of the part of the sentence not served at the time of the release but the JAP has the power to extend this by one year.

The order to grant release on licence sets out conditions (for example to have an assurance of work[6] and accommodation) as well as the terms of enforcement (assistance and supervision). The release on licence order may be revoked in cases of bad behaviour or re-offending during the release on licence period. An offender released on licence must observe certain conditions both of a general and individualised nature, which is specified by the JAP.

With regard to the general conditions, he is obliged to reside at an address fixed by the order for his release, to attend meetings arranged with the JAP or social worker, to allow visits from the latter and to send him any information or documents necessary to check his means and that he is fulfilling his obligations, i.e. in order to warn the social worker of any changes concerning employment. With regard to the individualised conditions, the order may subordinate the granting or continuing of the release on licence to other conditions e.g. satisfactory results from day release, re-

[5] According to the 15th June 2000 law, the decision is not longer taken by the Minister of Justice. It is the duty of a regional jurisdiction after a contradictory debate. The convicted person may be assist by a lawyer.

[6] According to the 15th June 2000 law, the assurance of a work is no longer required.

fraining from visiting certain locations, following an educational or vocational training course, submitting to a course of medical treatment, paying compensation to a victim, avoiding contact with certain persons, especially to the victim, perpetrators or accomplices of an offence.

2.2. *Alternative sentences to imprisonment*

A convicted person may find himself in the non-custodial sector as a result of two possible situations:
- either he has been imprisoned at the beginning and he continues his sentence in the non-custodial sector following the decision of the JAP;
- or, sentenced by a court to a sanction in the non-custodial sector, he has served the totality of his sentence in the non-custodial sector under the supervision of a JAP.

In both cases, the role of the JAP is to keep watch and supervise the duration of the sentence. He is assisted in this task, by the CPAL. All the Main criminal court centres have a CPAL on their premises which, under the authority of the JAP, puts into effect the measures of supervision and surveillance in respect of the obligations and conditions imposed on the convicted person, such as a suspended sentence with conditions attached, community service, conditional release and banishment. Moreover, the CPAL, together with public or private bodies if need be, puts into effect aid and assistance measures in order to stimulate the social reintegration of the offender under their charge.

Measures taken in the non-custodial sector include supervision and aid and assistance.

2.2.1. *Local or territorial banishment*

Territorial banishment is an extension of local banishment and means banishment from all French territory. Release on licence concurrent to territorial banishment poses problems regarding the supervision of the conditions attached to the first measure. On the other hand, in the case of local banishment the duties of the JAP are made easier as the offender is only banished from certain parts of French territory. The JAP may modify the measures of surveillance or the places out of bounds after interviewing the offender and upon the advice of the prosecution department; alternatively he may temporarily suspend the measure for period of less than three months.

2.2.2. *Suspended sentence with conditions attached*

The court delivers this measure at the time of conviction; it compels the offender to observe certain obligations during a fixed period. The suspended sentence with conditions attached is applicable to sentences of imprisonment of five years or more. The court fixes the duration of the conditions which cannot be less than18 months or more than 3 years. During the period, the offender must conform to certain measures of supervision and complete certain individualised obligations similar to those used in the release on licence regime.

The convicted person is under the authority of the JAP. Theoretically the court fixes the obligations at the time of conviction, but the JAP may alter them by adding others or cancelling any particular obligation. The party concerned in the criminal court may challenge his decision.

2.2.3. *Deferred sentence with conditions attached*

In summary jurisdictional matters, the court may, after finding the defendant guilty, decide to adjourn sentencing when it appears that the rehabilitation of the offender is already in progress, that the damage caused is being repaired or that the disturbance resulting from the offence has terminated. In these circumstances the court must state in its decision the date when it will rule on the sanction. At the next hearing, the court, after taking into account the conduct of the offender during the intervening period, may dispense with a punishment, pronounce the sentence as prescribed by the law, or again adjourn sentencing for a one-year period. The adjournment of sentencing, with or without conditions attached, may be for a period of not more than one year. In the case where the adjournment is with conditions attached, the convicted person is placed under the authority of a JAP who must ensure that the measures are performed. The court fixes the conditions. The JAP may not change them unilaterally. The supervision is conducted by a probation officer who keeps the JAP informed of progress in the performance of the measures. The JAP sends a conduct report to the court after their completion. The utility of this measure is without question, however it appears to be a form of sanction little used by the courts as a result of the heavy backlog of hearings which they are confronted with. In these circumstances the courts hesitate before bringing a case back several times.

2.2.4. *Community service*

Community service may be pronounced as the main sentence, as an obligation to be performed in a suspended sentence with conditions attached,

or to be used as an optional additional sanction in drink driving cases. The convicted person must be present in court when sentenced and has the right to refuse this type of sanction.

a) Community service as the main sanction

When an either way offence *(délit)* is sanctioned by a term of imprisonment, the court may stipulate that the convicted person completes from 40 to 240 hours of unpaid community service for the benefit of a public body or an association so entitled. The court fixes the period of time in which the community service must be served within a time limit of 18 months. The time limit ends with the completion of the community service. The JAP decides the method of implementing the obligation to perform community service and the possible suspension of the time limits. During the period, the offender must also satisfy the obligation to complete the designated work under general supervision. It is for the JAP to decide on the employment situation of the offender, the type of work to be completed and hours of employment. This decision may be changed at any time.

b) Suspended sentence together with the obligation to complete a community service programme

The suspended sentence together with the obligation to complete a community service programme may be confirmed either at the time of conviction, or agreed on after conviction. At the time of conviction: the criminal court may, after sentencing the offender to a suspending sentence, attach a community service order. This measure is linked to both the suspended sentence with conditions attached and community service: also the individual conditions attached to each of the two measures are applicable. After conviction: a court may, after having pronounced a sentence of 6 months or more of imprisonment for an either way offence in the defendant's absence, order that the sentence be suspended and that the offender complete a community service programme. The JAP lodges a report in which the court confirms the offender's acceptance of the community service, although at this stage he must not already have started the programme.

c) Community service as an additional sanction in drink driving offences

Article L. 1 er-1 of the *Code de la route* (Road Traffic Act) stipulates that in cases of conviction in drink driving cases, the court may decide on community service as an additional sanction. The JAP notifies the convicted person of the obligations of the sanction and assigns him to the

community service. Supervision (control aid and assistance) is assured by a probation officer who conducts the interviews, introduces the offender to the body allocating the work and advises him on steps necessary for rehabilitation.

2.2.5. Day-fines

Furthermore, whether for minor summary offences or for either way offences punishable by prison, the court may deliver as the main sentence one or more of the following sanctions: fines, day-fines, disqualification from driving, vehicle, arm or hunting licence confiscation, community service (described above). Day-fines were introduced in 1983. This sanction consists of adjusting twice the sanction in relation to the gravity of the offence by fixing the number of day-fines (which cannot exceed 360), then in relation to the convicted person's resources, by the amount of the fine on a daily basis (which may not exceed 2000 francs per day). A preliminary enquiry must therefore be conducted in order to discover the resources of the person concerned. The global amount of the fine ordered by the court by way of a day-fine must not be paid until after the expiry of the period. The offender avoids imprisonment if he pays the total amount due; otherwise he is automatically imprisoned for a period of time equal to half of the number of day-fines outstanding. At the end of the period of imprisonment, the sanction is said to have been extinguished. The amount outstanding may no longer be reclaimed. This sanction is ten times less used than the simple fine.

2.3. The offender's consent

Certain measures delivered by the court require the express consent of the party concerned: This is so for community service as will also be the case for electronic monitoring. For community service it is necessary to acknowledge the offender's right to refuse work which is for the benefit of the community, France being a country, which by reason of its international engagements prohibits hard labour. To a certain extent we may talk of the consent of the party concerned in cases of release on licence (except conditional release with deportation) day release and external placement. Further, some consider that it is appropriate to match the offender with the choice of sanction in order to increase the chances of the treatment being a success. It goes without saying that alternative sentences may not be really effective until the convicted person supports the measure (which must be

investigated). On the other hand, the deferred sentence, conditional bail *(contrôle judiciaire)* and the suspended sentence with conditions attached do not require the consent of the party concerned.

2.4. Revocation

When the offender does not adhere either totally or partially to the measure certain action may be taken leading to reappearance before the court and the revocation of the original measure. But beforehand, the party concerned is called before the JAP, if he does not appear the police may summon him. The scale of sanctions is graduated, normally starting with a warning. A breach of the terms of a community service order is covered by Article 434-42 of the Criminal code *(Code pénal)*. This creates a new offence which is punishable by 2 years imprisonment and a 200 000 francs fine. The State is held liable for any damage caused to a third party by the offender. For release on licence, day release and exterior placement, revocation may be ordered when the obligations have not been observed. On the other hand, for community service and suspended sentences with conditions attached, the JAP has to evaluate whether or not there has been a breach.

The nature of the obligation is decided by the court (for orders for treatment) or the JAP. The supervision of the measures is officially the duty of the JAP, but in practice they are supervised by social workers. The measures may be cancelled by the JAP (in the case of day release or parole). The court cancels community service. The offender may " reject " this cancellation by making an appeal to the court of appeal, or to the administrative court in cases where there is cancellation of an administrative measure. The offender's legal position is sufficiently protected when he goes before the court: he may appeal against conviction. On the other hand, the party concerned has little recourse concerning the content, organisation or supervision of the sanction. Day release may be cancelled; the granting of leave may be suspended for lateness. These sanctions, evaluated by the JAP may only be appealed by the Chief prosecutor (*procureur de la République*).

2.5. Combination of measures

Measures may be combined with other measures or sanctions. Community service may be imposed for example as the main or additional sanction. On the other hand it may not run concurrently with day-fines, disqualification

from driving or vehicle confiscation. Numerous combinations are allowed. They are generally used in accordance with the court's wishes. Currently community service is imposed concurrently with a suspended sentence with conditions attached. The sentence to measure does not correspond to the official guidelines: in particular there is no condition regarding the interested party's previous record or the type of offence committed. On the other hand, in practice some judges decide against community service for a recidivist and it is little used for illegal immigrants.

3. Enforcement of community sanctions and measures

Criminal courts sentence the defendant to community sanctions and measures and the probation and release aid committees - CPAL- (after the reform - see part 6-, they will be know as the probation and rehabilitation services) assure their supervision. During the last twenty years, one of the most important changes has been carried out with the developments of methods of rehabilitation. This is what in administrative language has become known as the policy of partnership and decompartmentalisation of the prison population. Twenty years ago the administration alone or almost alone assured all the services provided. Today the local councils and associations increasingly assure by the community, especially the public authorities, but the services also.

The rights and obligations of the local communities and associations involved in community service are defined by the criminal code *(code pénal)*.

The general assembly of judges confers on the associations the capacity to be involved in a community service scheme and the JAP compiles a list of vacancies. The probation and rehabilitation staff sitting on the probation service are prison service civil servants in the majority. They follow a two-year alternate theory and practice sandwich course base on law and social sciences.

4. Empirical information and evaluation of community sanctions and measures

In order to evaluate the use of community sanctions and measures, different statistical sources may be analysed. This data represents a particular point in the criminal process and gives an indication of the development of

the measures and their current frequency. Three statistical sources may be observed:
Convictions statistics show the number of measures ordered by the courts.
Statistics in the non-custodial sector show the measures supervised by these services. The day release, exterior placement and parole statistics account for the use of measures of supervising sanctions.

4.1. Conviction statistics

4.1.1. Evolution of convictions

The annexed chart shows the convictions in the summary criminal courts and the courts of appeal during the course of one year. Between 1966 and 1998, the number of convictions increased by 52,3%. However, the evolution of convictions was not uniformly in accordance with the sanctions. Prison sentences had increased slightly (29,4%) while suspended sentences, alternative sanctions and convictions without sanction increased in the same period.

Inversely, fines plus imprisonment and fines with a suspended sentence decreased during the same period.

- If we look more closely at alternative sanctions to prison, it appears that at the time of their introduction and for some years afterwards, these measures (particularly the suspended sentence with conditions attached and substitute sanctions) were applied economically by the criminal courts of summary jurisdiction. In 1978, in their third year of application, substitute sanctions represented just more than 3% of sentences in the criminal courts of summary jurisdiction and convictions without sanction just 1%. Suspended sentences with conditions attached affected 3.3% of offenders. In 1986, after the introduction of community service and the revival of alternatives to prison policies, community service was aimed at only 1% of the total number of convicted persons as a substitute sanction, but its introduction was accompanied by a big increase in the overall number of substitute sanctions which reached in all 8.4% at that time. From then on these sanctions played an important role in the overall choice of sanctions. In 1998 the total of suspended sentences with either community service or a conditions attached represented 13% of sentences, while substitute sentences in general represented 12% (see annexe 2).

- The increase in these sanctions does not mean that imprisonment is on the decline by the same proportion[7]. In fact, as the chart referred to above highlights, the rise in the absolute number and of the proportion of the prison sentences (except in 1998) has taken place despite the significant rise in substitute sanctions and suspended sentences with conditions attached. Imprisonment is again on the increase. In 1993 we were back at the same levels as in 1966: more than one conviction out of four.
- Thus, on the question of sanctions imposed, since 1966 the most obvious trend has been a wider recourse to alternative sentences to imprisonment with supervision (suspended sentences with conditions attached or community service) as well as substitute sanctions. Note that for the latter, sentencing tripled between 1978 and 1998, and despite the disappearance of the sanction of interdiction from issuing cheques for the offence of dishonouring cheques, sentences of community service as the main sanction have increased five times. In 1998 community service represented 24% of substitute sanctions against 8% for 1984, the increase alone explains more than half of the global increase in substitute sanctions. But the increase in alternatives to imprisonment was not made at the expense of prison sentences as their designation would suggest, but at the expense of sentences such as fines and suspended sentences.

The abandonment of the basic suspended sentence for supervised sentences in the non-custodial sector especially is often explained by the fact that its psychological effectiveness on the " ordinary " convicted person is doubtful: legal practitioners are familiar with the common reaction of the defendant who asserts in good faith that he is not in breach of any outstanding sentence only to discover that he has an ongoing suspended sentence hanging over him. In other words the threat, though serious, appears to the offender to be an absence of sanction as a result of the lack of any immediate, visible, practical consequences.

4.1.2. Characteristics of convicted persons

In 1994, nearly three quarters of all sanctions imposed led to prison sentences. Amongst them, nearly a third were sanctions that the probation

[7] AUBUSSON DE CAVARLAY, B, : L'impact des peines alternatives à l'emprisonnement. Approche statistique, Actes n°73, 1990.

committees took charge of (suspended sentences with conditions attached or community service). The imposing of such sanctions is linked to the socio-demographic and criminal characteristics of the offenders concerned.

- Sanctioning an offence with a suspended sentence and conditions attached or community service depends on the offence committed[8]. Half of suspended sentences with conditions attached or community service are imposed for theft or drink driving offences. In particular, suspended sentences with conditions attached are used also in a preferential way to sanction abandonment of family. This measure appears to be designed especially for this type of offence, as it allows the court to control family allowance payments. Suspended sentences with conditions attached are applied equally to offenders convicted of sexual offences and indecent exposure. The use of this measure in these cases is explained by the likelihood of the courts or the JAP to impose on the defendant, amongst other things the obligation to undergo medical examinations and refrain from making contact the victim. With regard to the suspended sentence with community service, this sanction is primarily applied to persons having committed petty offences against property. Imposed on average in about 5% of either way offences, it is used more frequently in theft and receiving cases (10%) but is little used for drink driving offences (4%).
- The use of these measures depends also on the socio-demographic and criminal characteristics of the offender concerned[9]. Sanctions carrying probationary periods are in fact twice as less likely to be used in the case of foreigners than for French citizens, whether for men or women, but community service is more frequently used for men (5%) than for women (3%). Moreover, differences according to age appear: probation is less used for those aged 60 or over, and in criminal matters suspended sentences with combined orders are often used for minors. Recourse to probation in the latter situation allows the imposition of a heavy sentence in order to assure the support necessary for social reintegration. Community service is more often used for young adult offenders.
- Alternative measures to imprisonment are increasingly being used therefore as a means of sanction but their development seems limited by

[8] BURRICAND, C. HARAL, C : Dix ans de probation, Infostat Justice, n°49, October 1997, p. 3.

[9] Idem p. 4.

certain drawbacks. Remember that according to public opinion, prison remains the point of reference. Furthermore, it is true that most criminal conduct could be punished by a term of imprisonment. Moreover, alternatives to imprisonment suffer from a lack of credibility as a result of the lack of the financial support required to carry them out. Another factor which does not help when considering alternatives to prison in France is the evolution of a court procedure known as *comparution immédiate* which is designed to deal with cases on an immediate hearing basis so that the offender is dealt with as quickly as possible. These procedures do not leave sufficient time for the court to study the personality and social situation of the defendant, factors necessary in devising an alternative sanction to imprisonment.

4.2. Orders supervised by the probation and release aid committees (CPAL) - enforcement of sanctions

As emphasised previously, the Probation and Release Aid Committees (CPAL) takes charge of almost one-third of the alternative measures to prison. Since 1989, in order to give an account of their activities, the CPALs have supplied half-yearly statistics. As at 1st January 1998, the CPALs had under their charge 122,959 persons following 138,554 measures (on average 1.1 measures per person). Since 1989 the number of supervised measures has increased to almost 80%. The number of supervised persons has risen to 70%. This increase is linked to a rise in the number of newcomers supervised (incoming numbers); the duration of the supervision has not ceased to fall since 1994. The structure of measures according to type has changed somewhat. In 1989, 85% of those supervised were serving suspended sentences with conditions attached and 7% were on parole. In 1998, suspended sentences with conditions attached, although still the highest, represented less than three quarters of the court orders made. Similarly, the number of cases of release on licence has similarly declined: they represent hardly more than 3% of supervised measures compared to 7% in 1989. There has been a large increase in number of those supervised on community service programmes (17.2% compared to 4.8% in 1989).

Post-sentencing orders represent 3.5% of orders supervised. However the CPAL also cover pre-sentencing measures (2.4% of all measures supervised) and more particularly persons under conditional bail. Since 1989 the number of persons under conditional bail supervised by the CPALs had

doubled, from 1,078 as at 1st January 1989 to 2,562 as at 1st January 1998. But this order remains a borderline one amongst all the other orders supervised by the CPAL[10]. The private (associative) sector is competitive in the pre-sentencing area.

Similarly, as at 1st January 1998, 763 orders of deferment of sentence with conditions attached where under their control, representing 0.6% of the total number of orders.

4.3. Supervision orders: exterior placement, day release and release on licence

Supervision in the day release or full release sector may take place in parallel to a prison sentence. This is especially the case for those who have obtained an exterior placement or day release but also for those allowed release on licence. The principal data concerning these three types of sanction, especially relating to the rate of admissions, comes from the prison institutions that supply them.

4.3.1. Exterior placement

During 1997, the JAP made 3,268 exterior placement orders. This number has, since 1990, increased to 49% (2,193 orders made in 1990) while during the same period the average number of offenders has increased by 18%. Thus, though marginal (as at 1st January 1998, 725, representing 2.2% of convicted persons given exterior placements), this type of order has become more popular. Offenders admitted on external placements have been in 10% of cases admitted from the beginning, and 60% of the places are without surveillance. Almost half of the offenders (44.9%) have committed an offence against property, almost a third (29.2%) an offence against the person, and 12.8% have committed a drug related offence. Moreover, almost half of offenders (44.5%) are obliged to return to the prison institution in the evening, a third (33.4%) are in lodgings and 12.4% are in rented apartments. With regard to the activities of offenders on exterior placements 29% have an assistance contract, 25% provide general assistance in the prison institution and 21.6% are following a paid training course.

[10] In 1996, 44,879 cases instructed were terminated during the year. Amongst these cases, 19,461 conditional bail were made (representing 43%).

4.3.2. Day release

In 1997, 6,288 day-release orders were imposed of which 60% were from the beginning of the sentence. Since 1981 the number of day release orders has doubled, but has remained stable at around 6000 orders annually since 1990. As at 1st January 1998, 999 offenders were put on day release, representing 3.1% of the total (2.2% in 1981, 2.5% in 1990). This supervision is more emphasised now than before but remains limited. More than two-thirds of admissions for day release are justified by an employment contract, 35% of offenders on day release have committed an offence against property, 23% an offence against the person and 13% a drug related offence.

4.3.3. Release on licence

Release on licence may be imposed by the JAP or the Minister of Justice according to the length of sentence to be served by the convicted person: the former has jurisdiction for those with sentences of less than 5 years, and the latter for those with sentences of 5 years or more.

- During 1997, the JAP offered 20,724 offenders parole. The rate of offers (which relates to the number of offenders fulfilling the necessary conditions) was 59%. 5,034 were allowed release on licence, namely, a rate of admission of 14,3% calculated with reference to those offenders who received an offer.

  Offenders given release on licence had in a third of all cases committed a property offence, 27% drug related offences, and in 24% of cases an offence against property. 59% of them were first time offenders. For three-quarters of the offenders release on licence was allowed after they had served between a half and two-thirds of their sentences. In 10% of case release on licence was offered after they had served three-quarters of their sentences.

  4,193 of release on licence cases had special conditions attached: 20% of cases involved a deportation or extradition order, 19% had obligatory medical conditions attached, 16% included vocational training courses and 14% indemnifying an innocent party in criminal proceedings. 50% of releases on licence cases were accompanied by continued assistance (17% for less than 6 months, 34% from 6 months to one year).

  Admissions for release on licence have continued to decline for some years. In 1973, 29% of offenders fulfilling the conditions for granting

release on licence within the jurisdiction of the JAP were offered it. This proportion went down to 23% in 1980, 21% in 1990 and 14% in 1997.

- Similarly, release on licence granted by the Minister of Justice has also continued to decline. Between 1976 and 1991, the last year with figures available, the rate of admissions for parole within the jurisdiction of the Minister of Justice (relating to the numbers arrested and the number of files examined by Commission for the Application of sentences CAP) went from 21% to 8%.

Thus releases on licence orders granted, whether within the jurisdiction of Minister of Justice or the JAP, are becoming increasingly rare. Different reasons are advanced to explain the limited use of release on licence orders.

Firstly, the practice of reducing sentences and appeals, and hence systematic collective pardons have lessened the individualisation of sentencing. Moreover, the distribution of offenders in accordance with the offence (reduction in the number of those convicted of theft, increase in number of those convicted of murder, sexual and drug offences) and the deterioration of the economic situation making it more difficult to find a job or accommodation contribute towards the reduction in parole orders granted[11]. These last two reasons may also offer an explanation for the limited use of day release and external placement orders. Finally, to grant such an order is to run the risk of recidivism. The authorities refuse to take the risk that a person released may commit further offences. Grounds are not given for the refusal of release on licence and the convicted person has no right to appeal such a refusal. There can never be absolute certainty on the question reintegration and non-recidivism. Nevertheless statistical studies show that persons benefiting from supervision orders have a lower level of recidivism than those who are released from prison after completing their sentence.

4.4. Recidivism and execution of sentences

During the debate on " life meaning life " (1993), the problem of recidivism was discussed: certain politicians gave figures of rates of 70%, whilst

[11] TOURNIER, P. : Prison overpopulationand the supervision of sentences, Journée d'étude " Prison : sortir avant terme ", University of Poitiers, Institut de sciences criminelles?, 19th May 1995 p. 7.

others gave figures below 50% without giving any further precision. The study undertaken by the CESDIP and the Prison Service led to national standards on released prisoners who had initially been sentenced to a term of 3 years or more of imprisonment[12] has drawn three types of observations:

- on the one hand the statistics relating to rates of recidivism as well as the term " recidivist " should be handled with care. Thus, for example, one of the investigations shows that if, 4 years after their release, 49.7% of former inmates sentenced to 3 years or more imprisonment have a new conviction on their criminal record, this rate falls to 3.3% if only serious offences are considered (offences punished by 3 or more years in prison). To make further progress in this area it is necessary to define exactly the group being studied, the time period taken into consideration, and above all what is meant by the term " recidivist " because according to the criteria used, the rate can vary from 0 to 100% !
- on the other hand, the frequency of recidivism varies according to a number of factors. Some relating to the demographic characteristics of the convicted person (sex, age, marital status, nationality etc.), and others relating to his previous criminal history, either before his conviction (existence of previous criminal record for example) or after (type and amount of sanction delivered for example). Recent studies show the particularly discriminatory nature of certain variables such as the type of offence committed (murder, rape, theft etc.), the proportion of the sentence served in prison and the method of release (convicted persons having the benefit of a release on licence order have a much lower rate of recidivism than those released at the end of their sentence).
- Finally, the time period elapsed before recidivist behaviour, i.e. the less time that has passed between the date of release and the date of the first subsequent offence sanctioned by the courts: the more time that passes, the more the number of recidivists is decreased. These investigations

[12] TOURNIER, P. : Enquête sur la récidive des condamnés à une peine de trois ans et plus, libérés en 1973, Paris, DAP, Travaux et documents n°14, 1982.
KENSEY, A. et TOURNIER, P. : Le retour en prison, analyse diachronique. Détenus libérés en 1982 initialement condamnés à 3 ans et plus, Paris, DAP, Travaux et documents n°40, 1991.
KENSEY,A. et TOURNIER, P. : Libération sans retour ?, devenir judiciaire d'une cohorte de sortants de prison initialement condamnes à 3 ans et plus, Paris, DAP, Travaux et documents n°47, 1994.

only concern those leaving prison, new research is planned to tackle the issue of offenders in the non-custodial sector.

These studies illustrate the probable important influence of methods of enforcing sentences in reducing recidivism. Thus for example in 1982, amongst a group of convicted persons 1/3 of whom had benefited from release on licence orders and 2/3 of whom had left prison after serving their sentences, it was observed that the rate of return to prison varied according to the method of release: 23% in cases of release on licence against 40% for those who were released at the end of their sentences. These results could be partly attributable to the post-release supervision undertaken by the CPAL, who supervise the offender's release on licence and whose objective is to encourage his social reintegration. But it must be emphasised that the reason for the noticeable difference in the above results may certainly be found at the beginning of the process in the choice of inmates who would benefit from release on licence. Different criteria of a diverse nature may come into play in the JAP's decision, upon the advice of the CAP, whether or not to grant release on licence, or an alternative measure. Therefore, at the present stage of research, this criterion has largely escaped analysis.

5. The probation service

The non-custodial sector covers all of the following measures:

- pre-sentence reports required by the courts before sentencing;
- the supervision of persons in the non-custodial sector before judgement (supervision under conditional bail, joint welfare and education service, deferment of sentence with a conditions attached);
- the supervision of sentences restricting liberty imposed by the criminal courts (suspended sentence with combination order, community service);
- the supervision of persons serving a prison sentence in the non-custodial sector, following the decision of the JAP or the Minister of Justice (release on licence or day release);
- aid and assistance for those leaving prison.

Social reintegration of the offender is one of the stated objectives of the sanction. The law allows the JAP certain measures, carried out by the CPAL, in order to help the offender. Measures of aid and assistance may be accompanied by surveillance measures ordered in release on licence

cases. Measures of aid and assistance in the form of psychological or material help are designed to prevent subsequent offending. Measures of aid and assistance may also be used to help persons leaving prison after serving their sentences provided however that in these cases the persons concerned make a request to the CPAL. If the offender has not been imprisoned, the court in cases where the offender is sentenced to a combined order schedules aid and assistance measures.

The probation staffs assures the implementation of these measures in the probation and release aid committees situated in each 183 criminal court centre.

As at 1st January 1998, these services bring together 935 probation officers (Chief probation officers and social workers) who are in all responsible for 123,000 persons. In prison all the work involving the joint welfare and education supervision of the inmates, the individualised sentences planned by the JAP and the carrying out of the plan of action after release, are the responsibility of 1,239 social workers distributed in the 187 prison institutions. The objectives assigned to the probation service are regulated by Article II of the Law of 22nd June 1987, which states " The prison service participates in the implementation of decisions and criminal sanctions and the maintaining of the security of the public. It favours the social reintegration of persons who are made their responsibility by the criminal courts. It is organised in such a way as to assure the individualisation of sentencing ".

The objectives assigned to the probation service are the supervision of the defendant in order to protect public order within the mandate of the courts and to favour the reintegration of the party concerned and preventing recidivism. The probation service is composed of probation officers, assistants on renewable contracts and voluntary representatives. The JAP upon liasing with judges involved gives general directions relating to the enforcement of the measures. These directions concern the orientation of priority actions determined in relation to the needs and characteristics of the persons for whom they are responsible; they define a policy adapted to the means of the probation committee and the needs of the courts. The historical development described in the introduction has elicited a qualitative and quantitative extension of the probation committee's activities: concerning an in depth review of the administrative structure of the prison service's educational service. This is the objective of the probation and reintegration services.

6. Expectations in the near future

6.1. The reform of the probation and reintegration penitentiary services.

The reform is recent. This is what we expect. In France the term given to the sector that supervises sentences outside prison is the " non-custodial sector " as opposed to " custodial sector ". The fact that there are two different designations could lead one to believe that there are from two different sectors. Yet, the individuals most often pass from one sector to the other either because after several sentences outside prison they finally arrive in prison, or because after prison they finish their sentence on parole or finally, because those leaving prison have the possibility to go before the probation committee in order to ask for aid and assistance.

The management of the prison service in France was very recently reorganised and the above distinction no longer exists. A sub-management for the administered population has been created which is responsible for prisons and reintegration services. At the same time, reform of the non-custodial sector has commenced. CPAL's have become the probation and reintegration penitentiary services. Social work in general and prison service social workers in particular have in the last ten years been faced with important changes:

- a deterioration in the economic and social circumstances of the persons supervised;
- diversification of duties resulting from modifications to legislation and regulations (the establishment of community service, deferment of sentence with conditions attached etc.);
- transformation in methods of intervention: change in methods from close assistantship supervision to the formulation of negotiated objectives, from an individual relationship to global supervision, from working inside the prison institution to frequent recourse to outside partners;
- an important increase in the number of measures entrusted to the committees.

There may be observed a lack of credibility and legibility of actions vis à vis these services and the criminal courts. To a large extent this situation may be attributed to an inadequate administrative structuring of the com-

mittee (double hierarchy: JAP and head of probation). The reform confers to the education services a unique and departmentalised organisation. The department is the territorial area where the quasi totality of French social policy takes place. This will assure more consistent social work between the prisons and the committees. By thus favouring a better continuation of policy towards the supervision of individuals and their projects, it should reinforce prevention of recidivism. The reform will modify appreciably the current situation of the different parties concerned (judges, prison governors and social workers).

6.2. Electronic monitoring project

The recent Act of 19th December 1997 has not yet implemented the necessary provisional studies techniques and methodology. Placement under electronic monitoring (PEM) consists of verifying by an electronic method whether the party concerned remains in a given locality, normally his place of residence. The JAP decides on the actual measures to be taken. PEM is not a sentence in itself, but a method of serving a prison sentence in the same way as day release or semi-liberty by placing the individual concerned, with his consent, outside the prison environment. This measure may be applied in three cases: when the sentence imposed is of less than one year's duration, when the remainder is less than one year, and finally, as a probationary period before release on licence i.e. before a final decision for release on licence has been made (as is the case with day release).

6.3. Project to set up centres for supervising sentences

At the moment one-third of convicted persons are serving sentences of less than one year. But if longer sentences have benefited from better supervision since the setting up of the sentence serving project, the supervision of shorter sentences in remand type prisons still remains too undifferentiated. A recent experiment has been the creation of accommodation structures of 50 to 80 places (maximum), which are different to day release centres and are organised around reintegration. These centres would receive inmates on exterior placement, on day release or benefiting from outside leave. These centres could also be used as locations where persons placed under electronic monitoring are administratively situated.

6.4. Social and judicial supervision for sex offenders

The Act of 17th June 1998 concerning the prevention and repression of sexual offences aims at no longer releasing sexual offenders without ensuring that the maximum has been done to avoid recidivism. The novelty of this Act is the setting up of social and judicial supervision, which will intervene after release. The supervision may last for a maximum duration of 10 years for either way offences and 20 years for indictable offences. Amongst the obligations it may impose is a treatment order. The convicted person may be sent back to prison if he does not follow the order. The JAP may give the CPAL responsibility for the supervision.

7. Problems to resolve

The great number of non-custodial sentences and the regular increase in measures and individuals supervised by the CPALs seems to suggest that the application of these sanctions and measures has encountered few difficulties. Yet the development of these measures raises several questions: are they responding to their initial objective i.e. the rehabilitation of offenders by the application of a more appropriate sanction, and to reduce the rising prison population. Similarly, confronted by the small number of day release, exterior placements and release on licence orders, and confronted by the regular fall in conditions attached to release supervised by the CPAL, it could be justifiably asked why these measures of supervising sentences are so little used.

7.1. Less use of sentence supervision: the case of release on licence

Post-sentencing measures may be taken in order to limit the time served in prison. France mainly employs three types of sentence supervision: day release, exterior placement and release on licence. As we have seen previously, these three types of sentence supervision are relatively little used: convicted persons on day release and on exterior placement make up 3.1 and 2.3% respectively of all convicted persons. For some years the rate of admission on the release on licence programme has continued to decline.

In 1973, the first year that the Act of 29 December 1972 came into force giving the JAP jurisdiction in release on licence matters when the prison sentence did not exceed three years, the proportion of admissions on the

release on licence programme exceeded 30%. 20 years later it was at 10% and the proportion has fallen dramatically since 1989. The extension in 1993 of the JAPs jurisdiction to prison sentences of up to 5 years duration has hardly had an effect on this trend. Similarly, release on licence orders granted by the Minister of Justice have fallen globally for the last 20 years: on average, for 100 cases examined in 1976 by the Commission for the application of sentences, in all 21 orders were issued by the Minister of Justice. In 1991, the last year for which figures are available, the number was less than 8. There are several reasons for this:

- the unfavourable economic situation makes preparation for release more difficult (finding a job or vocational training course, accommodation);
- faced with the evolution of a prison population whose profile is changing, a greater risk is taken: reduction in the proportion of those convicted of theft and an increase in proportion of those convicted of murder, sex and drug offences;
- the number of imprisoned foreigners in irregular situations has increased dramatically, though these persons may not benefit from release on licence;
- the deterioration of supervision in the non custodial sector led to courts turning to alternative measures such as external placements;
- finally, certain commentators underline the political effect on the reduction of sentences. Methods of supervising non-individualised sentences have been widely developed: sentence reduction for good conduct is granted almost systematically; collective amnesties have been granted annually since 1991 (on the 14th July public holiday). Reduced prison sentences are competing with release on licence.

7.2. The rising prison population

As mentioned in Part 1, one cannot refrain from making parallels between the tendency towards a rising prison population on the one hand and the development of policies which are looking for ways to avoid prison on the other: pre-sentencing measures such as conditional bail or a non-custodial sentence such as community service. Furthermore, these policies have sometimes been offered as a " solution " to the persisting problem of the rising prison population. Besides, cannot this making of parallels be concluded other than by the acknowledgement of the failure of alternatives to

imprisonment, without knowing enough about what is involved in this acknowledgement. However the data concerning the problems may be presented very differently if we think about the factors that explain this rising prison population.

In fact the latter point may be explained by an increase in the number of persons imprisoned or by longer sentences. The analysis of these two indicators illustrates that the length of prison sentences continues to increase while the number of persons in prison has been falling on a regular basis for several years.

Thus, without being able to confirm the existence of a cause and effect between the desire to announce restrictions on resorting to prison and the reduction in prison sentences, it is appropriate all the same to underline this correlation. Faced with this observation it is easy to think that efforts made in the development of alternative policies to imprisonment in processing less serious criminal matters are not in vain. On the other hand, it is not enough for resolving the problem of the rising prison population to take account of lengthening prison sentences.

Taking into consideration the fact that the rising prison population is mainly linked to the increase in length of prison sentences should lead us to tackling the question of alternatives in new terms. In theory, several measures can reduce detention lengths. These include time limits on pretrial procedures, penal code-established sentence reductions, reform in the serving of sentences and hopefully changes in attitudes of the judge and jury.

Planned reductions in the sentencing scale might appear unpopular, as clemency is never widely spread during a social and economic crisis. However such an opinion neglects the educational role of government authorities, professionals, community-based organizations, and especially, academics.

This complex situation calls for serious public debate concerning the serving of sentences. When a convicted individual serves his sentence " outside rather than inside " there is, of course, risk of recidivism. Further, detention length cannot be reduced without taking into account the interests of the victims of crimes and the criminal offences; and more generally, without consideration of public safety. These are not empty words. This is a fundamental issue.

The risk of recidivism can be reduced when inmates are assisted in two important ways: First, prior to release, through interventions adapted to

inmates in prison. Second, after release, through supervisory measures, which vary in restrictedness and are adapted to each convicted person. These two conditions are necessary to make release on licence more credible to judges and the community. It's a policy of " give and take ": detention lengths can be reduced, if detention itself changes. More can be done with inmates in less time, if release occurs in appropriate conditions, which favours reintegration of inmates into the community, while ensuring public safety.

7.3. Community service: difficulties in its application

Although the number of community service orders continue to raise, the question of the problem of usefulness and objectives assigned to the sanction arise. The most relevant example is community service. When the Act introducing community service was passed in 1983, two arguments in its favour were predominant. Some politicians saw in the Act the means to make idle offenders useful by allowing them the chance to pay back their debt to society. Others, fewer in number, considered that taking on a social role could act as beneficial learning experience for the offenders concerned. Therefore, the initial objective of this measure was to sanction and rehabilitate the offender by means of work. However the application of this measure has met with certain difficulties and seems to have brought into question the original objectives of community service.

We have already seen that since 1983 the probation committees have witnessed their workload increase whilst at the same time staff and equipment have stagnated. The probation committees have therefore had to simplify community service procedures: facilities close to the convicted person's home are chosen as a priority in order to reduce transport and accommodation problems. Moreover, not having time to set up new reception facilities, probation committees tend to offer the same organisations. Concerning the organisation of the community service itself, there appears to be a tendency to compress sentences into a short period while community service was initially devised to last a relatively long period of time so that the offender could " assimilate " the sanction and the work could be carried out during non working hours. This trend to compress sentences is not solely attributable to the CPALs. Young unemployed persons who have committed minor offences against property are usually the recipients of sentences of community service. It is not surprising therefore that CPALs

offer this unoccupied section of the population full-time community service and settle the file as quickly as possible.

Community service is a demanding sentence and some convicted persons, drug addicts for example, sometimes have such difficulties to reinsert themselves, that it is too complex to find them work which is appropriate to their "handicap". In these circumstances, community service does not appear to overlap into prison but more with a simple suspended sentence or probation order. In order that community service responds to its original objectives, the work has to be formative and sufficiently split up to give the offender enough time to make a real commitment[13].

7.4. Statistical and social information in this sector

At the criminal policy level we are confronted by a difficulty which is becoming increasingly obvious: the absence, or at least the lack of information at national level and at local level of the data required to determine criminal policy; the difficulties of the statistical system and computer science. An increasing lack of interest by the judicial authorities for research projects, which is more often being supplanted by administrative investigations, is also apparent. Therefore we have little knowledge of social expectations or the expectations of victims, of the strategy of the administration involved in the judicial process, where a criminal policy is extremely receptive to the vagaries of public opinion[14].

[13] FAGET, J. : Le TIG, beaucoup d'espoir..., des résultats mitigés, Bulletin du CLCJ n° 1, February 1997.

[14] ROBERT, M. : Bulletin du CLCJ, n°1, February 1997.

Annex:

Table 1: Evolution of adult convictions according to the type of main sentence

Year	1966		1978		1986		1993		1994*		1998	
	Convicted population	%	Convicted population	%	Convicted population	%	Convicted population	%	Convicted population	%	Convicted population	%
Total convictions	275891	100	424007	100	556502	100	422012	100	395828	100	420084	100
Imprisonment	73710	27	86274	20	123608	22	113010	27	102685	26	95362	23
Prison Suspended	64912	23	121404	29	161688	29	200711	47	169877	43	184680	44
- with combined order	*7043*	*2*	*13842*	*3*	*21300*	*4*	*25330*	*6*	*27737*	*7*	*40312*	*10*
- with community service					*3389*	*1*	*8524*	*2*	*10345*	*3*	*11232*	*3*
Fine	128976	47	189479	45	194870	35	65009	15	65805	16	71889	17
Fine suspended sentence	8293	3	7863	2	15777	3	7305	2	8057	2	11641	3
Substituted sentence	---		14866	3	46601	8	29301	7	43403	11	*49028*	*12*
- with community service					*6492*	*1*	*5571*	*1*	*10167*	*1*	*11574*	*3*
No penalty	---		4121	1	13958	3	6676	2	6001	2	*7484*	*2*

Area : The whole of France

Source : Compte général (1960-1978) ; Casier judiciaire (1979-1994), Bruno Aubusson de Cavarlay

Remarks : From 1966 to 1978, contradictory and flawed. For subsequent years, all methods of judgement are mixed up.

* concern adults and juveniles

Table 2: Distribution of substitute sentences according to type

Nature of the sentence	1986		1994		1998	
	Convicted population	%	Convicted population	%	Convicted population	%
Free movement	5252	11,3	3976	8,1	1175	18,7
Driving ban	20675	44,4	26885	54,4	26166	49,4
Withdrawal of banking rights	8840	19,0	---	---	---	17,0
Community service	6492	13,9	10779	21,8	11670	7,8
Day fines	3253	7,0	5222	10,6	8062	2,6
Confiscations and others	2089	4,5	2521	5,1	2363	4,5
Total	46601	100,0	49383	100,0	49436	100,0

Area : The whole of France
Source : Compte général (1960-1978) ; Casier judiciaire (1979-1994) ,
Bruno Aubusson de Cavarlay

Measures at 1st January	1989		1998		Rate of variation 1993/98
	Convicted population	%	Convicted population	%	(in %)
Suspended sentence with combination order	66037	85,2	104482	75,4	58,2
Release on licence (JAP)	1027	1,3	553	0,4	-46,2
Release on licence (Minister of Justice)	4335	5,6	4222	3	-2,6
Community service	3684	4,8	23763	17,2	545,0
Probation	1078	1,4	2562	1,8	137,7
Banishment	19	0,0	1237	0,9	6410,5
Conditional pardon	26	0,0	98	0,1	276,9
L 51	1277	1,6	874	0,6	-31,6
Deferment of sentence	---	---	763	0,6	529,9
Measures	77483	100,0	138554	100,0	78,8

Area : Metropolitan France and overseas territories

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Community Sanctions in the Federal Republic of Germany

HANS-JÖRG ALBRECHT

1. Introduction

In order to describe and explain the development of community sanctions in the Federal Republic of Germany, the federal character of the criminal justice system should first be noted. With the federal system, law-making in the field of substantial and procedural criminal law is entrusted to the Federal Parliament, while the administration of justice and law enforcement virtually exclusively falls under the authority of the individual states (*Bundesländer*). The only exception so far concerns, besides the Federal Bureau of Criminal Investigations (*Bundeskriminalamt*), the Federal courts which – as courts of last appeal – also have the function to provide for uniform decision-making within the criminal justice system. Secondly, a distinction is made in the German criminal justice system between adult and juvenile criminal law. Penalty ranges provided in the criminal penal code do not apply to juvenile offenders, nor are the main penalties of day fines or adult imprisonment applied to juveniles (or, in most instances, to young adults, e.g. those 18 to 20 years old). The Youth Court Law contains a specific system of sanctions divided into educational measures (e.g. community service, participation in victim offender mediation, etc.), "disciplinary measures" (e.g. short-term detention, restitution, fines, etc.) and youth imprisonment with a minimum of six months and a maximum of 5 years. Thirdly, appeals to the community were virtually non-existent in Germany until the beginning of the 1990s when "community crime prevention" all of

sudden became a widely discussed issue within German ministries of the interior, the police and some groups of criminologists and other criminal justice professionals [1].

While the concept of community has been stressed for quite some time now in such countries as England and the United States, and somewhat less in continental European countries, Germany has never experienced an explicit community approach to criminal sanctions[2]. An explanation for this could be the apparent differences in political structures as well as modes of governance and the overall reliance in Germany on all kind of services delivered by state agencies. However, also in those countries where community has been invoked with respect to criminal sanctions, the contents of the concept are by no means clear. Political, ideological and theoretical loadings of community are numerous, and what community actually should represent is very rarely spelt out in concepts of criminal justice, crime prevention and criminal sanctions.[3] It would certainly be fair to say that community appeals on the one hand to the causes of crime problems as well as to their solution. On the other hand, "community" appeals point to the question of responsibility for crime problems as well as for solutions of the crime problem. Thus, "community" comes close to being a catch-all concept which acknowledges that the performance of criminal law, its enforcement and the outcomes are basically and in various respects dependent on community resources.

What should be noticed, then, are changes in the focus of crime policies. In particular during the 1990s the focus of German criminal policies switched to such areas as organized crime, drug-trafficking, dangerous sexual offences and violent youth. Moreover, it is the immigrant offender who has attracted the attention of policy makers. Finally, the question of who is interested in developing community sanctions has to be put forward. Here, we find two institutionalized interest groups which from different perspectives have been active in developing community sanctions in the last decades. These are the probation services and in general "social services within the criminal justice system" (*Soziale Dienste in der Justiz*) whose interests are based on a specific support and treatment model which is part

[1] Albrecht, H.-J.: Gemeinde und Kriminalität. In: Kury, H. (ed.): *Gesellschaftliche Umwälzung: Kriminalitätserfahrungen, Straffälligkeit und soziale Kontrolle.* Freiburg 1992, pp. 33-54.

[2] Lacey, N., Zedner, L.: Discourses of Community in Criminal Justice. *Journal of Law and Society* 22(1995), pp. 301-325.

[3] Lacey, N., Zedner, L.: op.cit. 1995, pp. 302-303.

of the social services' professional image; justice administration (and with that the political system) has been interested in community sanctions because of their potential to save costs and resources, as well as of growing distrust in the prisons' ability to deter individuals from committing further crimes.

The main focus in discussing and developing the system of criminal sanctions in the Federal Republic of Germany has been put on alternatives to imprisonment. This policy is rooted in a major criminal law reform of the 1960s that put into effect the programme as spelt out by Franz von Liszt at the end of the 19th century (Programme of Marburg)[4]. This programme aimed to concentrate long prison sentences, and with that treatment and rehabilitation, on serious recidivists and dangerous criminals, while short-term imprisonment should be abolished because of its assumed negative impact on first-time and petty offenders. Short-term imprisonment therefore should be substituted by fines. In between fines and imprisonment the suspended prison sentence and probation should then single out those criminal offenders who would profit from support and supervision by the probation services within the community. Law reforms enacted in 1969 and 1975 backed up this philosophy by introducing statutory sentencing guidelines that make in-out decisions in terms of fine/imprisonment, suspended sentence/immediate imprisonment dependent on the risk of relapse into crime and on positive general prevention. As it was thought back in the 1960s and 1970s that during periods of imprisonment treatment could be delivered effectively to long-term prisoners, increased risks of relapse into crime have been made a major variable in deciding on immediate imprisonment. With the criminal law reforms of 1969 and 1975, fines and imprisonment were made the major components of the adult system of criminal sanctions.

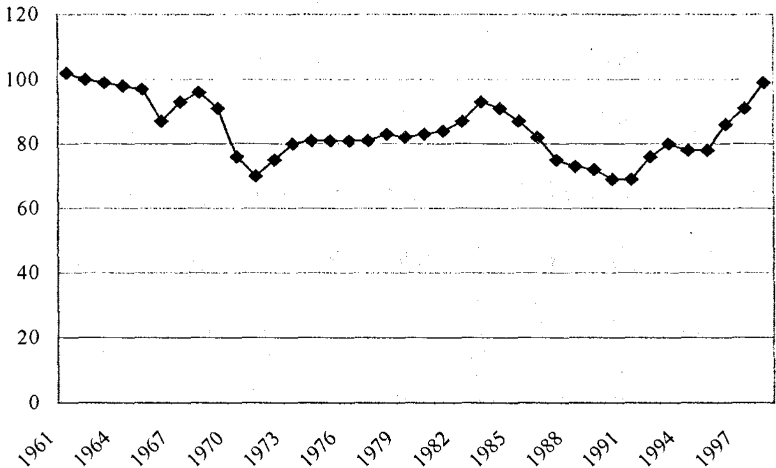
For juveniles aged 14-17 years and young adults aged 18-20 years a totally different system of sanctions was established when the major law reforms of 1923, 1943 and 1953 completely separated the system of juvenile sanctions from the system of criminal sanctions for adult offenders. In the juvenile system of criminal sanctions even more weight was laid on community sanctions or alternatives to imprisonment. However, also in the juvenile justice system education and rehabilitation were made the primary

[4] For a complete review see Kürzinger, J.: Landesbericht Deutschland. In: Jescheck, H.-H. (ed.): *Die Freiheitsstrafe und ihre Surrogate in rechtsvergleichender Darstellung.* Baden-Baden 1984, pp.1737.

goal of sanctions with the option of juvenile imprisonment available only under the condition that a considerable need of rehabilitation would necessitate juvenile imprisonment[5].

As regards general developments in the criminal justice system, we should note that from the 1960s onwards significant increases in police-recorded crime are revealed by German criminal statistics. However, a rather flat line of criminal convictions and sentencing can be observed for the same period, oscillating during the 1970s, 1980s and 1990s at around 1,000/100,000 and increasing (only slightly, however) in the mid-1990s. Despite this trend in adjudication and sentencing, increases in the prison population led at the beginning of the 1980s and then throughout the 1990s to serious prison capacity problems. The increase in 1998 has led to a prison population size equal to that before the major reform of criminal sanctions in 1969 (Graph 1).

Graph 1: Prisoner rates 1961 - 1998



Source: Statistisches Bundesamt: Rechtspflege. *Fachserie* 10. Strafvollzug. Wiesbaden 1968-1999.

[5] See Albrecht, H.-J.: Juvenile Crime and Juvenile Law in the Federal Republic of Germany. In: Winterdyk, J. (ed.): *Juvenile Justice Systems - International Perspectives*. Canadian Scholars' Press: Toronto 1997, pp. 233-269.

Significant changes then took place in criminal doctrine as regards the purposes of punishment. While in the 1960s and 1970s traditional just-deserts thinking prevailed, during the 1980s and 1990s the goal of positive general prevention in terms of pursuing reinforcement of norms and addressing the public at large instead of the individual offender became more prominent. The traditional just-deserts approach to criminal sanctions and sentencing was always embedded firmly within the concept of individual guilt as expressed in the offence which has been committed.

Although the "penal value" therefore should be decided upon strictly according to individual guilt, the type of penalty corresponding to the "penal value" of the offence as well as the way penalties are enforced should be matched to the individual's need of rehabilitation. As mentioned earlier, penal policy makers in the 1960s and 1970s were preoccupied with developing penal sanctions for the two main groups of offenders into which the criminal population conceptually had been divided. First, mass crimes and herewith essentially the first-time offender as well as the well-integrated offender on the one hand, and the heavy criminal as well as the maladjusted, recidivating individual on the other hand, were made the offender groups for which penal policies and penal sanctions should be developed. For the well-integrated offender, day fines and suspended sentences should serve to avoid incarceration and its assumed negative impacts. Imprisonment was thought to be the adequate response to serious recidivists, as an *ultima ratio* or a last resort, while rehabilitative efforts were carried out within a secure prison environment.

The basic conception of the policies implemented in the 1960s and 1970s referred to dichotomized criminal offender groups: one not requiring rehabilitation (but for which imprisonment would be counterproductive), the other being in need of supervision, treatment and care. It is essentially with respect to this conception of the criminal offender that significant changes occurred during the 1980s and 1990s. During those two decades, organized crime, transnational and cross-border crimes, and new crimes such as, for example, economic and environmental crimes, were put on the policy agenda. Sensitive crimes such as hate crimes and sexual violence, terrorism and drug crimes also contributed to changing the policy debate on criminal sanctions. However, already in the concept of mass crimes and the first-time offender/well-integrated offender another policy concept was embedded, based on a different line of policy-making than the one based on rehabilitation. Mass crimes have led to capacity and overload problems, and have contributed to a significant trend towards simplification and the

streamlining of basic criminal law, in particular criminal procedure[6]. Organized, economic and other types of rational crime have led to an ongoing search for measures and policies likely to improve clearing rates and to overcome problems of evidence and problems of collecting evidence, which has become a notorious field of concern in virtually all criminal justice systems. This is specially true for so-called victimless crimes where the function of the crime victim – that is, bringing an offence to the attention of police and prosecuting authority – is no longer fulfilled and must be taken over by the criminal justice agencies themselves.

These changes have contributed to the emergence of a system of proactive policing with undercover police, new investigative technologies and an understanding of crime as network relationships, which in turn has led to the erosion of the line between investigations triggered by reasonable suspicion that a crime has been committed and criminal investigations being extended to a pre-suspicion field. With the new type of crimes mentioned above, the complexity of criminal cases has increased automatically, with certain types of economic, environmental and transnational crimes placing new and hitherto unknown demands on the procedural, legal and technological expertise of prosecution authorities and criminal courts. Finally, the costs of criminal justice have increased dramatically. New types of offenders – who are partially linked to the new crime phenomenon such as the rational offender, the minority offender and criminal organizations or corporate criminals – have to be considered. With these types of offenders, the basic approach adopted in criminal justice systems during the 1960s and 1970s (i.e. rehabilitation and reintegration focusing on the individual offender) has come under considerable pressure.

2. The system of community sanctions and measures

When looking at alternatives to imprisonment (community sanctions) in the adult criminal justice system, the role of the public prosecutor and the changes that office has undergone during the last decades should also be considered. Community sanctions or alternatives to imprisonment have to be assessed from a larger conceptual framework of criminal procedure and

[6] Council of Europe: *The Simplification of Criminal Justice.* Strasbourg 1988; Weigend, Th.: The Bare Bones of Criminal Justice: The Simplification of the Criminal Process. In: HEUNI (ed.): *Effective, Rational and Humane Criminal Justice.* Helsinki 1984, pp.233-239.

the overall system of criminal justice. While in theory the criminal process in Germany is still guided by the principle of legality, law amendments over the last three decades have created an enormous potential for the dismissal of cases and discretionary prosecution through the public prosecutor. In 1975, § 153a Criminal Procedural Code was introduced, granting the public prosecutor the power to dismiss a case in exchange for the fulfilment of certain conditions (e.g. paying a fine, community service, restitution). The 1975 law amendment restricted conditional dismissals to petty cases (in terms of petty guilt as expressed in the criminal offence) with punitive conditions thought to neutralize public interest in prosecution (in terms of deterrence or rehabilitation). In March 1993 a law came into force which essentially was justified by the economic problems which had arisen due to German reunification.

As rebuilding the justice system in the east of Germany was devouring a lot of resources, the need was felt to further streamline criminal procedures in order to reduce costs. Therefore, the power of public prosecutors to dismiss cases was extended dramatically. Now, in exchange for the conditions mentioned above, the public prosecutor is empowered to dismiss a criminal case if the guilt of the offender does not necessitate a criminal penalty. One criticism is that with these extensions the balance of powers is affected seriously as is the principle of due process; in addition a process of marginalizing the judge in sentencing is noted. But it seems evident that budget concerns have outweighed legitimate interests in keeping up proper lines between the public prosecutor's task of investigating criminal cases and indicting criminal suspects on the one hand, and the judge's task to impose criminal punishment on the other hand.

Besides the non-prosecution option, the public prosecutor has the choice between two procedures when bringing a case to court, one of which is indictment with the consequence of a regular criminal trial. On the other hand, a simplified procedure consisting only of written proceedings may be initiated. If the public prosecutor concludes that the case is not complicated in terms of proving guilt and that a day fine would be sufficient punishment, a penal order may be suggested to the judge where besides the indictment, the public prosecutor proposes a day fine. If the judge agrees a penal order is mailed to the suspect who may appeal against the order within two weeks. In the case of ordinary crimes which in principle could be brought to court (of which there were approximately 2.8 million 1997), almost 40% are dismissed either conditionally or unconditionally, another 25% are dealt with in simplified procedures and just 11% go into a full trial

(Graph 2 below). These data demonstrate that most offenders do not go through a full-blown criminal procedure but are dealt with in a simplified, administrative-like manner. The procedural option of simplified procedures was also extended drastically in the 1993 criminal procedure reform. Now the public prosecutor may propose in a simplified procedure a suspended sentence of imprisonment of up to one year under the condition that the offender had a defence counsel. As only some 6% of all criminal penalties meted out in the FRG by criminal courts today involve prison sentences of more than one year, in theory a full trial (and an explicit sentencing decision by the criminal court) could be restricted to a minor proportion of all offenders dealt with in the system. Economic pressure and administrative convenience have thus contributed to the increased use of non-custodial sentences (especially day fines).

In 1994 a law amendment bearing an American-style label („*Verbrechensbekämpfungsgesetz*" or "Crime Control Law") came into force. Among the new instruments introduced by this amendment was the exchange of information between the secret services and the police. However, with the Crime Control Law victim-offender reconciliation/mediation was inserted into adult criminal law, too (§46a Criminal Code)[7]. According to §46a C.C. sentencing shall always consider whether reconciliation, restitution or compensation had taken place. If the offender has managed to compensate the victim completely or at least has seriously tried to provide for complete compensation, the court may mitigate the sentence or – under the condition that a prison sentence of one year or less or a day fine of 360 units had been deemed appropriate – refrain from imposing any punishment at all. By systematically taking into account restitutive or reconciliatory action by the offender as a mitigating factor in sentencing – as was already suggested during the 1992 Deutscher Juristentag[8] – an attempt was made to take a major step towards incorporating the idea of restitutive justice into the system of criminal sanctions[9].

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[7] See for a complete review Steffens, R.: *Wiedergutmachung und Täter-Opfer-Ausgleich im Jugend- und Erwachsenenstrafrecht in den neuen Bundesländern.* Godesberg 1999, pp. 143.

[8] Schöch, H.: Empfehlen sich Änderungen und Ergänzungen bei den strafrechtlichen Sanktionen ohne Freiheitsentzug? *Gutachten C zum* 59. Deutschen Jursitentag. München 1992.

[9] Meier, B.-D.: Täter-Opfer-Ausgleich und Wiedergutmachung im allgemeinen Strafrecht. *Juristische Schulung* 36 (1996), pp. 436-442.

As regards the system of sanctions there are in principle three alternatives to imprisonment:

a) Cautioning with punishment (in terms of a day fine of up to 180 day fines) postponed, as introduced into German criminal law by the 1975 reform. Cautioning can be backed up by conditions set by the judge and to be fulfilled by the offender as well as a 2-5 year period of probation during which relapse into crime (or the non-fulfilment of conditions) may result in re-sentencing the offender (to a day fine). § 59 German Criminal Code, which deals with cautioning, states that cautioning and postponement of punishment should be imposed only under exceptional circumstances related either to the offender or to the criminal offence. The restrictive criteria adopted in § 59 obviously explain to a certain extent that not much use is made of cautioning; furthermore, the scope of cautioning certainly overlaps with those cases where conditional dismissals (transactions) apply, too. However, it is argued that the range of cases responded to by cautioning could be extended by lowering the statutory criteria of "exceptional circumstances" [10].

b) Day fines, which were introduced in 1975. However, the major step towards drastically reducing short-term imprisonment was made in 1969 with the introduction of a sentencing statute (§ 47 German Criminal Code), which prohibits the imposition of a prison sentence of less than 6 months if neither serious rehabilitative needs nor positive general prevention require a short prison sentence. If such needs cannot be demonstrated, a fine has to be imposed. Day fines, unlike fixed sum fines, are designed to satisfy the need for both equal and proportional punishment. Day fines, at least in theory, may be adjusted to the financial circumstances of the offender.

   Although throughout the century fines per se have been viewed as representing an inexpensive and feasible alternative to prison sentences, negative attitudes towards the use of fines have persisted among members of the public, scholars and criminal justice professionals. These critics have stressed that the use of fines enables the better-off offender to buy his or her way out of the system, while the poor offender eventually serves time in prison due to default (inabil-

[10] Albrecht, P.-A.: Entkriminalisierung als Gebot des Rechtsstaats. *Kritische Vierteljahresschrift* 1996, pp. 330.

ity to pay the fine). This leads to another argument put forward in favour of day fines. This argument stresses that the acceptance of fines and of the criminal justice system at large can be increased by making the process of imposing fines more transparent and better understandable. In fact, research on day fines has provided evidence that differences in each offender's means and assets are better taken into account than is the case with summary fines[11]. It has also been proposed that day fine systems can be useful in greatly extending the scope of fines, thereby significantly restricting the use of prison sentences to those offenders for whom imprisonment is seen as the last resort.

Consequently, day fines serve the manifest function of concentrating the resources of the criminal justice system on a small group of more serious offenders. Day fines then are seen to be congruent with current thinking in criminal justice that emphasizes a shift away from the rehabilitation and treatment of offenders towards sentencing guided by justice and proportionality. Since the seriousness of the offence should be the basic determinant of the number of day fines imposed, the number of day fines can easily be related to length of time in prison, length of time on probation, or periods of community service. Therefore, the number of day fines serves as a common denominator for the different types of penalties and the extent of deprivation or pain associated with each of them. Finally, in support of day fines it is argued that the process of day-fining leads to increased rationality in sentencing, as a judge first has to decide on the number of day fines proportional to the seriousness of the offence, the harm caused and the culpability of the offender. The judge must then adjust the level of the single day fine unit to the financial circumstances of the offender. The lower and upper limits of day fines are statutorily defined and set at five day fines as the minimum and 360 day fines as the maximum. This equals prison sentences of up to one year imprisonment for which day fines can in principle serve as an alternative.

However, besides the range of sentences of up to 6 months where § 47 mentioned above gives day fines priority over prison sentences the range of sentences between 6 months and one year is not regu-

[11] Albrecht, H.-J.: *Strafzumessung und Vollstreckung bei Geldstrafen. Unter besonderer Berücksichtigung des Tagessatzsystems*. Berlin 1980.

lated statutorily. It is thus up to the judge to choose between day fines and imprisonment of 6 months to one year on the basis of the general sentencing statute (§ 46 German Criminal Code). The size of a day fine unit may vary from 2 DM to 10,000 DM.

c) § 56 German Criminal Code addresses the suspension of prison sentences. Prison sentences of up to two years can be suspended under various conditions. While a prison sentence of up to 6 months must be suspended if the rehabilitative needs of the offender do not require immediate imprisonment, a prison sentence of up to one year may be suspended if there is no considerable risk of relapse into crime and if general positive prevention does not require immediate imprisonment. Prison sentences of between one and two years may be suspended in the case of exceptional circumstances related either to the offender or to the offence itself.

   Suspended sentences are backed up by conditions set by the court. The court may impose a range of conditions which have a punitive impact and meaning to be fulfilled by the offender. These conditions may comprise paying a fine, compensating the victim, undergoing community service and/or complying with maintenance duties. Besides such conditions, the court may impose certain restrictions, supervision and treatment orders which set in force a regime of supervision and restrictions during the period of probation. Examples of such restrictions are the duty to report at certain time intervals to the court or to the police. The court may subject the offender to supervision by the probation service for a period of 2 to 5 years. With such placement under the supervision of the probation services – whose tasks consist of supervising the offender and reporting any breaches of probation orders or probation conditions – the offender is at risk of revocation of suspension and serving the prison sentence in the case of recidivism or gross violation of probation conditions. In case of young adult offenders (up to the age of 27 years), placement under probation supervision is mandatory.

The German system of criminal sanctions separates guilt-dependent penalties from so-called measures of rehabilitation and incapacitation. Among incapacitative measures are revocation of the driving licence, which may be imposed for a period of 6 months to 5 years (or for life), as well as supervision by the probation services (which may be imposed in case of certain offence types as well as a serious risk of relapse into crime) and which ap-

plies to cases where ordinary placement under probation services cannot take place because the offender has served his or her whole term in prison. Furthermore, a "side-penalty" exists in terms of a driving ban for a period of up to 3 months which cannot be imposed as a sanction in its own right but may be imposed as an annex to either a day fine or a prison sentence or suspended prison sentence.

Although the German system of criminal sanctions seems to be rather simple due to its reliance on day fines and imprisonment, there is a hidden agenda behind the formal criminal penalties which essentially is made up of combinations of various community-based measures allowed through suspension of a prison sentence, the two-track system of penalties and rehabilitative as well as incapacitative measures, and, finally, enforcement of day fines which may lead to community service. Behind the camouflage of the basically two-tier system of criminal penalties there is a huge potential for community-based measures and sanctions which on the one hand are developed in court practice and on the other hand are not captured by court statistics or the bulk of research on criminal sanctions which concentrates on criminal sanctions and becomes visible in court information systems.

3. The organizational framework of community sanctions

Basically, within the German criminal justice system there are two organizations involved in the implementation of community sanctions: the probation services – which are located within the judicial system and are part of the district courts – and the "court aid" or the judicial social services, which are located within the public prosecutor's office (which in general deals with enforcement of criminal sanctions). Probation services are staffed by professional social workers (*Laendergesetze ueber soziale Dienste in der Justiz*) who are organizationally part of the district court with the president of the district court acting as chief of the probation service. However, the judicial authority over probation services extends only to the formal aspects of probation work. As regards the content of such work, the probation services are independent and subject only to those provisions related to reporting duties as regards the supervision of offenders placed on probation. In principle, probation cases are assigned by criminal courts to individual probation workers, not to the probation service itself.

The court aid is also staffed by social workers and forms a subdivision of the public prosecutor's office. Its tasks are twofold. First, to prepare pretrial reports on suspects, to provide information on the social and personal

characteristics of the suspect in order to allow public prosecution services to prepare the charge, and to channel this type of information into the trial. The second task is linked to the enforcement of criminal sanctions. The court aid is currently assigned the task of organizing community service (in the case of fine default). Both social service organizations are children of the rehabilitative idea in criminal law. Both are firmly attached to a core criminal justice agency, i.e. to criminal courts and the public prosecutor.

Apart from court aid and probation services, private organizations are involved in community service for adult offenders, and in recent years they have even become involved in the mediation and restitution programmes which first mushroomed in the juvenile justice system and are now gaining momentum in the daily system of criminal justice. However, the main field where private organizations get involved with community sanctions is that of juvenile justice.

4. Community sanctions and measures in practice

4.1 Conditional dismissal and non-prosecution policies

Although criminal procedural law has adopted the legality principle (and with that mandatory prosecution as a means to provide for equality in criminal justice and to protect prosecution services against political pressure), already in the mid-1960s increases in caseloads triggered the partial suspension of the legality principle through introducing § 153 German Criminal Procedural Law[12]. This law authorizes the public prosecutor to dismiss a criminal case if it involves a petty offence (and a petty guilt) and if the criminal court to which the case would have been brought agrees with the decision to dismiss. In 1975, the power of the public prosecutor to dismiss cases was extended considerably. Again, this process was driven primarily by cost-benefit reasons, but was backed up by the growing influence of the idea of avoiding the negative side-effects of formal criminal sanctions through the early diversion of criminal offenders from the system[13].

[12] See Männlein, U.: *Empirische und kriminalpolitische Aspekte zur Anwendung der Opportunitätsvorschriften §§153, 153a StPO durch die Staatanwaltschaft*. Bielefeld 1992, pp. 23.

[13] Meinberg, V.: *Geringfügigkeitseinstellungen von Wirtschaftsstrafsachen. Eine empirische Untersuchung zur staatsanwaltschaftlichen Verfahrenserledigung nach §153a Abs.* 1 StPO. Freiburg 1985.

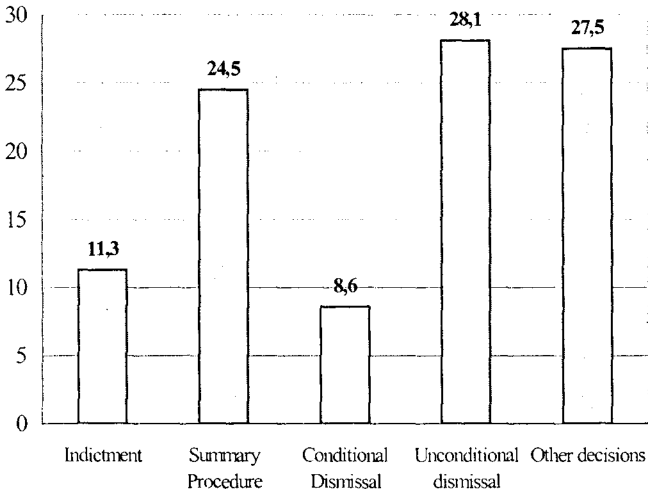
Extension of the power to dismiss criminal cases was introduced through two amendments. The first concerned making the public prosecutor independent of the consent of the criminal court in the area of property crimes, and the second concerned the introduction of conditions which can be set by the public prosecutor in order to compensate in criminal cases where despite petty guilt public interest in prosecution cannot be denied. Thus, the public prosecutor has been empowered to impose conditions to be fulfilled before a case ultimately is dismissed. These conditions concern summary fines, restitution, community service and complying with maintenance duties. In essence, there are no statutory upper limits for fines or community service. It is solely the principle of proportionality (with respect to the seriousness of the crime involved) that applies and should restrict summary fines and community service hours. Furthermore, a confession is not required.

In 1993, due to economic pressure brought about by German reunification, a major extension of the power to dismiss criminal cases in exchange for conditions was implemented (*Gesetz zur Entlastung der Rechtspflege* (Law on Reducing The Burden of the Justice System) 11.1.1993)[14]. While the wording of the former § 153a German Criminal Procedural Code still referred to petty crimes (or petty guilt as expressed in the criminal offence), the public prosecutor may now dismiss a criminal case on the condition that the personal guilt does not speak against dismissing the case. With that, exceptions from the legality principle were disconnected from the idea of separating petty offences from those cases that go to court and trial [15].

[14] BGBl I, 50.

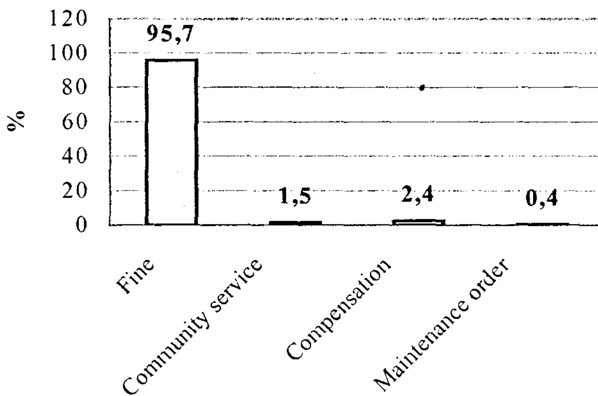
[15] Beulke, W.: *Strafprozessrecht*. 3rd Ed.., Heidelberg 1998, p. 147.

Graph 2: Decisions made by the Public Prosecutor 1997 in %



Source: Statistisches Bundesamt: *Staatsanwaltschaften* 1997. Wiesbaden 1999, p. 14.

Graph 3: Conditions Imposed by the Public Prosecutor 1997



Source: Statistisches Bundesamt: *Staatsanwaltschaften* 1997. Wiesbaden 1999.

Graph 3 presents the conditions imposed by the public prosecutor in 1997. It is evident that among the conditions fines prevail and that with this distribution of conditions the pre-eminent goal pursued concerns the swift and cost-efficient finalization of criminal cases. In 1990, the total amount of fines imposed by the public prosecutor was some 35% of the total sum of criminal fines imposed by courts [16]. In particular those conditions which are highlighted in discussions on community sanctions (e.g. community service and restitution) amount to negligible proportions. This should be explained by the choices that are made when dismissing cases. Decision-making in this field will segregate first offenders who are thought not to present risks of either re-offending or of creating problems with the enforcement of conditions. Furthermore, prosecution services resort to conditional dismissal also in cases which, from the point of view of the prosecution, would pose considerable problems in obtaining a conviction or in cases where enormous resources would have to be invested in order to provide sufficient evidence. Thus, conditional dismissals are to a certain extent also part of bargaining processes, with defence councils or defendants accepting a sometimes very high fine as a condition for non-prosecution.

The policy of non-prosecution which becomes visible with the substantial role that dismissals play in the German criminal justice system, in particular conditional dismissals, has been subject to continuing criticism for several reasons. It is argued that authorizing the public prosecutor to impose punishment in terms of conditions infringes the principle of the division of power. Concerns have also been raised with respect to the principle of the presumption of innocence, which is seen to have been put at risk. Furthermore, unequal treatment has been raised as a problem, as obviously different non-prosecution policies have been adopted in the German *Lands* with respect to various criminal offences (particularly drug offences)[17]. Finally, the lack of control of non-prosecution policies has been highlighted, as neither the victim nor the suspect may appeal against decisions not to prosecute.

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[16] Streck, M.: *Die Steuerfahndung*. 2. Aufl., Köln 1993, p. 270.

[17] Aulinger, S.: *Rechtsgleichheit und Rechtswirklichkeit bei der Strafverfolgung von Drogenkonsumenten. Die Anwendung von §31a BtMG im Kontext anderer Einstellungsvorschriften*. Baden-Baden 1997.

4.2 Cautioning with postponement of a day fine

Cautioning with postponement of a day fine is a good example of alternatives to imprisonment or community sanctions that obviously do not operate properly or do not operate in the way they are meant to operate. Cautioning with postponement of punishment comes between conditional dismissal on the one hand and day fines on the other hand [18]. Only 4,000 cases per year are registered, which amounts to 0.6 per cent of all criminal penalties meted out annually[19]. It is evident that those cases which from the viewpoint of legislation have been aimed at by introducing cautioning as a sole penalty are dealt with by the public prosecutor in terms of unconditional or conditional non-prosecution.

4.3 Day fines

Significant changes regarding the use of fines took place in 1969 and 1975. In 1969 legislation was introduced (§ 47 German Criminal Code) ordering that the fine should have priority over short-term imprisonment (less than 6 months) with the exception of particular circumstances demanding a short prison sentence for preventive reasons (individual prevention and positive general prevention). Behind the decision to cut back short-term imprisonment that drastically, stood the idea that short-term imprisonment could not work out well enough with respect to rehabilitation due to the short period available for treatment on the one hand, and the corruptive effects of the prison environment on the individual offender on the other hand.

According to this law amendment of 1969, in particular first-time offenders and petty offenders should be the main target groups of criminal fines, while long prison sentences should be reserved for a small group of heavy recidivists as well as those who commit serious crimes. At the end of 1975 a system of day fines was introduced to replace summary fines. This system of day fines is rather clear-cut and simple. No extras are available (e.g. the suspension or partial suspension of the fine or combination with other penalties). Day fines are backed up by substitute imprisonment in

[18] Scheel, J.: Die Rechtswirklichkeit der Verwarnung mit Strafvorbehalt (§§59-59c StGB). Göttingen 1996.

[19] Neymayer-Wagner, E.M.: *Die Verwarnung mit Strafvorbehalt: ihre Entstehung, gegenwärtige rechtliche Ausgestaltung, praktische Handhabung und ihr Entwicklungspotential.* Berlin: Duncker & Humblot 1998.

case of the non-payment of a fine, with one day fine equalling one day of imprisonment. It is in particular with respect to substitute imprisonment that community service entered the arena of criminal sanctions. When at the end of the 1970s and the beginning of the 1980s unemployment increased considerably, failure rates among fined offenders – which until then had oscillated at around 3% in the 1970s – increased, too. As a response to that development, community service was introduced through legislation in the individual *Lands*, as federal legislation on the replacement of substitute imprisonment through community service was not available and legislative powers in this field have been left to the *Lands*. By around the mid-1980s all German *Lands* had passed legislation concerning substituting community service for imprisonment. It is clear that community service has gained in momentum, because since 1970 the share of fines has oscillated at around 83%.

Table 1: The share of fines/day fines 1968-1996 in Germany (in %)

OFFENCE	1968	1982	1990	1996	1999
Assault	77	85	85	84	85
Theft	74	86	86	85	85
Aggravated theft	20	22	23	26	25
Fraud	52	71	78	81	82
Criminal damage	85	95	94	95	95
Drug offences	43	40	49	50	52
Drunken driving	66	93	95	90	92

Source: Statistisches Bundesamt: *Strafverfolgung*. Wiesbaden 1969-2000.

The data in Table 1 reveal on the one hand the significant role day fines play in punishing traditional crimes as well as traffic offences, whereas on the other hand it is evident that the fine is routinely used in those types of crimes characterized by petty offending. However, the records show that a considerable proportion of serious property offences and drug offences have been punished with a fine: in 1996, one in four aggravated thefts was punished by a fine and approximately half of all drug offenders received a fine. Therefore, the fine is not only the typical punishment for traffic offences; day fines are also used for more traditional crimes such as theft, larceny, burglary, fraud, assault and drug offences[20].

More recently, the emergence of environmental crimes has created another field for the application of day fines, although there is heated discussion as to whether the response to these crimes should be immediate imprisonment. On the other hand, we may conclude from research on sentencing that day fines are used regularly as a primary penalty for prison sentences in the range of up to six months. This means that in addition to petty offences, a substantial part of criminal offences ranking high on a serious scale are currently punished by a day fine.

4.4 Suspended prison sentences

The statutory framework of suspended prison sentences divides prison sentences which in principle are eligible for suspension into three categories: those of up to 6 months, those of 6 to 12 months, and those of up to 2 years. In the 1990s the share of suspended prison sentences per category was 80%, 73% and 65%, respectively. However, the role of suspended sentences can be assessed better if one considers that only about 1% of criminal sentences imposed by criminal courts (in absolute numbers, some 9,000 sentences) lie above the 2 year limit and thus outside the range of day fines and suspended sentences. Among prison sentences the share of sentences which statutorily could not be suspended amounted to approximately 7% in the second half of the 1990s.

The use of prison sentences in general (suspended and unsuspended) has been stable since the beginning of the 1970s, with 16-18% of all prison

[20] Albrecht, H.-J.: *Strafzumessung und Vollstreckung bei Geldstrafen*. Duncker & Humblot, Berlin 1980; Janssen, H.: *Die Praxis der Geldstrafenvollstreckung*. Peter Lang, Frankfurt et al. 1993, pp.26-29.

sentences being suspended. The rate of unconditional prison sentences declined until the end of the 1980s (in absolute numbers, between 30,000 and 40,000 per year in the 1970s and 1980s). The use of suspended prison sentences steadily increased until the end of the 1980s.

With a suspended sentence, the offender is placed on probation for a period of between 2 and 5 years. Suspended sentences can come with the range of conditions to be fulfilled by the offender, as was outlined above. These conditions and restrictions can be broken down into two categories: one category comprises punitive conditions, the other comprises restriction, supervision and treatment orders that should influence the offender's lifestyle as well as behaviour patterns in order to reduce the risk of relapse into crime. With respect to conditions and supervision, restriction and treatment orders, two particulars have to be noted. With a suspended prison sentence the court may impose a treatment order requiring the offender to undergo some type of therapy. Until April 1998, this type of treatment order required the offender's consent; then, however, a law amendment (initiated by strong political concerns about sexual crimes) made such a treatment order compulsive [21]. Second, when deciding on conditions and restrictions the court should consider voluntary offers made by the offender and give them priority.

As regards fines and community service, essentially the same problems come up as have been noted for conditions required for dismissing a case by the public prosecutor. An upper limit of the fine and community service has statutorily not been set nor does the law provide explicit sentencing guidelines[22]. Not much is known about the use of conditions and supervision, restriction and treatment orders attached to suspended sentences and thus about the various forms this type of community sanction can take. From a study on sentencing serious criminal offenders (covering burglary, rape and robbery) we know that fines play a major role as a condition for suspended prison sentences[23]. In this study it was found that 48% of suspended prison sentences for burglary were accompanied by a fine, while in 17% of the suspended prison sentences compensation was imposed (see Graph 4); in another 6% community service was ordered. The correspond-

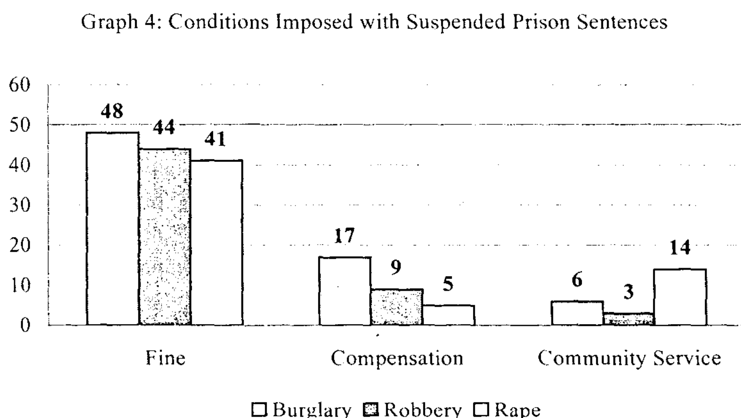
[21] Albrecht, H.J.: *Die Determinanten der Sexualstrafrechtsreform.* Zeitschrift für die gesamte Strafrechtswissenschaft 111 (1999), pp. 863-888.

[22] Fünfsinn, H.: *Die "Zumessung" der Geldauflage nach §153a I, Nr. 2* StPO. NStZ 7(1987), pp.97-103, p.98.

[23] See Albrecht, H.-J.: *Strafzumessung bei schwerer Kriminalität.* Berlin 1994.

ing rates for robbery were 44. 9% and 3%; fines were annexed to 41% of suspended rape sentences, while 5% and 14% were ordered to pay compensation or perform community service, respectively.

Graph 4: Conditions Imposed with Suspended Prison Sentences



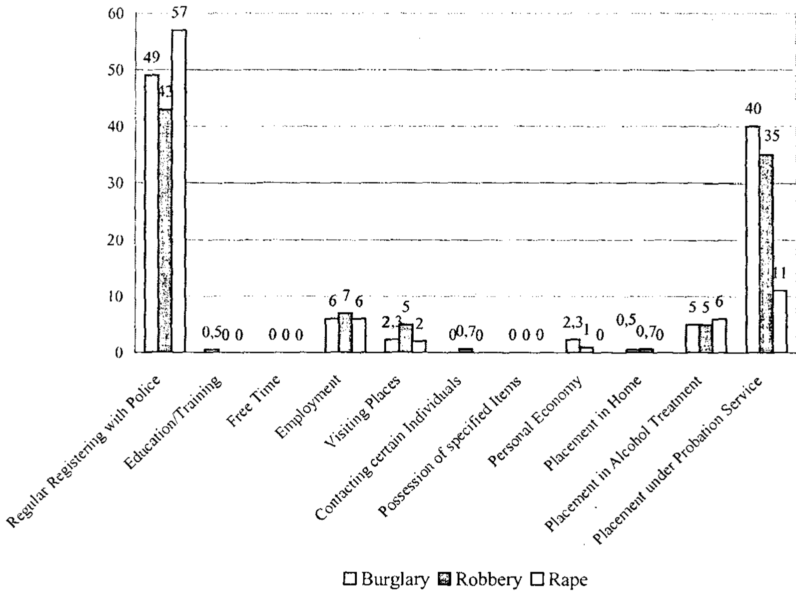
Source: Albrecht, H.-J.: *Strafzumessung bei schwerer Kriminalität*. Berlin 1994.

As regards supervision, restriction and treatment orders, by far the most important orders imposed on offenders whose sentence was suspended concerned regular reporting to police or to the court as well as placement under probation supervision (Graph 5). It can thus be concluded from these data that conditions and restrictions imposed with suspended prison sentences are punitive and/or controlling in nature.

The dominant position of punitive conditions and the restrictive and selective use made of the various supervision, restriction and treatment orders point to the development of suspended prison sentences into some kind of combination order, where the prison sentence plays the role of a threat available when enforcing conditions and restriction orders. Conditions and restrictions actually represent the penalty imposed. Therefore, it can be concluded that suspended prison sentences in practice have been transformed into a third major and independent penalty, although statutorily the suspended prison sentence remains a modification of imprisonment [24].

[24] Horn, E.: Systematischer Kommentar zum Strafgesetzbuch. 5th Ed., Neuwied, Frankfurt 1990, Sec. 2 §56b.

Graph 5: Supervision, Restriction and Treatment Orders annexed to Suspended Prison Sentences



Source: Albrecht, H.-J.: *Strafzumessung bei schwerer Kriminalität.* Berlin 1994.

5. What do we know about the implementation and outcomes of community sanctions?

When looking at the implementation and outcomes of community sanction policies, we may note first of all that day fines have been effective in replacing short-term imprisonment to a substantial degree. By placing a heavy emphasis on day fines, the problem of fine default arises. However, fine default has not been a major problem, as demonstrated by research on fine collection in the 1970s after the day fine reform took effect[25]. The picture changed somewhat in the 1980s, however, when unemployment

[25] Albrecht, H.-J.: *Legalbewährung bei zu Geldstrafe und Freiheitsstrafe Verurteilten.* Freiburg 1982.

increased to hitherto unseen levels. This is why during the 1980s community service was introduced through state legislation[26] allowing the transformation of default imprisonment into community service hours. The conversion rate was not uniformly set by the *Lands* but in general amounts to 6 hours of community service replacing one day of default imprisonment. The introduction and implementation of community service schemes have proven to be rather successful in preventing fine default and substitute imprisonment from developing into major problems [27].

As regards suspended sentences, the major impact on the offender comes by imposing additional conditions and restrictions that can result in a mix of punishment, control and supervision as well as treatment. As outlined earlier, only scattered information is available about the implementation and outcomes of conditions and restrictions. However, it can be assumed that punitive conditions and controlling restrictions play a significant role, and in practise have given suspended sentences a huge potential for various types of community sanctions. However, research also points to a sort of simplification whereby the emphasis is placed either on punitive conditions (fines) or on control. Despite the substantial increase in the use of suspended prison sentences, the rate of revocation of such sentences has actually decreased over the last decades. This, however, is primarily due to changing criteria in revocation decisions.

The developments in conviction and prisoner rates show the significant impact of unconditional and conditional dismissals, fines and suspended prison sentences. Sentencing practices during the last few decades reveal several long-term trends. The absolute number of offenders convicted and sentenced was rather stable during the 1970s and 1980s, oscillating at around 700,000 per year (around 1,000 - 1,100 criminal convictions per 100,000 of the population), but in the mid-1990s this figure increased to 760,000. The obvious stability in conviction and sentencing rates was due to the successful implementation of non-prosecution policies which cut off

[26] No federal legislation exists in this field. The introduction of community service through state legislation was possible as basic criminal law statutorily empowers the *Lands* to enact legislation as regards community service in exchange for default imprisonment; see for details Feuerhelm, W.: Stellung und Ausgestaltung der gemeinnützigen Arbeit im Strafrecht. Wiesbaden 1997.

[27] Albrecht, H.-J., Schädler, W. (eds.): Community Service, Gemeinnützige Arbeit, Dienstverlening, Travail d'Intérêt Général - a new option in punishing offenders in Europe. Freiburg 1986; Albrecht, H.-J., Schädler, W.: Die gemeinnützige Arbeit auf dem Wege zu einer eigenständigen Sanktion?? Zeitschrift für Rechtspolitik 21(1988), pp. 278-283.

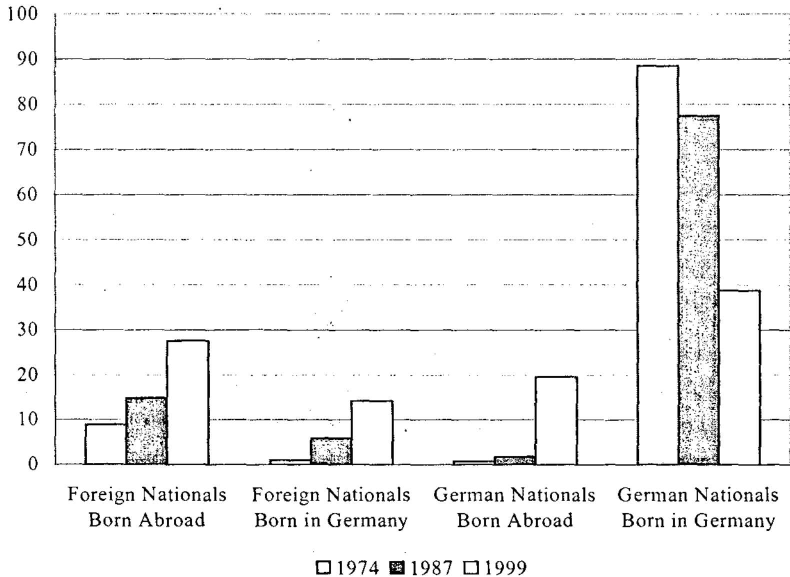
steadily increasing numbers of suspects. The increase in the numbers sentenced during the 1990s is accounted for by the rapidly growing proportion of foreign offenders. The percentage of sentenced offenders among the German population has in fact decreased in light of the developments during the last 20 years. While 1,342 German offenders were sentenced per 100,000 of the population in 1975, in 1996 this figure amounted to 1,076/100,000.

The development of prisoner rates since the 1960s very clearly reflects the apparent success of alternatives to imprisonment such as day fines and suspended prison sentences. The prisoner rate dropped from 100/100,000 at the end of the 1960s to 65/100,000 at the beginning of the 1970s, and then increased until the beginning of the 1980s (due to the increasingly punitive response to drug-trafficking, and partially also to sexual offences). From the beginning of the 1980s, the prisoner rate decreased again until the beginning of the 1990s, but since then has shown an unbroken upward trend throughout the nineties. However, at the beginning of the new millennium the trend seems to have stabilized. In 2000 and 2001 absolute and relative figures evidently are even slightely decreasing. The developments in prisoner rates during the nineties can be attributed to foreign and immigrant offenders. It is in particular immigrants (together with drug offenders) who account for the increase in the use of imprisonment in the 1990s. As regards resident offenders, in principle nothing has changed in the last few decades and they will most probably continue to be subject to the trends in the sanction systems which have been developed since the 1960s and 1970s. It is for these resident offenders that intermediate and community-based sanctions still play a major role, as do diversionary practices and non-prosecution policies. In turn, this means that the role of imprisonment for these groups will continue to decline and the role of imprisonment for unsettled groups such as illegal immigrants, immigrants in precarious situations (asylum, refugee status) as well as addicts and those working in shadow economies will continue to increase.

A rather significant account of such developments is visible in data drawn from the Baden-Württemberg youth correctional system. Data on display in graph 6 demonstrates the dramatic changes in the ethnic composition of youth prison inmates. Between 1974 and 1999 youth prisoners of German nationality and born in Germany became a minority while foreign nationals and German nationals born abroad (these come primarily from the former Sovjet Union and are ethnic Germans re-emigrating to Germany since the seventies; however, since the beginning of the nineties most of

these immigrants bring a multitude of problems with them that create obstacles for integration) at the turn of the century make up the majority of prison inmates.

Graph 6: Ethnicities in German Youth Prisons (%)



Particularly from the view of rehabilitation, comparative analyses of recidivism after different types of criminal sanctions have become an important topic since the 1970s. However, despite the evident significance community sanctions or alternatives to imprisonment have gained in practice, research on recidivism has continued to concentrate on the prison system. Those studies on recidivism that compare community sanctions with sentences of immediate imprisonment, however, support the conclusion that neither the introduction of fine priority nor the extension of suspended sentences has led to increased rates of recidivism among those groups who had before the law amendments and changes in sentencing practice been sentenced to imprisonment[28]. Summarizing the evidence so far, it can be

[28] For a summary of research see Albrecht, H.-J.: op.cit. 1982.

concluded that community sanctions and imprisonment are – from the viewpoint of individual prevention of crime – exchangeable.

6. The future of community sanctions

Fines and suspended sentences will continue to play the role they have played during the last three decades. However, critics stress that the German system of sanctions based on day fines and prison sentences alone is too simple and should become more differentiated[29]. Debates sparked in the 1980s in the Federal Republic of Germany have highlighted upgrading community service [30], the driving ban, the revocation of the driver's license as well as the suspension of a prison sentence to sanctions in their own right[31] as well as the possibility to suspend a day fine and place the convicted person on probation. A commission for the reform of penal sanctions set up in 1998 has published its final report in 2000 and has outlined again the range of possible alternatives to imprisonment and intermediate sanctions whichhave been mentioned above [32]. Furthermore, electronic monitoring became an issue in the mid-1990s, with serious efforts as expressed in draft laws presented by several *Lands* to introduce electronic monitoring as a criminal sanction. However, there are different views on what electronic monitoring should replace. While the Berlin *Land* has introduced a proposal suggesting that electronic monitoring should be introduced as a special version of an open prison environment (*Vollzugslockerung*)[33], other *Lands* have put forward the idea of introducing such monitoring as an additional restriction order within the framework of suspended sentences (Hessen), as an alternative to pre-trial detention or as an additional device when responding to fine defaulters (Baden-Wuerttemberg). Electronic monitoring has been discussed from the perspective of human rights as well

[29] Weßlau, E.: In welche Richtung geht die Reform des Sanktionensystems? *Strafverteidiger* 1999, S. 278-287, p. 280.

[30] Feuerhelm, W.: Stellung und Ausgestaltung der gemeinnützigen Arbeit im Strafrecht. Wiesbaden 1997; Schneider, U.: Gemeinnützige Arbeit als „Zwischensanktion". Monatsschrift für Kriminologie und Strafrechtsreform 84(2001), pp. 273-287.

[31] See Weßlau, E.: op.cit. 1999, pp. 278.

[32] Kommission zur Reform des strafrechtlichen Sanktionensystems: Abschlussbericht. Berlin 2000 (www.bmj.bund.de).

[33] BR-Drucksache (Federal Council Printed Materials) 698/97, p. 4.

as its compliance with the European Rules on Community Sanctions and Measures (see rule 22) [34].

There remains widespread scepticism with respect to the potential benefits of introducing electronic monitoring (or other intermediate sanctions) as a sanction designed to replace custodial sanctions. It is argued that those systems where up to now electronic monitoring has succeeded somewhat in substituting imprisonment differ sharply from the German criminal justice system as regards the use of short prison sentences[35]. However, a look at judicial information systems demonstrates clearly that despite the statutory priority of day fines over imprisonment for a period of less than 6 months (§47 GCC), short prison sentences of 6 months or less still make up 37% of all unsuspended prison sentences (1997)[36]. The debates of the last 15 years have also demonstrated the obvious reluctance and partially also resistance on the part of the judiciary and of parliaments to introduce further community sanctions. This may change now with a new government, which has been in office since the autumn of 1998 and is placing more emphasis on reform of the criminal justice system [37], including also the introduction of new penalties.

The current plans of the new government concern community service, driving bans, electronic tagging and a kind of summary fine meted out in simplified and administrative-like procedures [38]. However, in face of the apparent success of suspended prison sentences on the one hand and day fines on the other hand, it seems questionable whether the introduction of new penalties will result in anything more than replacing minor proportions of existing community penalties. It is obviously in particular community service which could serve as an important sentencing alternative, as experiences with community service as a substitute for substitute imprisonment have shown that there is an obvious need to respond to those criminal of-

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[34] Wittstamm, K.: *Elektronischer Hausarrest? Zur Anwendbarkeit eines amerikanischen Sanktionsmodells in Deutschland.* Baden-Baden 1999, pp. 102.

[35] Hudy, M.: *Elektronisch überwachter Hausarrest. Befunde zur Zielgruppenplanung und Probleme einer Implementation in das deutsche Sanktionensystem.* Baden-Baden 1998, p. 246.

[36] Statistisches Bundesamt (ed.): *Rechtspflege. Fachserie 10. Ausgewählte Zahlen für die Rechtspflege 1997.* Wiesbaden 1999, p. 26-27.

[37] See eg. Däubler-Gmelin, H.: Überlegungen zur Reform des Strafprozesses. Strafverteidiger 2001, pp. 359-363.

[38] Weßlau, E.: op.cit. 1999, p. 286, this summary fine – according to reform plans – should be imposed by the police.

fenders who evidently will not be able to pay a fine [39]. In the year 2000, the Land of Hessen has initiated an experiment with electronically controlled house arrest (which is devised to replace imprisonment as well as revocation of suspended prison sentences; the scope of replaceable detention covers also remand prison) [40]. The results available so far from evaluation research implemented together with the experiment shows that electronic monitoring is feasible as regards technic and administration and that there exists obviously a certain range of cases perceived to be suited for house arrest instead of placement in prison by prosecutors and judges [41]. In particular judges and prosecutors welcome the experiment which will last for a period of two years before being evaluated and assessed with respect to implementing electronically controlled house detention in the whole of the Land Hessen. Social services and probation workers though are rather critical of electronic monitoring, a position which certainly is explained by a social work and social support guided approach that sees itself confronted with control and supervision.

However, neither available community sanctions nor plans to add variations to such sanctions will present solutions to those offender groups still increasing in numbers which – because of their unsettled and marginal life – are placed outside communities and therefore fall outside the reach of all types of community sanctions and fall into the centre of criminal (and administrative) detention.

[39] See Schneider, U.: opus cited 2001, p. 284, pointing to the need of a wide availability of community service jobs, social work support annexed to community service, carefull screening of offenders eligible for community service and carefull consideration of the capability of offenders.

[40] Albrecht, H.-J., Schädler, W., Arnold, H.: Der hessische Modellversuch zur Anwendung der „elektronischen Fussfessel". Zeitschrift für Kriminalpolitik 33 (2000), pp. 466-470.

[41] See preliminary results at www.iuscrim.mpg.de

Community Sanctions and Measures in Greece

AGLAIA TSITSOURA

1. History

Although crime policy in Greece has always been based on the use of custodial sanctions, non-custodial sanctions have existed in Greek legislation and practice for a long time.[1] The first Greek Criminal Code of 1834 provided only for fines. Later, Act 3810 introduced some alternatives to imprisonment - such as conditional suspension of the enforcement of a custodial sanction, conditional release and conversion of custodial sentences into fines - in 1911. The same measures were included in the Criminal Code of 1950, which is still in force. The Criminal Code provided also for measures of supervision and care by a specialised social worker for juvenile offenders.

Non-custodial measures for adults were mainly aimed at limiting the number of brief prison sentences imposed, which are considered dangerous, as they give first-time offenders the opportunity to meet other, more depraved offenders. It was also hoped that threat of revocation of the condi-

[1] See e.g.: ALEXIADIS S.: Towards the reform of the penal system, Athens, KOMOTINI, 1983, p. 7 ff. (in Greek) - COURAKIS N.: Penal repression, Athens, 1985, p. 228 ff. (in Greek) - KAKKALIS P., COURAKIS N., MAGGANAS A., FARSEDAKIS J.: Criminal Code, Athens, 1995, p. 588 ff. (in Greek) - MANOLEDAKIS J.: The recent reforms of the Criminal Code and of the Code of Criminal Procedure. In: Society of Jurists of Northern Greece, The recent reforms of Greek CC and CCP, Thessaloniki, 1995, p. 15 ff. (in Greek) - MARGARITIS L., PARASKEVOPOULOS N.: Penology, Thessaloniki, 1989, p. 89 ff. (in Greek) - PITSELA A.: Greece. In: Sanction systems in the member-states of the Council of Europe, Part I, ed. Anton M. van Kalmthout, Peter J.P. Tak, Kluwer Law and Taxation Publishers, 1988, p. 151 ff. - SPINELLI C.: Attacking prison overcrowding in Greece: a task of Sicyphus? In: Festschrift für G. Kaiser, Berlin 1998.

tional measure might deter the conditionally sentenced or conditionally released offender from new offences. Finally, although not openly expressed, the above measures were essentially aimed at reducing the prison population.[2]

Much later, in the 1990s, under the influence of the work of the United Nations[3] and of the Council of Europe[4], it became evident that it was necessary to introduce into Greek legislation and practice measures giving real opportunities for the treatment and rehabilitation of offenders. Thus, in 1991, Act 1941/91 introduced conditional suspension of the enforcement of a custodial sanction with supervision and, in 1993 Act 2145/93 introduced conversion of custodial sentences into community service. Provisions of these laws, as later amended especially by Acts 2408/96 and 2479/97, were inserted into the Criminal Code.

These reforms align Greek legislation with that of other member states of the Council of Europe and are a considerable improvement. However, subsequent policy did not favour the implementation of the new measures. Greek legislation and practice concerning community sanctions and measures and, in particular, problems of implementation will be described briefly hereafter.

2. Legislation and practice concerning CSMs in Greece

Community sanctions and measures may be:

- autonomous sanctions;
- modalities or conditions of implementation of custodial sanctions.

[2] See: MANOLEDAKIS J., op. cit. p. 28.

[3] From the beginning of its activities, the United Nations gave great attention to community measures. The United Nations Standard Minimum Rules for non-custodial measures (Tokyo Rules) summarize the UN Position in this field. See: EIGHTH CONGRESS OF THE UNITED NATIONS FOR THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS. Havana, 1990, A/Conf. 144/28/Rev. 1.

[4] The COUNCIL OF EUROPE has strongly promoted community measures in various resolutions, recommendations and reports. See: Resolution 65 (1) on suspended sentences, probation and other alternatives to imprisonment, Resolution (70) 1 on the practical organization of measures for the supervision and after-care of conditionally sentenced or conditionally released offenders, Resolution (76) 10 on certain alternative penal measures to imprisonment, Recommendation R (92) 16 on the European Rules on Community Sanctions and Measures. The European Convention on the supervision of conditionally sentenced or conditionally released offenders (1967) was meant to facilitate European collaboration in the implementation of the above measures.

2.1. *Autonomous sanctions*

A fine is the only autonomous, non-custodial sanction in the Greek Criminal Code (Art. 57). In fixing the amount of the fine, the court takes into account the financial conditions of the offender and of those members of his/her family who are in his/her charge (Art. 80, 1 CC). A fine and a custodial sentence may be imposed if the court considers that only one of these penalties is insufficient to deter the offender from committing further offences (Art. 80, 2 CC). A fine as an autonomous sanction is not frequently used: it represents around 3.8% of the sanctions pronounced in a year (in 1995, 3,275 out of a total of 85,909 sentences).[5]

2.2. *Community measures as modalities or conditions of enforcement of custodial sentences*

2.2.1. *Conditional suspension of the enforcement of a custodial sanction*

When an offender who has not been previously sentenced to a final custodial sanction of more than six months is sentenced to a custodial sanction not exceeding two years, the court grants suspension of the enforcement for a period of three to five years. Suspension will not be granted if the court considers - on the basis of evidence mentioned in the motivation - that enforcement of the custodial sanction is absolutely necessary in order to deter the offender from committing new offences (Art. 99 CC). If the custodial sanction pronounced by the court is between two and three years, the court may decide to grant suspension of the enforcement, taking into account the circumstances of and motives behind the offence as well as previous life and character of the offender. The behaviour of the offender after the commission of the offence and, especially, his/her repentance are also taken into consideration (Art. 100, 1 CC).

Suspension may also depend on the payment of judicial expenses and on the compensation of the victim (Art. 100, 3 CC). Suspension is revoked:

- if during the probationary period it is proven that the offender has been previously, finally sentenced to a custodial sanction of more than two years (Art. 101 § 1);

[5] NATIONAL STATISTICAL SERVICE OF GREECE, Judicial Statistics, 1995.

- if a similar sentence for an offence committed before publication of the decision on suspension becomes final during the probationary period, unless the court in its decision expressly states that - in view of the minor importance of the new offence - suspension should remain (Art. 101 § 2).

Suspension is withdrawn:

- if the offender is finally sentenced for an offence committed during the probationary period. However, in this case too, the court may decide that suspension should continue (Art. 102, 1 CC).

Conditional suspension of the enforcement of a custodial sanction, being practically mandatory in a great number of cases, is a measure playing an important role in Greek judicial practice. It is applied in around 25% of the sentences (in 1995: 20,856 suspended sentences out of a total of 82,634 custodial sentences)[6].

2.2.2. Conditional suspension of the enforcement of a custodial sanction with supervision

This measure, which corresponds to the French measure of *sursis avec mise à l'épreuve,* has been introduced in order to offer care and supervision to the offender with a view to his/her social rehabilitation. According to Art. 100A of the Criminal Code, "when the offender is sentenced to a custodial sanction of three to five years and the conditions for simple suspension exist, the court may grant suspension of the enforcement with care and supervision by a Social Assistance Officer for a period of three to five years."

Conditions accompanying this measure concern the behaviour and residence of the offender and may be, in particular (Art. 100A, 2 CC):

a) prohibition to leave the place of residence or any other place indicated by the court without permission;
b) revocation of the offender's passport, unless permission to leave the country, for no more than a month, is given;
c) obligation to present oneself, at certain intervals, to police authorities or to the Office of Social Assistance;
d) revocation of the driving licence;
e) prohibition to frequent certain persons;
f) compliance of the offender with his/her financial or care obligations.

[6] NATIONAL STATISTICAL SERVICE OF GREECE, Judicial Statistics, 1995.

The court may also order the offender (Art. 100A, 3 CC):

- to undergo a cure or a special treatment;
- to live in an institution during a certain period of time;
- to perform community service.

Compliance with these conditions is supervised by the Social Assistance Officer, who should submit, every three months, a report to the public prosecutor (Art. 100A, 4 CC). If, during the probationary period, the offender does not comply with the conditions, the court may, on request of the competent public prosecutor, revoke the suspension (Art. 100 A, 5 CC).

Act 1941/1991, which introduced this measure, requires the creation of a Service of Social Assistance Officers. However, this service has not yet been created. The corresponding service for the "care of minors" (Art. 122 CC) is considerably understaffed[7] and cannot undertake the supervision of adults.

Art. 100, 8 of the Criminal Code states that, until the creation of the Service of Social Assistance Officers, supervision of the offenders may be exercised by the public prosecutor of the court that granted the suspension. However, it is evident that public prosecutors do not have the time or the training to perform the function of probation officer. As a consequence, implementation of the measure of "conditional suspension with supervision" has not yet begun. The phenomenon, deeply regretted by many Greek scholars[8], is attributed to the indifference of the competent authorities rather than to financial difficulties in the creation of the service. In fact, implementation of the measure of suspension with supervision may reduce the prison population.

2.2.3. Conversion of custodial sanctions into a fine

This is the alternative measure most frequently applied in Greece. According to Art. 82 of the Criminal Code, "custodial sanctions not exceeding one year are converted into fines". Custodial sanctions of more than one but

[7] See e.g. SPINELLI C. - TROIANOU A.: Law concerning minors. Athens, Komotini, 1987 (in Greek), p. 88 ff.

[8] See e.g. SPINELLI C.: Description of criminality in Greece and in Europe, necessary condition for the establishment of a crime policy, p. 52, TSITSOURA A., Crime Policy and Human Rights, p. 22, A YOTOPOULOS MARANGOPOULOS: Custodial Sentences and Human Rights, p. 108-109. In: Crime Policy and Human Rights (in Greek and French), Ed. A TSITSOURA, MARANGOPOULOS Foundation for Human Rights, Athens, Komotini, 1997.

less than two years are also converted into fines unless the offender is recidivist and the court, in a motivated sentence, declares that enforcement of the custodial sanction is necessary in order to avoid commission of further offences by the offender. When custodial sanctions exceed two years, after enforcement of half of the time and if the remaining part does not exceed two years, the court at the request of the inmate converts the remaining part into a fine, unless due to the offender's behaviour during detention the court considers that a fine is not sufficient to deter the offender from the commission of further offences (Art. 82, 2 CC). Conversion is not allowed in the case of drug-trafficking offences or offences against the Military Criminal Code (Art. 82, 11 CC). Converted sanctions conserve their character of custodial sanctions (Art. 82, 10 CC).

The amount of the fine is fixed on the basis of the offender's financial situation. If the offender cannot pay the lowest sum of the conversion and the offence was not a profit-seeking one, the amount may be reduced to one-third of the lowest limit (Art. 82, 3 CC). The custodial sanction pronounced by the court is implemented until payment of the entire sum of the conversion. However - at the request of the offender - the public prosecutor may permit the payment of the conversion fine by instalments, within two years from the date of the sentence. Such a decision is taken when the sentenced person: a) is manifestly unable to pay; b) in view of his/her education, professional situation and other elements of his/her personality, is expected to conform to his/her obligation; c) has asked conversion into community service which has been refused for reasons independent of his/her will (Art. 82,5 CC). The amount of conversion fines is fixed periodically by the joint decision of the Minister of Justice and the Minister of the Economy. Around 72% of custodial sentences are converted into fines (in 1995: 59,809 out of a total of 82 634 custodial sentences)[9]. The measure of conversion has been the subject of various discussions among Greek scholars:[10]

[9] NATIONAL STATISTICAL SERVICE OF GREECE, Judicial Statistics, 1995.

[10] See, e.g.: GAVALAS S.: Conversion of the custodial sentence. In: Society of Jurists of Northern Greece. The recent reforms of the Criminal Code and of the Code of Criminal Procedure (in Greek), Thessaloniki, 1995, p. 83 ff. MARGARITIS L., PARASKEVOPOULOS N.: Penology, (in Greek), Thessaloniki, 1989, p. 363 ff. SPINELLIS D.: The conversion. Purchase or pecuniary sanction? (in Greek) In: Volume in memory of N. Chorafas, E., Gafos, K., Gardikas, I., Athens, Komotini, 1986.

- Nobody denies the advantage of avoiding, by means of conversion, short-term prison sentences and their many drawbacks.[11] The rather low percentage of the prison population in Greece is explained by the frequent use of the above measure.[12]
- It is also evident that conversion does not imply costs; on the contrary, its implementation brings money to the state treasury.
- However, conversion often gives the impression that the offender is 'buying off' his/her sentence and is escaping punishment.
- Conversion results in social inequality, as poor offenders are not able to pay the conversion fine. Nevertheless, the financial situation of the offender is taken into account by the court; equally, various modalities facilitate payment (postponement of payment for a certain period of time). Thus, conversion is now very similar to measures of 'day fines' existing in various countries.[13]

The imposition of an autonomous fine, instead of the conversion of a custodial sentence into a fine, might be considered preferable. However, the legislation appears to grant importance to the initial pronouncement of a custodial sanction as a stronger deterrent, even if this sanction is subsequently to be converted into a fine. Possibilities for conversion have been more and more extended by recent legislation. Nevertheless, a number of offenders are still not able to convert the custodial sanction.[14] Especially foreign prisoners (clandestine migrants in particular) are completely without resources, live far from their families and - consequently - are obliged to serve the custodial sanction. This explains, among other things, their frequent presence among the prison population in Greece.[15]

[11] See RESOLUTION (73) 17 OF THE COUNCIL OF EUROPE ON SHORT-TERM TREATMENT OF ADULT OFFENDERS AND EXPLANATORY REPORT, Strasbourg, 1974 - See also SPINELLIS, D., op. cit. p. 214 ff.

[12] 71°/oooo in 1994. See COUNCIL OF EUROPE, Penological Information Bulletin, Nos. 19-20, December 1994-95, p. 77.

[13] See: SPINELLIS, D., op. cit. p. 224 ff.

[14] According to a research in the prison of Korydallos, more than 20% of the inmates cannot pay the sum of conversion. See: SPINELLI C.: The alternative sanction of community work in Greece: an inapplicable institution? (in Greek). Volume in memory of E. Dascalakis, Athens, 2000, p. 279 ff.

[15] See: SPINELLI C., ANGELOPOULOU K. AND KOULOURIS N.: The Brave New World of Ethnic Groups in the Overcrowded Prisons. A Challenge for the Guardians of Human Rights (in Greek). In Chroniques, Vol. 8, Athens, Komotini, Dec. 1993, p. 97 ff.

2.2.4. Conversion of a custodial sanction into community service

According to Art. 82, 6 CC "a custodial sanction exceeding one month, which has been converted into a fine, is further converted into community service if the offender requires or accepts it and if he/she is able to perform the task. If the custodial sanction is between two and three years, the court may convert it into community service under the same conditions". The court decides on the number of hours, which correspond to a day of custody (Art. 82, 7 CC). Normally, each day corresponds to four hours of work, but the court may - taking into account the personal conditions of the offender - fix it at two hours or at six hours. It should be noted that - in comparison to other countries - the number of hours of community service according to Greek legislation is very high: for example, 720 hours for a six-month custodial sanction![16] The sentenced person cannot perform the task during his/her leisure time, unless implementation takes place over several years.

The public prosecutor responsible for enforcement of the sentence indicates the institution or the person who will benefit from the work as well as the period of execution of the task. Community service is granted without remuneration to public services, local authorities, public or private (non-profit making) legal entities or to any other service specified by ministerial decision. It may also be granted to the victim if offender and victim agree to that. A Social Assistance Officer must supervise community service unless the court decides otherwise (Art. 82, 8 CC). If the community service is not performed or if it is performed in an unsatisfactory way, the conversion ceases. The court may agree to convert again the custodial sanction into a fine (Art 82, 9 CC).

Conversion of a custodial sanction into community service has been introduced in order to give a constructive and educative character to the measure of conversion. Unfortunately, implementation of this measure has been very difficult. As already mentioned, community service should be supervised by the Service of Social Assistance - which has not yet been created. The initial Act of 1941/91 indicated that the measure would come into force after the creation of this service. However, the more recent Act

[16] In most countries that have introduced community service, the minimum of hours imposed is 40 and the maximum is 240. See: JUNGER-TAS J.: Alternatives to prison sentences - experiences and developments. RDC Ministry of Justice, Kugler Publ., Amsterdam - New York, 1994, p. 26.

2408/95 (incorporated in the Criminal Law, Art. 82, 8) specified that in the absence of this service, other civil servants might assume the role of supervisor.

The Greek Supreme Court (Areios Pagos) by decisions 23/1997 and 313/1997 invalidated two decisions of the Court of First Instance of Thessaloniki, converting imprisonment to community service, pointing out (among other things) that in the absence of a specific ministerial decision on organisms benefiting from community service and other details of implementation, provisions of Act 1941/91 (as inserted in the Criminal Code) are not yet in force.[17] Efforts have been made to overcome these formal obstacles:

- Juvenile courts in some recent cases applied the measure of community service in the framework of the re-educative measure of care (Art. 122, 22 CC).[18]
- In order to promote the movement in favour of the community service, a group of students at the Faculty of Law of Athens carried out research by sending a questionnaire to 49 municipalities and other public services asking them if they were willing to offer tasks for community service in order to prevent the imprisonment of a number of offenders. Twenty-four municipalities replied positively, 3 negatively and 22 rather positively but with some reservations. Some public services (railways etc.) also expressed their willingness to collaborate.[19]
- On the basis of results of the above mentioned research the Ministerial Decision No. 108842/1997 communicated to all concerned a table of public (or local authorities) services willing to accept community services by sentenced persons. The decision dealt also with some modalities of implementation of such service (place where it should take place, tasks adequate, ecc).

These were timid attempts to start the implementation of the measure of community service, in Greek crime policy.

[17] See: SPINELLI C.: The alternative sanction of community service, etc.
[18] See: SPINELLI C.: op. cit.
[19] See: SPINELLI, C., op. cit.

2.2.5. Conditional release

According to Art. 105 of CC, conditional release may be granted to inmates who have served:

- two-thirds of the custodial sanction in the case of 'imprisonment' (sentences from 10 days to 5 years);
- three-fifths in the case of 'reclusion' (sentences from 5 to 20 years);
- twenty years in the case of life imprisonment.

Inmates above 70 may be released after serving two-fifths of the sentence and, in the case of life imprisonment, sixteen years. Conditional release is always granted unless the court considers, on the basis of the inmate's behaviour during detention, that continuation of the detention is necessary in order to prevent the commission of new offences.

Specific conditions concerning the released offender's way of life or residence may accompany the release (Art. 106, 2 CC). Conditional release may be revoked if the offender does not comply with these conditions (Art. 107, 2 CC). Release is also revoked if the released offender commits an intentional offence and receives a final sentence of more than six months imprisonment during the probationary period (Art. 108 CC). The Court of First Instance of the place of detention, deciding in camera, grants conditional release, on the request of the penal institution. Revocation of the release is decided by the same court (Art. 110, 2, 3 CC). The released offender may be supervised by the Society for the Protection of Released Offenders (Art. 110, 4 CC). However, the Society has very few resources. Thus, after-care has not really been developed.[20]

Conditional release, being almost mandatory, is largely used, although more often prisoners are released after conversion of the last part of their custodial sanction (no longer than two years) into a fine. Thus, among 5,438 inmates released in 1995, 1,182 were conditionally released and 2,309 were released by conversion of the last part of their penalty into a fine.[21] Conditions of release have been criticised for various reasons:

- the almost automatic character of release sometimes influences judicial practice (i.e. the court may give longer sentences knowing that a part of them will not be served);[22]

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[20] See; MARGARITIS L., Paraskevopoulos N., op. cit. p. 426.

[21] NATIONAL STATISTICAL SERVICE OF GREECE, Judicial Statistics, 1995.

[22] See: E. ANAGNOSTOPOULOS: Conditional release: The end of an institution? In: Criminal Chronicles (Poinika Chronika), December 1997, Vol. 10, p. 1508.

- the unique criterion of the offender's behaviour inside prison - where most of the offenders behave well in the hope of gaining privileges or early release - is considered as inadequate. The initial Art. 105 of the Criminal Code (Act 1492/1950) required, apart from good behaviour during the implementation of the sanction, compliance with obligations towards the victim imposed by the court and expectation of a future law-abiding life, evaluated on the basis of the personal and social circumstances of the offender. The latter conditions were deleted when Art. 105 was reformed by Act 2408/96. Probably, the prognostic work required by the previous text has been considered very difficult. Nevertheless, actual conditions for granting conditional release are considered insufficient.[23]

Facilitating release serves usually to reduce the prison population. In fact, some of the reforms in this field are a response to prison riots motivated by prison overcrowding.

3. Measures provided by Act 1851/89 Code of Basic Rules for the Treatment of Offenders

3.1. Semi-liberty

According to Arts. 53, 55, 57 of Act 1851/89, prisoners who have served one-third of their penalty (at least six months or, in the case of life imprisonment, fifteen years), and who wish and are able to exercise some profession outside the penal institution may be granted (by a competent commission) the permission to live in a regime of semi-liberty. The permission specifies the days and hours of work, the kind of work, the salary of the prisoner, the insurance against work accidents and the staff responsible for the implementation of the measure.

3.2. Weekend imprisonment - community work

Art. 61 of Act 1851/89 provides the possibility for offenders whose custodial sentence (less then eighteen months) has been converted into a fine to

[23] See: STATHEAS G.: Requirements for conditional release of the sentenced persons. Criminal Chronicles (Poinika Chronika), December 1997, Vol. 10, p. 1563 ff. Anagnostopoulos E., op. cit., p. 1566 ff.

ask to serve their custodial sentence in instalments (especially during weekends and holidays) in order to be able to continue their studies or professional occupation. Under the same circumstances, the offender may be able to perform community work. The Court of Implementation of Sentences takes the decision on these requests.

3.3. Beneficial calculation of days of work

According to Act 2058/52 (Art. 25), each day of work in a penal institution may be calculated as two days. Act 1851/89 (Basic rules for the treatment of offenders) specifies that such calculation will not take place in the case of semi-liberty, weekend imprisonment or community service (Arts. 57, 4 and 61, 3).

4. Conclusions

Greek legislation and practice concerning community measures can be summarized as follows:

a) Alternatives to custodial sentences are largely applied but are only aimed at avoiding short-term custodial sentences and unburdening prisons. The hope that these measures might also prevent recidivism (by the threat of their revocation in case of a new offence) did not become a reality. According to the Judicial Statistics[24], in 1995 42.8% of sentenced persons were recidivists.
b) Community measures - which are aimed at helping the offender, by supervision and care, to lead a law-abiding life or measures giving offenders a constructive role in the community (suspension of the enforcement of a custodial sentence with supervision; community service) - exist in legislation but are not applied in practice.

Legal formalities and financial pretexts impede the implementation of the two above-mentioned measures and, in particular, the creation of a Service of Social Assistance, which is necessary for both measures. Governments prefer to promote the extension of possibilities for simple conditional suspension or for the conversion of custodial sentences into a fine. Many efforts have been and are being made in academic circles to change mentali-

[24] NATIONAL STATISTICAL SERVICE OF JUSTICE, Judicial Statistics, 1995.

ties, but so far this has met with only moderate success.[25] However, as mentioned above, there are some signs that the public authorities are becoming sensitised to the new measures. It is to be hoped that a more community-oriented policy will be established in Greece in the near future.

[25] See e.g. the conclusions of a seminar organised by the Marangopoulos Foundation for Human Rights: A. YOTOPOULOS-MARANGOPOULOS: Proposals concerning the measures to be taken. In: Crime Policy and Human Rights (in Greek and French). Ed. A. Tsitsoura, Athens, Komotini, 1997, p. 221.

Community Sanctions and Measures in Ireland

BILL LOCKHART, COLETTE BLAIR

1. Context of Community Sanctions

Before examining community sanctions in Ireland, it is necessary to put them in their political and criminal justice context. The island of Ireland has been politically divided since 1922 into the Republic of Ireland and Northern Ireland, which is part of the United Kingdom. Both states are part of the European Union.

The criminal justice systems in the Republic of Ireland and Northern Ireland share many common features, such as the adversarial system, the separation of prosecution from investigation, and a professional and independent judiciary. Both have their roots in the English system. The criminal law within which they operate include a mix of common law and Acts of their respective parliaments (in the case of Northern Ireland from 1972 this has been through Acts of the United Kingdom Parliament and Orders in Council).

Because of reasons of space this paper will focus primarily on community sanctions in the Republic of Ireland. However, the history and context of community sanctions in Northern Ireland will also be summarised. This will allow some comparisons to be made between the two jurisdictions.

Ireland's history has been chequered with civil unrest and periods of terrorism. This has had an effect on the crime profile - particularly of Northern Ireland. The latest period of civil unrest, known colloquially as 'the troubles', commenced in 1969 and has gone on more or less for over a quarter of a century. In the last seven years terrorist activity has been greatly reduced as politicians have striven to reach a political settlement. On Good Friday (10 April 1998) a tentative political agreement between

the protagonists and political parties was reached at talks in Belfast. This agreement was endorsed by the overwhelming majority of the people of Ireland at a referendum held in both countries in May 1998. It is now hoped that there will be political stability and that the level of politically inspired terrorism will be low (although a bomb in Omagh in August 1998 which killed 30 people, set off by a dissident terrorist group, placed this hope in doubt). Increasing co-operation between the Republic of Ireland and Northern Ireland has been initiated on a range of fronts including criminal justice issues.

Both countries are facing a period of unprecedented and rapid change in the criminal justice arena. In the Republic, on the back of considerable public debate and anxiety about the levels of crime, a National Crime Forum was convened which reported to government in the early autumn of 1998. The Forum's Report recommended the establishment of a National Crime Council, which is now in operation. It has a wide variety of functions related to promoting informed debate on criminological issues. In February 1997, a report from the Expert Group on Prisons recommended the setting up of an independent Prisons Agency. This recommendation has been implemented on an interim basis, with legislation pending. Recently, the final report from the Expert Group on the Probation and Welfare Service was provided in 1999, which examined the potential role of the service, its needs and desired organisational status.

In Northern Ireland, substantial changes have taken place following the political agreement. Sentence Review Commissioners began work in August 1998 examining the sentences of prisoners who had been sentenced to five or more years for scheduled offences. The Northern Ireland (Sentences Act) provided for the accelerated release of prisoners who had been convicted of mainly terrorist offences. In 1999, the Independent Commission on Policing produced their recommendations in the 'Patten Report. In addition, the Criminal Justice Review was published in March 2000 and following public consultation, the Secretary of State accepted the recommendations in September of that year. Both the Republic of Ireland and Northern Ireland therefore, are clearly undergoing a period of change demonstrating a profound governmental interest in modernising criminal justice.

Contrary to popular belief, crime in both parts of Ireland is very low when viewed in an international context. Recorded crime per 100,000 is shown in Figure 1 (in appendix). This shows comparative figures for England and Wales, the Republic of Ireland and Northern Ireland between 1971

and 1995. It can be seen that England and Wales has had a consistently higher rate than Northern Ireland, which in turn has had a higher rate than the Republic. Crime rates for 1999/2000 were, per 100,000 population: 10,061 for England and Wales, 7,040 for Northern Ireland[1] and 2,311 for the Republic of Ireland (albeit the latter figure refers to 1998)[2].

The recorded rates for most types of crime in 1999/2000 were lower in Northern Ireland than in England and Wales. Northern Ireland does feature however, a higher rate of crime for three of the eight main types of crime. Comparing Northern Ireland to England and Wales (as crimes per 100,000 population), the rate for violence against the person was 1,268 versus 1,103; for sexual offences, 79 versus 72; and for criminal damage, 1,844 versus 1,795. For all other categories of offence the rate in England and Wales was much higher. For example, the rate for theft in England and Wales was 4,220 compared to 2,188 in Northern Ireland.

Since the late 1950's the recorded crime rate per 100,000 population for Northern Ireland has been higher than that for the Republic. This differential has been increasing over time[3]. The European Sourcebook of Crime and Criminal Justice Statistics (Council of Europe, 1999) highlighted the differences in the violent crime rates per 100,000 population for Northern Ireland and the Republic of Ireland in 1996. "Northern Ireland's rates for assault (287), rape (181) and completed homicides (24) were much higher than those for the Republic of Ireland (15, 5 and 1.2 respectively)." The Republic's rate however for robbery (182) was 70% higher than that for Northern Ireland (103)[4].

Northern Ireland took part in the International Crime Victimisation Survey 2000 however, the Republic did not. Figure 2 (in appendix) is taken from the 2000 Survey and shows the overall victimisation rate for all crimes in 1996. Northern Ireland had the lowest rate of victimisation of the 17 countries surveyed. The rate, at 17 per cent, was substantially lower than

[1] FRENCH, B., DONNELLY, D. and WILLIS, M.: Experience of Crime in Northern Ireland. Research and Statistical Bulletin 5/2001. Northern Ireland Office: Belfast 2001.

[2] O'DONNELL, I.: Crime, Punishment and Penal Policy. Irish Journal of Applied Social Studies, Vol 2, No. 3, 2000-2001.

[3] BREWER, J., LOCKHART, B. and RODGERS, P. Crime in Ireland 1945-1995 – 'Here be dragons'. Clarendon Press 1997.

[4] FRENCH, B., DONNELLY, D. and WILLIS, M.: Experience of Crime in Northern Ireland. Research and Statistical Bulletin 5/2001. Northern Ireland Office: Belfast 2001.

England and Wales and the Netherlands, which each featured a rate of more than 30 per cent. The most recent victimisation survey found Northern Ireland's rate to have fallen to 15 per cent while England and Wales' rate remained high, but had fallen to 26.4 per cent[5].

In spite of having a low victimisation rate, surveys have shown that the Northern Ireland population is very punitive in relation to how they believe offenders should be treated. Thus, in the 1989 International Victimisation Survey more people in Northern Ireland than in any of the other countries surveyed wanted young recidivist offenders imprisoned[6]. The 2000 International Victimisation Survey showed consistent results as Northern Ireland again featured imprisonment as the preferred sentence for a young recidivist burglar[7].

In the Republic of Ireland, public attitudes have been seen to be less punitive regarding the treatment of offenders. In 1998, the National Crime Forum was set up to solicit views on crime and related matters, from national and international experts as well as the general public. While a few of these submissions sought more and longer punishment, most displayed a sensitivity to the complexities of the crime problem. While there had been calls for effective action, this was not equated with longer prison sentences or increased police powers. Most submissions wanted prison to be offered as a last resort after a range of alternatives had been considered.

While public support for hardline political rhetoric was limited, there has been considerable pressure from the media on the government to adopt a more punitive approach, including a 'zero tolerance' approach to offenders. The government responded by promising to provide an additional 2,000 prison places, without explanation as to how this figure was determined. These places are extremely costly and are being delivered at the expense of community sanctions and measures (see O'Dea[8]). Between July 1999 and

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[5] VAN KESTEREN, J., MAYHEW, P. AND NIEUWBEERTA, P.: Criminal Victimisation in Seventeen Industrialised Countries: Key findings from the 2000 International Crime Victims Survey. WODC, 2000.

[6] VAN DIJK, J.J.M AND MAYHEW, P.: Criminal Victimisation in the Industrialized World: key findings from the 1989 and 1992 International Crime Surveys. The Hague, 1992.

[7] VAN KESTEREN, J., MAYHEW, P. AND NIEUWBEERTA, P.: Criminal Victimisation in Seventeen Industrialised Countries: Key findings from the 2000 International Crime Victims Survey. Wetenschappenlijk Onderzoek – en Documentiecentrum, 2000

[8] O'DEA, P.: Additional Prison Spaces. Letters to the Editor. Irish Times, 23 May 1998. Dublin 1998, p. 9.

December 2000, three additional prisons became fully operational, offering an additional 995 places. The planning of a further 720 prison places is also underway[9].

While there is evidence of overcrowding in prisons, there is little empirical evidence of the need for so many extra prison places. In 1996, major problems were identified specifically regarding drug misuse inside prison with strong evidence that some prisoners actually gain their heroin addiction during sentences to Mountjoy Prison in Dublin[10]. In 1997, the Expert Review Group recommended the creation of an autonomous prison agency, called the Irish Prison Service. This would take the prison service away from the direct control of the Department of Justice. This was accepted and it was agreed to invest the new prison management with greater authority, accountability and responsibility[11].

While the Report of Expert Group on Prisons provided a well-informed direction for criminal justice policy, the political zeitgeist was approaching criminal justice from a different angle. In 1997, the Fianna Fail government, under Minister for Justice, John O'Donoghue, introduced the policy of 'zero tolerance'. This American import is thought by criminologists to have been unlikely to have prevented much crime however it is likely to have influenced the nature of policing in Ireland. O'Donnell[12] points to the recent surge in the number of proceedings taken against prostitutes, beggars and the disorderly public. These people serve as public representations of crime that is external and easily identifiable (and therefore arrestable). "These are the 'social junk' for which zero tolerance rhetoric can have serious consequences."

Figure 3 (in appendix) compares rates of imprisonment with a number of other selected jurisdictions for 1996. By international standards, the Republic of Ireland has had a low rate of imprisonment per 100,000 population however this has been steadily rising. The daily average prison population in late 1999 was 2,929. This represents a 39% increase in the daily average population being held in Irish prisons since 1994. "Only two other countries have shown a larger increase than Ireland in the prison population

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[9] O'DONNELL, I.: Prison Policy in Ireland. Prison Service Journal. Issue 135. 35-37.

[10] O'DONNELL and O'SULLIVAN, E.: Crime Control in Ireland: the politics of intolerance. Cork University Press. 2001.

[11] REPORT OF EXPERT GROUP: Towards an Independent Prisons Agency. The Stationery Office. Dublin 1997.

[12] O'DONNELL and O'SULLIVAN, E.: Crime Control in Ireland: the politics of intolerance. Cork University Press. 2001.

rate per 100,000 between 1997 and 1999, Greece and South Africa"[13]. In December 2000, the daily average prison population had risen to 2,948.

In addition to an increase in prison population, the Republic of Ireland has also consistently featured a disproportionately high level of young prisoners. The Council of Europe figures for 1997 show the Republic to feature the highest proportion of prisoners less than 21 years of age at 24.2%. The rate for England and Wales was 17.6% and Northern Ireland was 13.5%. By way of comparison, Austria's and Finland's under 21 year old prisoners make up only 3.7% and 3.6% of the prison population respectively[14].

In 1998, the Republic's proportion of imprisoned under 21 year olds fell to 22.8% along with England and Wales and Scotland's rate, down to 15.8%. Northern Ireland on the other hand, increased its proportion of under 21's in prison to 16.2% for 1998. Other countries that featured high rates of imprisonment for under 21 year olds in 1998 were Albania (36.4%), Andorra (35.3%) and the former Yugoslav Republic of Macedonia (24.5%)[15].

The Final Report of the Expert Group on Prisons recommended that as a general principle, no one under 21 years of age, or convicted for a first offence should be sentenced to a term of imprisonment without a report being provided to the court from the Probation Service (except where there is a mandatory sentence of imprisonment for the case)[16]. Thus, while efforts have been made to reduce the proportion of under 21 year old prisoners, the Republic of Ireland still features a high rate based on international comparisons.

A picture has emerged of the government of the Republic having a strongly punitive attitude towards crime. The overall prison population rate is low by international standards but rising with each year. In addition, a large number of prisoners are incarcerated for short sentences. The Council of Europe's most recent statistics show that the average daily population of prisoners is low, however the annual throughput of prisoners is high. Scotland is the only European country that features a shorter average prison

[13] O'DONNELL and O'SULLIVAN, E.: Crime Control in Ireland: the politics of intolerance. Cork University Press. 2001.

[14] COUNCIL OF EUROPE: Penological Information Bulletin. No. 22 December 2000. 24

[15] COUNCIL OF EUROPE: Penological Information Bulletin. No. 22 December 2000. 62

[16] REPORT OF EXPERT GROUP: Towards an Independent Prisons Agency. The Stationery Office. Dublin 1997.

sentence[17]. Short-term imprisonment is seen as unsatisfactory as it does not allow adequate time for individuals to take advantage of any programmes that may be on offer within an institution[18].

The number of persons committed to prison each year has grown steadily from 2,537 in 1990 to 4,377 in 1994[19] to 11,307 in 1998[20]. Many of these persons have served previous sentences. Figures for 1994 suggest that 59.8 per cent had been sentenced to prison prior to their current sentence. Only 10.2 per cent of those sentenced to prison in 1994 were there for violence against the person.

It is interesting to read a summary of O'Mahony's[21] description of a sample survey of prisoners in Mountjoy Prison (the main catchment prison for young males from the Dublin area):

> "more than two-thirds of the sample include: coming from a working-class area of Dublin (about 80%); having a father from the two lowest socio-economic classes (94%); coming from a family with 4 or more children (90%); living in rental accommodation (76%); having left school before the age of 16 (80%); having never sat a public exam (77%); and being unemployed prior to this period of imprisonment (80%); ... used cannabis (86%); were currently or had been users of hard drugs (71%); were never married (81%); but had fathered children (72%)."

It makes depressing reading, and reveals the very complex and disadvantaged backgrounds of the young prisoners. It, perhaps, brings into focus the very difficult task faced by those who wish to see the development of community sanctions and measures. Furthermore, it is likely that the overall profile of the prison population will change over the coming years particularly due to the increase in the numbers of sex offenders being sentenced to imprisonment.

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[17] O'DONNELL, I.: A Comment on Sentencing. Irish Criminal Law Journal. Volume 10 No. 4. 2000. 2.

[18] JOINT COMMITTEE ON JUSTICE, EQUALITY, DEFENCE AND WOMEN'S RIGHTS.: Report of the Sub-Committee on Crime and Punishment of the Joint Committee on Justice, Equality, Defence and Women's Rights on Alternatives to Fines and Uses of Prison. November 2000. Para. 38.

[19] STATISTICAL ABSTRACT 1997: Prison Statistics. Central Statistical Office Dublin. 256-257.

[20] VAUGHAN, B.: Toward a model penal system. Irish Penal Reform Trust. Dublin 2001. 27.

[21] O'MAHONY, P.: Mountjoy Prisoners - A Sociological and Criminological Profile. 135. Department of Justice. Dublin 1997.

There are already a large number of sex offenders in Irish prisons (almost 400)[22] accounting for one in eight of the sentenced male prison population[23]. The average prison sentence received by a convicted rapist is more than eight years[24]. They are generally older than in the Mountjoy profile, have fewer previous convictions and come from wider social and economic backgrounds. They are usually held together in prisons such as the Curragh and Arbour Hill, for ease of management purposes. They do not qualify for early release schemes (except normal remission) and very few receive specialised voluntary treatment for their sex offending while in prison. Recent recommendations point to the need for the development of sex offender treatment programmes along with incentives to encourage participation[25] in such schemes.

It is clear that the prison system has not been effective in reducing crime with claims that it may even be counter productive in terms of reducing offending[26]. It is the most costly option available yet it is seen as the main sanction imposed by the state against persistent offenders. The Republic's continued reliance on incarceration provides a very different picture to the situation in Northern Ireland's prisons.

In 1996, the average prison population for Northern Ireland was 99 prisoners per 100,000 population. During this year, almost two-thirds of the Northern Ireland prison population was made up of 'scheduled' (or politically motivated) offenders. Most of these people were released over the following years, in line with legislation passed in July 1998, which allowed for the release of those terrorist offenders who were considered by the Commission on the Release of Prisoners to no longer pose a threat. The first release took place on September 11, 1998 and by March 31, 2001, 441 prisoners had been released.

This has left Northern Ireland with a much-changed landscape in its prison population. In 2000, the rate of imprisonment per 100,000 popula-

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[22] VAUGHAN, B.: Toward a model penal system. Irish Penal Reform Trust. Dublin 2001. 35.

[23] MURPHY: Maximising Community Safety: The Treatment and Management of Sexual Offenders. Irish Penal Reform Trust. Dublin 1999.

[24] O'MALLEY.: Sexual Offences: Law Policy and Punishment. Round Hall Sweet and Maxwell. Dublin 1996.

[25] VAUGHAN, B.: Toward a model penal system. Irish Penal Reform Trust. Dublin 2001. 36.

[26] NATIONAL CRIME FORUM.: Report 1998. Institute of Public Administration. Government of Ireland 1998. 149.

tion was lower for Northern Ireland (70) compared with Ireland (80), Scotland (120) and England and Wales (125). The average Northern Ireland prison population fell by 35% from 1,639 in 1996 to 1,068 in 2000. "The 14% decrease that occurred between 1999 and 2000 was the seventh consecutive annual average decrease since 1994." Current estimates suggest that the prison population will continue to decline in 2001 with the total ranging from 863 to 975 thereafter[27]. This estimate of prison population is contingent on a number of factors. In particular, any policy or legislative change relating to prisoners, sentencing, etc. that may be brought about by the implementation of the Criminal Justice Review which could result in substantially altering the future prison population.

Away from the statistics, an interesting question is raised regarding the 'terrorist' or 'politically motivated' prisoners that have been released into the community. Many of these prisoners served very long sentences for serious offences, such as murder and bombing. Substantial numbers of these prisoners have been released over the past seven years and there is very little evidence of any of these prisoners being reconvicted for terrorist or 'ordinary' offences. There is no doubt however, that the paramilitary organisations from which they came do engage in a level of crime for fund-raising purposes. This can include robberies, intimidation, drug trafficking, protection and other rackets. There is still a question of whether these ex-terrorists will increasingly turn to organised crime or will settle down to become law-abiding citizens in the light of the political settlement.

The paramilitaries do, of course, play another role in Northern Ireland and to a much lesser degree in the Republic. In this role they act as self-appointed community policemen. Their actions are largely against young males from urban areas whom they believe to be guilty of anti-social behaviour and minor delinquency. In these cases 'community sanctions' are handed out through barbaric beatings and banishment. In 2000/2001, there were 323 casualties from these paramilitary style attacks, which included 162 shootings and 161 assaults (beatings)[28]. There is little evidence that even such harsh treatments are effective and certainly add to the sense of

[27] HAGUE, L. and WILLIS, M.: The Northern Ireland Prison Population in 2000. Research and Statistical Bulletin 7/2001. Northern Ireland Office 2001.

[28] ROYAL ULSTER CONSTABULARY: Report of the Chief Constable 2000-2001. 69.

social exclusion on the part of the alleged offender (see, for example, Brewer et al.[29]).

In this context there is now considerable interest in both parts of Ireland in the philosophy of 'restorative justice'. It may provide a model of community justice, which makes sense to local people, victims and offenders, as well as to the paramilitary organisations and both the British and Irish governments. There are currently several restorative justice pilot projects being made available to young offenders. Some are run by the police forces in the Republic and Northern Ireland; others have been set up by community groups. Significant problems still have to be sorted out concerning how these projects will interface with the formal criminal justice system. There is a danger that some of the projects run by community groups will operate as an alternative to the state system rather than complementary to it. An issue well discussed in the Report of the Criminal Justice Review.

2. History of Community Sanctions

2.1 Probation Service in Republic of Ireland

In both parts of Ireland, the main state agency charged with delivering community sanctions is the Probation Service. The origins of probation in Ireland go back to the nineteenth century when there were 'court missionaries' who acted without official status in the courts. These people, appointed by philanthropic societies, befriended offenders and offered them support. At this time community sanctions, such as probation, tended to apply to petty offenders who, because of personal moral weakness (often linked to drink), tended to stray into offending. These people, it was argued, needed help and advice. This informal system was given legal force by the Probation of Offenders Act 1907. The act also marked the move to the appointment of full-time officials and made it possible for courts of summary jurisdiction to appoint probation officers to work with those individuals whom the court felt would benefit from a 'probation order'.

The Act has essentially guided the ethos and direction of the Probation and Welfare Services in the Republic of Ireland since that date. Its purpose is to work towards the rehabilitation of offenders. The role of the Probation

[29] BREWER, J.D., LOCKHART, B. & RODGERS, P.: Crime in Ireland: Here be Dragons. 185-193. Oxford University Press. Oxford 1997.

and Welfare Service is to 'advise, assist and befriend' offenders. In its 1998 submission to the National Crime Forum, the Probation and Welfare Officers Branch of IMPACT (the trade union for Probation Officers in the Republic)[30] stated explicitly that it would wish to preserve and consolidate this ethic in any development that the Service might undertake.

The Probation and Welfare Service's main emphasis is on trying to turn offenders away from offending through a system of "intervention, including supervision, monitoring, counselling, treatment, training, therapeutic and educational programmes" (O'Dea[31]). Increasingly however, probation programmes are including an element of reparation to society (through, for example, Community Service Orders), as well as challenging the offender to look at and change his/her offending behaviour.

The Probation and Welfare Service in the Republic of Ireland is unincorporated in law as a specific body or agency and the service is part of the Department of Justice, Equality and Law Reform. It is financially provided for within the Prisons vote by Dail Eireann (the Irish Parliament). It has a reporting relationship with Prisons Division and is advised and supported by Personnel Division on human resources and management issues. In practice, the Service has separate office accommodation and operates independently on a day-to-day basis. It is headed by the Principal Probation and Welfare Officer. The delivery of service is currently organised on a team basis in which a number of officers, led by a Senior Probation Officer, deal with referrals arising in geographical areas across the country. Teams in turn are managed through a regional structure of six regions, four of which cover mainly the greater Dublin area and the other two the rest of the country.

The Probation and Welfare Service has a number of powers and functions. It prepares pre-sanction reports for the courts. It offers a welfare service to offenders in prisons and places of detention. It also undertakes a small amount of 'non-criminal' work, which includes Family Law Court assessments and assisting the courts in making decisions relating to adoption. But the core of its work relates to the supervision of offenders in the community and on release from prison. This is evidenced by its current

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30 PROBATION AND WELFARE OFFICERS BRANCH, IMPACT.: Submission to National Crime Forum. Unpublished Document available from IMPACT, Nerney's Court, Temple Street, Dublin 1 1998.

31 O'DEA, P.: Probation and Welfare in the 1990s. Probation and Welfare Officers' Branch IMPACT (Public Sector) Union. Dublin 1996.

Mission Statement: "To foster public safety and promote the common good by advancing the recognition and use of community based sanctions, thereby reducing the level of re-offending"[32].

2.2 Current Community Sanctions and Measures in the Republic of Ireland

2.2.1. Probation Orders

The main community supervision order made by the courts over the years has been the Probation Order (Probation of Offenders Act 1907, as amended by the Criminal Justice (Administration) Act 1914 and applied by subsequent acts). Probation Orders discharge conditionally those guilty of offences for whom a custodial sentence is not considered necessary by the courts. Offenders undertake before the court (enter recognisance's) to be of good behaviour and observe all the conditions laid down, including Probation Officer supervision, for a specified period (up to three years). Extra conditions may be added if appropriate, for example, attendance at a training programme, residence in a hostel, and so on. The supervising officers ensure that the court's requirements are met and may report on an offender's response. Further crime or breach of any condition may result in the offender appearing before the court again for conviction and sentence.

These Probation Orders tend to be made for offenders with personal problems such as alcohol or drug addiction, family disharmony, personality disorders, housing or other social problems. This frequently requires close liaison with other specialist agencies, such as employment training centres, hostels and so on. Some of the centres are provided by the voluntary sector and are directly funded by the Probation and Welfare Service.

Internationally, there has been a change of emphasis and hence philosophy in the sentencing intentions of courts when they make Probation orders. There has been more attention placed on punishment and control within the community rather than simply assisting and befriending offenders. Thus, there is increasing emphasis on attaching conditions to a Probation order which may in some manner restrict liberty, such as requirement

[32] OFFICE OF PROBATION AND WELFARE SERVICE.: Freedom of Information - Guide to the functions, records, rules and practices of the Service. Freedom of Information Act, 1997, Sections 15 and 16 Reference Book. Dublin 1998. 12.

to reside in a specified hostel and so on. As May[33] points out, there has been an on-going shift away from a 'professional-therapeutic' model of community sentencing towards a 'punishment-administrative' rationale, which has been only weakly resisted by professional probation officers.

2.2.2 Deferment of sentence

A further type of supervision imposed by the courts is during Deferment of Penalty. This refers to where a judge postpones a decision in a case to a future date on condition that the offender responds to supervision by the Probation and Welfare Service.

While this is a commonly used form of supervision there is some debate concerning its legislative basis. Indeed it is argued that this form of supervision is simply a 'judicial creation' - a "procedure rather than a sanction"[34]. Here the judge appears to be 'hedging his bets' and not imposing the sentence until a period of probation supervision has been tried and tested. If the offender responds satisfactorily then the court imposes no further penalty or a suspended sentence. Between 1995 and 1996, the number of deferments rose from 1,575 to 1,815[35].

The fact that such deferments of sentence have no legislative basis raises a number of issues and problems. It means that there are no limits on what a judge can set as a condition of deferment. On occasion the basic human rights of the defendant could be infringed, for example by imposing a curfew or other restriction of liberty. In practice as the defendant views deferment of sentence as an alternative to imprisonment and therefore as a 'concession' by the court he/she is not inclined to appeal the decision. This means that no case law on this type of supervision has been built up to determine its legality and limits. Likewise there is no research concerning its effectiveness. In essence, a deferment represents a form of 'double jeopardy' whereby the offender could be punished twice for the same offence, if they have failed to abide by their conditions[36]. It is highly likely that De-

[33] MAY, T.: Probation and Community Sanctions. In: Maguire, Morgan and Reiner. The Oxford Handbook of Criminology. Oxford 1994. 861-887.

[34] VAUGHAN, B.: Toward a model penal system. Irish Penal Reform Trust. Dublin 2001. pp. 74

[35] O'DONNELL, I.: Crime, Punishment and Penal Policy. Irish Journal of Applied Social Studies, Vol 2, No. 3, 2000-2001.

[36] VAUGHAN, B.: Toward a model penal system. Irish Penal Reform Trust. Dublin 2001. pp. 74

ferment of Penalty contravenes the European Rules on Community Sanctions and Measures (Recommendation No R (92) 16), particularly Rules 4, 5, and 7. These require that community sanctions be enshrined in law and that they shall not be of indeterminate duration.

2.2.3. Recognisance under the Misuse of Drugs Act

A further form of supervision which can be imposed by the courts is Recognisance under the Misuse of Drugs Act (1977). This can be used for offenders convicted of certain drug offences. Particular conditions as to supervision, giving urine samples, attendance for treatment, etc. may be inserted. Like the Probation Order, a failure to observe any condition may lead to the matter being re-entered before the court.

2.2.4. Community Service Order

In the Republic of Ireland, one of the most significant recent innovations was the introduction of Community Service Orders (CSO) for those 16 year of age and older. These were legislated for in the Criminal Justice (Community Service) Act 1983 with the first orders being made in 1985. Under this sanction offenders may be ordered to perform a specified number of hours (between 40 and 240) of unpaid work for the benefit of the community, instead of serving the custodial order that the court considered was merited by the crime. Indeed, it is noteworthy that the court must specify the length of custodial sentence that would have been given had the offender not opted for community service. This allows one to calculate the savings which can be made by substituting community service for imprisonment. Calculations for 1995 and 1996 suggest that the average cost per offender on community service was just £36 per week or less than £2,000 per annum, compared with imprisonment which costs around £46,000 per annum. The direct supervision of individuals on Community Service Orders is done by approximately 30 people, most of whom are not probation officers. These individuals are employed on a three-day week with no security of tenure.

Before a Community Service Order can be made the offender must consent to the order and the court must first be satisfied that the convicted person is suitable to perform work and that there is work available. Failure to comply with the order constitutes a fresh offence, prosecutable by a Probation Officer which may result in the court ordering that the specified sentence of imprisonment be served.

As noted earlier Community Service Orders were introduced as an alternative to imprisonment. If they are truly alternatives to imprisonment one would expect that following their introduction there would have been a reduction in the numbers being sentenced to imprisonment commensurate with the number of Community Service Orders made. To determine if this was the case a fairly detailed analysis of the statistics would need to be undertaken. No such study has taken place. However, a cursory examination of the numbers being sentenced to prison before and after the introduction of Community Service Orders reveals no discernible reduction. This, of course, is not surprising as research elsewhere has tended to indicate that Community Service may not be a true alternative to custody but simply an alternative to other alternatives. For example, McIvor[37] found that a Community Service Order would have been a substitute for custody in 42 percent of cases. As May[38] points out there are real dangers in this as in any community sentence a certain proportion of those on the sentence will reoffend or fail to keep the conditions. If when brought back to court they are then sentenced to prison this means that a certain number will end up in custody who should not have been there for the original offence. Paradoxically this means that a sentence which was originally meant to be an alternative to prison may actually serve to increase the prison population.

The recent use of Community Service Orders indicates that the numbers sentenced to this sanction has decreased from 1,602 in 1995, 1,386 in 1996[39] to 1,119 in 1997[40]. This is compounded by the rapidly increasing prison population mentioned earlier. It would appear that the use of CSOs is declining while imprisonment rates are on the increase. Whether or not the increase is a product of those who have failed a CSO and have been returned to prison or as a result of judicial frustration at functional aspects of the CSO would require further investigation.

Recent research into the use of Community Service Orders in the Republic found that they had not always been used appropriately or for offences that would not normally attract a custodial sentence. There was a

[37] MCIVOR, G.: Community Service and Custody in Scotland. Howard Journal 29/2. 1990. 101-113.

[38] MAY, T.: Probation and Community Sanctions. In Maguire, Morgan and Reiner. The Oxford Handbook of Criminology. Oxford 1994. 861-887

[39] O'DONNELL, I.: Crime, Punishment and Penal Policy. Irish Journal of Applied Social Studies, Vol 2, No. 3, 2000-2001. pp. 99.

[40] COUNCIL OF EUROPE.: Penological Information Bulletin No. 22 – December 2000. pp. 95.

lack of consensus regarding the equivalence between the number of months of imprisonment and the number of hours served on CSOs. Interestingly, the state refused to provide insurance cover for those undertaking work in this community. It was the latter factor that was cited by judges as being responsible for frustrating their ability to effectively impose this sanction to a greater extent[41].

This section regarding Community Service Orders should not be read as a critique of community sanctions but as a suggestion that CSOs be used as a sentence in their own right and not just as an alternative to custody. This may mean that a somewhat different group of offenders should be targeted for these sentences.

2.2.5 Intensive Probation Supervision

A number of innovative probation practices have been devised to respond to the particular problems that offenders have presented. Intensive Probation programmes are one such development. They are based on research into the relative effectiveness of different types of intervention with different types of offender. Intensive Probation engages relatively young adult, high-risk offenders in a range of interventions and supervision at a number of levels. The Intensive Probation Supervision programme has been operating in Dublin and Cork since 1992 with approximately 100 prisoners passing through each year. These projects are known as the Bridge Project and Grattan House respectively and are innovative community based alternatives to a substantial custodial sentence. Offenders remain accountable to the court while participating on the programme through the mechanism of supervision on deferment of penalty. In addition, referrals are accepted through the prison administration on persons who have served a period of imprisonment but who are deemed appropriate for inclusion in the programme as part of an overall plan of Temporary Release.

The programme is divided into three phases. In phase one, staff meet with the prospective participant to carry out an in-depth assessment focusing on his\her attitude to crime, motivation and level of social skills, etc. Phase two of the programme provides an integrated schedule of group work modules (e.g. anger management, addictions, etc.) which have been designed by staff and are implemented over a set time period. Phase three is a

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[41] WALSH, D. & SEXTON, P.: An Empirical Study of Community Service Orders in Ireland. Stationery Office. Dublin 1999. 77.

period of consolidation when participants receive ongoing support with a special emphasis on training and employment goals.

2.2.6 Early Release from Prison

In late 2000, the Minister for Justice, Equality and Law Reform announced the setting up of a Parole Board. This has now been established on an administrative basis until legislation follows at a later date. The Parole Board once operational, will replace the Sentence Review Group and will be advisory in nature. It "will review cases of eligible prisoners serving determinate sentences of more than 8 years but less than 14 years at the half of sentence stage and, in the cases of prisoners serving sentences of 14 years or more or life sentences, after 7 years had been served of the sentence"[42].

It is likely that the Parole Board will cater for long-term prisoners, while prisoners serving shorter terms will continue under the previous regime. Prisoners serving more than one month automatically qualify for a 25 per cent remission of a determinate prison sentence and women prisoners for 33 per cent.

Prior to the announcement of the introduction of a Parole Board, there had been no formal parole system in the Republic of Ireland. In 1960 a 'discretionary early release of prisoners scheme' (Criminal Justice (Administration) Act, 1960) was introduced. This scheme has meant that in practice, the Department of Justice is able to release anybody at any time. The period of release could be for one day or several years with the prisoner not being required to return to prison. Sometimes the release is recommended by the sentencing judge who asks to review the case after a specified time. In these cases the released prisoner is likely to be placed under the supervision of the Probation and Welfare Service. Prisoners could also be released by the Department of Justice, Equality and Law Reform on the advice of Prison Governors who have decided that it would be of benefit to the prisoner to undertake a particular training course, such as the Intensive Probation scheme or to take up employment. In such cases monitoring and supervision could be quite strict and may include released persons visiting the prison on a weekly basis and signing-on at a police station each evening.

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[42] DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM.: Minister O'Donoghue announces membership of Parole Board. Press Release. April 4, 2001.

At other times the release may be more of an administrative convenience, often because of prison overcrowding. In these cases the prisoner is usually released without supervision. Sometimes he/she is required to return to prison after a period of days or weeks but on other occasions prisoners are simply released early with little monitoring. O'Mahony[43] is highly critical of this system which he claims is chaotic and bringing the whole criminal justice system into disrepute. Certainly there is anecdotal evidence that many of the prisoners on early, unsupervised release reoffend. This causes considerable public disquiet. They often confuse those offenders on early release with those being supervised by the Probation Service in the community. This causes a crisis of confidence in community sanctions that can be fed by inaccurate media reporting.

There have been attempts to address the problems associated with the temporary release scheme. Indeed, the average number of prisoners on temporary release has decreased from 516 in December 1996, to 407 in December 1998 to 200 in December 2000. March 2001 saw the publication of the Criminal Justice (Temporary Release of Prisoners) Bill 2001. The purpose of this bill is to amend the Criminal Justice Act, 1960 and to provide a clearer legislative basis for the Minister's power to grant temporary release. This Bill is intended to provide a more transparent basis for the system of temporary release. The Minister can release prisoners for rehabilitative purposes; to assist in an investigation; apprehension or prosecution of an offender; for health or humanitarian reasons; or to ensure good order and management of prisons. Prior to granting temporary release, the Minister must take into account a number of factors including the gravity and nature of the offence; the proportion of the period served; community safety and security; and the likely benefit for re-integration of the prisoner into society[44].

2.2.7 Other Non-Custodial Options

One of the most common sentences of the court is the fine. It works well in the vast majority of cases. But there is a significant problem for the small minority who fail to pay the fine. Many of these end up in prison for short

[43] O'MAHONY, P.: Criminal Chaos: Seven Crises in Irish Criminal Justice. Round Hall. Dublin 1996. 9-10.

[44] DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM.: Publication of Criminal Justice (Temporary Release of Prisoners) Bill 2001. Press Release. 12 March, 2001.

periods and add to overcrowding. It is estimated that 1 in 3 of all prison committals are there for fine default. At present the government is looking at non-custodial alternative sanctions for these people, such as a community service substitute, attachment of earnings and a compensation supervision order. It is likely that these orders, if introduced, will be supervised by the Probation Service.

Another sentence often given by the court is a suspended prison sentence. These are normally given without supervision. However, like the deferment of sentence, these are a judicial creation and without statutory basis. This means that they are totally unstructured and some very odd suspended sentences can be given, including long sentences suspended for long periods of time. This would appear to be at odds with the European Rules on Community Sanctions and Measures(Recommendation No R (1992) 16), particularly Rule 5 which states:

> *'No community sanction or measure shall be of indeterminate duration. The duration of community sanctions and measures shall be fixed by the authority empowered to make the decision within the limits laid down in law.' (pg. 8).*

There is a definitional issue regarding this particular sanction. The suspended sentence represents an alternative to custody however it is not necessarily a community sanction. This raises a curious question: 'when is a sanction located in the community not a community sanction?' If it is a non-custodial sentence but not liable to the ERCSM Rules, what safeguards are in place to ensure that its use is not abused?

There are other forms of community sanctions that have been discussed in recent times. These include methods of monitoring serious sex offenders on release from prison. Recently, the government published and enacted a Sex Offenders Bill which placed the courts under a duty to consider post-release supervision needs. There are two aspects of this supervision: helping offenders maintain control over their behaviour; and the monitoring of activities. Proposals for a sex offender register have been put forward as part of this Bill. The period of registration could last either for five years (for an offender given a non-custodial sentence) or between seven years to a lifetime (following a custodial sentence). The community treatment of sex offenders is seen to be an integral part of a child protection strategy and there have been calls to increase the provision of these programmes for sex offenders to each of Ireland's Health Board regions. Other recommenda-

tions call for the establishment of alcohol treatment programmes for each probation region and Intensive Probation schemes extended to all major urban centres[45].

2.3 Probation Service in Northern Ireland

Space will only allow a brief history of the Probation Service in Northern Ireland. Its early history is very similar to that of the Probation and Welfare Service in the Republic. The Probation Act (Northern Ireland) 1950 made it clear that instead of making a sentence the court could make a Probation Order for the supervision of the offender. As in the Republic the fundamental philosophy was to 'advise, assist and befriend' the offender.

It was actually only in the mid-1950s that the first full-time Probation Officer was appointed by the then Ministry of Home Affairs. There then followed a fairly slow build up of the service. Increases in crime and some prison overcrowding in the late 1960s led to a government decision to expand the Probation Service and employ qualified social workers to staff it. The next big change came in 1982 with the passing of the Probation Board (Northern Ireland) Order. This set up the Probation Service as an independent statutory authority. This was managed by a Board of not more than 18 persons drawn from a cross-section of the community. The Board had a clear mandate, defined in legislation, which allowed it to determine policy and oversee the effectiveness of the Probation Service. It also had the power to fund groups or individuals to provide additional services for the Board, either in the supervision of offenders or for crime prevention purposes. The Northern Ireland Office provides all funding for the work of the Board.

Its distinct legislative basis meant that the Probation Service in Northern Ireland began to develop differences from other probation services in the rest of the United Kingdom. It retained responsibility for the supervision of juvenile offenders. It also gave up matrimonial work for the courts to the Health and Social Services Boards.

As there is no Parole Board in Northern Ireland the Probation Service did not have responsibility for the supervision of prisoners on release, except for a few special exceptions. The huge rise in terrorist incidents in the 1970's meant that many people were being sentenced for politically moti-

[45] VAUGHAN, B.: Toward a model penal system. Irish Penal Reform Trust. Dublin 2001. pp. 87

vated offences. These people refused to be subject to any statutory supervision on release and indeed would have placed anybody who tried to supervise them under threat. Until the passing of the Criminal Justice (Northern Ireland) Order 1996, most statutory supervision of released prisoners was suspended. While all prisoners sentenced to life imprisonment would be subject to supervision following release, it has not been the usual practice to supervise those convicted of terrorists offences. For determinate sentence prisoners, two main levels of unsupervised remission of sentence were available: 50 per cent for 'ordinary' prisoners and 33 per cent for those serving sentences for serious terrorist offences.

The Northern Ireland Sentences Act (1998) provides the most up to date prisoner release information for those sentenced for a scheduled offence. In order to qualify, the offence must have been committed prior to the Belfast Agreement of April 10, 1998. Prisoners must be serving a sentence of five years of more, or life imprisonment in Northern Ireland. Prisoners must not be a current supporter of, or when released, not likely to become a supporter of, a specified organisation. Prisoners were released on licence and should they re-engage in terrorist activity or give support to an organisation engaged in terrorist activities, they would be recalled to prison. In addition, if a life sentence prisoner were considered to be a serious risk to the public, they would not be released[46].

2.3.1 Probation and Community Service Order

The uniqueness of the needs of Northern Ireland's prison population has led to a number of innovations in supervision by the Probation Service. These have included the introduction of Community Service Orders in 1979 (Treatment of Offenders (NI) Order 1976) which allowed courts to sentence persons aged 17 and over, convicted of an offence for which he/she could be sent to prison, to do unpaid work in the community for between 40 and 240 hours. The offender's agreement is needed before this sanction can be imposed. A further innovation was the ability of the court to attach special requirements to the conditions of a Probation Order (Treatment of Offenders (NI) Order 1989), such as treatment for alcohol dependency or attendance at a day centre. The effect of these innovations

[46] COMMITTEE ON THE ADMINISTRATION OF JUSTICE.: A Guide to Prisoners' Rights and Prison Law in Northern Ireland. Belfast 1998.

was to up-tariff community sanctions to include the supervision of more serious offenders.

The basic philosophy of the Probation Service was fundamentally changed by government when the Criminal Justice (Northern Ireland) Order 1996 was passed. This Order came into operation in January 1998 and had a very different ethos and purpose compared to the Probation Act 1950.

The new Order:

a) redefines the Probation Order as a sentence of the court;
b) creates a new sentence combining community service and probation;
c) creates a new sentence, available for offences serious enough to merit imprisonment for 12 months or over, involving a period of custody followed by a period of supervision under a Probation Order;
d) provides the court with the option of requiring a sex offender to be subject to supervision and licence conditions throughout the full period of remission; and
e) requires the court normally to consider a pre-sentence report before ordering a custodial sentence or certain types of community disposal.

This is a very different philosophy to the old Probation Order and follows similar legislation to England and Wales, where there has even been talk of changing the name of Probation to something like 'the Community Protection Agency'. The focus is on securing the rehabilitation of the offender and protecting the public from harm or preventing the commission of further offences by the offender. There is a clear expectancy that the Probation Service will be required to work with increasingly serious and higher risk offenders. There are real fears among Probation Officers that the Probation Service is being set up to fail and that the demands being put on it are just too high and unrealistic.

The new legislation has caused a major restructuring of the Probation Service in Northern Ireland. There have not been significant new resources allocated to cope with the new expectations, indeed in some areas there have actually been cutbacks in funding. As part of PBNI's Future Strategy it is proposed that a number of services would have to be diminished. PBNI will reduce the intensity of supervision of low risk offenders under supervision, including applications to court for variation of orders to conditional discharge where appropriate. More community volunteers will be involved in the supervision of minor offenders and there has been a withdrawal from crime prevention work. In addition, PBNI have reduced the availability of

medium intervention programmes, which include sessions on alcohol education[47].

A significant revision of PBNI Standards for the implementation of Community Service Orders and Probation Orders is likely. Experience in England suggests that this means that Probation Officers may have to breach and bring back to court significantly more offenders for not complying with their orders. Many of these offenders then end up in prison. This weakens the scope for professional decision-making on the part of Probation Officers and instead requires them to follow set rules and procedures. Similarly there is talk of reducing the qualifications required of Probation Officers and not expecting them to be qualified social workers. All of this has led to a degree of pessimism in Probation Officers in Northern Ireland and loss of morale.

The Criminal Justice Review featured a number of recommendations that impact on Probation Services in Northern Ireland. Many of these relate to the need for increased co-operation between the prison and probation services. Most significantly however, it was recommended that the Probation Service be reconstituted as a next steps agency following the devolution of criminal justice matters to the Stormont Executive. Responsibility for probation services would then lie directly with the relevant Minister and be supported by small management boards[48].

The key strategic themes in PBNI's Corporate Plan for 1998-2001 are policy development; making reparation; assessment; and building communities. There has been some re-focusing of work towards more serious and violent offenders. This could have its downside and may damage the relationship of trust and co-operation which the Probation Service has built up with some of the most disadvantaged communities in Northern Ireland.

While there are many changes on the horizon, the core business of dealing with offenders in problematic communities continues. The Probation Service in Northern Ireland has successfully built close links with local communities in addressing the causes and dealing with the consequences of crime. At an early stage in the civil unrest in Northern Ireland, a decision was made that the Probation Service had no statutory responsibility in the supervision of those convicted of politically motivated crimes. This deci-

[47] PROBATION BOARD OF NORTHERN IRELAND.: PBNI Corporate Plan 1999-2002. Belfast 2000.

[48] REVIEW OF THE CRIMINAL JUSTICE SYSTEM IN NORTHERN IRELAND.: Criminal Justice Review Group. The Stationery Office London. 2000. 430.

sion was not popular with government but has stood the test of time. As such the Probation Service is '*one of the few services within the criminal justice system able to move freely without police protection*'[49].

The Probation Service has also introduced a number of innovations and a diverse range of community supervision programmes (usually linked to Probation Orders). These vary in intensity from local community based schemes run by community groups to intensive residential programmes for juveniles and adults based on a cognitive behavioural approach. In developing these schemes Probation has employed a range of staff skills and now hires skilled specialists, such as forensic psychologists, youth workers and outdoor pursuits experts, as well as Probation Officers. There is a strong emphasis on making the best use of research and developing a 'what works?' philosophy. In doing so it is struggling with turning theory into practice. As Gadd[50] points out:

> "*The most highly motivated offender is not necessarily the most serious or persistent, and very often the most serious offender is the one who performs the legal minimum requirements of the order. Instilling motivation and maintaining it, as any probation worker will testify, is a complex and at times potentially soul-destroying task. PBNI is currently grappling with the development of a paradigm which grades programmes on the basis of factors such as intensity and duration and then matches offender and seriousness of offence to programme.*"

As noted earlier we are living in a time of great and rapid change. The implementation of the recommendations of the Criminal Justice Review is underway with legislation soon to follow. Northern Ireland's continued political instability may also provide some unexpected changes in the landscape of Probation and community sanctions.

2.3.2 Other Non-Custodial Options in Northern Ireland

As in the case of the Republic of Ireland the courts have a range of non-custodial options open to them. Fines are by far the most common sanction

[49] GADD, B.: Probation in Northern Ireland. In McIvor, Working with Offenders. Jessica Kingsley. London 1996. 9-10.

[50] GADD, B.: Probation in Northern Ireland. In McIvor, Working with Offenders. Jessica Kingsley. London 1996. 64.

used. Once again there is an on-going problem of fine default, when a minority of these offenders do not pay their fines on time. Many of these people end up in jail for a short sentence.

In addition there are a range of discharges and suspended sentences. Most of these require no form of supervision. Suspended prison sentences may be from one to three years in duration. If during that time the offender commits a further offence for which he/she could be sent to prison, the court may order that the suspended sentence, or part of it, is to be served.

In Northern Ireland, Deferment of Sentence is legislated for (Treatment of Offenders Order (NI) 1989 Article 11 and re-stated as Article 3 of the Criminal Justice (NI) Order 1996). A number of conditions are specified in the legislation:

* only one period of deferral is permitted and for a maximum of six months;
* the offender must consent;
* the court must be satisfied that deferral is in the interests of justice;
* the court may deal with the offender before the end of deferment if, during that time, he is convicted in Northern Ireland of any offence; and
* the court may not, at the same time as deferment, remand the offender.

Often Deferment of Sentence is used to confirm the offender's promise of good behaviour or await the outcome of a specific event such as a new job or completion of a training course. It may also be used to allow the offender to make reparation. The court should record the specific object of the deferment and make this clear to the offender.

There have been some developments in case law concerning Deferment of Sentence. This includes the expectation that where an offender has conformed, or attempted to conform with the expectations of the court, he/she is entitled to expect that an immediate custodial sentence will not be imposed. In late 2001, the focus has moved away from sentence deferral. Instead, the focus has been on the development of arrangements as set out in the Criminal Justice Review for youth conferencing and youth conference plans.

Electronic monitoring has not yet been introduced into Northern Ireland as a community sanction. The Northern Ireland Office is currently looking at the experience in England and Wales before drafting legislation. Indeed it is also examining the whole area of bail support for pre-trial defendants who might otherwise be remanded in custody. This is a much-neglected area in Northern Ireland with no formal supervision system available; although police, magistrates and judges can fix conditions when allowing

bail to defendants before trial. These can include obligatory residence in a hostel, regular reporting to the police, and so on.

3. Statistical Overview

Republic of Ireland

In 1970 the current Principal Probation Officer in the Republic of Ireland headed a team of just 7 Probation and Welfare Officers to cover the whole of Ireland. This number grew substantially over the next 15 years. The influential Whitaker Committee Report[51] in 1985 considered the effectiveness of existing sanctions and proposed a number of steps to strengthen and extend them. This included a recommendation for a very substantial increase in the number of Probation and Welfare Officers. At that time the number of professional staff stood at 169. In spite of an announcement of an additional 65 staff following the Whitaker Report these officers were never appointed. As a result, the number of Probation and Welfare Officers in the Republic has remained virtually static since 1985. The staffing level in 2001 was only 180 officers with the Department of Justice pursuing an additional 39 recruits.[52]

Yet during this time the volume and complexity of work undertaken has developed to an entirely different order than 1985. This staffing deficit has strained and over-stretched the Probation and Welfare Service. Typically, a supervising Probation and Welfare Officer attached to one of the area teams may have a caseload of around 60 offenders to manage. In this situation he/she can do little more than monitor individual offenders but cannot do much meaningful work with them. Current estimates suggest that Probation and Welfare needs around 400 officers to adequately carry out its statutory duties. Instead there is more spending on prisons. Imprisonment rather than community sanctions appears to be the main reference point for sentences.

Figures from 1991 to 1995 actually show a small reduction in the number of Probation Orders made by the courts from 1,133 to 1,042. This number increased however in 1997 to 1,386. There were modest increases in the

[51] WHITAKER COMMITTEE.: Report of the Committee of Inquiry into the Penal System. Department of Justice. Dublin 1985. 11.

[52] VAUGHAN, B.: Toward a model penal system. Irish Penal Reform Trust. Dublin 2001.

number of Community Service Orders made between 1991 to 1995, from 1,390 to 1,602 however in 1997, this decreased substantially to 1,119.

The use of supervision under the Misuse of Drugs Act is almost non-existent with only three orders being made in 1991, none in 1995 and only one in 1997. There has been an increase in supervision during Deferment of Penalty, from 1,237 in 1991, 1,575 in 1995 to 1,851 in 1997[53]. This again appears to show the courts tendency towards tight control. In other words offenders have to succeed during supervision and keep away from offending, otherwise they are liable to imprisonment when they return to court for sentence.

Northern Ireland

In Northern Ireland, the number of Probation Officers rose between 1991 and 1996 from 164 to 194. This indicates that the number of Probation Officers in Northern Ireland per head of the population is considerably greater than for the Republic of Ireland, as the population of the Republic is more than twice that of Northern Ireland. The average caseload for main grade Probation Officers in Northern Ireland in the year 1996/97 was 21 clients versus 60 clients in the Republic[54].

The number of Probation Orders made in Northern Ireland rose between 1991 and 1997 from 986 to 1,202. However, there was a dip in the number of Community Service Orders made from 858 in 1991 to 598 in 1997. Nonetheless, the overall balance in Northern Ireland between community sanctions and imprisonment appears to have altered very little during the period 1991-1997[55].

4. Evidence of Effectiveness of Community Sanctions

Both the Probation and Welfare Service in the Republic of Ireland and the Probation Board in Northern Ireland are strong advocates of community

[53] COUNCIL OF EUROPE.: Penological Information Bulletin. No. 22, December 2000. 95.

[54] VAUGHAN, B.: Toward a model penal system. Irish Penal Reform Trust. Dublin 2001. 79.

[55] COUNCIL OF EUROPE.: Penological Information Bulletin No. 22 – December 2000. pp. 96.

sanctions. This is evidenced in their promotional literature and in their public utterances.

For example, IMPACT, the trade union for Probation Officers in the Republic, in its submission to the National Crime Forum[56], made the following opening statement:

> "*Community Sanctions need serious attention. The case for their existence is utterly reasonable. Community Sanctions are effective in reducing recidivist crime levels, they reduce the level of custody use, they are supportive of family and community ties, they contribute to offender's ability to take responsibility for their actions and they are considerably cheaper than imprisonment*".

Increasingly, there are calls for greater use of community sanctions. The Report of the Sub-Committee on Crime and Punishment found the balance of resources to be heavily skewed towards the use of imprisonment. It argued that punishment in the community should be considered the norm, and prison used sparingly and only in exceptional cases. The Report argued strongly against the use of increased imprisonment however recognised that its widespread use "may be a function of an insufficient range of alternative penalties which are attractive to the courts and perceived as tough and effective by the public"[57]. There have been difficulties in attracting new recruits to the probation service as well as a dearth of independent empirical evaluations of community sanctions. Clearly, much more research is needed in this area.

Such evidence as there is tends to be favourable. Community sanctions always win the case in terms of cost. Northern Ireland features one of the highest costs for incarceration at £74,580[58] per prisoner place followed by the Republic of Ireland at £53,400[59] and England and Wales at £19,270[60].

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[56] O'DEA, P.: Probation and Welfare in the 1990s. Probation and Welfare Officers' Branch IMPACT (Public Sector) Union. Dublin 1996. 7-8.

[57] JOINT COMMITTEE ON JUSTICE, EQUALITY, DEFENCE AND WOMEN'S RIGHTS.: Report of the Sub-Committee on Crime and Punishment of the Joint Committee on Justice, Equality, Defence and Women's Rights on Alternatives to Fines and Uses of Prison. November 2000. Para. 6.

[58] NORTHERN IRELAND PRISON SERVICE: Annual Report and Accounts 2000-2001. The Stationery Office London. 18.

[59] VAUGHAN, B.: Toward a model penal system. Irish Penal Reform Trust. Dublin 2001. 16.

The cost of a Community Service Order (for example, in Ireland) represents an alternative to prison and is approximately £2,100 per year per offender.

The 'Tackling Crime'[61] Discussion Paper produced by the Republic's Department of Justice (1997) states that in relation to Community Service Orders, over 1.5 million hours of work had been performed by offenders since the Orders were introduced in January 1985. This work brought positive benefits to local communities. Over 80 per cent of offenders placed on these orders had completed their hours of work without further offences.

The same document[62] outlines an independent research evaluation of the Dublin Intensive Probation Supervision programme. This showed that targets were being met, both in terms of category of offender referred and the outcome of participation, and the re-offending rate was very low. By August 1996, twenty-seven programmes had been run with a total of 244 offenders. Completion rates for these programmes were approximately 80 per cent.

In terms of ordinary Probation Orders the 'Probation and Welfare in the 1990's' [63] document published by IMPACT (1996) states that the level of co-operation by offenders with their supervisory Probation Officers and the courts was high - less than 10 per cent of offenders on Probation needed to be brought back to court for not complying with their court orders. The overwhelming majority successfully completed Probation Orders and a substantial reduction in offending was achieved.

In Northern Ireland there is a similar paucity of empirical research. In 1996 the Probation Board for Northern Ireland asked CIRAC[64] to conduct a Consumer Survey of a sample of persons subject to a Probation Order or Community Service Order to ascertain their views of the service on offer. The overwhelming majority (over 95%) of all respondents felt that they had benefited from the service provided by the Probation Service, citing such

[60] HM PRISON SERVICE.: Annual Report and Accounts: April 1997-March 1998. The Stationery Office London. 1998.

[61] DEPARTMENT OF JUSTICE.: Tackling Crime – Discussion Paper. Dublin 1997. 118.

[62] DEPARTMENT OF JUSTICE.: Tackling Crime – Discussion Paper. Dublin 1997. 120.

[63] O'DEA, P.: Probation and Welfare in the 1990s. Probation and Welfare Officers' Branch IMPACT (Public Sector) Union. Dublin 1996. 6.

[64] CIRAC.: Consumer Survey for the Probation Board for Northern Ireland. Belfast 1996. 4.

reasons as: 'understanding', 'caring', 'always there for you', 'good advice', 'confidential', 'helped stay out of trouble', and 'provided employment'. It can be seen from this that the majority of Probation clients viewed the service they were receiving at that time as very much following the 'advise, assist and befriend' philosophy and not as controlling and punitive. It is also clear that they believed this to be helpful to them.

The Probation Board for Northern Ireland participated in a United Kingdom-wide study entitled 'Increasing the Employability of Offenders'[65] which looked at employment-related interventions attempted by 11 different area Probation Services and the employment-related outcomes achieved. The main findings were that offenders who were unemployed at commencement and received an employment-related intervention, gained a job before their supervision ended at twice the rate of those who did not receive such an intervention during their supervision. This is a very important finding in view of the international research which suggests that finding employment is a major factor in reducing re-offending. For example, Lipsey's[66] meta-analysis in the United States concluded: *'The single most effective factor in reducing re-offending rates, with a positive effect size of 37 per cent, is employment'.*

From this the importance of Probation Services becoming effective at increasing offender employment is made clear. It is, perhaps, in this area that Probation Services and, indeed, most community measures should focus their activity if they are to help most offenders and protect the community from future re-offending.

5. Problems to be Solved and Expectations for the Future

In looking to the future it is important to try to predict future trends and identify a number of issues and problems to be solved. The following are particularly pertinent to the Republic of Ireland.

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[65] BRIDGES, A.: Increasing the Employability of Offenders. University of Oxford Probation Studies Unit. Oxford 1998.

[66] LIPSEY, M.W.: Juvenile Delinquency Treatment: A meta-analytic enquiry into the variability and effects. In Cook et al. (eds.) Meta-analysis for explanation. Sage Beverley Hills. 1992.

5.1 Crime Trends and Government Policy

'Donnell[67], based on the criminological literature and observations of political developments in Ireland and other countries, has tried to predict crime trends and policy development in the Republic. He suggests that if economic growth continues there will be a short-term drop in the levels of property crime and an increase in violence against the person. This raises worrying issues regarding the Republic's excessive use of imprisonment (compared to other European countries) against a backdrop of a currently low, and declining, level of recorded crime.

The government's 'zero tolerance' policy has led (and will continue to lead) to a substantial growth in the size of the prison population. This is coupled with an increase in sentence lengths for serious crime as well as a growing interest in community penalties without the resources to support them. There will be a further hardening in the attitudes of society such that the disadvantaged are blamed for their own misfortune. He argues that the Republic of Ireland is rapidly descending into 'populist punitiveness' which characterises the response to crime in Britain and the United States. O'Donnell places the blame firmly at the door of the Minister for Justice, John O'Donoghue stating that he "can take the credit for the surge in the prison population and the promotion of intolerance in policing"[68]. This punitive ethos is one driven by hysterical media coverage of crime and is difficult for any government to resist.

5.2 Public Attitudes

As part of the Expert Group on the Probation and Welfare Service's work, a survey of public attitudes to crime was carried out[69]. This survey featured a high level of support for counselling and rehabilitation to deal with juvenile and drug related crime. There was little support for the building of prisons as a solution to the rising prison population. Almost three out of

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[67] O'DONNELL, I.: Crime, Punishment and Poverty. Irish Criminal Law Journal. 1997. 150-151.

[68] O'DONNELL, I. & O'SULLIVAN, E.: Crime Control in Ireland: The Politics of Intolerance. Cork University Press. 2001.

[69] McDADE, D.: Public Perception of Crime in Ireland. Research and Evaluation Services.

four respondents viewed fines, community service and probation as being more appropriate than prison for certain crimes.

In Northern Ireland there are similar public attitudes towards crime. The former Chief Probation Officer in Northern Ireland, Mrs. Breidge Gadd[27], argued that within an increasingly hostile climate, probation services in future will need to devote more attention and resources to public relations and to the development of communication strategies which inform the public and also engage the commitment of the public to the work to which the Probation Service aspires. It seems that this type of public relations and community education work will be essential in both parts of Ireland if community sanctions and measures are to gain the credibility they deserve.

5.3 Research and Evaluation

As noted earlier there is a need for much more evaluative research concerning the effectiveness of community sanctions and measures in both parts of Ireland. Such research as there is tends to be mainly of a descriptive nature. We need carefully planned prospective studies which build in comparison/control groups and use objective indices, including reconviction rates, to measure outcome.

It is pleasing to note that the Department of Justice, Equality and Law Reform in its Strategy Statement 1998-2000[70] has recognised the need for quality research and evaluation and has proposed setting up a Research Unit to procure and utilise research. Additional research is likely to come from the Institute of Criminology which was set up in the Law Faculty of University College Dublin in 2000. In Northern Ireland, the Probation Board have in hand a number of empirical evaluations of their special programmes for adult offenders.

The Criminal Justice Review has made several recommendations regarding research and evaluation. It was identified that evaluation must be an integral part of the planning for the development of new policies and programmes. Crucially, it has been recommended that "funding be targeted towards fostering co-operation between researchers through joint confer-

[70] DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM.: Strategy Statement 1998-2000. Dublin 1998. 80.

ences and seminars, and suggest that specific research projects might be undertaken on an all-island basis"[71].

5.4 Structure and Management of Probation Service

The structure and management of the Probation and Welfare Service in the Republic of Ireland was reviewed by the Expert Working Group (the McCarthy Report). It's first recommendation was for "a significant shift in policy to facilitate the increased use of a much greater range of non-custodial sanctions. This will require significant additional staffing and other resources for the Service." [72] Additional recommendations included the creation of a new range of disposals such as treatment orders, mediation orders and reparation orders. The creation of an Inspector of Probation and Welfare Services was recommended along with the establishment of a statutory Probation and Welfare Agency. The increase in resources would allow the introduction of much needed specialist community programmes that focus on the needs of particular types of offender and move away from the more generic casework approach. This would do much to enhance the credibility of community sanctions. The Expert Review Group however, can only make recommendations and there is no guarantee that these will be implemented fully. In fact, the government has been slow to move the process forward.

5.5 Community Programmes

Drug misuse, especially opiates in the Dublin area, continues to be a major problem. It is estimated that 40% of offenders under supervision in the Dublin area are drug misusers. This creates serious problems for their management in the community. Currently there is a lack of availability of suitable treatment services and this has a bearing on levels of crime and credibility of community sanctions. Clearly, specially focused programmes for drug offenders need to be greatly expanded. New programmes should be based on research evidence of 'what works' elsewhere and then adapted for the Irish context.

[71] REVIEW OF THE CRIMINAL JUSTICE SYSTEM IN NORTHERN IRELAND.: Criminal Justice Review Group. The Stationery Office London. 2000. 438.

[72] EXPERT GROUP ON THE PROBATION AND WELFARE SERVICES: Final Report: Stationery Office. Dublin 1999.

Recently, a pilot Drugs Court was set up in Dublin to provide court supervised treatment programmes for less serious drug related offences. This pilot project is available to persons aged 17 or over who have pleaded guilty (or found guilty) of a drug or drug related offence of a non-violent nature which would ordinarily warrant imprisonment. The provision of services will come from a variety of agencies including Eastern Regional Health Authority and Probation and Welfare Services. The effectiveness of this pilot programme will no doubt be a reflection of the resources which are (or aren't) allocated to the service providers.

The numbers of men being charged, convicted and sentenced for sex offending is rising. The recent increase in the reporting of sex offences means that some are 'historical', having taken place many decades previous. These men have often committed very serious offences against women, and young boys and girls. This category of offender has caused increased attention in society generally and within the criminal justice system. In recent months, the government has taken steps to address this issue of sex offenders[73]. The Sex Offenders Bill 2001 places the courts under a duty to consider the need for post-release supervision. The intention is "to help offenders maintain control over their behaviour and to provide external monitoring of their activities"[74]. The Probation and Welfare Service is faced with problems on how to monitor serious sex offenders in the community. A number of questions need to be answered in this context. For example: Should such offenders be registered as in Northern Ireland? Are new, more specialised, forms of community sanction necessary? Et cetera.

The use of the fine also raises a number of issues. Firstly, there are fewer fines used in Ireland compared with England and Wales. It was found that individuals who were without financial means were more likely to receive an immediate sentence of imprisonment than a fine. It appears that the poor are doubly disadvantaged in this situation. "They are more likely to be jailed than fined in the first instance, but even if fined they may end up in custody anyway in the event of non-payment. As in Northern Ireland sig-

[73] DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM.: Minister O'Donoghue announces membership of Parole Board. Press Release. April 4, 2001.

[74] VAUGHAN, B.: Toward a model penal system. Irish Penal Reform Trust. Dublin 2001. 86.

nificant numbers of prisoners in the Republic are there for fine default"[75]. The Sub-Committee on Crime and Punishment recommended a number of alternatives for fine enforcement. These included reviewing the level of the fine; payments by instalment; supervision payments; attachment of earnings; and deduction from state benefits. It was clearly identified that there is a need to move away from imprisonment as the main sanction for fine default.

Overall, there appears to be a need for an expanded range of community programmes. These could include specialist programmes for car thieves and violent men. There are great opportunities to develop such programmes in partnership with other agencies, as happened with the Bridge Intensive Project in Dublin. This has a number of real benefits, such as bringing in additional expertise and new sources of funding. Programmes developed in partnership with local community groups could be particularly beneficial. This has already been happening with special projects for juvenile offenders.

Clearly the public demands a degree of punishment or restitution in any programme. There are real opportunities to develop restorative justice approaches which will help satisfy that need. Equally the public will accept the need for rehabilitative approaches and are likely to be particularly attracted to programmes which objectively assist offenders to find work. In this manner the philosophy of community sanctions could take on a much more problem-solving paradigm, which includes an element of restitution and public protection but equally should emphasise restoration and social inclusion.

5.6 Deferral of Sentence

As was mentioned earlier the practice of deferring sentence to allow a period of probation supervision to be tried has grown substantially over the years. Yet it is believed to be a judicial creation and as such has not yet been legislated for. This means that it, almost certainly, contravenes the European Rules on Community Sanctions and Measures. It is understand-

[75] JOINT COMMITTEE ON JUSTICE, EQUALITY, DEFENCE AND WOMEN'S RIGHTS.: Report of the Sub-Committee on Crime and Punishment of the Joint Committee on Justice, Equality, Defence and Women's Rights on Alternatives to Fines and Uses of Prison. November 2000. Para. 14.

able why the courts, in some instances, may wish to defer sentence. It is believed that this practice grew up principally because of the increasing number of drug addicts coming before the courts. These persons tended to have a history of relapse and the courts wished to see if they kept promises to attend treatment clinics, etc. before passing a final sentence. It allows the courts to carry on a periodic monitoring function, which may act as an incentive for offenders to modify their behaviour if they know that they are going to have to return to court. However, as the practice is essentially without effective regulation it could be open to abuse by individual sentencers. It also adds considerably to the workload of Probation Officers who have to prepare additional written reports on progress each time the offender returns to court. The Department of Justice's Strategy Statement 1998-2000[76] noted its intention to implement, as appropriate, the European Rules on Community Sanctions and Measures. This would require legislation for Deferred Sentences and introduce regulations governing their use however to date there has been no movement on this issue.

5.7 Temporary Release of Prisoners

There had been genuine problems associated with the Temporary Release scheme which was introduced under the Criminal Justice Act, 1960. When first used this power allowed the Minister of Justice to grant release to prisoners for humanitarian purposes, (e.g. to visit a sick relative, etc.) or for rehabilitative purposes, such as to attend job interviews, training courses and so on. But because of pressures on prison accommodation since the early 1980's it was used as a means of easing accommodation problems. In 1997, the Department of Justice[77] estimated that on any one day there were some 500-600 prisoners on such release. There was considerable public and judicial frustration with this 'revolving door' however this problem is being addressed. O'Donnell notes that almost half of the increase in the prison population since 1996 is explained by a reduction in the use of Temporary

[76] DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM.: Strategy Statement 1998-2000. Dublin 1998. 44.

[77] DEPARTMENT OF JUSTICE.: Tackling Crime – Discussion Paper. Dublin 1997. 110.

Release, "which is no longer being used as a safety valve to ease overcrowding".[78]

The Department of Justice have also recently published the Criminal Justice (Temporary Release of Prisoners) Bill 2001. While it will provide a more transparent basis for the system of temporary release, it will rely on increased supervision by the Probation and Welfare Service. This will clearly require a very significant increase in the resources available to the Probation and Welfare Service if this objective is to be achieved. The impact of the newly formed Parole Board will also be of interest to individuals concerned with transparency in prison procedure.

6. Concluding Comment*

Community sanctions and measures have seen major changes in Ireland over the past 25 years. In the early 1970's the Probation Services, which supervised most of these sanctions, were mainly of a welfare nature helping minor and first time offenders who were placed on Probation because they needed help. Then Community Service Orders were introduced as an alternative to prison. These involved more control over the offender and an element of punishment/retribution. This marked a move to the supervision of medium/high risk offenders in the community. This trend has persisted and there is now much more emphasis on controlling offenders in the community and protecting the public.

The Probation Services in both jurisdictions are developing a continuum of probation programmes aimed at matching persistence/seriousness of offending to intensity of programme. The objective is to reduce re-offending. To do this there is increasing emphasis on a 'what works' philosophy based on research and careful evaluation.

[78] O'DONNELL, I.: Prison Policy in Ireland. Prison Service Journal. Issue 135. 36

* The author would like to express thanks to the many people who supplied information to assist him in the preparation of this paper. These include: Dr. Paul O'Mahony (independent researcher), Dr. Ian O'Donnell (Institute of Criminology, University College Dublin), Dr. Tom O'Malley (University College Galway), Mr Martin Tansey (Probation and Welfare Service, Republic of Ireland), Mr. Patrick O'Dea (IMPACT), Mr. Sean Lowry (Probation and Welfare Service, Republic of Ireland), Ms. Donna Irwin (Probation Board for Northern Ireland) and Ms. Stephanie Mallon (Extern).

There is evidence that community sanctions and measures can effectively change behaviour. However, the movement to work with increasingly high-risk offenders in the community brings its own risks. Government must be careful to recognise the limitations of community sanctions and not expect too much of the Probation Services. Otherwise they will be set up to fail. This will be very dangerous in a climate of increasing public punitiveness and will result in even more money being spent on prisons and increasing numbers being sent to prison, as in the United States.

Figure 1: Crimes per 100k pop.

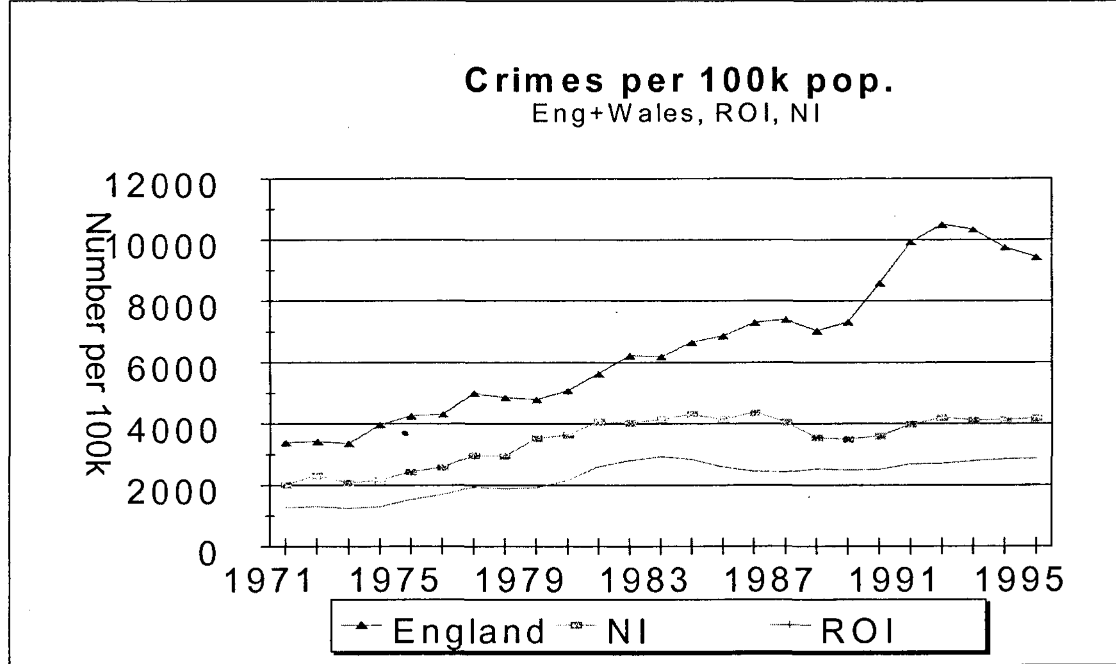


Figure 2: Overall International Victimisation Rates for all Crimes, 1996

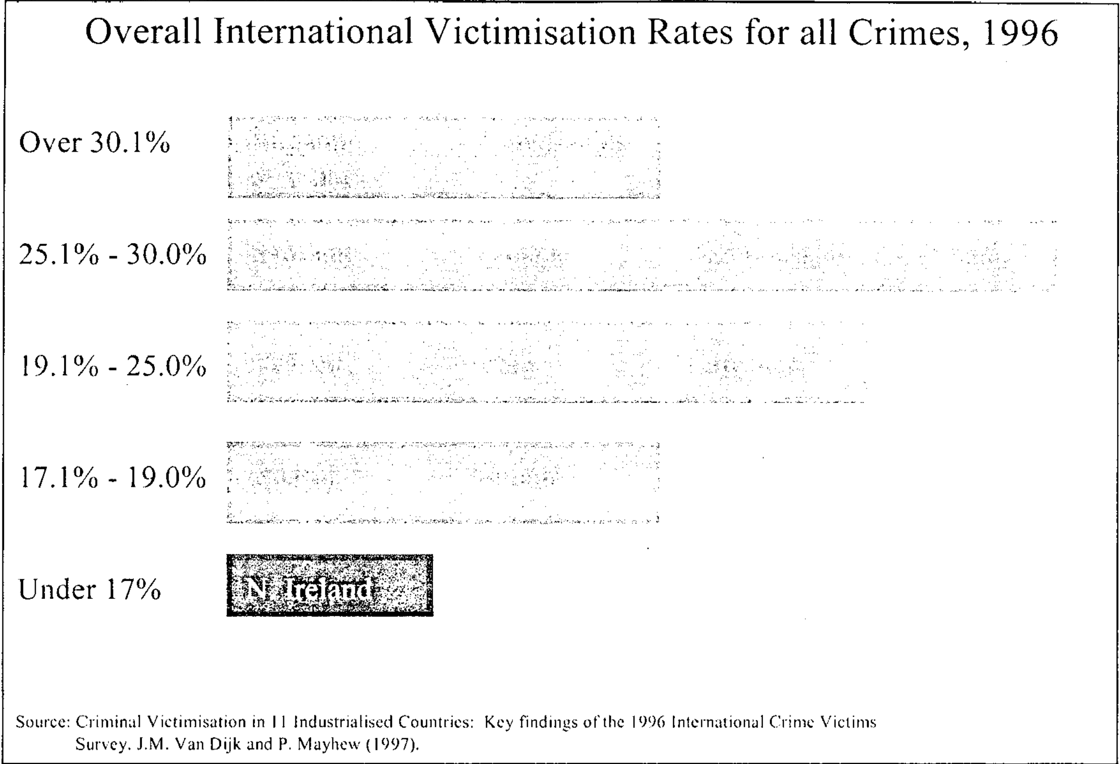
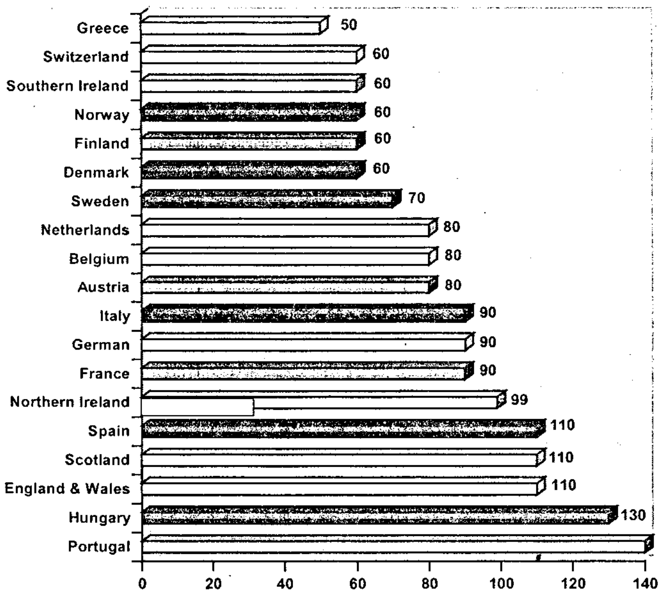


Figure 3:



(N. Ireland Non-scheduled (32) Scheduled (67))

Source: Council of Europe, Prison Information Bulletin; NIO Statistics and Research

Alternatives to Imprisonment in the Italian Criminal Justice System

VITTORIO FANCHIOTTI

1. The prison-centred 1930 correctional system and the 'traditional' non-custodial alternatives

1.1. Introduction

In order to fully understand the most specific problematic aspects of the Italian correctional system related to the field of community sanctions - understood as sanctions and measures which keep the offender in the community by restricting his/her liberty through the imposition of obligations - it is necessary to give a preliminary, although synthetic description of the general context in which these alternatives arose. The history of the birth and growth of such alternatives starts in 1975. In fact, it was in that year that a very important reform was enacted in the Italian sentencing and correctional system, the traditional structure of which is grounded mainly on two kinds of penal sanctions provided for by the Penal Code with a minimum and maximum amount for each offence: i.e. fine and detention, to be applied cumulatively or alternatively[1].

[1] To be more precise, there are two types of offences, *delitti* and *contravvenzioni*, respectively the more and the less serious ones. For both, the Penal Code provides for detention and/or fines, to be imposed alternatively or cumulatively, according to the relative seriousness of the case. Detention and fines are called for in different ways by the code when related to *delitti* (respectively, *reclusione* and *multa*) or to *contravvenzioni* (*arresto* and *ammenda*). Hereinafter I shall adopt a simplified terminology, speaking more generally of 'offences', 'detention' and 'fines', in order not to complicate the description with too many technicalities.

The specific sentence is imposed, case by case, at the end of the trial by the same trial judge, who decides on the merits of the facts charged: the Italian criminal procedural system, unlike those in common law countries, does not have a separate post-trial sentencing phase. The Penal Code (Art. 133) contains a very detailed list of criteria to be followed by the trial judge in fixing a penalty within the minimum and maximum range predetermined by law, but it still leaves the judge with a very broad discretionary power. The decision as to type and length of sentence must be followed up by a written statement of the reasons behind the decision and is subject to the same means of appeal which are available for the judgement on the facts, i.e. not only for errors of law, but also on the merits. If in the appellate proceeding the conviction is confirmed, it is quite common for the defendant to get a new sentence, which is more severe than the trial one.

On a general level, the specific terms of imprisonment provided for by the Penal Code are characterized by rather excessive severity, mostly due to the authoritarian attitude of the legislator. It must be remembered that the code, enacted in the early 1930s, was a typical product of the Fascist state, and so far has not been substantially changed in its original general structure for what relates to the whole scale of penalties and the proportion between seriousness of crimes and severity of sanctions. Only partial changes have occurred from time to time: the most important was a reform introduced in 1974 (Act of 7 June 1974, no. 220) in the general part of the Penal Code, aimed at mitigating - but only on a case-by-case basis - in a very significant way the previous draconian severity. The result was obtained in part by allowing the trial judge to give a particular weight to the role played in the offence by any extenuating circumstances, thus allowing the judge to lower the sentence far below the statutory minimum.

But, if considered from another point of view, the solution mentioned above - although undoubtedly very useful in improving the adequacy of the original penalties to a less drastic sentencing scale - has the inevitable result of giving the trial judge much more discretion than he/she enjoyed before and, consequently, leaves much more room for disparity in sentencing. Discretion and disparity can represent a rather serious problem when related to the principle of legality, which has to control the definition not only of the specific offences but also of the sanctions related to them. In fact, many scholars - particularly those in the field of substantive criminal law - are very critical of this too broad discretionary system and strongly support a general radical reform of the legislative scale, which defines the gravity of crimes and the related penalty.

The way towards a general reform still seems to be a very long one because of the tendency to maintain the status quo, characterized by the coexistence of severity 'on the books' and leniency 'in action', which seems difficult to replace in the short term[2]. One factor that has undoubtedly helped to delay any reform is represented by a very typical tool - a sort of security valve - which is over-utilized to control both the length of sentences and the growth of the prison population: i.e. the general amnesty and pardon, which used to be applied (until the 1980s) on average every three years.[3]

1.2. The first Community Sanctions and Measures

Anyway, coming back to imprisonment, which represented the principal criminal sanction utilized before 1975 for all but the less serious offences. According to the system's orientation towards the aim of general prevention, the opportunities to have access to some alternatives to it were very limited, although they were significantly increased during the course of the decades following the enactment of the code, which put sentencing more in tune with the new democratic society's values.

1.2.1. Conditional release

For offences of medium or long duration, the only possibility offered by the code is limited to the final part of the time to be served according to the sentence imposed: this is *liberazione condizionale* (conditional release), a sort of parole, available to those who have spent in prison a minimum of thirty months and at least half of the sentence imposed by the judge, if the remaining part of the sentence is less than five years; or, in case of a recidivist, not before having spent at least four years in prison and serving not less than three-quarters of the sentence, while for those sentenced to life, *liberazione* is available only after twenty-six years of imprisonment[4]. The prerequisites for being granted *liberazione condizionale* are behaviour in prison that shows 'certain repentance' and the fulfilment of the civil obli-

[2] PAVARINI, M.: *The New Penology and Politics in Crisis: the Italian Case. British Journal of Criminology*, 34 (1994), p. 50.

[3] MAZZACUVA, N.: *Il principio di difesa sociale e i provvedimenti di clemenza. Profili di una politica criminale e analisi per una ricerca storica*, Bologna 1983.

[4] Art. 176 c.p. Before 1986, the minimum term of time to be served for offenders sentenced to life was 28 years.

gations generated by the offence, i.e. damages and restitution to the victim.

For a period of time corresponding to the remaining part of the sentence - or for five years, if sentenced to life - the released prisoner is subjected to *libertà vigilata*, a form of supervision. Only the police originally performed such supervision, but the 1975 correctional reform has added to it (Art. 55 ord. pen.) an intervention by the probation service, whose task is to support and assist the released inmate in his/her social resettlement. From this point of view, *liberazione condizionale* has been transformed from a mere expression of clemency - leading to an early release for a detainee who does not deserve more the prison penalty because of his/her repentance - into a form of 'active', although partial, treatment alternative to prison, according to the 'progressive' model which is aimed at gradual re-socialisation[5], although many believe that, in practice, the probation service's intervention vests a secondary importance when confronted with the central role of control played by the police in the management of the measure[6]. The commission of a new offence while on release, or a violation of the obligations imposed for the *libertà vigilata*, determines the revocation of the measure, which cannot be granted again.

Following (but not in a very timely manner!) the general trend towards the jurisdictionalisation of the sentencing system, according to a constitutional principle (Art. 13 Const.) which imposes the judicial intervention whenever the matter to be decided affects personal liberty, the decision as to the granting and revocation of *liberazione condizionale*, initially reserved for an administrative authority (more precisely, the Minister of Justice), was transferred in 1974 to the Court of Appeals and, finally, in 1986, to the *tribunale di sorveglianza* (the new correctional court), which had been created in the meantime[7].

1.2.2. Suspended Sentence

Only the less severe sentences, i.e. those determined by the trial judge to be of less than two years (originally, one year) of imprisonment, could (and still can) be immediately suspended by the same judge and not served at all, unless recidivism occurs within two or five years, depending on the type of offence committed (Art. 163 ss. c.p.). This *sospensione condizion-*

[5] MANTOVANI, F.: *Diritto penale*, Padova 1988, p. 810.

[6] COPPETTA, M.G.: *Commento*. In: GREVI, V., GIOSTRA, G., DELLA CASA, F., *Ordinamento penitenziario*, Padova, 1997, p. 476.

[7] See paragraph 2.

ale della pena, although it may be conditioned to the fulfilment of the obligations for damages or restitution in favour of the victim, has generally been considered a form of clemency, a sort of mitigation of the abovementioned draconian severity in the statutory penalties and also a way to avoid the negative effects of short-term incarceration, but really not at all a kind of treatment as an alternative to prison[8].

Only for juveniles offenders (i.e. those who commit an offence while under the age of 18) - who can also be granted a *sospensione condizionale* in case of a sentence not exceeding three years of imprisonment - there is another opportunity to completely avoid serving a prison sentence: the *perdono giudiziale*, according to which the pre-trial or trial judge simply abstains from imposing a sentence, if he/she presumes that the defendant, although found guilty of an offence whose statutory sanction is not longer two years of imprisonment (Art. 169 c.p.), will not commit any other crime in the future. The aim of this measure is to avoid the short-term imprisonment of - and its consequential criminogenetic effect on - non-recidivist juveniles (the *perdono* can be granted only once); any kind of treatment is totally absent and no conditions are attached to the *perdono*, which cannot consequently be revoked.

2. The 1975 re-socialisation-oriented reform: the birth of a new system of alternatives to detention

2.1. Tribunal of surveillance

As mentioned earlier, the enactment in 1975 of a statute containing *Norme sull'ordinamento penitenziario e sulla esecuzione delle misure privative e limitative della libertà personale* (Act of 26 July 1975, no. 354), marked the beginning of a new system of alternatives to imprisonment. The roots of the 1975 reform are to be found in the complex interplay of many factors: among them a very diffuse critique of the 'total institutions', which characterized the late 1960s, paralleled by an atmosphere of permanent revolt within the overcrowded prisons, animated by the struggle for the civil rights of the prisoners; the disillusionment with the practicability in the short term of a global reform able to solve the problems connected to the severity and lack of proportionality among sanctions provided for in the

[8] GIUNTA, F.: *Sospensione condizionale*. In: *Enciclopedia del diritto*, XLIII, p. 103.

Penal Code, which is no longer in tune with the values and needs of a democratic society; the intent to render effective a constitutional mandate, contained in Art. 27 of the 1948 Constitution, which reads as follows: "Criminal sanctions cannot consist of treatments that are contrary to the sense of humanity and must tend to the re-education of the convicted". In this perspective, the 1975 reform operates at two levels: by offering the inmate a rehabilitative opportunity inside the prison, and by creating some kind of treatment outside the prison.

As regards the second aspect, the one that particularly interests us here, the 1975 reform introduced, after the definitive imposition of a custodial sentence at the end of the criminal trial, an articulated system of alternatives to imprisonment to be administered by a new court, the *tribunale di sorveglianza* (tribunal of surveillance). This tribunal - a panel composed of two professional judges and two experts, the last two being selected from specialists in criminology, psychiatry, psychology, pedagogy or the social sciences - is in charge of deciding on the requests to be granted an alternative to prison. Such applications have to be presented before the tribunal by the interested prisoner, i.e. the person who, after the exhaustion of every means of appeal, has begun to serve a definitive prison sentence for a determined amount of time imposed by the criminal judge. The principle of mandatory prosecution - provided for by the Constitution (Art. 112) - precludes the introduction of any kind of pre-trial diversion (although some exceptions can be found in the juvenile criminal justice system).

The *tribunale di sorveglianza,* after a hearing in chambers, makes its decision, which has to contain a written statement of its reasoning. During such a hearing, which is held in the presence of the applicant (unless he/she waives his/her right to be present), his/her attorney and the prosecutor, the existence of the legal prerequisites for granting the alternative measure is discussed on the grounds of the prisoner's personal participation and considering all the reports submitted to the *tribunale* by the prison authorities (more specifically, by an 'observation and treatment team', composed of 'educators', psychologists, etc.), by the social services of the Department of Justice (relating to familiar and socio-economic background, and prospects of resettlement outside the prison) and by the police (relating to the dangerousness of the applicant and his/her liaisons with organized crime). The *tribunale* is also empowered to revoke the measure to be adopted after another similar hearing; the prisoner has the right to appeal against both the rejection of his/her request to be granted the alternative measure and against the revocation of the measure, but the appeal - to be held before the

Corte di cassazione - is limited to questions of law, which can also affect the statements of reasons attached to the decision.

2.2. Probation

The most important measure created by the 1975 reform - and, strictly speaking, the only positive measure that represents a full alternative to imprisonment - is the *affidamento in prova al servizio sociale*, a sort of probation. In the original scheme it can be adopted, after a three-month period of "scientific observation of the personality" in favour of prisoners who have to serve no more than thirty months (three years for juveniles or persons over seventy) in prison, if they have external prospects of engaging in a re-socializing activity. *Affidamento* consists of spending days and nights outside the prison, with the obligation to engage in a re-socializing activity, the content and modalities of which are determined by the *tribunale* and must be accepted by the prisoner, who has to sign a document confirming acceptance of the behavioural prescriptions. The programme is supervised by the *servizio sociale.*

The *servizio sociale*, whose offices are present at the location of each *tribunale*, is an official public agency created by the 1975 reform[9] as a branch of the Department of Justice; its members are full-time civil servants, who are recruited after passing a national, competitive examination and who must hold a university diploma (the programme of which lasts three years) in the social services. In performing its tasks, the social services may be assisted by a number of *assistenti volontari*, people who - authorized by the prison administration - cooperate with the service on a voluntary basis. In Italy, there are many types of groups and organizations, most of them with a religious background (some have existed for centuries, e.g. *Confraternite della Misericordia*), whose members are active in finding job and educational, logistical or social opportunities and support for the detainees.

In any case, contrary to what happens in other countries, the activity of the volunteers cannot became a complete substitute for the professional in-

[9] On an experimental basis, a social services team has been operating since 1955 in some selected detention facilities, among them the *Centro per l'osservazione della personalità* located at Roma-Rebibbia. A similar service has been operative within the juvenile system since 1948.

tervention of the *servizio sociale*[10], which is always in charge of supervision and coordinates all the volunteers' activities. The supervision operated by the social services consists of on-site visits and periodical meetings with the probationer, aimed at "controlling the behaviour of the probationer, helping him/her to overcome the difficulties in adapting to the social life", and also of having contacts with his/her family and employers (Art. 47 o.p.). The social services have to report periodically to the *tribunale* as to the development of the *affidamento* and upon its termination.

The duration of the measure coincides with the remaining part of the prison sentence still to be served, and when the final result is a positive one, the *tribunale* declares the penalty 'quashed'. On the other hand, a revocation is ordered if the probationer's behaviour, being in violation of the prescriptions or against the law, is deemed incompatible with the continuation of the experiment. In this case, the *tribunale di sorveglianza* - which has broad discretion in determining the importance to be given to misbehaviour and even to criminal offences committed during the *affidamento* - decides whether and, if so, how much of the time spent on probation can be subtracted from the original custodial sentence, the enforcement of which has to start again as a consequence of the revocation.

2.3. *Semi-liberty*

The second alternative to the traditional prison sentence is *semilibertà* (semi-liberty), which consists of spending only part of the day outside the prison working, studying or engaging in another re-socializing activity (for instance, assisting old or ill relatives, or taking care of children), under the supervision of the *servizio sociale*. This measure can be adopted not only for those serving short sentences (for inmates serving up to six months, no initial minimum stay in prison is required), but also for prisoners serving very long custodial sentences. In this case, it is possible to obtain *semilibertà* after serving half the sentence, the length of which can be further reduced if the prisoner exhibits good behaviour (another 'benefit' created by the same 1975 reform in favour of the detainee who actively participates in a rehabilitation programme, which supposedly exists inside each prison; it anticipates the end of the final release by reducing the sentence, initially by twenty days for every six months served and, after the 1986 reform, by

[10] DI GENNARO, G., BREDA, R., LA GRECA, G.: *Ordinamento penitenziario e misure alternative alla detenzione*. Milano 1997, p. 355.

forty-five days for every six months). The prisoner granted *semilibertà* can also obtain some periods of *licenza*, a sort of furlough, in which he/she also spends nights outside the prison, for a maximum of forty-five days per year.

The revocation of the measure can be decided by the *tribunale di sorveglianza* if the person granted *semilibertà* "appears unsuitable for treatment" or absents him/herself from the prison by not returning at night, without any justifiable reason, after a determined number of hours. The 1975 Act excluded the applicability of *affidamento* and *semilibertà* if the conviction was related to some kind of 'serious crime', namely robbery, extortion or kidnapping. This exclusion was removed by the 1986 reform. Prisoners, who are not eligible for *affidamento* or *semilibertà*, or as an initial step for verifying the feasibility of granting such measures in the future, can also be allowed to spend part of the day outside the prison performing work activities for public or private employers. This measure, called *lavoro all'esterno* (extramural work), which initially was left to the decision of the prison's authorities, has been devolved (since 1986) to the *magistrato di sorveglianza* (a professional judge who is a member of the *tribunale di sorveglianza*) who in this matter acts alone (Art. 21 ord. pen.). Also prisoners sentenced to life are eligible for this treatment after serving at least ten years.

The *lavoro all'esterno* - which initially was considered not to be a real alternative to prison but a specific form of treatment attached to a prison sentence - has in practice many affinities with the *semilibertà*[11]. This has been particularly true since 1986, when the original limitation on the fields of working activities in which the measure could be utilized - i.e. only the industrial and agricultural sectors, excluding the commercial sector - was removed (the reason for the original limitation was to prevent direct contact between the general public and the inmate[12]). For this reason, but also because of the reluctance that characterized the Prison Administration in this regard, in the first ten years after its introduction, the *lavoro all'esterno* was only very occasionally utilized. More recently, it has been revitalized thanks to a series of interventions sponsored by local and regional administrations, which created *borse lavoro*, a sort of paid public working and training opportunity.

[11] PAVARINI, M.: *La nuova disciplina del lavoro dei detenuti nella logica del trattamento differenziato.* In: GREVI, V. (ed.): *L'ordinamento penitenziario dopo la riforma.* Padova 1988, p. 112.

[12] DI GENNARO, G., BREDA, R., LA GRECA, G., *supra*, note 9 at 155.

3. The 1986 Act: broadening the applicability of the alternatives

3.1. Reform of probation

In 1986 a second legislative reform took place, with the aim of broadening the feasibility of the alternatives to prison created in 1975. According to the new statute (Act of 10 October 1986, no. 663, popularly known as *legge Gozzini*, after the name of its proponent), an *affidamento* can be obtained also by offenders whose prison sentence does not exceed three years (instead of thirty months, as it was before). Furthermore, it is no longer necessary to spend any initial period in prison for 'observation', if at the time of the imposition of the sentence the offender is on bail, having served a period of preventive detention. Because preventive detention cannot be utilized for 'observing' the personality of the detainee[13], as he/she is to be presumed not guilty (according to Art. 27 of the Italian Constitution) until a final conviction - i.e. one that is not subject to appeal - intervenes, and is therefore 'intractable', the behaviour while on bail is considered a substitute for the observation aimed at the prognosis of aptness for treatment in a non-custodial environment. The purpose of the new rule is obviously connected to the exigency not to stop a rehabilitative process already in progress. In the remaining cases, the observational period has been reduced to a month. The trend towards a progressive devaluation of the importance of observing the prisoner's personality before granting him/her the alternative measure is quite clear, as it has the general purpose of mainly facilitating the avoidance of - or, at least, the minimization of - the prison sanction for people eligible for *affidamento*[14].

It must also be remembered that a 1985 statute (Act of 21 June 1985, no. 144), taking into consideration the seriousness and the broadness of the problem related to the massive presence in prison of drug-addicted inmates, introduced a new kind of *affidamento*, the so-called therapeutic one (now Art. 47 bis ord. pen.), for the purpose of facilitating the detoxification of such people (it is also available for those addicted to alcohol) if, at the time of sentencing, they are already engaged in a detoxifying therapeutic pro-

[13] PALAZZO, F.: *La nuova disciplina della semilibertà*. In: GREVI, V., *supra*, note 10, at 242.

[14] PRESUTTI, A.: *Affidamento in prova al servizio sociale e affidamento con finalità terapeutiche*. In: GREVI, V., *supra*, note 10 at 167.

gramme, or if they manifest the willingness to start such a programme. In the first case, the offender's application for *affidamento* can determine a provisional suspension of the imprisonment order issued to enforce the sentence, until the *tribunale di sorveglianza* decides on the matter. So, if at the time of the definitive conviction the applicant is on bail and actively engaged in a rehabilitative programme, he/she can be granted *affidamento terapeutico* without entering prison.

The rehabilitation programme has to be approved by the local branch of the national public health service and can be effectuated by a public or private structure, not necessarily a residential one. More recently (since 1992), the granting of this kind of *affidamento* has been extended to addicts who have to serve up to four years in prison: the four-year term does not necessarily have to be the original one determined by the sentence, but can be the final part of an originally longer sentence, partly already served. This last rule is now the general one for all prisoners applying for an alternative measure, which has brought about a very significant change both in terms of the number of people eligible for the alternatives to a prison sentence and in terms of the kind of offences for which it is possible to get the alternative: any detainee can apply for *affidamento* in the third year of his/her sentence, regardless of its total length as originally determined by the trial judge.

3.2. *Reform of semi-liberty*

The 1986 reform affects also *semilibertà* in many ways. First of all, it makes it possible, in case of a sentence of up to six months, to obtain *semilibertà* before starting a sentence; secondly, in the case of a sentence not exceeding three years, the alternative is possible after only one month of 'observation'. The legislative aim of coordinating this rule with those related to the *affidamento* is evident: the *tribunale di sorveglianza* will opt for *semilibertà* if it, not at all convinced of the opportunity to immediately grant the more ample measure of *affidamento*, nonetheless deems the results of the observation of the detainee's personality favourable for gradual social reinsertion[15]. Finally, the *semilibertà* is now available to those sentenced to life after they have served twenty years of their sentence: this is undoubtedly a very important change[16], which, after the idea of progression

[15] CANEPA, M., MERLO, S.: *Manuale di diritto penitenziario*, Milano 1996, p. 254.
[16] FASSONE, E., BASILE, TUCCILLO: *La riforma penitenziaria*, Napoli1987, p. 165

in the treatment, makes *semilibertà* a step towards granting the more ample measure of *liberazione condizionale*, which is attainable, as mentioned before[17], after twenty-six years[18].

3.3. House Arrest

The 1986 statute introduced another alternative to imprisonment: *detenzione domiciliare* (Art. 47 ter ord. pen.), a sort of home detention[19]. According to this regulation, if the prison sentence is less (globally or as the remaining part of a longer one) than three years (the original term of two years was increased in 1993: Art. 3, Act of 12 August 1993, no. 296), and the prerequisites for granting an *affidamento* are not present, the detainee can serve the sentence in his/her own home, in some other private residence or in a public hospital or shelter, if the detainee is: 1) a pregnant woman, a woman nursing a child, or the mother of a child of five or under who is living with her (in 1992, the *Corte costituzionale* extended this measure to the father, if the mother is deceased or otherwise unable to take care of the child); 2) a person whose health is in such a condition that permanent contact must be maintained with local public health services; 3) a person older than sixty who is totally or partially disabled; or 4) a person younger than 21 who has proven health, study, work or family needs.

A person granted *detenzione domiciliare* can be authorized by the *tribunale di sorveglianza*, which is empowered to grant the measure, to leave his/her domicile for a very limited number of hours each day; if indigent; he/she can be also authorized to leave home to work, in order to earn a living. The police authority is in charge of checking that the home detainee conforms to the obligations imposed on him/her (consisting essentially of not absenting him/herself from the domicile unless authorized to do so), the violation of which determines the revocation of the measure, to be disposed by the *tribunale di sorveglianza*.

Although structured in many aspects like the other alternative measures, *detenzione domiciliare* is generally considered more a humanitarian wel-

[17] Supra, paragraph 1.

[18] PRESUTTI, A.: *Commento*. In GREVI, *supra*, note 5, at 419.

[19] In some way, *detenzione domiciliare* follows the trend, initiated two years earlier with the enactment of a similal measure - *arresti domiciliari* - as an alternative to preventive detention during a criminal proceeding. *See*: CASAROLI, *Misure alterantive alla detenzione*. In: *Digesto discipline penalistiche*, XVIII, Torino 1994, p. 35.

fare measure[20] than a rehabilitative one, as shown by the fact that the social services' intervention is not mandatory, and that there is no final evaluation of any kind of the 'results' of the measure, the mere completion of which quashes the penalty, as it does for the traditional custodial sentence.

3.4. *Reward-furlough*

Last but not least, the 1986 reform also introduced another very important re-socializing tool: *permesso premio*, or 'reward-furlough'. Previously, according to the 1975 reform, there was the possibility to grant a 'necessary' furlough only in exceptional circumstances, e.g. the imminent death of a relative or when particularly serious family events have occurred. Since 1986, the new *permesso premio* has been available for inmates whose behaviour is regular (i.e. during detention they have exhibited a firm sense of responsibility and correctness in their personal behaviour, and have participated in prison activities, including, where applicable, working and cultural activities) and who are not considered socially dangerous. This last prerequisite is to be verified by looking at their previous convictions and, above all, at the police reports relating to the present connections existing in the environment where the furlough has to be spent.

Permesso premio consists of spending certain periods of time outside the prison; no one period may exceed fifteen days and the total amount of time may not exceed forty-five days per year (for juveniles, twenty days and no more than sixty days per year, respectively). In order to apply for the benefit, an inmate (who can also be serving *detenzione domiciliare*) whose penalty exceeds three years has to wait until he/she has served at least a quarter of that sentence (or, if sentenced for particularly serious crimes, at least half); for those serving a life sentence, *permesso* can be granted only after ten years. The judge of the sorveglianza acting alone grants the measure, and the application's rejection can be appealed before the *tribunale di sorveglianza*; of course, the prosecutor also can appeal against a concession.

The nature of *permesso premio* has been hotly debated: for some commentators it has only a rewarding function[21], while others tend to stress its special preventive and rehabilitative orientation, because - contrary to what

[20] CESARIS, L.: *La detenzione domiciliare come modalità alternativa dell'esecuzione penitenziaria*. In GREVI, V., *supra*, note 10, at 220.

[21] GIUNTA, *Commento all'art. 9, l. 10 ottobre 1986 n. 663*. In: *Legislazione penale*, 1987, p. 136.

happens with, for instance, *detenzione domiciliare* - it puts the responsibility on the detainee to abandon his/her previous crime-oriented behaviour[22]. Others observe that in order for it to be granted, *permesso premio* requires only 'regular' behaviour rather than active and participatory behaviour, as required for e.g. *affidamento*[23]. Probably the most realistic view of the measure is that characterizing it as a multifunctional tool[24]. From a practical perspective, *permesso premio* represents a very useful prognostic instrument for the *tribunale di sorveglianza* when called to decide on granting *affidamento* or *semilibertà*, as it is very indicative of the inmate's probable behaviour in the free environment.

4. A new impulse towards non-custodial alternatives: the 1998 Act

Very recently, the trend towards a gradually increasing extension of the alternatives to prison, which characterized the period following the 1975 reform, has been very strongly reaffirmed, or more precisely, has really accelerated with the enactment of another statute (Act of 27 May 1998, no. 165), which came into effect in June 1998 and reversed the relationship rule-exception which previously existed between detention and alternatives to it for a very large range of short- and medium-term prison sentences. As to *affidamento*, the decision concerning its concession can now be taken by the *tribunale di sorveglianza*, in any case without having to wait for the expiration of the one-month observation period, if it is possible to assume that the alternative measure with its attached obligations can contribute to the offender's re-socialisation and secure him/her against the risk of committing future crimes.

Detenzione domiciliare is undoubtedly the measure most widened by the new statute, which operates in two directions. The first consists of rendering available the 'old' 1986 *detenzione domiciliare* for prison sentences not exceeding four (instead of three, as previously) years of detention, and in increasing the maximum age of the children in need of care from five to ten years. The second direction consists of allowing access to alternative meas-

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[22] MARGARA, G.: *La modifica della legge penitenziaria. In: Questione giustizia,* 1986, p. 530.

[23] DI GENNARO, BONOMO, BREDA, *supra,* note 9, at 205.

[24] LA GRECA, G.: *La disciplina dei permessi premio nel quadro del trattamento penitenziario.* In: GREVI, V., *supra,* note 10, at 133.

ures to all convicted offenders (i.e. no longer only to specified categories), whose sentence does not exceed (also as a residual part of a longer sentence) two years, whenever the prerequisites for *affidamento* are not present and the measure is able to prevent the danger of the commission of new offences in future.

More generally, the new statute prescribes that every person sentenced to no more than three years in prison must be informed of the existence of a pending imprisonment warrant, which has to be consigned directly and personally to him/her, in order to allow him/her to apply for one of the alternative measures without beginning to serve the prison sentence: if he/she does not make an application within thirty days, the warrant - whose execution in the meantime remains provisionally suspended - has to be immediately carried out.

Furthermore, according to the new statute, if at the moment of the imposition of a prison sentence whose length is within the statutory limits prescribed for granting *detenzione domiciliare*, the convicted offender is still subjected to home arrest - that is, as mentioned, a kind of provisional measure, alternative to preventive detention - he/she maintains his/her home arrestee status, while the prosecutor (who is in charge of delivering the imprisonment warrant) has to invest *motu proprio* (i.e. without any need of application by the convicted arrestee) the *tribunale di sorveglianza* for a decision about granting *detenzione domiciliare*. The *tribunale* can decide the case without any formality (i.e. without holding the regular hearing generally prescribed for the alternatives measures and without any necessary personal involvement of the offender). Whatever its decision, also in the case of a negative one, time spent as a home arrestee while awaiting the *tribunale*'s decision is considered, for all its legal effects, as sentencing time actually served. Obviously, this automatic shortcut towards *detenzione domiciliare* does not preclude any subsequent offender's application directed at obtaining the more ample measure of *affidamento*, which has to be decided by the *tribunale di sorveglianza* after a regular proceeding, with the opportunity for an active intervention by the applicant.

The purpose underlying the new suspending mechanism is to enable the indigent and un-resourceful offender, who is unable to afford effective legal assistance, to fully and timely enjoy the opportunities the system offers, without first entering prison. Indeed, as past experience shows, the convicted offender, once imprisoned, quite inevitably risks serving a rather large part of his/her sentence in prison anyway, even if he/she applies for

an alternative measure, because such an application is too often destined to be taken in consideration by the *tribunale* only after a very long delay, due to judicial overload, which is particularly heavy in the largest jurisdictions[25]. The described situation can produce very negative consequences not only for the applicant him/herself, but also, in a more general perspective, as it generates enormous and unnecessary prison overcrowding, because of the presence of people who could otherwise (i.e. by applying for an alternative measure before entering prison) have been timely granted an alternative measure. During the 1998 preparatory legislative procedure, it was said that there are about 17,000 convicted offenders who have to serve a prison term not exceeding three years[26].

The importance of the 1998 Act can be fully appreciated if one bears in mind that it marks a resolute move away from the so-called emergency legislation, which was enacted in the early 1990s as a reaction to the escalation of activities carried out by the Mafia and organized criminals, and was characterized not only by the introduction of several very severe restrictions in granting any alternative to detention to those convicted of such crimes, but also by a strong ideological attack on the whole system created by the 1975 reform. In this perspective, the *tribunale di sorveglianza* has been considered the rebuked symbol of a negative attitude, expressive of excessive leniency, aimed at negating any deterrent effect of the penal sanction imposed by the trial judge, thus negating not only the results of his/her work but also the very ideal of certainty in criminal sanctions, and ignoring the real needs of the social defence, whose invocation becomes particularly strong in any period of struggle against the upsurge of criminality. As a practical consequence, the attention reserved for security problems inside the custodial institutions worked indirectly against rehabilitation, freezing the resources dedicated to the management of the alternative measures (in particular, the number of *assistenti sociali* remained far below the needs of a real, not only bureaucratic, supervision).

At the same time - in a way not so different from what occurred in the US during the mid-1970s[27] - the ideas underlying the alternatives to detention were also criticized by liberal civil-rights-oriented scholars, who were

[25] For example, on average, in Rome it takes the *tribunale di sorveglianza* two years to decide on an application for an alternative measure.

[26] DELLA CASA, F.: *'Democratizzazione' degli accessi alle misure alternative e contenimento della popolazione carceraria: le due linee-guida della nuova legge sull'esecuzione della pena detentiva. In: Legislazione penale*, 2000 (*forthcoming*)

[27] DELLA CASA, F.: *La magistratura di sorveglianza*, Torino 1994, p. 12.

worried about the excessive discretionary powers enjoyed by the *tribunale di sorveglianza* in granting the alternative measures on the basis of aleatory and subjective criteria[28], which cause undue manipulations of the sentencing system and render too flexible the criminal sanction, thus nullifying the principle of equality and the rule of law, and delaying the general reform of the whole criminal sanctioning system. On the other hand, the 1998 reform would have been more innovative than it actually was, had some of the proposals that emerged from the parliamentary procedure been accepted: among them was not only the suggestion regarding the introduction of weekend arrest as a new kind of alternative to imprisonment, but also a more systemic proposal aimed at introducing a biphasic procedural scheme - like the common law one - separating sentencing from the trial phase, and leaving entirely to the first instance the definitive decision as to the penalty to be imposed.

More recently, a new statute (Act of 12 July 1999, no. 231) introduces an "automatic" affidamento or detenzione domiciliare to be granted, whatever the sentence imposed , to offenders clearly affected by AIDS ', and who are under medical treatment. Another statute (Act of 8 March 2001, no. 40) provides for a new *detenzione domiciliare,* called *'speciale',* to be granted to mothers, who have been sentenced for a period longer than four years, after they have served at least one third of the sentence imposed, or fifteen years in case of life sentence, and who care for their child.

5. A different approach: the substitutive sanctions

In order to complete the scenario related to the field of alternatives to a prison sentence, there is another group of sanctions - introduced by statute in 1981 (Act of 11 November 1981, no. 689) - whose rehabilitative content is really very limited, because they do not necessarily require any kind of active programme or any mandatory intervention, supervision or control by the social services, but whose role is anyway very important in the economics of the global response to the problem of short-term custodial sanctions. These sanctions represent an answer quite different from the one characterizing *affidamento* and *semilibertà*, because their re-socializing profile merely consists of avoiding the social exclusion produced by short-term detention, while their content is essentially punitive. These are the so-called

[28] FERRAJOLI, L.: *Diritto e ragione. Teoria del garantismo penale*, Bari 1989, p. 410.

sanzioni sostitutive (substitutive sanctions); they differ from the 'alternatives' we considered above (i.e. *affidamento*, *semilibertà*, and *detenzione domiciliare*) also because of the different mechanism that regulates their imposition. Indeed, it is up to the trial judge during sentencing to grant them. More precisely, the judge, in the same context of the sentencing deliberation, first imposes a 'traditional' penalty according to the Penal Code's rules and fixes the corresponding extent of it, and, immediately after that, replaces it with the type and extent of the substitutive sanction to be served instead. The empowerment of the trial judge in this field clearly reflects the absence of any 'personalized' re-socializing intent, whose attainment would require a previous 'specialized' intervention by the *tribunale di sorveglianza*, as it happens for the measures created by the 1975 reform.

5.1. Semi-detention

The first *sanzione sostitutiva* proposed by the 1981 statute is *semidetenzione* (semi-detention), whose imposition is granted if, in the specific case, the judge deems that the appropriate prison sentence should be no longer than one year. *Semidetenzione* consists of spending at least ten hours each day in prison. Except for what relates to the existence of a positive re-socializing programme, which here is totally non-existent, in some ways the measure resembles *semilibertà*. Indeed, whereas *semilibertà* concerns the case of an inmate who is allowed to go outside the prison in order to resettle in society, the *semidetenzione* regards the case of an otherwise 'free' person who has to spend part of his/her time inside prison. The different orientation of the two measures is quite evident: giving an opportunity for re-socialisation (*semilibertà*) as opposed to punishing a person already supposedly inserted in society (*semidetenzione*).

5.2. Supervised liberty

The second substitutive measure is *libertà controllata* (supervised liberty): the trial judge can impose it instead of a prison sentence not exceeding six months. The measure requires the offender not to leave the place where he/she resides and to report daily to the local police station. Also here, as happens with *semidetenzione*, there is no positive programme to fulfil, although the trial judge, on a discretionary basis, can order the involvement of the social services case by case, but only for the purpose of helping the offender to overcome the difficulties he/she may meet in resettling

him/herself in society. The trial judge determines the length of the substitutive sanction by considering one day in prison to be equivalent to two days of *libertà controllata*.

5.3. Fine and substitutive work

The third measure introduced in 1981 consists of a mere replacement of the custodial sanction not exceeding three months by a pecuniary one: the judge converts the original prison sentence into a fine, the amount of which is automatically determined considering one day in prison tantamount to a fine of 75,000 liras. The 1981 Act introduced another measure, this one to be administered by the *magistrato di sorveglianza*: i.e. *conversione della pena pecuniaria* (conversion of the pecuniary penalty), whose field of application concerns the case of a convicted offender who is sentenced to a 'traditional' pecuniary sanction but has no financial resources to pay such a fine: in such cases, according to the original 1930 Penal Code, the insolvent had to spend in prison a time proportional to the amount of the fine but not to exceed a maximum of three years (Art. 136 c.p.). This norm was deemed unconstitutional by the *Corte costituzionale* in 1979, as a patent violation of the principle of equality, because it discriminated against the insolvent. In order to fulfil the lacuna created by the *Corte*, the 1981 Act prescribes that, in the case mentioned above, the pecuniary sanction has to be converted into *libertà controllata* or *lavoro sostitutivo*.

Lavoro sostitutivo (substitutive work) represents the last new measure created by the 1981 statute. It is available only if the original pecuniary penalty has to be converted into *libertà controllata* because of insolvency, and in the presence of a specific application by the offender. In this case, the offender is given the opportunity to engage in an unpaid work for the community, to be performed at some public, local or state administration or at some agency, organization or corps operating in the field of welfare, education, or civil or natural environmental protection, under special agreements, if necessary, with the Department of Justice. Such activities have to be performed one day per week, unless the offender asks for a more concentrated working schedule. At any time during *lavoro sostitutivo*, the offender may pay the remainder of the original pecuniary penalty, thus quashing also the substitutive measure. In practice, *lavoro sostitutivo* has never been significantly applied, not only because it is much more difficult than *libertà controllata* to comply with, but also because of the lack of interest shown by the Department of Justice in stipulating agreements with

the organizations mentioned above, whose absence can cause very serious problems in case, for instance, of work accidents[29].

A recently enacted statute (Act of 28 August 2000, no. 274) – which has not yet become effective because of repeatedly postponements by the parliament – shall introduce in the criminal justice system a new lay judge, *giudice di pace* (justice of the peace), whose jurisdiction concerns offences for which the Penal Code provides for a custodial sanction no longer than two (or, exceptionally, four) years. *Giudice di pace* shall not deliver a custodial sentence, but shall only choose the sanction between one of the two new alternative measures, namely *obbligo di permanenza domiciliare* or *lavoro di pubblica utilità*. *Obbligo di permanenza domiciliare* (weekend arrest) consists of staying at home or at another private place or in a public hospital or shelter on Saturdays and Sundays (or on other days, or on a continued number of days, if needed by family, work, education, or health reasons) for no longer than 45 days. The *giudice di pace* may grant *lavoro di pubblica utilità* only on offender's application, for a period not longer than six months: the offender has to work six hours per week, unless he asks for a more intense schedule, but not exceeding eight hours per day. The details of the measure, which resemble *lavoro sostitutivo*, shall be contained in bylaw which has to be adopted jointly by the Department of Justice and local governments.

6. Present risks and problems affecting the working of the alternatives to incarceration

The scenario described above - which is clearly characterized by an ongoing, very broad utilization of more and more extended alternatives to incarceration - is also marked by a very peculiar, widespread attitude within the Italian social context which facilitates the development of non-custodial alternatives: the policy of imposing alternative sanctions has never been in a significant way effectively contrasted by a demand from the general public for more severity, i.e. to adopt a 'lock 'em up, and throw the key away' style. Indeed, for several cultural and socio-political reasons[30], Italian pub-

[29] CANEPA, M., MERLO, S., *supra*, note 14 , at 301.

[30] PAVARINI, M., *supra*, note 2, at 51 and VAN KALMTHOUT, A.M., TAK, P.J.P.: *The Italian Sanctions System*, in: *Sanctions –Systems in the Member-States of the Council of Europe*, Part II, ed. By A.M.van Kalmthout and P.J.P. Tak, Deventer-Boston 1992, pp. 595-599.

lic opinion has never strongly enough asked politicians to use more custodial sanctions or to reduce the range of the alternatives to them.

The central problem the Italian system now faces is related to the dynamics connected to the 'oversize' of the 'alternative' phenomenon. Since 1975, there has been a huge legislative expansion of alternatives to imprisonment, but from a realistic point of view such expansion has been inevitably paralleled by the risk of fewer and fewer resources being devoted to it, because, in large part, of the growing number of people granted alternative measures, which has not been followed up by a proportional enhancement of the available resources, in terms of not only funds but also personnel. From time to time, there have been some exceptions, although partial ones. For example, the 1998 reform provides for the hiring of many new *assistenti sociali*, but not for increasing the number of judges sitting in the *tribunale di sorveglianza*, thus not adequately consenting to avoid the delay in their decision-making (although this was one of the legislative purposes underlying the reform) and giving rise to a more perfunctory judicial working style.

An enlarged use of alternatives to detention, notwithstanding its re-socializing aims, can often only decrease the total number of people serving prison sentences without giving them a really effective opportunity for successful social resettlement. It is necessary to ponder whether this result, although a good one *per se*, is the best one possible to obtain in a situation of chronically limited resources, which characterises (not only in Italy!) the availability of funding for such alternatives, and, more generally, for operating the whole criminal justice system. The overwhelming caseload, which tends to force the *tribunale di sorveglianza* and the probation service to play a rather bureaucratic and formalistic role in the granting and supervision of alternative measures, risks at the same time allowing the police to became the real 'supervisor', whose intervention in term of arrests and criminal complaints against offenders granted alternative measures becomes the first source of any measures' revocation.

The resulting retreat from an active re-socializing treatment and supportive intervention is also underlined by the ongoing expansion of *detenzione domiciliare*, a 'costless' measure, whose aim is substantially only punitive and to reduce the prison population, and whose supervision is a typically police job, as it is the use of electronic monitoring for the control of offenders enjoying detenzione domicilliare, recently introduced on an experimental basis. The development of such measures is a clear symptom of

a merely efficiency-oriented (and no longer re-socialisation-oriented) correctional system. This new trend has to be considered in its interplay with the changes that have occurred over the last decades in the prison population, a large part of which is now composed of drug addicts and poor immigrants, people who mostly need 'inclusive' measures and mostly are victims of the very high unemployment rate that affects (not only) Italy and that makes it very difficult for the most disadvantaged to find 'real' jobs in order to be granted a re-socializing alternative to detention.

Recent Trends in Sentencing Policies in The Netherlands

JOSINE JUNGER-TAS

1. Introduction

This paper considers sentencing in the Netherlands and in particular the changes that have been introduced since the 1980's, both in the adult and in the juvenile justice System. Several questions will be treated in the paper. Sentencing in the Netherlands in the last two decades is analyzed and some explanations for the changing trends are presented. Results indicate that The Netherlands is following a general pattern, shown in Europe and the US, of more punitive and repressive punishment. Also, the question to what extent new sentencing options, such as community sanctions have made a difference in the upward trend in imprisonment, will be analyzed. In an effort to reduce the costs of the system new policies are being developed, introducing both `Front door' and `Back door' varieties in sentencing. These will lead to some important and radical changes in the criminal justice system. All through the paper comparisons are made between the adult criminal justice system and the juvenile justice System. Do the trends in juvenile justice differ from those in the criminal justice System? To what extent have both Systems influenced each other, and do more punitive and repressive attitudes in criminal justice affect sentencing policies in juvenile justice. In this respect it should be recalled that the main characteristic distinguishing the two Systems is the -at least professed- more educative orientation of juvenile justice. This aspect has been explicitly emphisized in the UN Beijing rules and in the Council of Europe's Recommendation (No.R(87) 20) stating in its Preamble "...young people are developing beings and in consequence all measures taken in their respect should have an educational character.;...social reactions to juvenile delinquency should

take account of the personality and specific needs of minors ....." However, my conclusion is that despite educational theories and much rhetoric, in reality both systems function as two communicating vessels and are strongly influenced by general processes in society and social change.

Section I of the paper will give a brief overview of the Dutch sentencing system and the way it operates both in adult and juvenile cases. Section II presents a more detailed picture of the changing patterns in imprisonment and institutionalization in The Netherlands since the 1980's, while section III discusses the growing impact of alternative sanctions in sentencing. Section IV presents some explanations for the sentencing trends that have been shown in the paper, and section V describes what might be called the emergence of a new and rather different sentencing system from what has been known so far. The last section discusses the findings and draws some conclusions with respect to several problems that threaten the implementation of the new sentencing options and discusses sentencing trends that might be expected in the future.

2. The Dutch sentencing system

Dutch sentencing is essentially a distributive system: at every level of the system the authorities may take sentencing decisions. For example, the Police have sentencing powers although these are supervised by the prosecutor and of a limited nature. As is the case in many countries the police is authorized to offer a fine -in the form of a transaction- in the case of non-serious traffic violations, such as not observing traffic rules or speeding. By accepting to pay the fine the offender pleads guilty and the case will be dismissed. Considering the mass of traffic violations this procedure has been introduced for reasons of expediency. In juvenile justice the Police may send young people to a diversion program in cases of petty offences, such as vandalism, shoplifting and non-serious violence. The diversion program includes 4 to 8 hours community service as well as compensation to the victim. The legal provision is an informal conditional dismissal: if the juvenile satisfies the requirements, the Police will drop the case; if not they will refer the case to the prosecutor. These programs are now put into place in the whole country with the explicit objective to mete out mild and immediate punishment in cases that some 20 years ago were dealt with by a simple dismissal. The Prosecutors-General have issued guidelines specifying the offences where such action may be taken by the police

The key figure in the Dutch system, however, is the public prosecutor, who has very extensive powers in dealing with penal cases. The Position of the public prosecutor is somewhat ambiguous. He/she is not elected but appointed by the minister of justice, but contrary to the independent judge he can be fired and in fact he is placed in a certain hierarchy for which the minister of justice has final responsibility. Thus he may be characterized as both a magistrate and a civil servant. It is clear that this ambiguity sometimes leads to conflicting views an his position between the minister of justice and the prosecutors. Essentially the prosecutor is responsible for all investigating activities of the police. He is also prosecuting and dealing with a growing number of different types of penal cases. If he refers the case to court, he is responsable for the indictment and demand of a specific penalty during the trial. Since the 1980's prosecutors have been subjected to growing pressures from government and from the general public, who demand more efficiency and harsher penalties for criminals. In addition to their role as magistrates within the legal system, emphasis is now placed an instrumental aspects, that is his responsability for efficient and expedient procedures, as well as an his policy responsability for investigating practices of the police. An important prosecuting tool is the principle of expediency, that is the power the prosecutor has to dismiss a case when prosecution is not in the public interest or is not required by public order. Both in juvenile and adult cases the prosecutor may decide to drop the case with or without any notification. With respect to juveniles he may hear the juvenile in his office and he may impose a conditional dismissal, the conditions being an apology to the victim, payment of compensation, performance of community service up to a maximum of 40 hours or an educative sanction. Where adults are concerned the prosecutor may impose fines in more serious cases than the police is allowed to do. In 1983 that power has been greatly extended and the prosecutor may now offer a transaction by fine in cases threatened by a maximum penalty of 6 years imprisonment. This change has been introduced to improve the system's efficiency, as the growing volume of cases blocked the system. Once the case goes to trial, the prosecutor, representing the public interest, states the evidence for a conviction and demands a specific penalty.

The principle of expediency, being based an such vague notions as `the public interest' and `public order', gives the prosecutor considerable powers to deal quickly with a host of offenses he considers as not so serious. For example up to 1980 about three quarters of all officially recorded offenses

were dealt with by either a technical dismissal -based an a lack of evidence-, or by a policy dismissal -based an the discretionary power of the prosecutor-.In 1983, 15.000 of a total of 40.000 cases of vandalism and simple theft were dropped without any condition an the basis of 'dismiss, *unless...* '. In the 1980's prompted by the increased volume of recorded cases as well as by a radical change in views an crime and punishment, the basis of the opportunity principle was changed into 'do *not dismiss, unless...* '. This had farreaching consequences: the number of cases where the charges were simply dropped declined drastically whereas the number of transactions increased considerably.

As far as the powers of the judge are concerned, up to the 1980's the main sanctions at his disposal were the suspended sentence with- or without conditions and supervised by a probation worker, the fine, or unconditional prison. Efforts to reduce prison sentences have been deployed since the 19th century. For example the first alternative to prison, the fine, has been introduced in Dutch penal law in 1886, first only for petty crimes but later -in1925- also for more serious offenses. The Financial Penalties Act, dating from 1983, allows judges to dispose of practically all offenses with a fine. Of course if judges consider that the crime is particularly repulsive (violent sex crimes), that the breach of the legal order is too serious or public feelings of justice too much hurt, a fine will not be considered a realistic option. The possibilities of early release were expanded in 1916 and suspended sentences or probation have been adopted 1916. In addition the extensive Criminal Procedural Code, introduced in 1926, offered considerable legal safeguards for defendants and helped to create a rather mild penal climate that was maintained until the 1980's. The following table gives some insight in the shifts in sentencing policies since the last century.

Table 1: Decisions by prosecutor and judge an criminal defendants in the court-district Amsterdam in three selected years -in %

Decision	1880 N = 963	1910 N = 606	1989 N = 9.942
Decision by prosecutor (transaction)	36	39	56
Decision in court by a judge	63	55	38
Other (acquittal, joinders...)	1	6	6
Total	100	100	100

Source: van Ruller & Faber, 1995 p.67

Of course the comparison between these years is far from perfect because the transaction did not exist in 1880 and 1910. However, table 1 does clearly show the shift away from dealing with defendants in court towards out-of-court dealings by the prosecutor, who has taken over some of the judge's powers and competence. In 1990 a transaction offer was allowed in cases of drunk driving, hit and run offenses, simple and aggravated theft, simple assault and vandalism. This process is still continuing. For example, in addition to the financial transaction, the new juvenile justice law 1995, which laid down the rules for imposing community sanctions, gives the prosecutor the Power to offer a transaction to the defendant in the form of 40 hours of community service or a training order. The Commission that introduced Community service in adult penal practice in 1981 proposed the same possibility in the case of adults, but the fierce opposition of judges has prevented this to be adopted in parliament. In the new Bill an community sanctions (now called `taskpenalties') the government submits this proposal again for adoption, in an effort to increase the use of alternatives. Because of the fact that the prosecutors' powers were enlarged in 1983 the workload of judges has changed. For example, between 1982 and 1990, traffic offenses, which formed about half of the judges' workload, were considerably reduced. Only the most serious offenses, those that have led to serious injuries or death, are dealt with in court. However, the kind of cases that end up in court depend an a number of conditions, among which changes in the crime picture, changes in prosecution policies and changes in the public's views an the behaviours it wants to see more severely punished. Table 2 presents some of the changes that have occurred between 1985 and 1995.

*Table 2. Sentencing in 1985 and 1995 -in %**

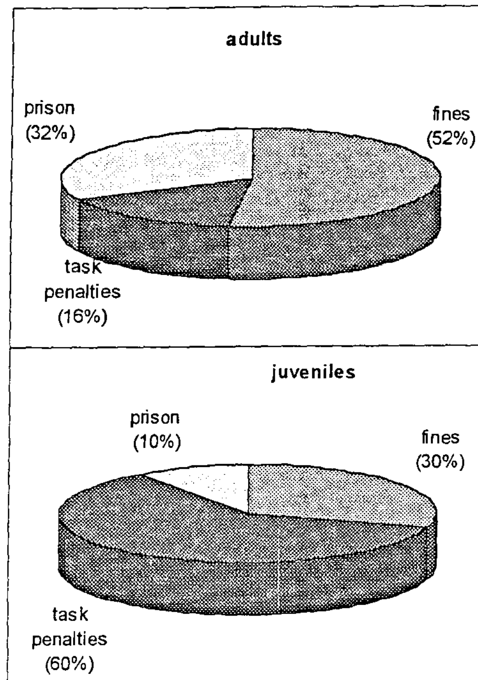
Sentences	1985 N = 82.712	'1995 N = 98.901
Unconditional prison	24,5	27,5
Suspended sentences	29,5	13,5
Fines (uncond.)	65	46,5
Community service	11,5	14
Withdrawal driver's license	10,5	9

* totals more than 100% because-of sanction combinations
Source: Grapendaal, Groen & van der Heide, 1997, p.25

A first consequence of changing sentencing patterns is the reduction of court sanctioned fines, because of the enlarged power in this respect of the

prosecutor. A second consequence is the reduction of suspended prison sentences. This is probably caused by a combination of factors, such as more sentencing powers for the prosecutor, the increase of Community service and the increase of unconditional prison sentences. It is interesting to notice some essential differences in sentencing patterns between adults and juveniles.

*Figure 1: Main dispositions in adult and juvenile cases in 1994**



* all sentences are (partially) unconditional
Source: Parliament, document No. 24.807, p. 10/11

The largest difference concerns the imposition by the judge of 'taskpenalties'. In 1994 they constituted about 60% of all sanctions imposed an juveniles, while this was the case in only 16% in adult criminal cases. One third

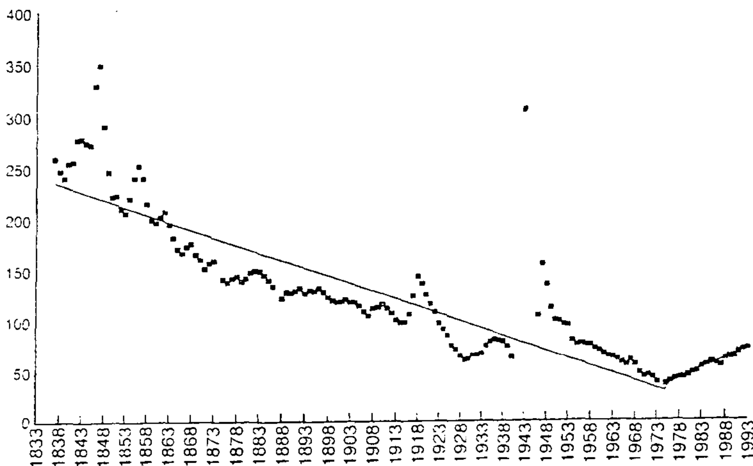
of all adult sanctions consists of (partly) unconditional prison, while placement in an institution is decided in only 10% of juvenile cases. The difference in fines imposed has to do with the circumstance that as fines are generally paid by parents, juvenile judges do not consider them as very effective sanctions.

3. Changing patterns in imprisonment

The Netherlands have long been known for their mild sanctioning climate in general and for their low prison and institutionalization rate in particular. As the penal climate has been changing since about the 1980's it is interesting to examine some of the processes that are taking place.

Complete prison statistics are available since 1837, while the number of yearly entries in penitentiary institutions are recorded since 1900. Including all types of inmates, that is prisoners, detainees awaiting trial, mentally disturbed prisoners in special institutions and juveniles in state institutions, and taking into account the size of the population aged 15-64, van Ruller and Beijers (1995) calculated prisonrates since 1837.

Figure 2: Average daily population in all types of institutions per year and per 100.000 population aged 15-64, including prisons, jails (since 1846), state institutions for juveniles (since 1883) and mental institutions (since 1929)



Source: van Ruller & Beijers, 1995, p.38

Overall there is a clear and continuous reduction in prison sentences from 1837 to 1975, with some interruptions during two economic recessions and the two world wars. Since 1975 the rates are steadily increasing with only some minor interruption in 1987. The authors expect the rates to continue to rise for some time because of the considerable prison building program under way in the country. According to them this will lead to a structural expansion of the number of deprivations of liberty and it makes a rapid decrease in imprisonment highly unlikely.

A number of factors have contributed to the secular downward trend in imprisonment between 1837 and 1975. While in the 1850's prison terms of 5 years were considered as long , in the 1970's and 1980's this was the case for prison terms of over 6 months. It seems likely that people tended to perceive ever shorter detention periods as harsh and as sufficient retribution for the crime committed, in the same line as people's sensitivity to pain and suffering has increased (van Ruller and Beijers, 1995). This then led to the reduction of prison terms, for example by early release -first as a reward for good behaviour and later as a right by law- and to the suspended sentence, the latter beeing based an a threat with prison instead of real prison. In addition, the prosecutors powers allowed many cases to be dealt with out of Court. Even as recent as 1988, 87% of all minor infractions and 64% of all crimes were dealt with by the police and the prosecutor. Moreover, in contrast to what happened in other countries, the limitations of prison capacity until that time did not lead to prison overcrowding or to putting two persons in one cell, but to sending suspects home to wait for a vacancy, a condition that raised increasing unrest and protest. In the beginning of the 1980's this helped to limit prison rates, but unfortunately it led subsequently to a huge prison building program.

Considering the changes in imprisonment in the years 1985-1995 the data clearly show that the rising rates are due to an increase in the number of prison sentences as well as to an increase in the length of terms served in prison. Figure 3 and 4 show the overall increase in number and length of prison sentences.

Although according to the situation in 1994 and 1995 the average prison term seems to stabilize, the number of prison sentences continues to grow. In fact the number of detention years (which is roughly the number of prison cells) has almost doubled during that period (from 5.861 in 1985 to 10.939 in 1995). On the basis of the available data Grapendaal et al. (1997) calculated that 41% of the increase in the number of detention years is due

to the rise in prison sentences and 59% to the increase in the average prison term.

Figure 3: Number of unconditional prison sentences - 1985-1995

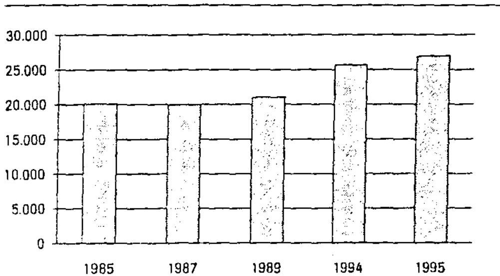
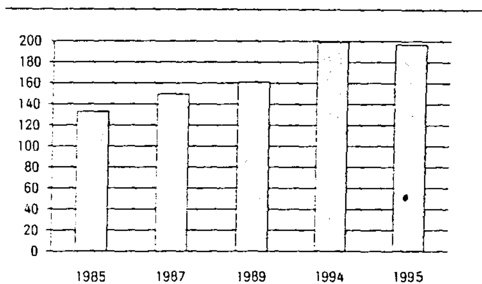


Figure 4: Average length in days of unconditional prison sentences



Source: Grapendaal, Groen & van der Heide, 1997, p.27

Of course this varies according to offense type. For example in the case of sex offenses there is no increase at all in the number of prison sentences but more cells are needed mainly because of the increase *in* sentence length. Also half of the increase in detention years in 1985-1995 is due to violent

offenses, mainly robberies for which the number of prison sentences has doubled during this period. The trend is quite the opposite with respect to property- and drugoffenses, where the number of prison sentences has increased but sentence length has decreased. As prison sentences for property offenses are usually rather short these offenders do not occupy much prison space. Traffic offenses are slowly disappearing in court: only the most serious ones are dealt with by a judge in court. Most prison capacity is needed for property-, drugs-, and violent offenders. These changes are illustrated in table 3.

Table 3: Recent trends in prison sentences and sentence length by offense category – 1985-1995

	Percentage of sentences that were unconditional			Average length of term served in days		
	1985	1995	increase	1985	1995	increase
Offenses	N=20.119	N=26.935	34%	133	197	48%
Violence	13%	17%	68%	280	471	68%
Sexoffenses	2%	2%	19%	250	501	101%
Drugs	8%	11%	79%	401	375	-7%
Property	49%	57%	57%	94	91	-3%
Public order	6%	5%	1%	78	161	108%
Firearms	2%	2%	35%	47	88	87%
Traffic	18%	4%	-70%	24	33	38%
Other	1%	2%	244%	42	176	325%

Source: Grapendaal, Groen & van der Heide, 1997, p.29

The highest increase in unconditional sentences is for violent-, drugs- and propertyoffenses. These offenses account for 87% of all occupied cells. However, the average term served for property offenses is low (three months) and did hardly increase between 1985 and 1995. As a consequence property offenses account for only 30% of occupied cells. In con-

trast violent offenses -mainly robberies- account for half of the increased cell occupation: the number of prisonsentences for these offenses has doubled in ten years and average term served increased by almost 70%. Considering all offenses it is clear that both phenomena -more prison sentences and longer prison terms- have operated to explain the Dutch prison crisis: the number of prison sentences has increased by 34% and the increase in average time served increased by 87% (Grapendaal, Groen & van der Heide, 1997).

Concerning juvenile justice trends are fairly similar to what is seen in the adult system. The standard practice among the police and the prosecutor to simply drop charges in the case of petty offenses is strongly reduced. The police will increasingly drop the case only an the condition that compensation is paid to the victim and reparative work is done. Similarly the prosecutor will practically always impose a transaction in the form of a fine, compensation or a community sanction as a condition for no further processing.

Between 1985 and 1995 the number of juveniles deprived of their liberty did not change much. Every year about 6.000 juveniles appeared before the juvenile judge, of which about one fifth were deprived of their liberty. On the basis of juvenile penal law, which allows - in exceptional cases - the transfer of 16-18 year old juveniles into adult court, some 5% to 6% of these were sent to prison, while in 1985 17,7%, and in 1995 19% of 12-18 year old juveniles appearing before the judge, were sent to juvenile hall, a slight increase. However, the proportion of suspended sentences increased from 17,3 in 1985 to 31,3% in 1995. This was due to the fact that at that time no legislation an alternative sanctions had been adopted so these sanctions could only be imposed as a condition of probation. Considering the nature of the offenses, judges are dealing with relatively more violent offenses (robberies) in 1995 -24%- than in 1985 -14%which suggests similar changes in juvenile delinquency as in adult criminal behavior.

However, the situation is now quickly changing. In September 1995 a new juvenile justice law was adopted, introducing longer sentences. For juveniles aged 12-16 the length of putting them in a state institution was doubled (6 moths to 12 months) and for juveniles aged 16-18 quadrupled (6 months to 2 years), while the transfer of juveniles aged 16-18 to adult court was made considerably easier. In 1996 4,5% of prison inmates were aged 14-19, most of whom were under 18 when they committed their of-

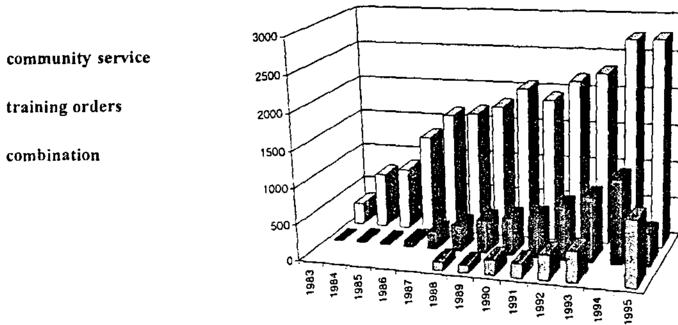
fense. The average number of days served in juvenile detention facilities increased from 56 in 1991 to 80 days in 1996, and in treatment institutions from 394 to 424 days. About 58% of juveniles were institutionalized because of violent offenses and 36,5% because of property offenses (DJI, 1997).

4. The popularity of community sanctions

The first community sanction introduced explicitly to replace a short unconditional prison sentence up to 6 months was community service. Taking over the English model, community Service was introduced in The Netherlands in 1981 in 8 experimental court districts. A first evaluation showed it worked as expected, except that the substituted prison term was not 6, but only 3 months (Bol & Overwater, 1984). A second evaluation conducted about ten years later showed that, similar to what research had shown abroad, substitution of prison sentences took place in only about half of all cases (Spaans, 1994,1995). The other half were very similar to cases in which either a suspended sentence or a fine was imposed. Community service slowly spread through the country and a law an *'the penalty of unpaid labor for the benefit of the community'* was passed in 1989. The successful introduction of community service for adults had a strong effect an those working in the juvenile justice system. Because community service was supposed to present numerous advantages over prison, such as a less criminogenic environment, better opportunities for rehabilitation, reparation to the victim or the community, the sanction was seen as particularly adequate for juveniles.

In 1983 community service was introduced for juveniles together with another sanction modelled an the English Intermediate Treatment order (van der Laan & van Hecke, 1986; Junger-Tas, 1989). The latter consisted of a three-month very structured and strict training program, based an behavioral techniques, social skills training and vocational training. It was used in rather serious cases as an alternative to pre-trial detention (van der Laan & Essers, 1990; Essers, van der Laan & van der Veer, 1995; Blees & Brouwers, 1996; Blees & Brouwers, 1996). Both sanctions, however, were essentially considered as welcome additions to the limited sanctioning options that juvenile judges had, instead of substitutes for institutional placements. Since these beginnings the popularity of community sanctions has been overwhelming.

Figure 5. Growth of community sanctions in Juvenile justice

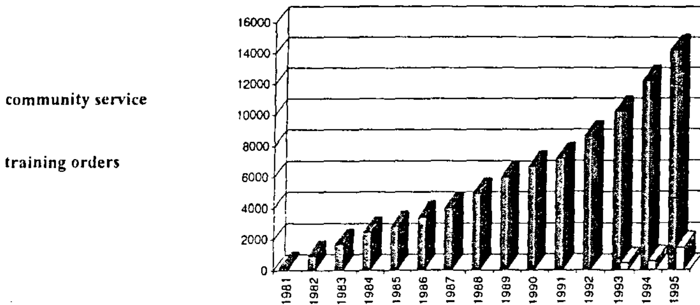


Source: Parliament, document, no. 24.807 (1995-1996)

Of all juveniles sentences in 1996, 60% were alternative sanctions. In 1998 the proportion has increased to about 70%[1]. In 1983 juvenile judges imposed 298 community services and 6 training orders. In 1995 this was roughly 3000 community services and 1.500 training orders. Juvenile judges were willing to experiment with training orders, although this was something entirely new in juvenile justice. Training orders may vary from 6 meetings to a three months program and are still mainly imposed an juveniles. Because of some positive evaluations (van der Laan & Essers, 1990) the more intrusive kind, combining training with intensive Supervision, was extended to young adults. Actually efforts are made to develop varieties of training orders that would be suited for adults.

[1] Personal communication from Mr. R. de Vries, Solicitor General in the Amsterdam appelate Court

Figure 6. Community sentences for adults



Source: Parliament, document, no. 24.807

As for adults, in 1983 judges imposed about 1700 and in 1995 14.400 community services, while in 1400 cases the sentence was a training order. Community sentences are mainly imposed in cases of theft, assault and battery, vandalism and (social security) fraud. Research showed that up to this moment the sanction is not a real substitute for detention but instead for the fine or the suspended sentence (Spaans, 1995). Suspects charged with sexual or firearms offenses are generally excluded, as well as drugaddicts, repeat offenders and offenders without a fixed address. Over the years successful completion is achieved in 85% (adults) to 89% (juveniles) of cases. A study of reconviction data, conducted about ten years after the introduction of the scheme confirmed earlier studies showing that recidivism rates are essentially related to the criminal record of the target groups concerned and not so much to type of intervention (Pease et al., 1977; Petersilia & Turner, 1990; Petersilia, 1991; Spaans, 1995).

5. Background of the changes in sentencing

A great many factors have been mentioned to explain the growth of the number of prisoners and the expansion of the prison system, among which legislative change, the increasing tendency to report offenses to the police, chain-effects in the criminal justice system, changes in the volume, nature and seriousness of crime and changes in attitudes and behavior of the judiciary (Grapendaal et al., 1997). Others emphasize fundamental social

change in Dutch society since the 1980's leading to increased punitiveness and repression (van Ruller & Beijers, 1995). In the following different explanations are reviewed.

First, in Holland, as elsewhere, new behaviours have been defined as punishable, that did not figure in the law before, such as computercrime, commercial surrogate motherhood, the trade of illegal immigrants and evironmental crime. In addition maximum penalties for some crimes, such as the production and traffic in childpornography, fraud of legal documents, discrimination and environmental pollution, have been raised. However, the objective in these cases was not so much to increase imprisonment rather than to facilitate the investigative powers of the prosecutor and the police. For example, telephone bugging, infiltration, entering an premises and pre-trial detention was not permitted unless the crime is sufciently serious and threatened by a heavy penalty. So raising maximum penalties served to facilitate the investigating process. Moreover, considering that maximum penalties are hardly ever imposed, these changes probably did not have any real effect an the increased use of prison (Grapendaal et al., 1997).

Second, it might be questioned whether the increased tendency to report offenses to the police had any effect an imprisonment. Between 1982 and 1992 the tendency to report offenses has increased from 30% to 37% (Kester & Junger-Tas, 1994), However, the highest percentages reporting are found for motor- and cartheft and for burglary (75%), which is related to the requirement of insurance companies of a police report before they compensate the losses. It is true that the tendency to report violent and sexual offenses has also increased. This is related to a heightened sensitivity and social awareness both of violence and of sexoffenses, such as rape, sexual abuse, incest and assault of homosexuals (Kester & Junger-Tas, 1994). On the other hand serious crimes have always been reported and the increase, while real, is not so sizable as to have a real influence an sentencing. As Grapendaal et al. (1994) observe: of all crimes known to the police only 11% are referred to the prosecutor, while ultimately only in 12% of all cases dealt with in court (by prosecutor and judge) an unconditional prison sentence is imposed. For example in 1995 roughly 225.000 penal cases were dealt with, of which only 27.000 resulted in the deprivation of liberty.

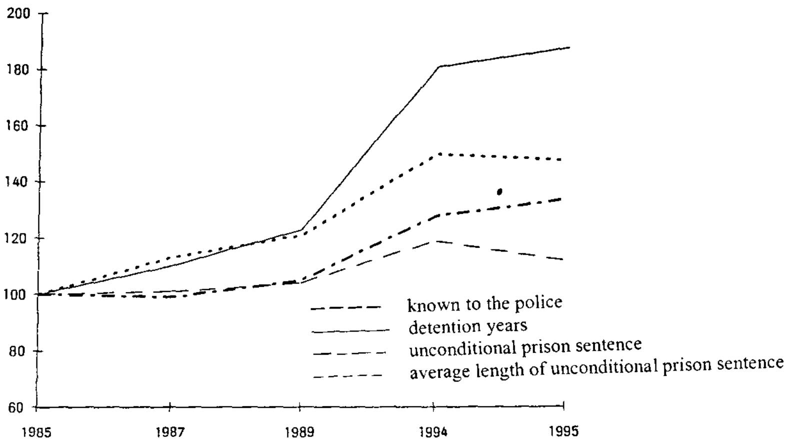
A third possibility is that police capacity as well as their investigative activities had an impact an the number of people eligible for prison. Indeed the police have shifted their attention from petty offending to more serious crime, such as burglary, simple robbery, armed robbery, rape and assault.

However, this has not resulted in clearing considerably more of such offenses. A rising police budget has not had any effect either, mainly because much of that budget did go into (computer) equipment and police cars instead of into manpower. An interesting question is whether the police takes into account the availability of (jail) cells when considering to detain a suspect. It appears they do not: they merely consider whether it is necessary to lock someone up an the basis of his personality and offense characteristics. If they feel detention is required they will take that decision despite any problems with cell space. They consider that this is not their responsability. The importance of this behaviour is the chain-effect of police detention – pre-trial detention - imprisonment. We know that the prosecutor will tend to place a person in pre-trial detention if he has been put in police detention, while the judge -in turn- will tend to sentence to prison those who have been held in pre-trial detention.

Fourth, most people think that the nature, volume and seriousness of criminal offenses has changed. More specifically they think that, compared to the period 1945-1980, many more new and different offenses are committed and that these are of a considerably more serious nature than before. With respect to the nature of crime, the only really `new' offense is the trade of refugees and this is a relatively rare offense. Acquisitive crime by drugaddicts, although generally of a non-serious nature, caused considerable trouble, irritation and fear among residents in specific big city neighbourhoods. Considerable media attention and public pressures helped to create the feeling of a crime wave. Of great concern has been the rise in armed robberies an banks, petrol stations and postoffences and sometimes even an private dwellings. Also of concern is the relatively high juvenile crime rate of some ethnic minority groups - essentially Moroccan and Antillean boys -, who tend to threaten their victims and/or use violence. In addition, increased mobility in Europe has to some degree internationalized crime and this had an effect an organized crime involving foreigners without fixed residence in the country. Among these there is considerable violence and most of the deaths by gunfire are settlements among criminals. But apart from change in the nature of crime, what worries people more than anything is the increase in violence. Again it is difficult to disentangle what is real from what appears in police data and which is partly the result of a heightened sensitivity to violence, more reporting and more police investigation. However, victim surveys as well as self-report surveys suggest there is a real increase in violent behavior, but police figures are probably

overstating the violence (Junger-Tas, 1996). Concerning the volume of crime incidents, there has been no significant increase since 1985, a conclusion based an police data as well as an the bi-annual Dutch victim surveys (Kelter & Junger-Tas, 1994). The research showed that the annual increase based an both data sources was about 1% per year, but taken into account population increase, registration effects and a greater tendency to report offenses to the police this amounted to about 0,5%. The next figure illustrates the change in recorded crimes, in prison sentences, in the average term served and in the total number of detention years between 1985 and 1995. Figure 7 clearly shows that where the number of crimes has only slightly increased (and even seems to decline since 1994), both the number of prison sentences and the average term served have increased considerably more, leading to a really huge rise in detention years.

Figure 7: Indexed comparison of recorded crimes, number of prison sentences, average term served and number of detention years -1985=100



Source: Grapendaal, Groen & van der Heide, 1997, p. S 1

All mentioned factors can hardly explain the acute shortage of prison cells, which has led to a considerable prison building program. So the inescapable conclusion must be that the major factor explaining the rise in prison sentences is the tendency to impose more severe sentences. Analogous to the demise of the welfare state since the 1980's into what is called `a market economy', diminishing the responsability of the state to its citizens and emphasizing heavily individual responsability, in criminal policy causes of criminal behavior are no longer seen as lying in the criminal's social background, life situation and circumstances of the offense, but essentially as some act in which the actor entered by his own free will and for which he is fully responsible. Similarly, the growing attention for the rights of victims has not only led to new legislation, allowing for the payment of large sums of money as a penal sanction (the Terwee law 1992) but also to a greater emphasis an punishment and retribution of the offender.

Others have observed that Dutch criminal justice as well as the Ministry of Justice have long been operated by a liberal and tolerant elite of experts, legislators and high-ranking civil servants, working in relative `splendid' isolation. They were not plagued by the media, which were usually quite discreet and not much interested in criminal matters (van Ruller & Beijers).

However, this situation has changed dramatically. The number of victims of petty offenses increased. Moreover, crime has become a consumption article in the media. Crime coverage is extreme and often not in proportion to what happened in reality. Pressures an the government, parliament and an the judiciary for tougher laws and harsher penalties increased.

Although, as mentioned there has been some legislative change, such as the Terwee law, the new juvenile justice law and higher maximum penalties for a number of crimes, their influence an sentencing is limited. The real impact an sentencing comes from the prosecutors. The prosecutor decides an the proceedings, including pre-trial detention, and in the trial he demands the sentence. In fact he determines to a large extent the margins by which the options of the judge are restricted. Interviews with prosecutors indicate they see themselves as real crime fighters. They consider the tendency to tougher sentences both justifiable and inevitable and declare that `as criminality has become more serious, they honor society's claims for harsher punishment' (Grapendaal et al., 1997, p.54). In fact the increase in the number of `detention years' of almost 100% between 1982 and 1993 is largely due to more prison sentences for five crime types: robbery and extorsion, aggravated theft, drugtrafficking, crimes against life and rape

(Berghufs, 1994). However, harsher penalties are also meted out for offenses that used to be punished in more lenient ways. For example in 1980 the average prison term served for rape was 250 days, while in 1993 it was nearly 600 (Berghufs, 1994). Another example is purse snatching that is now defined as theft with violence instead of simple theft, incurring stiffer penalties than before (Kester & Junger-Tas, 1994). The court district of Groningen recently doubled the average term for burglary in private houses and in businesses. In Amsterdam public order offenses and pickpocketing are punished increasingly severely because of the fear that the frequency of these offenses might threaten the touristic attraction of Amsterdam. Two other court districts showed an exceptionally high number of shoplifting cases with violence: it appears that private security officers provoked the violence, leading to a charge of theft with violence, a more serious offense. Finally, introducing appeal, instead of leading to milder sentences as was usually the case, now frequently leads to even more severe sentences (Grapendaal et al., 1997).

The result of all this is a trebling of prison capacity since the 1980's and the expectation of a fourfold increase for the end of the 1990's (Ministry of Justice, 1997).

6. The emergence of a new sentencing policy

It becomes more and more clear that the changes in sentencing policy in The Netherlands have dramatic consequences, not only in terms of the number of people ending up in prison, but also in terms of financial costs. In that respect there is not much to expect from prosecutors and judges. Asked about the problems in the prison system they answered, as the police did before, that this was not their responsability but a problem for the administration to solve. In fact two major initiatives were taken. First, the Minister of Justice stated that there had to be limits to the growth of prison capacity, acknowledging that Dutch prison rates have become higher than the European average. A bill was prepared proposing a radical expansion of community sanctions, essentially with the objective to avoid prison sentences – so-called `front door' measures. The main elements of the bill - which will probably be presented to parliament in the coming weeks - are the following.

- Community (or Task-) sanctions become sanctions `sui generis' and are no longer exclusively used as substitutes for a prison sentence. This was already the case in juvenile justice. It is hoped that, also similar to what happened in juvenile justice, this will encourage judges to use this

type of sanctions. In order to create the possibility to impose community sanctions even by default, the government had to deal with the question of consent, required by the European treaty of Human Rights. The bell stated that the person sentenced gives implicit consent by presenting himself at the workplace. However, lawyers were quick to protest against this elastic interpretation of `consent' and the disposition was withdrawn.

- Also, similar to what is customary in juvenile justice, community sanction of half the maximum that can be imposed by the judge, may be offered by the prosecutor in the form of a transaction. In that case the suspect would be entitled to legal assistance. However, realizing the financial consequences of this disposition, the government quickly withdrew it. The obvious objective of this proposal is to relieve the workload of the judge and to multiply community sanctions.
- Combinations of a prison sentence of 6 months maximum -3 months for juveniles- with a community sanction will be possible. Later an and if successful, prison sentences of 12 months may be substituted by 6 months of prison, followed for example by electronic monitoring or community service.
- Introduction of forced treatment for drugaddicts as an alternative to imprisonment;
- Training orders will be introduced for adults, in particular for young adults, similar to those available for juveniles. This type of sanction is a combination of job training, monitoring job placements and social skills training and may include (alcohol and drugs) therapy.

It is clear that the two first measures will only have limited influence an imprisonment, but the combination of prison and electronic monitoring might have some impact. In this respect expectations are high because evaluation of an EM experiment in the north of the country proved successful (Spaans & Verwers, 1997). Two models were tried out: 1) EM would be combined with community service to replace a prison sentence of 6 to 12 months, and 2) EM would replace the last months of a prison sentence. The first model was hardly applied at all, but the second one was seen by the judiciary as useful. The success of EM was in large part due to intense and effective guidance and monitoring of the probation service, which is responsible for the execution of community sanctions. EM will also be used in juvenile justice to substitute pre-trial detention. Training orders for young adults are

generally used to replace pre-trial detention. Used rather rarely at this moment, the sanction is expected to spread slowly throughout the country.

Change is also introduced in penitentiary practice. These are mainly `back door' measures in order to reduce time spent in prison. Their explicit objective is to decrease costs and to facilitate the transition to liberty for (long term) prisoners. The Dutch system is based an a model of detention phasing or detention planning, in which inmates may be gradually transferred form a (high) security prison to a low security semi-open or open prison, in which they either work in day-time and spend the night in prison, or they follow a special program in prison during the day and spend the night at home. The new law an Penitentiary Principles -recently adopted in parliament (16 June 1998) includes the option of `penitentiary programs', introducing extramural execution of a prison sentence, once the inmate has served two third of his term (at least 12 months). The decision to use this option will rest with the administration, thus sidestepping referral to a judge, which is quite an innovation in Dutch law. Extramural execution of a prison sentence may take any form: experiments have been conducted with day-detention, EM and community service, but therapy, vocational training, job placement and social skills training are added. The probation service will be responsible for the execution and control of the programs.

In the field of juvenile justice a proposal for a new law an principles for juvenile institutions has also introduced the possibility of extramural execution of the penalty or measure, in the form of social skills- and jobtraining programs.

The second initiative was taken by the Finances ministry. Under their direction and with the implicit objective to put a stop to the uncontrolled growth of the number of prisons, an interdepartmental working group was set up to examine substitution effects of alternative sanctions and to develop proposals to multiply their use (IBO, 1997). The working group's explicit objective shows clearly the new philosophy of sentencing policy: *"the working group strives for an increase in the effectivity of the total penal system of law enforcement against lower average cost. To this end the use of community sanctions has to be expanded by re-inforcing their punitive character, thus increasing public support and enlarging the possibilities for substitution of prison sentences... "*.

The working group has proposed to add the following options, considering that increasing the number of alternatives to prison implies imposing them an more serious offenders than has been the case:

- increase of the number of supervised community service group programs. In this respect the probation service is prepared to supervise up to 30.000 community services in the year 2001, 60% of them individual programs and 40% group programs;
- stricter rules and more intense supervision of those serving a community penalty;
- urinalysis of addicts and their transport to and from the workplace; introduction of special programs for addicts, allowing the use of methadon;
- combination of short term detention with intensive training and community service; Amsterdam and Rotterdam are experimenting with such a program for juveniles and young adults. The program consists of an intramural phase, inplying training and working, and a second phase in which special training- and workprograms are executed. After completing the sanction the young people are assisted in finding a 'ob and/or a place to live. The program is a substitute for a prison sentence of 3-9 months.
- combination sentences, for example pre-trial detention followed by community service;
- a mandate from the judge to the administration to transform half of the prison sentence served into a community penalty, depending an the inmate's behaviour in the institution. The proposal includes an exchange rate: every month unconditional prison would be exchanged for 40 hours in a community program;
- in order to substitute sentences of up to one year, the working group proposes to double the number of hours that may be imposed. This would raise the maximum to 480 hours instead of 240, despite the working group's recognition of possibly higher failure rates;
- combination of EM with community service for sentences up to 12 months;
- introduction of EM in juvenile justice, either in combination with school attendance in day-time, or in the case of detention of hooligans and public order offenses;
- penitentiary programs of one year -instead of the proposed 6 months-, including EM during the first 6 months. Possibility of applying such programs alter having served half of the sentence in the form of parole. Since parole is granted by law alter two third of the sentence served, this would require a revision of the law;

The working group realized that effective implementation of these proposals would not be easy. To achieve support of the judiciary the sanctioning system would have to be transparent and the elements of retribution assured. But the working group considered *specific guidelines* both for the public prosecutor with respect to his demand policy in court and for the administration concerning the execution of penitentiary programs, as the most important instruments for change. Inspired by the use of sentencing guidelines in Delaware and Minnesota (US), there is growing support for such use, although in The Netherlands - considering the position of the prosecutor in the Dutch system, they would take the form of guidelines for criminal proceedings (Grapendaal & van der Linden, 1998; Morris & Tonry, 1990; Tonry, 1996). In fact several computerized systems have been developed to assist decision taking, among which the BOS-system for prosecutors and two different ones for judges. The first one forces prosecutors to take specific decisions and makes political control of the process possible, while the latter allows judges complete freedom to make use of their discretionary power (Oskamp & Schmidt, 1998). In addition, collaboration with local authorities and with employment exchange offices would be required, both to facilitate the execution of community sanctions and for purposes of resocialization. According to the working group it is necessary to increase social acceptance and support for community sanctions by the general public, the judiciary and those responsible for its practice. Successful implementation should therefore go together with extensive information, conferences and symposia an this subject. Taking all measures together the working group expects that in the year 2001 substitution of a total of 1000 detention years (i. e prison cells) will be realized. This is considered both by the working group and the government to be the limit of what is reasonably feasible. Later an this limit might be stretched and more substitution might be possible.

The government largely approved the proposals of the working group and took over a number of suggestions in the new bill an community sanctions. However, the government did not endorse the proposal to start a penitentiary program in the case of short prison sentences, nor does it intend to allow extramural execution of a prison sentence after having served only half instead of two third of the sentence. On the other hand it is to be expected that action will be taken to realize prosecutor guidelines, which will specify the demand for penalties in court, taking into account the nature and seriousness of the crime as well as the defendant's criminal record. A computerized informa-

tion system will assist the prosecutor in his decision taking. In this way the government hopes both to be able to somewhat control the sentencing process and to achieve more harmonization in sentencing.

7. Discussion and Conclusions

It is clear that the Dutch government is involved in an ambitious reform of the criminal justice system that will fundamentally change the way in which offenders will be punished and the consequences of which are not all that clean for one thing a number of lawyers have voiced objections to the new tools placed at the disposal of prosecutors and judges (Mevis, 1997).

First of all they question the new powers of the administration to modify a sentence imposed by a judge. The law gave to the administration the discretionary power to transform half of an unconditional prison sentence into a community sanction which the judge, however, at the time of the trial, did not consider a punishment option. Second, lawyers observe that the imposition of training orders an adults, including specific training programs, treatment, medication and even temporary institutionalization (drugaddicts), introduces a completely new dimension in sentencing. The justification for training orders is that they remedy gaps in the offender's social functioning. But how do we establish these gaps and how do we know whether there is a causal connection between them and the offense? This question is all the more important because of the fact that training orders - far from being soft options - can be extremely intrusive and coercive (Mevis, 1997). Similar to prison or community reparation to the victim, the goal of training orders is to enhance social security. However, unlike these other penalties training orders aim at changing the offenders behaviour in a straightforward manner by programs usually based an behavioral techniques and under the threat of deprivation of liberty. Taking into account that the education of children and adolescents includes such techniques as a matter of course, this type of interventions might be more suited for juveniles than for adults. Indeed they have already been incorporated in the new juvenile justice law 1995. But according to the new law an penitentiary principles (1998) and the bill an community sanctions they are now made possible also for adults.

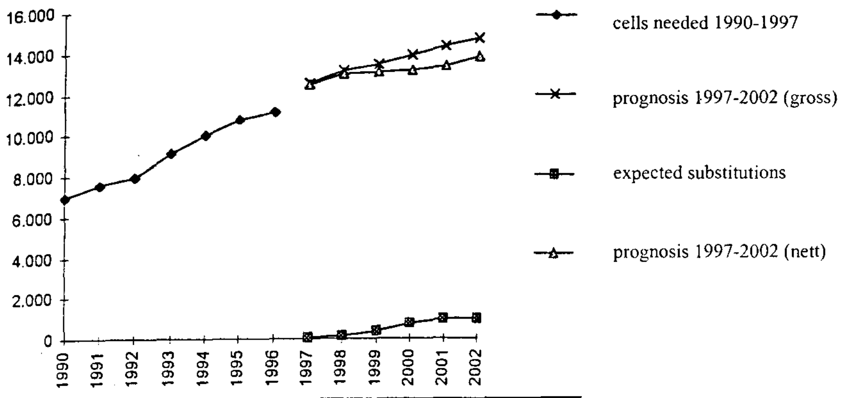
Third, community sanctions pose a number of practical difficulties. How are prosecutors and judges to determine the nature and content of the sanction with respect to the seriousness of the offense? In the case of community service this problem has been solved: there are guidelines indicating

the crimes for which community service may be an option and a tariff system has been developed specifying the number of hours that may be imposed. However, this will be considerably more difficult in the case of training orders. How should one decide an the degree of punishment in the training according to the seriousness of the crime. and what if an offender does not perform well and will be revocated to prison? An additional problem is the profusion of training programs developed by probation and the welfare sector and proposed to the judiciary. How are they to judge what is worthwhile and how will they weigh the retributive elements in these sanctions, in other words how should these programs be applied? The risk is of course that prosecutors and judges will simply not consider training programs as good options and will not impose them. There is a need for a kind of offcial manual specifying some well tried out programs that have proven their effectiveness. This will reduce available options to a limited number of programs, as is also the case in juvenile justice. Even when all these conditions are realized it is by no means sure that judges will go along with the proposed new sanctions.

The growing computerization of criminal justice poses additional problems. It is probable that both criminal proceeding guidelines and information technology, given the framework of the hierarchical prosecutor system will lead to considerably more conformity - and thus less disparity - in the prosecutor's work. This will give also a powerful tool to policy makers to steer and control the System and make more planning possible. But it is to be expected that Dutch judges will offer more resistance. Although they see the need for less disparities they consider that the seriousness of an offence is strongly related to specific times and places, just as are the circumstances of the offense and personal situation of the offender. They are quite willing to introduce a certain harmonization in sentencing and may welcome a computer datasystem as a useful tool. They will, however, continue to insist an their discretionary power to individualize the punishment and are opposed to what has been called `the appearance of equality', but is perceived as merely injustice (Otte, 1998). All in all I think we may expect that the proposed reform will take considerable time before being realized. In a country where respect for hierarchy and discipline are no highly prized virtues, it will by no means be easy to introduce much stricter procedures and system control. On the other hand where planning the future is such an essential element in Dutch policy, the need to introduce more rational decision making as well as more steering possibilities is great and this will eventually dictate future developments.

A last question is whether the new policy will have an impact an sentencing severity and the general tendency towards harsher punishment. In that respect it is useful to consider the prognosis for the period 1996-2002, made by a working group of members of the Ministry of Justice and the Social Cultural Planningbureau, which is based on an econometric model (1997). The prognosis for crime trends was based an trends in socio-demographic variables, such as the number of juveniles and young men, divorced persons, drugaddicts admitted in hospital, foreigners, unemployed and the average income, as well as an judicial variables, such as the risk of being caught, being punished, being imprisoned and sentence length. Taking into account the productivity of the police, the decisions taken by prosecutor and judge, as well as the means put at their disposal, calculations were made an future needs for available cells. During these years crime is expected to rise by 4% (excluding victimless crime), sentencing by 3% and prison sentences by 5%. The latter will result in an increase in prison terms of 1-3 years by 32% and an increase in prison terms of 3 years and more of 41%, leading to a need for more cells of 27% or about 14.000 cells. This is illustrated by figure 8.

Figure 8: Prognosis needed prison space in the Dutch prison system



Source: Ministry of Justice, Directorate Penitentiary Institutions, p.17

Figure 8 also shows the Impact of penitentiary programs an prison space, which appears to be quite limited.

In the case of juveniles there are two types of institutions. *Detention homes* and *Treatment institutions*. The majority of the inmates in detention homes are placed in pre-trial detention, while in treatment institutions juveniles under a civil measure undergo long term treatment. The prognosis is that 36% additional places (760 in all) will be needed in juvenile facilities in 2001. As for community sanctions the policy in juvenile justice is *'community sanction, unless...* ', which will probably amount to an increase by one third in 2001, while for adults the increase is expected to be 20%.

What comes out clearly in our analysis is that quite similar trend can be shown in adult justice and in juvenile justice. It is true that the adult system has taken over some elements that did already figure in juvenile law, such as the prosecutor model in imposing community sanctions and training orders, but similar to what happened in adult sentencing, more and more juveniles are now placed in institutions, combination sanctions are introduced and the control aspect of community sanctions is increased.

What will be the net effect of the new policies an the total number of cells needed? Adding the expected effects of both the increase in community sanctions to the effect of penitentiary programs, the expected results are a substitution of a 1000 prison cells. On a total of about 15.000 cells this is not a substantial effect.

So it must be that the increase in persons sentenced to prison and the increase in sentence length will continue in the coming years, leading to more growth in the prison system. In addition community sanctions will get an increasingly retributive character, introducing behavioral change and considerably tighter controls in the community. This is deemed necessary because the government wishes judges to impose them for more serious offenses than they have done so far, and out of fear that otherwise the judiciary would not be willing to impose them.

Taking all these factors into account the conclusion is unescapable: there is no reason at all to expect that the Dutch sentencing system, whether dealing with juveniles or adults, will become more lenient in the coming years. All the indicators suggest that a more repressive and retributive system has been firmly rooted in Dutch society and it will remain so for some considerable time.

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Community Sanctions in the Netherlands: Recent Developments

ANTON M. VAN KALMTHOUT

1. Introduction

In her contribution on sentencing in the Netherlands, Professor Junger-Tas provides a clear overview and analysis of recent trends in Dutch sentencing policies.[1] She rightfully expresses her scepticism and doubts about the real effects of the development of intermediate sanctions in the Netherlands on the sentencing policies of the Dutch legislature and judiciary.

However, these doubts do not negate the fact that the developments in the field of community sentencing have proceeded at a much faster pace than was predicted twenty years ago. At the start of experimental community service in 1981, there was doubt about the viability of this kind of sanction. The experiment started at a time in which the sentencing policy brought about by the liberal, mild penal climate and much praised Dutch tolerance seemed to be changing into a no-nonsense, neo-classical policy. The doubts were supported by the dualistic stance of the Dutch probation system, which enthusiastically embraced the search for alternatives to imprisonment, but hesitated to get involved in the development and execution of such alternatives. In probation circles, these tasks were seen as incompatible with the traditional, primary tasks of probation services: preparing social enquiry reports and providing offenders with support and assistance.

In executing these tasks, probation officers felt committed to the basic rules of social work. In fact, they were social workers and therefore had no interest whatsoever in carrying out activities on behalf of the judiciary,

1 See: J. Junger-Tas, 'Sentencing in the Netherlands', in this volume.

such as supervising the performance of special conditions and maintaining the offender's contact with the probation services as ordered by the judge.

Before the experiment with community sanctions was launched, this tension in the task conceptions of probation officers led to many internal debates within the probation services in which the credibility of the services' confidential relationship with their clients (i.e. offenders) was a central point. Partly because they feared difficult financial and personnel consequences, during the experimental period the probation services accepted the task of implementing the sentences by recruiting organizations for which offenders could perform their community service, by supervising and controlling the progress of the sentence and by reporting to the public prosecutor, who according to the letter of the law remained responsible for enforcing the sentence. Because of the experimental character of this new sanction, the legislator decided not to change the law, but to situate community service within the existing legal sentencing framework. In practice, this meant that community service was mainly imposed as a special condition attached to a suspended sentence. The maximum number of hours was fixed at 240 – a sentence that could substitute an unconditional prison sentence of six months. These 240 hours could be combined with a conditional prison sentence of up to six months.

2. Community service as an experiment (1981-1989)

The experimental phase lasted from 1981 until 1989.[2] In the light of the rapid growth of community service since the start of the experiments, one has to conclude that in quantitative terms it has been far more successful than was originally anticipated. Especially since it was extended to cover the whole country in 1983, the growth of community service has surpassed both the government's and the probation services' projected figures up to 1990: whereas the government aimed to achieve 4,000 community service orders (CSOs) in the period 1985-1990, this figure was realized by 1987. Likewise, the goals set by the Probation Service (1,500 in 1983, 3,000 in 1986 and 5,000 in 1989) were achieved far earlier than expected.

However, this development did not occur automatically. Looking back, a number of factors behind the flourishing growth of CSOs can be distinguished:

2 For a more detailed analysis of this experimental period see: A.M. van Kalmthout, 'The Netherlands', in: A.M. van Kalmthout and P.J.P. Tak, *Sanction systems in the Member States of the Council of Europe*, Part II, Deventer/Boston, 1992, pp. 663-807.

- A very important factor is that before these new sanctions were applied on a large scale, small-scale experiments in one or a few areas were set up in order to gain experience and knowledge. These experiments were necessary in order to get the judiciary, lawyers, trade unions and the public committed and involved. They were also necessary in order to give the Probation Service the opportunity to learn from its experiences and to establish an adequate organization and infrastructure and to develop the required working methods. In the Netherlands this infrastructure was based on special bureaux within the probation services that prepared the execution and the monitoring of community sentences. The tasks and authorities of community sentence officers were laid down in a special statute. Also the agreements made with the offenders, project execution organizations and the probation services were recorded in contracts.
- From the outset, clear agreements were made concerning the monitoring and controlling tasks of probation services. Initially, there was a great deal of scepticism within prosecution services circles concerning whether the probation services could perform the controlling task in a reliable way, given the extant social work approach and critical attitude within probation circles regarding society in general. Also within probation services the perceived incompatibility of new tasks and the extant work attitude caused quite a struggle during the experimental phase. But, finally, the developing spirit of the age and ascendant no-nonsense approach changed the working methods of probation services and their attitude towards the judiciary and society. The judiciary and penal law are no longer regarded as potential enemies and natural resisters. Through the development of community sentences and the attitude of the public prosecution service, the judiciary and the probation services started to regard each other more and more as partners in the criminal justice system with full responsibilities of all.
- Although at the beginning the monitoring and supervision of the community service activities was very strict the failure rate turned out to be surprisingly modest, especially when compared to that in some other countries. During the experimental phase, around 15% of all community sanctions were not completed successfully. For half of these 15%, this was due to the failure of offenders to show up at the relevant probation service to make further agreements after being convicted. Of those who actually started to carry out a community sanction, 92% completed the sentence in a regular way.

- The growing collaboration between the participants in the criminal justice system resulted in an unexpectedly high level of societal involvement in community sanctions. As in many countries, at the beginning of experimental community sanctions there was great doubt whether sufficient support would be gained from society, for example, whether society would accept the shift from prison sentences to community sentences and, more concretely, whether sufficient societal organizations would be willing to develop and operate sentencing projects for criminal offenders. These doubts turned out to be unfounded. Even though the Dutch sentencing policy (as Professor Junger-Tas shows in her contribution to this volume) is less lenient and liberal than it was fifteen years ago, numerous opinion polls make it clear that community sanctions for many criminal offences have gained a much more positive appreciation compared to prison sentences. Also the vast majority of the popular public media evaluate community sanctions positively. Obviously, this has had positive effects on the willingness of organizations to provide community sanctions projects. Interestingly, the most reserved were public bodies and governmental organizations, which initially hardly participated. Nowadays, in general all governmental organizations have contracts with the probation service system and many community sanctions projects are carried out in public bodies. The probation services' databanks contain records of more than 4,000 organizations that have made themselves available for community sanctions projects.
- Another important point is that sufficient financial and human resources were placed at the disposal of the organizations responsible for implementing community sanctions so that: a) they could fulfil their tasks and duties on the same basis as the prison authorities when executing prison sentences, and b) community sanctions could also be applied to more categories of offenders, especially drug offenders and offenders with serious behavioural disturbances.
- What has greatly contributed to the success of community sanctions is that the application of the practical enforcement of sanctions is continuously evaluated. Such evaluations are carried out by independent committees and research institutes. Right from the beginning, researchers have shown a great deal of interest. Only in the USA and the UK has there been so much research on community sanctions and have so many articles and reviews on the topic been published.
- Also worth mentioning is that the implementation of community sanctions is carried out under the supervision of independent committees, on

both the national and the court district level. Representatives of the public prosecution service, the judiciary, lawyers, the probation services, police, trade unions, employers' organizations and universities have participated in these committees.

3. The 1989 Community Service Act

3.1 Initial review

The experimental phase of community service came to an end in 1989 with the introduction of the Community Service Act. This Act includes community service in the Penal Code as a principal penalty. The so-called 'condition attached to a conditional waiver' or 'conditional prison sentence', which existed during the experimental period, became obsolete. However, both the maximum period of community service (240 hours) and the rule that it is up to the judge to decide on the nature of the work to be performed were maintained. The judge had to be informed beforehand whether a vacancy is available at the intended community sanctions project; if no vacancy is available, the judge had to sentence the offender in a classical way.

The new law included three regulations from the experimental period, which were intended to prevent a clash with international laws on forced or compulsory labour. A community service may be imposed only if: 1) the offender requests such, 2) he or she agrees with the nature, purpose and extent of the community service, and 3) there is public interest in the unpaid work. In fact, the official name of community service is 'the sentence of unpaid work for the general good'. Other features of community service in this law were:

- Community service as a principal penalty is only possible if the judge considers a non-conditional prison sentence of a maximum of six months, or if he or she intends to convert a conditional prison sentence into a non-conditional prison sentence because of the offender's non-compliance with the conditions earlier imposed.
- Probation services retain responsibility for preparing, organizing and executing community sanctions.
- A combination of community service and fine is possible, whereas combining community service with an unconditional prison sentence is not. However, a combination of community service with a conditional prison sentence of no more than six months is possible.

- Time spent in pre-trial detention is to be compensated for by reducing the number of hours of community service. However, the law does not stipulate a conversion rate.
- A judge is obliged to stipulate in his or her verdict the number of hours to be spent performing community service, the approximate starting and completion date of the service, and the nature of the unpaid work. In the verdict, it should be explicitly mentioned that the offender agrees with the sentence.
- In case of unsatisfactorily completion of community service, the prosecution service must bring the case to court again in a procedure rather than revoke a suspended sentence. In case of non-compliance with the community service prescriptions, the judge can impose the original unconditional prison sentence entirely or partially, or can again impose community service. In case of a partial failure, the judge is obliged to subtract the part of community service that was completed satisfactorily from the length of the prison sentence intended to replace the uncompleted part of the service.
- Community service can be imposed not only as a principal penalty, but also in case of a pardon or an amnesty. In those cases, a non-conditional prison sentence is converted into a conditional sentence that includes the community service as a special condition. Concerning the rest of the sentence, the regulations for the principal penalty are followed in broad lines.

I criticized the law of 1989[3]. The law contained the artificial construction that in his or her verdict, a judge should state the unconditional sentence he or she would have imposed had the offender not offered to do community service. This resulted in a situation in which judges were forced to comply with a construction that did not correspond with the concrete reality of the case. Contrary to the aims of the law, judges began to impose community sanctions in cases in which a large fine or a conditional prison sentence could have been imposed.

Another point of criticism concerned the formalistic demand that the offender had to offer to perform community service and to agree with the sanction, and that the judge had to mention in his or her verdict the nature of the unpaid work. In practise, this led to ritual formalities the judiciary increasingly considered as having limited value. Also, it was experienced

3 See: A.M. van Kalmthout, *Onbetaalde arbeid ten algemenen nutte: Een dienst aan de dienstverlening?*, Arnhem/'s-Hertogenbosch 1988, pp. 1-55.

as problematic that no conversion rates were included in the law regarding the deduction of the time spent in pre-trial detention when converting intended prison sentences into community service, nor regarding the conversion of community service into a prison sentence in case of non-compliance.

However, these and other mainly technical-judicial objections did not hamper the rapid proliferation of community services. From less than 5,000 applications in 1988, there were around 16,000 in 1998. But it became clear that the intended reduction of unconditional prison sentences was not taking place to the same degree. After the 1989 Community Service Act came into effect, prison capacity continued to increase (from 7,195 in 1990 to 12,491 in 1990). The number of offenders sentenced to prison also rose in the same period from 3,511 to 5,7314.

3.2 Developments during the period 1989-2000

On the basis of the experiences with the first Community Service Act, the inevitable conclusion is that the initial expectations have been far exceeded – at least in a quantitative sense. Another positive conclusion is that community services have broad societal support, as shown by research. A real problem, however, is that the main goal of community service – i.e. to reduce the number of prison sentences passed – has only very modestly been realized. The main problems in this respect are:

- The frequent application of pre-trial detention. Community service aims exclusively at the replacement of detention as the principal penalty. Alternatives to pre-trial detention are almost entirely absent. Many prison sentences are as long as the period of pre-trial detention already spent in gaol, meaning that it is no longer possible to impose a community sanction.
- A big problem is that in former days community sanctions could only be applied if the offender offered to undergo such a penalty and agreed with the sanction. This meant that the many offenders who did not show up at court and were judged by default were not eligible for community sanctions. In many cases these were persons who had committed a minor or less serious offence, were not accompanied by a solicitor and were insufficiently familiar with the penal law system. Many short-term prison sentences could therefore not be substituted by a community sanction.

4 Source: Ministerie van Justitie, *Sancties in perspectief*, Den Haag 2000, p. 21.

- Although in principle every liberty punishment can be replaced by a community sanction, in practise judges and public prosecutors believed that 240 hours of work is not equivalent to six months of unconditional imprisonment. This increasingly led to a conditional prison sentence of a maximum of six months and/or a fine combined with a community sanction. Moreover, it became usual to attach to the conditions of a verdict a newly developed community sanction, the 'learning/training order'. This community sanction, which was developed in juvenile criminal law, requires the offender to learn specific skills or to be confronted with the victim's consequences of the offender's criminal behaviour. Such a sanction ranged from five meetings with the victim, to three months (or longer) of learning/training for 40 hours a week. In contrast to juvenile criminal law, this new community sanction had no explicit legal basis and could only be imposed as a special condition attached to a suspended sentence. Article 14c of the Penal Code gives the judge a great discretionary power to attach all types of conditions to a suspended sentence, as long as they are related to the future behaviour of the offender. This is why the legal framework of a suspended sentence is so frequently used as the legal basis for experimenting with new sanction modalities. Depending on the results of these experiments, the legislator will decide whether or not these new modalities will be introduced as a penalty or penal measure in the Penal Code.
- Although it is now the case to a lesser degree than at the beginning of community sanction development, community sanctions are mostly applied to so-called normal, decent offenders or less serious criminals, who are leading a more or less stable life. If one looks at the characteristics of offenders sentenced to community sanctions, one has to conclude that especially during the experimental period very important categories of offenders (such as drug addicts, foreigners and homeless offenders) were highly underrepresented. After the introduction of the Community Service Act, special projects were set up for those offenders who were not fit for a standard community service. These group projects were supervised by specialized foremen and probation officers and were particularly targeted at drug addicts.
- After the new Act came into force, the failure rate rose significantly. During the experimental period, the average failure rate was about 12%. Offenders who never actually started their term of service accounted for one-third. The remaining 60% failed during the performance of the

community service order. This failure rate increased to about 20% in 1997. In contrast to the situation before 1989, most of these failures (60%) now concern offenders who after their conviction never started their term of service. There are three main reasons for this: 1) the target group of community service offenders has grown substantially; 2) the nature of the offences punished with community service has been changed, because of the agreement between the Public Prosecution service and the Probation Service that in principle in all cases where the Public Prosecutor could require an unconditional prison sentence of up to six months he would impose community service, provided the offender consented to such; and 3) the Probation Service was no longer required to provide the judge with advice before he or she passed community sentence. This resulted in convictions of offenders who had never had any contact with the Probation Service and also after their conviction never showed up.

In the literature, the following categories of reasons are given for non-compliance with a CSO: 1) Personal reasons having to do with the community service offender, such as lack of motivation, inability to keep appointments, lack of discipline, and a high rate of recidivism. 2) Reasons connected with the nature of the work, such as activities that are insufficiently or not at all suited to the capacity of the offender. 3) Reasons related to working conditions, such as an unpleasant atmosphere, insufficient guidance through the project, and lack of possibilities for work in a broader context. 4) Failure due to lack of proper guidance and control by the Probation Service.

4. Act of Task Penalties of 2000

On 1 February 2001, the 1989 Community Service Act was replaced by the Act on Task Penalties. This law changed the legal structure of the community service in major ways and introduced a new principal penalty: the learning/training order. It also enables combinations of this new penalty with community service.

4.1 Legal structure of the Task Penalties

When establishing the 1989 Community Service Act, the legislator expected around 30,000 offenders to perform community service in the year 2000. Despite the rise in the number of CSOs during recent years, the total

number of 16,500 realized in 2000 did not meet this target by a long way. In order to reach the target in the coming years, some of the restrictions on the use of CSOs in the 1989 Community Service Act have been removed. One major restriction was the statutory requirement for the offender to consent at his or her trial to the CSO. In recent years, nearly 13,000 short-term prison sentences were imposed annually on offenders who did not appear for trial. This meant that they were not eligible for a CSO as a substitute for incarceration. Therefore, this statutory requirement has been removed from the new Act, so that a CSO or a learning/training order can also be imposed on offenders who are sentenced in absentia. It is expected that two-thirds of short-term prison sentences will now be substituted by a task penalty.

As is the case in England and Wales, the new Act has abolished the condition that the offender has to consent to a task penalty. Contrary to the persistent opinion that this requirement was inevitable because of the international rules on forced or compulsory labour, the Dutch legislator has dissociated itself from this disputable point of view. Also the additional condition that a CSO could only be imposed at the request of the accused has been removed. In practice this condition had already lost its meaning because the courts increasingly neglected it. This is also the case with the legal stipulation in the 1989 Act that says that the court in its verdict has to stipulate the nature and content of the community service activities. The new Act leaves it to the judge to determine whether or not to do this. Legally, a judge is now only obliged to determine by verdict the number of hours of the task penalty and whether the task penalty should consist of a CSO (maximum of 240 hours), a learning/training order (maximum of 480 hours) or a combination order (maximum of 480 hours, of which a maximum of 240 hours may be community service).

Another restriction in the 1989 Act was that the court could impose a CSO only if it would otherwise impose a prison term of up to six months. According to the new Act, a CSO or training/learning order can also be imposed as a substitute for a fine or a conditional sentence. In the case of noncompliance with the community sanction, a fine default detention will take place according to a fixed conversion rate: each two hours of the remaining community sanction is converted into one day of confinement. Because of the maximum limit of a community sanction (480 hours), the maximum duration of this subsidiary detention is 240 days. However, this seems likely to prove counterproductive: since task penalties are now also imposed as a substitute for conditional sentences and fines. This means that

there is a risk that through this default mechanism failures of community service orders that originally were imposed instead of a fine or a conditional sentence finally will result in a custodial sentence, which is contradictory to the original aim of community sanctions. In contrast to a principal custodial sanction, the rules concerning automatic early release after serving two-thirds of a prison sentence are not applicable to this default detention. This means that the maximum of 480 hours can be considered equivalent to unconditional imprisonment for one year. A person who has to serve a prison sentence of that length will automatically and unconditionally be released after eight months, while eight months of default detention will be the almost automatic reaction to non-compliance with a task penalty of 480 hours.

A novelty in the new Act is the possibility to combine a task penalty with an unconditional prison sentence of a maximum of six months. This extension underlines the fact that a task penalty is a sanction in its own right and can no longer be applied only as a substitute for or alternative to a custodial prison sentence. As a consequence, a task penalty can also be imposed conditionally, just like the fine and custodial sanctions (detention and imprisonment). Other combinations possible under the new legislation are: a task penalty combined with a conditional prison sentence, a task penalty combined with a fine, or a combination of these penalties. Another possibility – which is not yet based on a statutory provision, but is being practised on an experimental basis – is to combine a task penalty with electronic monitoring. This is done by imposing a task penalty combined with a conditional prison sentence, to which as a main condition electronic monitoring has been attached. The most severe combination is a task penalty of 480 hours, combined with six months of unconditional and six months of conditional prison sentence with electronic monitoring, plus the maximum fine prescribed by law for that offence.

In order to extend the scope of the task penalties, the new Act has introduced the task penalty as a front-door sanction, by authorizing the public prosecutor to attach a CSO, a training/learning order or a combination of the two to its decision to drop a case. As a condition to this conditional waiver (called a transaction) the maximum may not exceed 120 hours. In contrast to the task penalty imposed as a principal penalty, the appearance of the task penalty as a condition requires the approval of the offender. Moreover, the offender has to be informed of his or her right to be assisted by legal counsel.

Also important is that the new Act has abandoned the concept that a community service has to consist of unpaid activities 'for the benefit of the general good'. In practice, this criterion was already being very loosely interpreted. In fact any work carried out on behalf of others has been accepted over the years, provided the person performing the community service does not have any personal or business relationship with the third party and provided the activities are not wholly commercial or solely directed at making good the damage caused by the offence. By deleting the criterion that the work itself must be of a 'general beneficial nature', the legislator has opened the door for CSOs carried out at commercial or semi-commercial working places.

5. Other new community sanctions

Two other new community sanctions have been introduced into the criminal law system: electronic monitoring as a front-door and as a back-door sanction, and penitentiary programmes. As a front-door sanction, electronic monitoring is still being used as a condition attached to a suspended sentence. As a front-door sanction, it is especially intended to be combined with a task penalty. However, in practice this combination is not very often applied.

More common is the combination with a new back-door modality: the penitentiary programme. The 1999 Penitentiary Principles Act and the Penitentiary Measure introduced this first back-door variant of community sanction. After the replacement of the conditional release by the automatic non-conditional early release in 1986, this is a new form of conditional release, which is nonetheless only open to a limited category of detainees. Penitentiary programmes at present still have the character of a favour, which can be granted to very motivated detainees provided they have served at least half of a prison sentence of at least one year. A penitentiary programme takes between a minimum of six weeks and a maximum of one year and precedes an automatic unconditional release, which is granted after two-thirds of the prison sentence has been served. As with the front-door variant, the convicted person is under the supervision of the Probation Service and is obliged to perform activities aimed at his or her reintegration and resocialization outside the prison for at least 26 hours per week. These activities are very similar to those that must be carried out after the imposition of a CSO or training/learning project order. The remaining hours will

not be served in prison, but at home, under the condition that the former prisoner is kept under house arrest and subject to electronic monitoring for 12-16 weeks.

6. Conclusion

The Dutch government has high expectations regarding the impact of the new Task Penalties Act on the sentencing practice of the courts and the Public Prosecution Service. A 1999 report by the Scientific Research and Documentation Centre of the Ministry of Justice (WODC) includes a calculation about the average annual prison capacity needed for the period 1998-2003[5]. It was based on the situation in 1998 and reflects the expected increase of community sanctions after the introduction of the new Act.

Sanction	1998	1999	2000	2001	2002	2003	1998-2003 increase
Task sanctions: juveniles	10,800	11,600	12,500	13,400	14,500	15,700	45%
Task sanctions: adults	16,800	17,800	18,900	19,800	20,600	21,300	27%
Prisons (excluding custody of illegal foreigners)	11,600	11,800	12,100	12,300	12,500	12,700	10%

This forecast shows that it is expected that the number of task penalties for adults will reach 21,300 in 2003 and for juveniles 15,700, an increase of 26% and 45%, respectively compared with 1998. How realistic this forecast is must be questioned. After all, there are still a lot of problems to be solved. The main problem is the lack of an adequate number of places in regular projects for the implementation of community service, learn-

[5] P.L.M. Steinmann, F.P. van Tulder, W. van der Heide, 'Prognose van de sanctiecapaciteit 1999-2003', *WODC* nr. 181, The Hague 1999.

ing/training and penitentiary programmes. Another problem is that it is very difficult to predict how the courts and public prosecutor will apply the new provisions on task penalties as laid down in the new Act. It is uncertain whether the increase in the number of hours (from 240 to 480) will lead to an extension of the application area to more serious crimes and therefore to more serious offenders, or whether application of these task penalties will remain restricted to the old target group, which will now be punished with more hours. It is also doubtful how far the possibility to combine a task penalty with an unconditional prison sentence will have an increasing rather than a reducing effect on the number of prison sentences passed.

Other problems are that the new Act does not provide for the compulsory deduction of the time spent in pre-trial detention, and a task penalty can be imposed without any previous enquiry by or advice from the Probation Service. Taking into account that most failures are ascribed to the fact that after conviction the offender does not show up, it can be expected that this will happen more frequently now that the task penalty can be imposed after a trial in absentia. It is also expected that the increase in the number of task penalties will be smaller than predicted, because in the new guidelines for the Public Prosecution Service some crimes are considered unsuitable for task penalties. This is especially the case as far as these crimes concern violent crimes and sexual crimes.[6] Also according to these guidelines, some offenders are considered unsuitable for a task penalty because, for example, they have been sentenced to a task penalty before, refuse to compensate for the damage caused by the offence, or refuse to accept mediation concerning such compensation. Also excluded are those who are unable to comply with a task penalty because of a physical or mental disorder, as well as those who do not consent to a task penalty. This last condition demonstrates how controversial the question of consent still is. In the additional comments on these guidelines, the fact that obligatory consent is no longer required is interpreted such that consent does not need to be pronounced in person at court, but can be given via the offender's solicitor or probation officer. It should be borne in mind, however, that judges are not committed to such guidelines. The question remains, therefore, in what way practice and jurisdiction will deal with and accommodate this discrepancy between law and guidelines.

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[6] 'Aanwijzing taakstraffen', *Staatscourant 2001*, 28.

Punishment in the Community; Norwegian Experiences with Community Sanctions and Measures

PAUL LARSSON

1. The use of Community Penalties in Norway

Community Sanction and measures is a rather wide and ambiguous term. It is a phrase that is not easily translated into Norwegian. The main reason for this is that we usually speak of penalties in the society (samfunnsstraffer) when we deal with community sanctions. There is no term that is identical to the rather positive community with all its associations to closeness, caring, small village life and so on. The use of sanctions and measures is also uncommon in penal law. Norwegian penal language usually avoids terms that can be associated with treatment when it speaks of punishments. Penalties and reactions are more in line with Norwegian terminology than sanctions and measures, but I will use the latter in the following for the sake of uniformity with the contributions in this anthology.

The presentation below is based on the following description of community sanctions and measures. They are understood as: "... sanctions and measures which maintain the offender in the community and involve some restrictions on his liberty through the imposition of conditions and/or obligations, and which are implemented by bodies designated in law for that purpose." (Council of Europe, Recommendation No.R (92) 16, p. 22). There are mainly three aspects that are important to underline. The first is that the punishment is in the community, the second is the importance of certain obligations or conditions that the offender must obey the last point is that there is an active control of the offender by a body of formal controllers (in Norway the probation service, Kriminalomsorg i frihet).

1.1. Current community sanctions

There are both old and new penalties that suit this description in the Norwegian Penal Code. The penal system is not complex; it is quite easy to get an overview. In § 15 in the penal code it is stated that "the ordinary penalties" are:

- imprisonment
- detention (hefte - is not in use)
- community service
- fines and
- in certain instances loss of civil rights.

Of these penalties community service is the one that best suits the description of a community sanction. But there are other sanctions not mentioned under the heading "ordinary penalties".

1.1.1. Suspended sentence

The oldest and most common "community sanction" is the suspended sentence with supervision (chapter 5 of the penal code). The suspended prison sentence is a penal alternative that dates back to 1894 (Røstad 1993). The form of suspended sentence most commonly used is the "continental" type where there is a non-enforcement of an imposed prison sentence (eksekusjonsutsettelse). There is also the Anglo-Saxon conditional postponement of sentencing, but it is used in less than 5% of the suspended sentences (Andenæs 1997). The possibility to impose supervision of the offenders by the probation service was introduced in 1919 (Hauge 1974).

There is a wide range of special conditions (Penal Code § 53) open to impose when a suspended sentence is used. The probationary period is usually two years and the maximum is five years. The conditions are:

- that the person shall be under supervision during all or part of the probationary period.
- that the convicted person shall comply with provisions concerning his place of abode, work, education or consorting with special persons;
- that the convicted person shall comply with provisions concerning restrictions of his right to dispose of his income and property and concerning the fulfilment of economic conditions;
- that the convicted person shall abstain from using alcohol or other intoxicating or narcotic substances;

- that the convicted person shall undergo a cure to counteract abuse of alcohol or other intoxicating or narcotic substances, if necessary in an institution;
- that the convicted person undergoes a alcohol treatment program, there can be imposed special supervision and treatment programs for drunken drivers suffering from alcohol problems;
- that the convicted person shall undergo psychiatric treatment, if necessary in an institution
- that the convicted person shall stay in a home or institution for up to one year;

There are also other conditions that can be imposed, like the payment of damages and maintenance that is of less interest in this instance. It is possible to impose more than one condition. Of the conditions mentioned supervision by the probation service might be called a community sanction, the others are often aimed at restricting the freedom of the offender or treating him in a more or less open institution. In most cases, 4876 of 6578 cases of suspended sentences in 1991, there is not imposed any special conditions.

Table 1: Suspended Sentences 1991
(One offender may have more than one condition; all conditions are recorded in the table.)

Suspended sentences total	6.578
No special conditions	4.876
Restrictions in place	33
Abstain from intoxication	18
Work / education	21
Supervision by the probation	476
Supervision by others	6
Paying damages and compensation	449
Community Service[1]	677
Other requirements	40

Source: NOU 1993: 32 p. 49.

[1] Community service was used as a condition under the § 53 in the penal code until the changes in 1991 (see below).

Suspended sentences are used as penalty in approximately 35 - 40% of the criminal cases. In 1995 there was imposed a total of 17 600 penalties in criminal cases. The court sentenced a total of 6103 conditional penalties (Crime statistics 1995 tab. 48). Supervision was used as a condition in 664 cases. Supervision has been used in less than 10% of the suspended sentences in the last decade (Andenæs 1997). One factor though is the relatively low numbers of offenders under supervision; another is the quality and intensity of the control. Critical voices have been raised questioning the way the probation service has been carrying out the supervision. It has been complained that the control is too casual and lenient, that the probation officers in many instances have been too slow to report breaches of conditions. The probation officers, on their side, have pointed out that they have to be "loose handed" to establish a relationship based on trust from the offenders. These control problems was one of the topics in the white paper on crime prevention in 1992 (St.meld. nr. 23 1991 – 92) and in the report on the work of the probation service in 1993 (NOU 1993:32). The proposals for an introduction of intensive supervision programs in the white paper from 1998 (St. meld. nr. 27 1997 – 98) are a result of these critical remarks (see below).

1.1.2. Treatment program

Among more recent sanctions is a treatment program for drunken drivers. This treatment program is still not an ordinary sentence; it has been a pilot or test project since 1996. The court has the possibility to sentence drunken drivers with alcohol problems to a treatment program (§ 53 nr. 3 e & nr. 6). These programs are administered by the Probation service. They consist of 20 to 30 hours of lessons, treatment of the addiction problems, supervision and control (St. meld. 27 1997 - 98 p. 74). The program is to be used as a alternative for unconditional prison and the special preventive effect is "assumed to better than with the use of unconditional prison." (Ot. prp. nr. 43 1994 - 95 p. 3) Another reason for the implementation of the treatment program is that it might release prison capacity and reduce the use of prison.

1.1.3. Sikring and Forvaring

There are some "traditional" sanctions that share basic similarities with community sanctions. Many of these are penalties were the offender is

more or less "in the community" and were the probation service play an important role. One such is the § 12 sanction. § 12 in the prison code of 1958 says that a prisoner if it is appropriate can be transferred to safe custody (*sikringsanstalt*), to a nursing home (*pleieanstalt*), to an apartment house under the probation service or to treatment in an institution for the rest of the sentence. This is an administrative measure under the prison board, which is aimed at prisoners in need of treatment. The § 12 is mainly aimed at offenders with drug and alcohol related problems that get the possibility to start on a treatment program in a treatment facility outside the prison (NOU 1988:37).

The security measures (*sikring*) is not considered a community sanction but it will be mentioned because some of the measures that are imposed are "in the community" and supervised by the probation service. It is used on offenders that are considered to be in danger of re-offending and mentally ill (Kalmthout & Tak 1991, Hennum 1997). A wide variety of security measures may be imposed. Some are restrictions on the offender's freedom in the community but it is also the use of safe custody, which is quite similar to a closed unit prison. The use of the security measures has been under massive critique the last three decades and is not used much anymore (Larsson 1997). *Sikring* is now being transformed into the new reaction of *forvaring*[2].

1.1.4. Parole

One might ask if parole is a form of community sanction. Parole is normally the rule after 2/3 of the sentence is served. It is used in 95% of the cases and is administered by the prison authorities and is given more or less automatically (NOU 1993: 32). The offender can be imposed conditions during the parole (same conditions as PC § 53 above); one of these is supervision by the probation service. The use of supervision has been reduced to a point where between 40 and 50% of the parolees are supervised (NOU 1993: 32). Today supervision is not considered to be a mandatory condition, and the use of the supervision is open for differences in use. There are few reports of breach of conditions. The supervision is viewed (by probation service) as more or less voluntary and up to the offender to

[2] A good translation of this term is hard to find, the difference is that this reaction is for both mentally ill and the dangerous offenders, and that the mentally ill shall not be in the community but in a ward or hospital.

decide, some see it as a sort of help more than control (NOU 1993: 32). Very few breaches of conditions are reported. The reason for this is said to be the voluntary nature of the supervision.

In the white paper on the probation service (St. meld nr. 27 1997 - 98) there are two "new" community sanctions proposed. These are intensive supervision programs (ISP) and electronic monitoring. In the following we will mainly focus on the use and experiences with community service orders. CSOs are the only "new" community sanction[3] that is in use at this moment (in 1998). As this brief presentation of the "old community sanctions" shoved many had elements of the three basic requirements of community, obligations and control. Suspended sentences with supervision are not used much and the control of the offenders has been questioned (to put it in a diplomatic way). Supervision is viewed as both help and control. The ideology behind the supervision is therefore rather opaque (NOU 1993: 32). Many of the penalties presented are more inside institutions than in the community, and not really community sanctions. We will now turn to community service that is the only new community sanction that we have substantial experiences with in Norway.

2. Community Service in Norway

2.1. From white paper to introduction

The Community Service Order was introduced as a conceivable alternative to prison in the now famous white paper on the criminal policy in 1978 (St. meld. nr. 104 1977 - 78). The white - paper presented new alternatives with the main goal to reduce the use of prison. This because of the well documented counter-productive effects of prison on both offenders and society. The dangers of creating new penal sanctions that did not work as a substitute for the use of prison was pointed out early in the report. "The starting point for the debate (on alternatives to prison) is a wish for a re-

[3] In Norway there has been mediation boards (*konfliktråd*) working since the beginning of the 1980s (the law is from 1991). In some respect these are outside the traditional penal system, the mediation is done outside the court-system. The cases usually (78%) come from the police (DULLUM 1996 AND LARSSON 1997b). Most cases are "small fry" that would not have ended in court, like shoplifting. It is not an alternative used in serious crime cases. Mediation often ends in a restorative deal, where the "culprit" must work to do good his damage. But time and again payment of damages to the victim is the outcome of the mediation.

duced use of prison because of the thoroughly damaging effects of the prison penalty. This assumption is important. The development of new penal alternatives must not be such that these first and foremost will be used as new penal sanctions for offenders that will not be sentenced to imprisonment today." (St. meld. 104 1977 – 78 p.117 translated by PL)

Alternatives were a way to reduce the use of prison. Mediation was also proposed, but the only "genuine" alternative[4] was the community service. In the parliamentary recommendation (Innst. S. nr. 175 [1979 – 80]) community service was presented as an "interesting penalty for some offenders" (p. 42) and it was recommended that there should be launched a pilot project to "get more knowledge and experience" (p. 43) before a final decision was reached. In the public report on community service (NOU 1982:4) a pilot project in the county of Rogaland was proposed and there was laid down guidelines for this. A pilot project started in the county of Rogaland in 1984 and was soon followed by other counties[5]. In the NOU report a wide range of topics concerning the CSO were illuminated. One such was the question of the legal regulation of the sanction another was the importance of community service as a genuine alternative to prison. In the practical organisation of the CSO we "stole" much from Danish experiences. Denmark started their pilot project in 1982. The Norwegian community service has many characteristics in common with the Danish (Kverneland 1990).

In the public debates and writings ahead of launching the community service project one central theme was the question of how to reduce the dangers of net widening. This was perhaps "the" central theme. The dangers of creating an alternative that did not divert people from prison but instead resulted in a wider control-net was pointed out early by critics in KROM (Mathiesen 1978, Heli 1979). KROM (The Norwegian Association for Penal Reform) was critical to *all* alternatives that did not reduce the use of prisons but instead functioned as intermediate sanctions. They pointed to British evaluations that found that approximately half of the CSO offenders was diverted from prison and would otherwise have been imprisoned (Pease et. al. 1977). So there were sound reasons for being sceptical, even if the British CS was designed with other sentencing goals than the Norwegian. Members of the Conservative Party (Høyre) had quite another view of the benefits of community service. They saw it as an opportunity for a new penal sanction filling the gap between conditional and uncondi-

[4] Other "alternatives" mentioned were night and weekend prisons.
[5] In 1985 by HEDMARK / OPPLAND and HORDALAND.

tional prison sentences. They also pointed out the positive moral effects of the offenders sentenced to work doing restitution and paying back to society. There were critics of community service pointing out the possibilities of the CSO being forced "slave" labour and the ideologically troublesome idea that work, seen as a right and a privilege, should be used as a penal sanction. In spite of critical voices there seemed to be wide support of community service as an alternative to prison (Bødal 1981, Røstad 1984, NOU 1982:4; Rieber-Mohn 1990).

Beyond the simple goal to reduce the use of prison, the ideology behind the introduction of community service in Norway was, as in other countries, mixed (Vass 1990). It is stated that it is *not* a sanction with much general preventive effects, though there has been no research done on this as far as I know. The special preventive effects, mainly reintegration in the community and rehabilitation has been underlined (Larsson 1991). It has also been pointed to the effects of restitution to the community, "paying back", and the relatively low cost of the community service orders compared to prison. One reason for the wide support of the community service in Norway seems to be the obscure and mixed justifications for the sanction and a limited knowledge of community service "in everyday use".

2.2. The use of CSOs in Norway

From 1984 to 1991 the legal framework for the use of community service was as a condition under the rules of conditional imprisonment in §§ 52 – 54 in the penal code. The offender had to consent to get a community service order (he still has). The reason for this was both the legal obligations in the Convention of Human Rights (art 4) but also the need to get offenders with a minimum of motivation. In 1991 community service was made an "ordinary penalty" according to § 15 in the penal code. The paragraphs regulating the use of the communities service are numbers 28 a, b and c in the penal code. There were important changes in the rules governing the use of community service that I will deal with later. The most important being a move away from the community service as a "pure" alternative towards a status as an intermediate sanction, the second being that the maximum hours sentenced was raised from 240 to 360. Community service can be used in combination with other sentences. It can be supplemented with a fine or in certain instances with a short prison sentence of maximum 30 days (§ 28a). Such combination-orders are not unusual and are often used when the offender has done time in remand

prison. The prison sentence is then served in remand and the offender goes directly to a CSO.

What kind of offenders was viewed as suitable for this sanction? In Norway it has always been stressed that the sanction is *not* aimed at only unproblematic offenders. The young recidivist thief and property offender is in many ways the ideal type of offender. Anyway he should not be to young, which has to do with the motivation. Juvenile delinquents are not the target-group. Research has shown that the average age has been around 23 - 25 years (Kverneland 1990, Larsson 1994). When it comes to gender the representation of women in CS is in general the same as for women in prison 4 – 5%. The question of gender has not been seriously debated even if there are good reasons for using CS as an alternative when the offender has responsibilities for children. "Women crimes" like fraud, theft and minor drug related crimes should make women well suited for CS. These considerations do not seem to make a difference in the everyday use of the penalty (Worrall 1997).

There are certain qualities that the probation service is looking after when they write their social inquiry report. The target group are offenders with work and family ties, without to serious substance abuse or mental problems (Larsson 1994). Since few offenders are like this there has often been openness towards stretching these qualities quite a bit. But recently there seems to a more restrictive line when it comes to substance abusers, a group of offenders that experience difficulties in fulfilling their obligations. Property and profit crimes (burglary, theft, car theft, fraud and so on), but also minor violence and drug cases are the main types of offences considered suitable. Community service is not regarded appropriate for offences of drunken driving (for the sake of general prevention), serious drug-, violent- or sex crimes. The possibilities of using the sanction in cases of white-collar crime have not been considered even if this is an interesting possibility (Johansen 1991). As Rieber-Mohn (1990) and Larsson (1994b) has pointed out there have been quite a few instances where the limits of the CS have been stretched in court. CSOs have been used in cases of minor sex, violence, robbery and drug crimes.

2.3. *Legal framework*[6]

Maximum sentence is now 360 hours. This sentence may be imposed for criminal acts "that would otherwise be punishable by imprisonment for a

[6] This description was true until April 2001 (see 7.5)

term not exceeding one year." (Penal code § 28a) But this one-year limit has been departed at instances. The CSO sentences used to be roughly 20 hours per month, so 6 months would be 120 hours of work. Sentences longer than 240 hours are rare. Probation service is responsible for the supervision and control of the offenders and the fulfilment of the obligations. There are two main types of conditions. The most basic condition (grunnvilkår) is that the offender doesn't commit new crimes. The second condition (særvilkår) is related to the implementation of the order, that the offender is sober and fulfils his duties. If serious offences are detected the case go back to court, this usually results in revocation and that the rest of the sentence is served in prison. When there is trouble with the conditions of implementation the use of reactions depends on the seriousness of the act, if this is his first breach, the history of the offender and the stage of the sentence (if it is beginning or end). The probation service usually follows a three-step ladder when reacting on breach, but this is not formalised (Larsson 1994). First time, if it is not serious, is responded by an oral warning by the probation officer. Next with a written warning and the third time the case is sent to the court where it is given a trial. In the white-paper St. meld 27 1997 – 98 it is recommended that the probation service develops a "ladder of reactions". It is also suggested that they might be given the opportunity to use short-term custody, up to 7 days. This measure has been proposed to give the service more powerful tools in the supervision of the offenders.

3. The implementation of community service

There have been difficulties in getting a substantial number of suitable community service cases in Norway. It has been complained that the local prosecutors, who is integrated in the police organisation, have not given serious attention to the community service and that there was a general lack of knowledge about the sanction. There have been complaints from the start that community service is not a *punitive* reaction and that it is too soft for "hardened criminals" by the police. In most instances the cases originates from the local prosecutors, sometimes the defence or the offender himself. The probation service produces a social inquiry report that focus on the suitability of the offender. The report makes a recommendation to the court. The social inquiry report is often conducted when the offender is in remand custody. The report is important for the judges that

often follow its proposals. In some cases the judge may impose a community service without a report, against a negative recommendation and without the option being mentioned by the parties.

The probation service is responsible to find a suitable assignment for the offender. In Norway the offenders usually work in a "normal" workplace, this usually is a humanitarian organisation, a kindergarten, old people's home, a sports club or other non-profit organisations (Larsson 1991). Offenders rarely work in groups with other offenders. This is because of the positive re-integrative effects that might come from the contact with non-offenders might be reduced. So far there has been no serious problems in getting assignments or work to do.

The regulation of the probation officers work with the community service is regulated in directives (*rundskriv*), rules and recommendations laid down by the Director of Public Prosecutions (*Riksadvokaten*). Supervision and control of the offenders is usually done by the probation service that makes visits to the workplace when the offender is serving. There is some use of private controllers. Since many counties are sparsely populated and there are long distances to travel the use of telephone and delegation of the control to the assignment-place is understandable. But the importance of the personal relations between the probation officer, the offender and the assignment-place are often stressed (Larsson 1994, Rådgivings- og evalueringsutvalgenes rapport 1986). The importance of a firm control and the possibilities to air problems when they occur is dependent on the personal contact with the probation officer assigned to the offender.

4. Research

There has been limited research done on the effects of the community service in Norway. During the pilot project there were some evaluations and reports (Rådgivnings- og evalueringsutvalgenes rapport om Prøverosjekt med samfunnstjeneste 1986). In 1990, in connection to the changes in the law concerning the community service, Kverneland made a report. There has been some research done by jurists on the legal perspectives mainly by Røstad (1984, 1991 and 1993) and Rieber-Mohn (1990). Some articles have been published (Hansen 1997) and there are student dissertations but no major works except Larssons criminological research. "*Et konstruktivt onde*?" (Larsson 1991) is based on qualitative interviews with offenders. Larsson analyses the community service in relation to other pe-

nal sanctions and present an "insiders view". It deals with questions like the effect of stigma, re-socialisation, the social relations of offenders and probation officers and the net-widening effects. His report from 1994 ("Ved alvorlig eller gjentatt brudd ...") is focusing on breach of conditions. It is based on qualitative interviews of offenders in different counties in Norway. 30% of the offenders did break conditions when serving in such a manner that the case was sent back to court. This number has dropped to around 23 – 24% by the end of the nineties. Most breaches were rather minor violations of conditions often committed by young offenders with drug-related problems and a deviant lifestyle. This report also focuses on what good supervision and control might be and the work of the probation service.

Any exhaustive research in the field has not been conducted for many years and there are no major books on the topic. This lack of research is regrettable because there are a lot of themes concerning the community service that is not fairly documented, like the cost of the sanction. Most of the research is of a more qualitative nature; there are few reliable figures or numbers. There have been substantial changes in the working of the sanction in the 90s, so old research can be of limited utility. Community service has been extensively debated, but few facts and findings concerning Norwegian experiences are available. We often have to turn to Danish (Rentzmann and Reimann 1994) or Swedish (Andersson and Alexandersson 1994) research for knowledge.

The debate concerning community service focuses on a few topics. The most common is in what degree community service is alternative to the use of prison (Rådgivnings- og evalueringsutvalgenes rapport om Prøverosjekt med samfunnstjeneste 1986, Rieber-Mohn 1990, Røstad 1984, 1993 and Larsson 1991). There has been little research on this, few have tried to measure it. The conclusions of these are that it does not seem to be the case that community service is used mainly as an alternative to conditional imprisonment. The courts have used it quite frequently in serious cases (Røstad 1991, Larsson 1994b).

The recidivist rates have also been questioned (Larsson 1991, Kverneland 1990, Hansen 1997, Wullum 1996, Larsson 1999a). It is questioned whether community service makes the offender better than other penal sanctions do, usually prison. For some it seems that the legitimisation of the sanction is dependent on better recidivist rates than prison. Again there is blend of strong opinions and a lack of serious research. Wullum (1997)

and Hansen (1997) have gathered some data on recidivist rates from their local jurisdictions. Hansen figures are small and there are methodological flaws in the research, Wullums numbers are also small so their findings cannot be generalised (Larsson 1999a). The best guess about recidivism in Norway is based upon Swedish and Danish research that harmonise with international experiences, namely that recidivism rates seems to be more or less the same as in use of prison. To sum up, much of the research is old and there is a need for more and better research on community service in Norway. Debates in media and on conferences about different topics concerning the use of the sanction have been rather lively, but the data to build a sober discussion on are limited.

5. The role of the Norwegian Probation Service (Kriminalomsorg i frihet)

The Norwegian Probation service can trace its history back to the middle of the nineteenth century when they started as voluntary private philanthropic organisations. To be more exact, there is reason to celebrate the 150th birthday of the Norwegian Probation service in 1999. The 5th of October 1849 "The Society for Care and Protection of Offenders released from Kristiania Prison Workhouse" (Foreningen til Forsorg og Beskyttelse for de fra Kristiania løsladte Forbrydere) was officially founded (Hauge 1974, p. 44). The founding fathers were inspired by the work of foreign probation services. Their aim was to reduce recidivism by helping released prisoners to readjust back in to the society, help them with work, a place to live and "keep watch" over their activities. There had been organised work directed towards released prisoners before 1849, but this was done as a part of the general help of the poor and needy. The Kristiania[7] Society was the first organisation that exclusively aimed their activities towards released offenders. It was logically connected towards the prison and penal institutions, not the poor-relief. These organisations soon spread to other major cities like Bergen, Drammen, Trondheim and Halden.

In 1919 the probation service was delegated the responsibility of supervision of offenders sentenced to conditional imprisonment (see above). In 1923 the social inquiry report was introduced. A process started in the 1870 - 80s that gradually moved the probation service from a position out-

[7] Kristiania was used until 1924 when the name Oslo was restored.

side the penal system towards integration. With their new role as supervisors of sentenced offenders, not only parolees, they became even closer integrated. The probation service – vernelagene – was from the start a private organisation, but grew more and more dependent on money from the state. In St. meld. 104 – 1977 –78 "kriminalmeldinga" it was stated that "It is commonly agreed that the state shall take over the probation service, that is the operations of vernelagene". (p. 172) This formally happened the first of January 1980.

In many ways the probation service was a "sleepy" organisation at the start of the 80s. With the pilot project in Rogaland in 1984 and the rapid development of the use of community service (see below figure 2) with its positive image, the probation service got some needed publicity. During the 90s the probation service has been assigned to new tasks. Today they are involved not only with making social inquiry reports, supervision of offenders, parolees and community service and running the apartment houses (*hybelhus*) but also have the responsibility of implementing alcohol treatment programs. With the new sanction of electronic monitoring and the recommendation of implementing intensive supervision programs in the recent white paper there will be further expansion in responsibilities. At the same time there has been an ideological move from help and care to control. The probation service is now closer integrated within the penal system and is viewed as a central part of it. The help and care tasks are now seen as work for agencies outside the penal system, this "outsourcing" of social work goes under the label of the "import model".

6. The future of community sanctions in Norway

The Norwegian sanction system has not been characterised by diversity and width of penal alternatives. It has up till the last decade been rather monolithic, you were either inside the prison walls or "free" in the community. This has changed the last decade into a more differentiated penal system. In the report of the committee working on the new prison law (NOU 1988: 37) a multi level system of punishments ranging from the high security prison to community sanctions "in the free" was introduced. The idea was a system of progressive punishment were the offender would have the possibility to work his way out from the closed regime out into the open (Larsson 1993 a).

In the report "A new foundation for the Probation Service" (NOU 1993:32) a few important changes to the probation service was recom-

mended. A closer organisational integration into the penal system was one topic; another was the use of the apartment houses (hybelhusene) as a step in the differentiated sanction system. The pilot project of alcohol treatment programs and a more conscious use and clearer rules related to supervision of offenders was also recommended.

One main recommendation in the white paper "On the probation service" (St. meld. nr. 27 1997 - 98) is that the use of community sanctions should be further developed. Two "new" community sanctions were introduced: the intensive supervision program and electronic monitoring. It is decided that there will bee a pilot project with home detention and electronic monitoring (Innst. S. nr. 6. 1998 – 99). There was clear support in parliament for a pilot project based on the ”Swedish model” of electronic monitoring (Andersson 1997a, b). But there were political differences in the view of what group of offenders that should be monitored. The right wing parties saw electronic monitoring as an alternative to suspended sentences, while the majority wanted it as an alternative to a short prison term. In Sweden a pilot project started in 1994. EM was used as alternatives in cases were the accused had been sentenced to a shorter prison sentence of maximum 3 months. Certain categories were viewed as suitable for the sentence such as drunken drivers and minor violent offenders. A group of offenders were given the possibility to get their prison terms converted into home detention with electronic monitoring. A total of 575 offenders were supervised in the project (Andersson 1997a). The supervision was intensive, with a stress on narcotic and drug tests and ”home visits” of uniformed private probation officers. Breach of conditions were handled in very firm manner, the “rule breakers” had to finish of their term in prison. The Swedish experience is often described as a success, the reason for this is that they were effective in diverting offenders from prison and that “only” 6 % did breach conditions.

Intensive supervision programs have not been treated as a reaction in its own right. Instead intensive supervision programs (ISP) are viewed as a supplement to other sanctions like community service. Since ordinary supervision of offenders has been criticised because of its randomness and lack of control ISP are seen as a substitute for the old sanction. ISP's are presented as intermediate sanctions, as responses in-between conditional and unconditional prison.

The white paper represents a final shift in perspective and ideology in the sanction system. The move towards a new pedagogic treatment ideol-

ogy is complete. The guiding star for the work with offenders is to implement different programs that seek to treat the lack of social and cognitive skills of the offenders. "The main idea is that the individual is responsible for his actions and that most of what we call crime is committed by irresponsible individuals whose way of thinking is wrong." (Larsson, 1999b p. 13) Similar ideas have been the ideological foundation for work with offenders on community service by the probation services since the 80s. Ideas from Reality therapy (Glasser 1977) and Consequence Pedagogic (Bay 1977) have influenced the probation service.

"Both inside and outside the prison there is no much talk of different treatment programs for offenders. The Cognitive Skills, or "New Start" as it is labelled in Norway, is now in use in the prisons. At the same time this model is also used on released prisoners for their readjustment into the society. There are different programs for sex offenders and drunken drivers that can be given as a community sanction on release from prison. Reality therapy and consequence pedagogic which is the ideology behind the probation officers work on community service share similarities with the mentioned treatment programs." (Larsson 1999b, p. 13)

7. The rise and fall of the Community Service, obstacles and second thoughts

7.1 CSOs compared with other sanctions

When Community Service was introduced in 1984 it was primarily described in positive terms by the media and in public. There has been a steady growth in use of community service since the start. The increase was slow in the beginning, after the sanction was introduced on a national scale in 1989 the rise was steep. The top was reached by the mid 90's followed by a dramatic decrease in numbers.

Table 2. Numbers of CSO per year.

Year:	1984	1986	1989	1991
Number:	24	46	268	760

Year:	1994	1996	1998	2000
Number:	1020	900	759	557

Source: Larsson 1993a and 1999b.

If these numbers are to make any sense we must compare them with the developments of other sanctions. There has been a slow but steady increase in the use of prison in the same period, an increase in the use of ticket fines and a small reduction in the use of suspended sentences. The total numbers of offenders in prison per day has grown from 1797 in 1980 to 2605 in 1995 (Larsson 1999b). To get a picture of the use of sanctions in Norway we need to know the distribution in the use of different penal alternatives. In 1996 the use of sanctions in criminal cases looked like this:

Table 3. Sanctions in criminal cases 1996[8].

Total	18.175
CSO	830
Ticket fine (forelegg)	5.730
Fine (bot)	502
Suspended sentence	53
Conditional imprisonment	2.174
Conditional imp. and fine	2.629
Unconditional imprisonment	4.615
Unconditional and conditional imp.	1.514
Security measures (sikring)	30

Source: Norwegian Crime Statistics 1996.

7.2. *A Punitive turn?*

Recent years there has been a tightening of the rules regulating CS. There has been a cry for a more punitive community service. This was first clearly seen when the sanction became an ordinary penalty like prison, fines and detention in the penal code in 1991. Community service was a pilot project from 1984 to 1991. It was viewed as an alternative that could

[8] The number of CSOs in 1996 differs in table 2 and 3. The reason for this is that the figures in table 2 is the number of persons who have been doing Community Service many of these was sentenced in 1995. In table 3 we get the number of CS sanctions sentenced by the courts in 1996.

reduce the strains on the prison system, the prison "queues"[9] and give suitable offenders a more constructive term than incarceration. There also seemed to be an agreement on the form and limitations of the penalty. It should not be used for petty offenders but for burglars, car-thieves and property offenders, but even violent and narcotic offenders could be sentenced to the sanction (Røstad 1991). The sentence should be the maximum of 1 year and 240 hours of service. In the process of passing the law concerning CS in 1991 there were political protests from the Conservative Party (H) and the right wing populist party (Frp), but also the Social Democrats (AP) joined in. They wanted to get rid of the 240 hours limit pointing among other factors to the great number of unemployed offenders. These, among others, needed to be controlled in a tighter fashion. The result was a raise of the maximum hours to 360.

The formulation that CS should be an alternative for acts that otherwise would be punishable to unconditional imprisonment was changed. This was simply done by removing the word unconditional from the text. Now the text reads (Penal Code § 28a): "Community service for a period not exceeding 360 hours may be imposed for criminal acts that would otherwise be punishable by imprisonment for a term for a term not exceeding one year." So after 1991 CS can be used as an alternative between conditional and unconditional imprisonment, as an intermediate sentence. Another question is if it is used in this way. This question is hard to answer in a qualified way because of lack of research.

7.3. The Probation Service, from help to control

There has been a transformation of the Norwegian probation service the last 10 years from a helper / controller profession towards a role more as "pure" controller. The Probation service officers used to have an identity as social workers, most of them still are by profession. The control of the Probation officers was viewed as a logical extension of their role as the helper. The everyday control therefore usually has a more informal character, but the hard end of the control, the threat of prison, was clearly seen by both offenders and critics (KROM).

The traditional critique of the probation service was that they were prison officers dressed like social workers. It was argued that there were

[9] In 1992 there was 4295 sentences awaiting imprisonment, this with a daily population of approximately 2400 prisoners (LARSSON 1993).

serious hazards in combining help and control. The probation service should tone down their control functions or leave them to others. In 1998 the world looks quite different than the liberal 70's. There is no longer talk about the probation service delivering help, there are mainly the control tasks left. St. meld. nr. 27 1997 – 98 recommend that the probation service is to be viewed as a totally integrated part of the penal system. The probation service is to be viewed as an extension of the prison service and their line of work. The help and care dimensions of the social worker is no longer the main goal, this is left to agencies outside the penal system (NOU 1993: 32).

The Probation service has got new control tasks with the new sanctions and treatment programs presented above. It is also recommended that they get more effective means to react on breach of conditions of the suspended sentence. It is complained that the probation service has no effective means to control the offenders. Short-term imprisonment, up to 7 days, is seen as a suitable tool for the probation service to use on unruly offenders (St. meld. nr. 27. 1997 – 98). Simultaneously there has been a turn towards new perspectives on crime, or should I say the criminal. The move has gone from explanations that underline crime as a social problem caused by social and individual factors towards theories focusing on the criminal. Crime is seen as the result of the offender's lack of cognitive and personal qualifications. This way we have got a new breed of the "good old" treatment ideology making its way into the penal system again. I will not go into these programs here, but only point out one important consequence of these pedagogic programs for the work of the probation service. These programs seem to fit as hand in glove for the service in the search for a new "meaning of life". These programs give them something that "works" and give them options that can be done. They are the answer in a problematic situation where the officers have been reduced to controllers while they see themselves as helpers. Now control can be seen as help. Hard measures are handed down in the best interest of the offender - "you must learn to behave and take the consequences of your acts." The Probation Service ends up as administrators of control; their main goal now is to get the work (punishment) done.

In this we see a new, at least for Norway, probation service emerging before our eyes. Prison wardens in the "free" society transpose the prison into the community (Foucault 1977). A service that started as private philanthropic groups helping released prisoners to readopt into society are now

the states controllers overlooking the implementation of penal measures inside society. The informal and personal form of control between offender and probation officer is gradually transformed to formal impersonal "by the book" control. This description share basic similarities with Cohens (1985) "visions" of the modern control-society. This is a widening and tightening of the net of social control.

7.4. Arguments for tightening up.

The movement towards a tighter control is politically motivated. The last years there has been sensational media coverage of community service being used in rape and robbery cases. There have also been critical articles on the use of the sanction – "Sentenced to drive racing cars", "Waffelbaking is not punishment" are news-headings. What the full effect of the coverage might be is not easy to say, but there is reason to believe that it is has had some influence on the negative attitudes towards community service. There are various reasons for the move towards tighter rules. The argument from the professionals working inside the penal system has been the need to make community reactions trustworthy. If community service is to be viewed as a serious penal measure it must be restrictive and must demand some efforts from the offender. The control must be tight so he's not committing new crimes and he must be supervised in an intensive manner so he does his work (we can't trust him).

There has been a drop in the number sentenced to community service recent years (table 2). One reason for this might be that there is a reduction in recommendations by the probation service. There has been a tendency to pick out the "success cases" for community service, leaving the troublesome drug-addicts and hopeless recidivists. It might also be that the police send over a reduced number of cases to the probation service or that the courts don't view community service as a "trustworthy" alternative anymore. Most likely there is a combination of these factors where the work of the police has been of greatest importance.

Others argue that the community sanctions shall not be used contrary to the feeling of fair justice in the population. If hard-boiled criminals are not met with tuff reactions that mirror the evil done then the "man in the street" will react. Therefore work as punishment shall be toil, it shall be painful - not fun. It seems like arguments for community sanctions must be backed by recommendations of tighter control. If not the public, and the

right wing parties won't buy it. So there are pragmatic reasons for this movement. At the same time there has been questions raised about the effects of the community service. It has been pointed out that it does not reduce the recidivist rate (Hansen 1997). The rate seems to be identical if the offender gets prison, a suspended sentence or community service. So it does not make the offenders better. Some see this as an argument for tighter control and use of more intensive work with more hours of penalty (Hansen 1997).

Few have yet questioned this development. Not the public, pressure groups or probation officers, and why should they complain? Few have asked if this is a wise or a good move or questioned the effects of this development on the society, offenders and probation officers. It might be argued that closer control of the offenders isn't that bad. There must be some good reasons for these new proposals and measures. How you view the changes is certainly dependent on who you are and the sort of values you think should guide the use of punishment. What the full effects of these changes will be is it to early to be sure about. There will, of course, be different effects for different groups and parties. Offenders, victims, probation officers, judges, prisoners, politicians will all be affected in different ways. There are at this moment many questions, but few clear answers.

Will the recidivist rate drop if the control is tighter? My guess is that it won't (Larsson 1999a). Will the offender gain in other ways by the new sanctions and measures? The answer seems to be both yes and no. Some will certainly like to serve their sentence at home, not in a prison if this is the option. But as Worrall (1997) has pointed out there is also limits to how punitive community sanctions the offenders will tolerate. In the search for more "trustworthy" and tighter controlled sanctions we might overestimate the price the offenders are willing to pay for not going to prison. In Sweden quite a few of the offenders (28%) turned down the offer of electronic monitoring as alternative to a short prison sentence (Andersson 1997a).

What will the effects be for the probation service? What will they gain or lose? They will probably get more resources, higher status and so on when they are transformed to more "pure" controllers. Some will find the new technological developments exciting. Electronic devices and bracelets are often more fun than unpleasant work at the street level. The probation officer can be more of an administrator of control, this gives power. This work is also easier to measure than "soft" supervision. There are nearly

unlimited possibilities to quantify this activity. That is, the possibilities of statistics production are huge. Statistics are good for many reasons. One is documenting work done (and not - done), argumentation by numbers and per cent is easy to understand. On the other side, for probation officers who view themselves as social workers with responsibilities towards their clients, this new development must feel like a threat. The necessary trust in the relationship between offender and supervisor is harder to establish when the personal contact is reduced to monitoring and control of behaviour.

Few have questioned the consequences of the changes on the penal system. The net-widening effect is already mentioned. Another development might be in the direction of what Bottoms (1977) labelled bifurcating. The community sanctions will be for the good guys while the "mad and the bad" will get prison. The hard end of the system might deteriorate into closed units for the hopeless. Another possible consequence of the growth of community sanctions and the stress on control is that there will be a flow of offenders who don't comply with their conditions who will serve the rest of their sentences in prison. This will not reduce the numbers in prison. Experiences from countries where community sanctions are more frequently used, like the US often shows that a substantial number of the prisoners are "rule breakers" (Christie 1992, Petersilia 1998). The norm is that community sanctions work as a supplement, not as a replacement for the use of prison. It might be argued that the growth in use of prison would have been greater had it not been for the introduction of community alternatives. But it might also be that community sanctions are alternatives for the use of fines or suspended sentences. In Norway there has been a steady growth in the use of imprisonment for the last 20 years, this pattern has changed for Community Service from increase until 1994 to a drop in sentences recent years. The number of suspended sentences has declined slowly in the same period (Larsson 1999b).

7.5 From Community Service to Community Punishment

In the last years there has been important changes concerning community sanctions in Norway. One that already is mentioned is the dramatic drop in the use of Community Service with nearly 50% from the top in 1994 with 1020 sentences to 557 in the year 2000 (Larsson and Dullum 2001). The explanation for this development seems to be a reduction of cases sent

from the Police to the Probation Service for a social inquiry report. But why do the Police sent over fewer cases? One reason might be that Community Service often is "forgotten" by the prosecutors when they are considering a suitable sanction. This "absentmindedness" has to do with the working conditions of the Police prosecutors who often are young "right out of school" who often have tremendous workload of cases to deal with. At the same time the pressure and focus from the central authorities, the Ministry of Justice, has moved on from Community Service to other sanctions and topics. Until the mid 90s community service was "the big thing", today it is just another sanction.

The Probation Service has undergone important changes in ideology and organization in recent years. They have now formally merged with the Prison Service (Kriminalomsorg i anstalt). The reason for this is the idea that they both are in the field of penal control, and that their tasks in a more diversified penal system are basically similar in nature. Their main duty is to control and sanction, not help and guide.

The most significant change happened in 2001 when Community Service was integrated in the new Sanction Punishment, "samfunnsstraff" §28 in the Penal Code (Ot. prp. Nr 5 2000 – 2001. It is no longer up to the courts to sentence the offenders to specific sanctions. Community Punishment will be imposed by the court, but the specific content of the sanction will be decided by the Probation Service. It may include and be combinations of ISP, electronic monitoring, Community Service or other programs. At the same time the maximum level of hours of community service was raised from 360 to 420. The reason for this increase is the political will to make the sanctions more punitive and intensive. Some of the sanctions in the Community Punishment are not alternatives to prison, or very short prison terms. With the introduction of Community Punishment we have taken the final step in the creation of an intermediate sanction in Norway.

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Community Sanctions in Polish Penal Law

BARBARA STANDO-KAWECKA

1. Change in the penal policy in Poland after 1989

On 6 June 1997, three new codes were introduced in Poland: the Penal Code, the Code of Penal Procedure and the Penal Executive Code[1]. The effective date for the new codes was set for 1 September 1998. The need for a thorough and complex reform of the penal law system became especially urgent after the political breakthrough that took place in Poland in 1989. The penal policy developed earlier was characterized by a high level of repression and was based on the wide application of the penalty of liberty deprivation. According to statistical data for 1970-1987, each year the number of prisoners in Poland averaged 100,000. 1973 was the record year in this respect, with 125,000 prisoners. Imprisonment rates (per 100,000 inhabitants) ranged between 214 in 1984 and 372 in 1973. The existence of such a large prison population was connected with, among other things, the wide application of pre-trial detention and a high percentage of penalties of unconditional deprivation of liberty. At the same time, unconditional deprivations of liberty accounted for 30 - 40% of all adjudged penalties.

Contrary to west European countries, a fine as a separate penalty did not play a major role and was imposed in only 10-20% of cases[2].

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[1] POLISH OFFICIAL JOURNAL OF LAWS AND STATUTES (DZIENNIK USTAW) OF 1997: NO. 88, item 555; No. 90, item 557.

[2] For more information on the penal policy in Communist Poland, cf. JASINSKI, J.: Przemiany polityki karnej sadów powszechnych rozwijanej na tle przepisów nowej kodyfikacji karnej /1970-1980/ (Changes in the Penal Policy of General Courts Developed against the Background of the New Penal Codification /1970-1980/). Archiwum Kryminologii (Criminology Archives) 1982, volume VIII-IX, 25-150 and by the same author: Obraz polityki karnej lat osiemdziesiatych i poczatku lat dziewiecdziesi-

Despite the work done on the thorough reform of the penal law, after 1989 numerous resolutions updating the regulations of the Penal Codes were passed in Poland, in order to get rid of the most glaring regulations in the new social and political reality. The major changes included: abolition of property confiscation, repeal of regulations on the obligatory tightening of deprivations of liberty imposed on recidivists, introduction of the statutory moratorium on capital punishment, and the parallel reintroduction of life imprisonment. Moreover, after 1989 significant changes were introduced in the jurisdiction of courts. As a result, there was a decrease in the percentage of unconditional deprivations of liberty imposed. However, among all penalties imposed an increase could be noticed in the percentage of persons fined (from 18.7% in 1988 to 27.4% in 1997) and the number of deprivations of liberty with conditional suspension of execution (from 36.9% in 1988 to 55.2% in 1997). After the Penal Code of 1997 came in force, this is since 1 September 1998, a further increase in the percentage of suspended imprisonment amounted to 59.9%. The proportion of fines, however, has diminished significantly (in 1999 – 19.1%). Statistical data concerning penalties imposed on offenders in 1988-1999 are presented in Tables I and II.

1.1. Penal Code of 1997

The new Penal Codes passed in 1997 completed the process of reforming the penal law in Poland, which aimed to adjust the law to the standards of a democratic legal state. The new Penal Code has a thoroughly updated system of penal sanctions and rules for imposing them. A changed catalogue of penal sanctions is based on the assumption that a rational penal policy requires limitation of the application of the penalty of unconditional deprivation of liberty and the development of a system of non-custodial penalties and penal measures[3]. A negative assessment of the penalty of depriva-

atych /1980-1991/ (The Overview of the Penal Policy in the Eighties and the Beginning of the Nineties /1980-1991/). Archiwum Kryminologii (Criminology Archives) 1993, volume XIX, 27-105; STANDO-KAWECKA, B.: Die Strafvollzugsreform in Polen nach 1989. Zeitschrift fur Strafvollzug und Straffälligenhilfe 5 (1997), pp. 271-272.

[3] ZOLL, A.: Zalozenia polityki karnej w projekcie kodeksu karnego (Premises of the Penal Policy in the Draft of the Penal Code). Panstwo i Prawo (State and Law) 5 (1994), pp.10-11; BUCHALA, K.: System kar, srodków karnych i zabezpieczajacych w projekcie kodeksu karnego z 1990 r. (System of Penalties, Penal and Preven-

tion of liberty is justified both by the high costs of its execution and the negative effects of penitentiary isolation, such as development of prison subculture, de-socialisation and stigmatisation. Limiting the application of the penalty of deprivation of liberty and moving towards non-custodial penal sanctions helps to avoid the negative results of being in prison and is less expensive, if we take into consideration the financial and social costs of liberty deprivation[4].

What is also important is the fact that some non-custodial penal sanctions have a compensatory character and help to resolve the social conflict, which emerged between the offender and the victim as a result of the criminal act. In accordance with the UN Declaration of 29 November 1985, the European Convention of 24 November 1988 on the restitution and compensation for crime victims, and the Resolution of the European Council No. 11/85, the reform of the penal law and the penal procedure carried out in Poland also aimed to strengthen the protection of the victim in the penal proceedings. The term 'community sanction' is not used in Poland. However, during many years of working on the preparation of drafts for the new penal codification, a lot of attention was paid to work carried out for the public good. Suggestions of new solutions in this area were formulated on the basis of the criticisms of solutions adopted in the 1969 Penal Code.

2. Work for the public good in the 1969 Penal Code

2.1. A system of penalties according to the 1969 Penal Code

The 1969 Penal Code divided penalties into primary and supplementary penalties. The term 'supplementary penalty' was connected with the fact that such penalties could, as a rule, be adjudged alongside primary penalties. Primary penalties included: 3 months to 15 years of deprivation of liberty or 25 years of deprivation of liberty, limitation of liberty for a period of between 3 months and 2 years, and a fine of a fixed amount. A primary penalty of an exceptional character, provided for in the case of the most serious crimes, was the death penalty. Since 1988, the death penalty has not

tive Measures in the Draft of the 1990 Penal Code). Pastwo i Prawo (State and Law) 6 (1991), pp. 20-21.

[4] SZEWCZYK, M.: Czy i jaka alternatywa dla kary pozbawienia wolnosci? (Whether and What Kind of Alternative to the Penalty of Liberty Deprivation?). Przeglad Prawa Karnego (Penal Law Review) 7 (1992), pp. 61-62.

been carried out in Poland, even though the statutory moratorium for the carrying out of this penalty was introduced only in 1995.

Among supplementary penalties the Penal Code enumerated: deprivation of civic rights, deprivation of parental or guardian's rights, the ban on holding certain offices, performing a certain profession or certain activities, the ban on driving, the confiscation of property (this supplementary penalty was repealed in 1990), the forfeiture of objects and making the sentence publicly known.

The 1969 Penal Code in many places provided for the obligation to work for the public good. However, work for the public good was not a self-standing penalty, but one of the obligations, which could be imposed within the framework of probationary measures or that of self-standing penalty.

2.2. *Work for the public good within the framework of probationary measures*

The term probationary measures is used in Polish legal publications in many different ways[5], e.g. to define penal measures connected with putting the offender on trial. The 1969 Penal Code provided for three kinds of such measures: conditional discontinuance of penal proceedings, conditional suspension of the execution of a penalty, and conditional earlier release.

2.2.1. *Conditional discontinuance of penal proceedings*

According to Article 27 of the 1969 Penal Code, the penal proceedings in the case concerning a crime punishable by deprivation of liberty for a maximum of 3 years could be conditionally discontinued if the degree of social danger of the deed was not high, the circumstances in which it was committed were unambiguous, and the criminal prognosis concerning the offender who has never been penalized for the crime before was positive. During the preparatory proceedings, the conditional discontinuance of the proceedings fell within the public prosecutor's competence. The accused, however, had the right to appeal the decision in front of the public prosecutor on the conditional discontinuance of the proceedings. The appeal resulted in bringing the case to court. After bringing the charge, the decision

[5] For more information on the meaning of the term probationary measures cf.: SKUPINSKI, J.: Warunkowe skazanie w prawie polskim na tle porównawczym (Conditional Sentencing in the Polish Law – Comparison). Warszawa 1992, pp. 17-18.

on the conditional discontinuance of the proceedings fell within the competence of the court, which considered the case. The legal character of the conditional discontinuance of the proceedings gave rise to numerous disputes and controversies. This measure was defined as a conditional conviction, a kind of penal responsibility not resulting from the conviction or else as a conditional resignation from penalizing the perpetrator of a crime[6]. The trial period in the event of conditional discontinuance of the proceedings lasted from 1 to 2 years. The public prosecutor or the court conditionally discontinuing the penal proceedings could oblige the offender to redress the damage, apologize to the victim and perform specific work for the public good.

The Penal Code did not specify what work for the public good the offender was to perform and when. The type of work and the time of its performance were defined by the court or the public prosecutor who imposed the obligation on the perpetrator. According to Article 28 § 4 of the Penal Code, the obligation to work for the public good could not exceed 20 hours. In the doctrine it was stressed that the obligation to work for the public good has an educational and verifying character: its aim is primarily the educational influence on the perpetrator of a crime, and, through observation of the way in which this obligation is fulfilled, the verification of the accuracy of the prognosis made[7]. Avoiding the fulfilment of the imposed obligations during the trial period, the obligation to work for the public good included, constituted the basis for the reopening of the conditionally discontinued proceedings, which were carried on according to general rules.

2.2.2. *Conditional suspension of the execution of the penalty*

Another probationary measure, i.e. conditional suspension of the execution of penalty, according to the 1969 Penal Code was connected exclusively with the penalty of liberty deprivation and constituted a kind of conditional conviction. In the event of sentencing a person to deprivation of liberty for a period not exceeding 2 years (for an intentional offence) and not exceeding 3 years (for an unintentional offence), the court in its decision could

[6] BUCHALA, K., CWIAKALSKI, Z., SZEWCZYK, M., ZOLL, A.: Komentarz do kodeksu karnego. Czesc ogólna (Commentary to the Penal Code. A General Part.). Warszawa 1994, p. 218.

[7] BUCHALA, K., CWIAKALSKI, Z., SZEWCZYK, M., ZOLL, A.: (see point 6), p. 226.

conditionally suspend the execution of this penalty for a trial period of 2 to 5 years.

2.2.3. *Conditional earlier release*

Similarly to conditional suspension of the execution of penalty, also the third probationary measure accounted for in the 1969 Penal Code (i.e. conditional earlier release) referred to the penalty of liberty deprivation only. This measure was the modification of the decision on the penalty of liberty deprivation at the stage of its performance. The decision on the earlier conditional release of the prisoner was taken by the penitentiary court on his/her completion of an appropriate part of the sentence: (1/3, 1/2, 2/3, or 3/4, depending on the category of prisoner; the minimum was 6 months). The length of the trial period in this case depended on the time remaining before the completion of the penalty. The trial period could not be shorter than 1 year or longer than 5 years.

2.2.4. *Conditions*

With reference to conditional suspension of the execution of penalty and conditional earlier release, the Penal Code provided for two forms of these measures: simple (non-probationary) and probationary, combined with putting the convicted person under the supervision of an appointed person, a social institution or organization, as well as the imposition of obligations on him/her. Among the obligations that could be imposed for the trial period, the Penal Code enumerated the following:

a) redressing in part or in full the damage caused by the crime,
b) apologizing to the victim,
c) the convicted person's fulfilment of the obligation to support another person,
d) performing certain work or services for the public good,
e) performing a paid job, learning or undergoing professional training,
f) refraining from alcohol abuse,
g) undergoing treatment,
h) staying away from certain surroundings or places.

The list of duties was not complete and the court could oblige the convicted person to comply with other forms of appropriate conduct during the trial period, if that would prevent another perpetration of the crime.

2.2.5. *The obligation to work for the public good*

The obligation to work for the public good was limited, similarly to conditional discontinuance of the penal proceedings, to 20 hours. According to the view consolidated in the doctrine, the obligation to work for the public good adjudged within the framework of those probationary measures had an educational and verifying character[8]. Also in the Supreme Court's jurisdiction it was stressed that work imposed within the framework of probationary measures should primarily be of an educational character. If during the trial period the convicted person failed to fulfil the obligation to work for the public good (e.g. failure to fulfil other obligations), such behaviour could constitute the grounds for the decision to carry out the penalty which was conditionally suspended, or to repeal the conditional earlier release. It should be also added that the court which applied these two probationary measures, could expand or change the obligation to work for the public good during the trial period, release the convicted person from the fulfilment of this obligation, or - on the contrary - impose on him/her an obligation to work for the public good, if it had not been imposed in the sentence or in the decision on the conditional earlier release.

During the period when the 1969 Penal Code was in effect, the penalty of liberty deprivation with conditional suspension of its execution was one of the most frequently adjudged non-isolation penalties. After 1989 we could still observe a considerable increase in the number of adjudged penalties of this type. In 1991 the proportion of this penalty among all adjudged penalties exceeded 50%, and in the following years it increased to 60% (see the relevant statistical data in Tables I and II).

The analysis of the penal policy in the years 1980-1991 shows that adjudging the penalty of liberty deprivation with the suspension of its execution in approximately every third case was connected with putting the convicted person under supervision (usually the supervision of a probation officer, and in exceptional cases – of a social organization). Every third or fourth person sentenced in this period to the penalty of liberty deprivation with the suspension of its execution was burdened with obligations. Obligations were imposed on the majority of convicted persons put under supervision and on some convicted persons in the case of whom the supervision was not adjudged. The most often imposed obligations were: refrain-

[8] SZEWCZYK, M.: Kara pracy na cele spoleczne na tle rozwazan o przestepstwie i karze (The Penalty of Work for The Public Good against the Background of Considerations on the Crime and Penalty). Kraków 1996, pp. 195-196.

ing from alcohol abuse, performing a paid job or learning, supporting the family, and redressing the damage caused due to the crime. The obligation to work for the public good was rarely imposed by courts[9]. In the years 1992-1995 the situation did not change much. The statistical data in Table III indicates that supervision was still used in the case of about one-third of persons sentenced to the penalty of liberty deprivation with conditional suspension of its execution. Among obligations imposed on the convicted persons was the obligation to work for the public good, however, it did not play a major role. Also in the case of conditional earlier release, penitentiary courts imposed this obligation on convicted persons only sporadically[10].

2.3. *Work for the public good within the framework of the primary penalty*

The 1969 Penal Code introduced a primary penalty, which had not been known before: the penalty of liberty limitation. The regulations of the Penal Code concerning this penalty were slightly changed by the act of 1988[11], but these were not the changes in the essence of the penalty. The penalty of liberty limitation was similar to the penalty of correction work known in the jurisdiction of the Soviet Union[12]. It was provided for with reference to perpetrators of crimes with a relatively low level of social danger, and the introduction of this penalty aimed to limit the use of short-term penalties of liberty deprivation. In the Penal Code, the penalty of liberty limitation appeared alternatively with the penalty of a fine and that of liberty deprivation of up to 1 or 2 years. Moreover, the penalty of liberty limitation could be adjudged in the event of applying an extraordinary remission of the pen-

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[9] The analysis of the penal policy in Poland in the years 1980-1991 with reference to the penalty of liberty deprivation with the conditional suspension of its execution is presented in detail by JASINSKI, J.: Obraz ... (The Overview...) (see point 2), pp. 72-74.

[10] LELENTAL describes the obligations imposed by penitentiary courts within the framework of conditional earlier release, S.: Wyklad prawa karnego wykonawczego z elementami polityki kryminalnej (The Exposition of the Executive Penal Law with the Elements of Criminal Policy). Lódz 1996, pp. 180-182.

[11] Polish Official Journal of Laws and Statutes (Dziennik Ustaw) of 1988: No. 20, item 135.

[12] For more information on the penalty of correction work in the jurisdiction of the Soviet Union and its influence on the shape of the penalty of liberty limitation in the Polish penal law cf. ANDREJEW, I.: Polskie prawo karne (Polish Penal Law). Warszawa 1983, pp. 263-265.

alty and in cases where the crime was punishable only by deprivation of liberty, on condition that the upper limit of the sentence did not exceed 5 years, and the penalty imposed was not higher than 1 year of liberty deprivation.

The penalty of liberty limitation could be adjudged for the period of 3 months to 2 years. The following elements constituted this penalty:

a) the ban on changing the permanent address without the court's permission,
b) the obligation to perform a job indicated by the court,
c) the ban on the right to hold offices in social organizations,
d) the obligation to give explanations concerning the course of the penalty.

Furthermore, the penalty of liberty limitation could be connected with such obligations as redressing the damage caused by the crime and apologizing to the victim, which were, however, adjudged on the facultative basis.

The 1969 Penal Code provided for three forms of the obligation to perform work specified by the court. This obligation could consist of:

a) performing unremunerated, supervised work for the public good in an appropriate public work establishment or a public institution of 20 to 50 hours per month,
b) leaving the person who has worked in a public work establishment in the same post, and deducting 10 - 25% of his/her remuneration for the work performed for the benefit of the State Treasury or for a public purpose specified by the court,
c) performing work in a public work establishment by the person not employed so far, on the basis of the court's decision, with the parallel deduction of remuneration for work, as in point b.

Certain sums deducted from the remuneration of the convicted person during the performance of the penalty of liberty limitation practically constituted a fine paid in instalments[13]. Only the first form of fulfilling the obligation to work, which consisted of unremunerated, supervised work for the public good, was similar to community service used in west European countries. Unremunerated work could be performed in the public work establishment specified directly by the voivod, or in the public institution specified by the court, on receiving permission from this institution. In practice, this form of work obligation was fulfilled in such establishments

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[13] WOLTER, W.: O potrzebie nowelizacji ustawodawstwa karnego (On the Need to Update the Penal Jurisdiction). Nowe Prawo (New Law) 4 (1981), p. 85.

as housing & town planning enterprises, enterprises responsible for the upkeep of city green areas, and city cleaning services. Public institutions included numerous care and education institutions, schools and kindergartens, and charity institutions, including those run by church organizations and associations.

The kind of work to be performed could be specified by the court in its sentence or upon directing the decision to be carried out. If the court did not specify the kind of work to be performed, the establishment or the institution in which the convicted person was to perform the work specified it. During the performance of work, the court had the right to adjudge changes in the way in which the work obligation was to be fulfilled, e.g. to change unremunerated supervised work for the public good into remunerated work in a public work establishment with the deduction of a part of the remuneration, or vice versa. Changes in the number of hours of unremunerated work for the public good were considered unacceptable, as were changes to the amounts deducted from the remuneration for work[14]. Considering the fact that the penalty of liberty limitation could be adjudged for a period of between 3 months and 2 years, and the number of hours of unremunerated work for the public good amounted to 20 to 50 per month, the minimum amount of unremunerated work related to the penalty of liberty limitation amounted to 60 hours (20 hours x 3 months), and the maximum to 1,200 hours (50 hours x 24 months).

The convicted person's avoidance of performing the penalty of liberty limitation, understood in the jurisdiction of the Supreme Court as "such behaviour of the convicted person which expresses his/her negative attitude to this penalty or obligations imposed in connection with it, and thus it results from his/her ill will, and not from other reason, whether objective or even dependent of him/her[15]" resulted in the imposition of the substitute penalty. The substitute penalty was a fine and, in exceptional cases, that of liberty deprivation. On defining the substitute penalty of liberty deprivation, the assumption was that one month of liberty limitation was equivalent to 15 days of liberty deprivation. The substitute penalty could not exceed the upper limit of the penalty of liberty deprivation provided for in the case of a given crime, and if the crime was not punishable by such a pen-

[14] Resolution of the Supreme Court of 27 June 1980 – VI KZP 16/80, Jurisdiction of the Supreme Court – PENAL AND MILITARY CHAMBER 9 (1980), item 71.

[15] Resolution of the Supreme Court of 20 June 1979 – VI KZP 6/79, Jurisdiction of the Supreme Court – PENAL AND MILITARY CHAMBER 9 (1979), item 89.

alty, it could not exceed 6 months. The person sentenced to the penalty of liberty limitation who completed at least half of the penalty, and who did not violate legal order during that time but distinguished him/herself at work and fulfilled the obligations imposed on him/her, could be unconditionally released by the court from the completion of the penalty.

In practice, the penalty of liberty limitation did not satisfy the hopes invested in it. The conducted research shows that the penalty of liberty limitation did not substitute the unconditional penalty of liberty deprivation, but other non-isolation penalties; i.e. the penalty of fine and that of liberty deprivation with conditional suspension of its execution[16]. Also the frequency with which courts adjudged this penalty was lower than expected. In 1970 (the first year that the 1969 Penal Code was in effect), the number of liberty limitations made up 6.2% of all sentences imposed[17]. In the following years, liberty limitation was adjudged slightly more often, and in the second half of the 1970s its use stabilized at the level of 12-14%. After a temporary drop in the frequency of using this penalty in the period when penal responsibility was made stricter after the introduction of martial law, in the years 1986-1988 the percentage of the adjudged penalties of liberty limitation increased and amounted to 14-17%[18]. The statistical data in Tables I and II indicates that after 1989, certain changes occurred in this area. There was a considerable drop in the number of persons sentenced to the penalty of liberty limitation and a drop in the proportion of all penalties that this penalty represented. In 1989 almost 10,000 persons were sentenced to the penalty of liberty limitation, which accounted for 10.5% of all convicted persons, whereas in the following years the number of persons sentenced to this penalty amounted to 5,000 - 7,000, and the proportion of the penalty of liberty limitation among all penalties adjudged dropped to 3.5-4%. In the late 1990s, however, there was a certain increase in the number of offenders sentenced to liberty limitation. In 1999, when the 1997 Penal Code was in effect, the proportion of liberty limitation among penalties imposed amounted to 7.6%.

[16] MELEZINI, M.: Koncepcja kary ograniczenia wolnosci w projekcie kodeksu karnego z 1994 r. (A Concept of Penalty of Liberty Limitation in the Draft of the 1994 Penal Code). In: HOFMANSKI, P. (ed.): Z problematyki prawa karnego (Issues of the Penal Law). Bialystok 1994, p. 9.

[17] KUBICKI, L., SKUPINSKI, J., WOJCIECHOWSKA, J.: Kara ograniczenia wolnosci w praktyce sadowej (The Penalty of Liberty Limitation in the Court Practice). Warszawa 1973, pp. 9 -27.

[18] JASINSKI, J.: Obraz ... (An Overview...) (see point 2), p. 55.

In the 1990s there were also important changes to the forms of the adjudged penalty of liberty deprivation. Until 1990 the most frequently adjudged penalty of liberty limitation was to leave the offender in the post he/she had held before in the public work establishment and deduct a part of his/her remuneration for work during the completion of the penalty. In 1990, of all persons sentenced to liberty limitation, most were sentenced to perform unremunerated work for the public good. The statistical data presented in Table IV indicates that this trend initiated in 1990 developed in the following years. Among all the adjudged penalties of liberty limitation, the percentage of the penalty, which consisted of performing unremunerated work for the public good, increased in the years 1990-1995 from 56.1% to 97%. The penalty of liberty limitation connected with deducting a part of remuneration of the offender previously working in the public work establishment was losing its importance. The form, which consisted of delegating the offender to work with the obligation to deduct certain sums, disappeared altogether.

The reasons for these changes are mainly connected with the economic changes that have taken place in Poland. An increase in unemployment and a gradual diminishing of the state sector in the economy have resulted in the fact that the penalty of liberty limitation in both forms connected with deductions has become difficult to carry out. Moreover, delegating the convicted persons to unremunerated work in the public work establishment has become problematic, and delegating them to unremunerated work in public institutions has turned out to be relatively complicated, due to the lack of appropriate probationary services, which would prepare a report on the possibilities of performing such work.

2.4. Work for the public good as a substitute penalty for the unpaid fine

The 1969 Penal Code provided for the substitute penalty of liberty deprivation in the case of the offender not paying the adjudged fine. The court that imposed the fine on the offender also specified in its judgement a substitute penalty of liberty deprivation in the event of the offender not paying the fine on time. The upper limit of the substitute penalty of liberty deprivation was very high (3 years). A certain limitation on this penalty were the regulations which provided that the substitute penalty could not exceed the upper limit of the penalty of liberty deprivation with which a given crime was

punishable, and if the crime was not punishable with such a penalty, it could not exceed 6 months of liberty deprivation. Work for the public good as a substitute penalty for the unpaid fine was introduced only in 1995 on the grounds of the act updating the Penal Code[19]. According to Article 85 of the Code (after its amendment in 1995), if the offender did not pay the fine on time, and it was checked that it could not be obtained by way of execution, the court, on obtaining the offender's permission, could substitute the fine with publicly useful work. In such a situation the court specified the kind of work and its duration. The work could last a minimum 2 months and a maximum 3 years. If the offender did not agree to take up work, or if, in spite of agreeing, did not perform the work, the court adjudged the execution of the substitute penalty of liberty deprivation.

2.5. Suggested changes to the regulations concerning work for the public good during the preparation of the draft of the new Penal Code

The work on the preparation of the new penal codification lasted for a dozen or so years. During that time an animated discussion continued in legal publications both on the philosophy of penalizing and on the axiological assumptions of the new penal law, and particular legislative solutions. During this discussion, numerous comments and postulates were formulated with reference to work for the public good as an institution of penal law. Introduction of work for the public good as a substitute penalty for an unpaid fine was assessed positively in legal publications. Such a solution allows courts to not execute the penalty of liberty deprivation in the situation when in passing a sentence they decide that there are no grounds for imposing this penalty and do not adjudge it as a primary penalty. However, there were certain reservations concerning the duration of work, which according to the 1969 Penal Code could amount to 3 years and could constitute too heavy a burden for the convicted person[20].

What was negatively assessed was work for the public good as the obligation imposed within the framework of probationary measures. Probationary measures aim primarily to educate and re-educate, while work for the public good, which is an alternative to the penalty of liberty deprivation,

[19] Polish Official Journal of Laws and Statutes (Dziennik Ustaw) of 1995: No. 95, item 475.

[20] SZEWCZYK, M.: (see point 8), pp. 203-204.

has a mostly retributive character. In view of the different characters of these two institutions, the resignation from imposing the obligation to work for the public good was postulated in cases where probationary measures were adjudged. Such a solution was also influenced by the fact that the imposition of work for the public good violated the international agreements signed by Poland. The ban on forced work formulated in Convention No. 29 of the International Work Organization does not cover work imposed on a person as a result of this person being convicted by legal authorities. In Article 8 of International Pacts of Civic and Political Rights and in Article 4 of the European Convention on Human Rights, the notion of forced or obligatory work does not cover work required within the framework of the execution of penalty of liberty deprivation or during a conditional release. The regulations of the Polish penal law which enable the public prosecutor and the court to impose the obligation to work for the public good in case of conditional discontinuance of penal proceedings visibly contradicted the resolutions of these agreements. What also raised objections was the possibility of imposing the obligation to work within the framework of conditional suspension of the execution of liberty deprivation. In this case, though, it was possible to assume that conditional suspension of the execution of penalty of liberty deprivation constituted a certain way of executing this penalty. Such an interpretation allowed for the elimination of inconsistency with the ratified international agreements[21].

As far as the penalty of liberty limitation is concerned, the subsequent drafts of the Penal Code provided only for one form of this penalty, related to the performance of unremunerated, supervised work for the public good. Such shaping of the penalty of liberty limitation, similar to the community service order, which is present in the legislation of west European countries, was approved of in legal publications. What was also positively assessed was the suggestion concerning the reduction of duration of this penalty and the number of hours of work.

During the discussion on regulating the penalty of liberty limitation in the new Penal Code, a lot of attention was paid to the relation of this penalty to the international agreements which ban forced and obligatory work. The possible ways of solving this problem were considered: the requirement of the offender's agreement to the execution of penalty of liberty limitation or giving the offender the right to decline the performance of

[21] For information on criticisms of the obligation to work for the public good within the framework of probationary measures SZEWCZYK, M.: (see point 8), pp. 195-198.

work for the community's sake. The regulation included in the draft of the Penal Code which said that the place and the way of fulfilling the obligation to work was specified by the court on hearing the convicted person caused numerous reservations. At the same time, attention was drawn to the fact that considering the agreement of the offender awaiting the extent of the penalty as voluntary is problematic. Moreover, in the Polish legal system, which does not provide for separate decisions concerning guilt and penalty, the requirement of the offender's agreement to adjudging the penalty of liberty limitation would constitute a violation of basic proceedings guarantees. The draft which suggested the combination of the penalty of liberty limitation, putting the offender under supervision and imposing probationary obligations on him/her was received in different ways. Giving the probationary character to the penalty of liberty limitation could increase the possibility of an individual influence on the offender, but, on the other hand, it could increase the inconvenience of this penalty. Among the arguments put forward against the probationary shaping of the penalty of liberty limitation there was also one which said that the number of probationary officers in Poland does not allow for the introduction of this concept[22]

3. Penalties, penal measures and probationary measures in the new Penal Code

3.1. The system of penalties and penal measures

In the 1997 Penal Code, the division of penalties into primary and supplementary penalties was abandoned. Instead, a catalogue of penalties and penal measures was introduced. The terms primary penalties and supplementary penalties were connected with the system of sanctions in which sup-

[22] For information on the penalty of liberty limitation in the subsequent drafts of the Penal Code cf. MELEZINI, M.: (see point 16), 7-28; Skupinski, J.: Zakaz pracy przymusowej lub obowiazkowej na wolnosci a prawo karne (The Ban on Forced or Obligatory Work of Persons Enjoying Liberty and the Penal Law). In: SKUPINSKI, J., JAKUBOWSKA-HARA, J. (ed.): Standardy praw czlowieka a polskie prawo karne (Standards of Human Rights and the Polish Penal Law). Warszawa 1995, 186-190; WOJCIECHOWSKA, J.: Kara ograniczenia wolnosci w swietle projektów kodeksu karnego i wykonawczego z 1991 r. (The Penalty of Liberty Limitation in the Light of Drafts of the 1991 Penal and Executive Codes). In: WALTOS, S. (ed.): Problemy kodyfikacji prawa karnego (Problems of the Codification of the Penal Law). Kraków 1993, pp. 183-194.

plementary penalties could be imposed alongside the primary penalty. The new Penal Code provides for quite a wide range of possibilities of adjudging only the penal measure without imposing the penalty. The resignation from the term supplementary penalty is also to be an indication for the judge that in the new penal law, penal measures should be treated as measures of a rational criminal policy, which aim to redress the damage, deprive the criminal of the advantages and prevent crimes, and not to increase the repressiveness of the penalty.

3.1.1. Penalties

The 1997 Penal Code enumerates the following penalties: a fine, limitation of liberty (1 - 12 months), deprivation of liberty (1 month - 15 years), 25 years of liberty deprivation, and life imprisonment. In the new Penal Code, the death penalty has been abandoned. The catalogue of penalties in comparison with the 1969 Penal Code has been reversed in a sense that it covers penalties ordered from the most lenient to the most severe. Such ordering of penalties was a purposeful legislative solution which was to show to the judge that a more severe penalty may be adjudged only if there is no ground for adjudging a more lenient penalty. In Article 58 § 1 of the new Code, the rule of *ultima ratio* penalty of liberty deprivation was formulated. According to this regulation, if the act provides for the choice of the type of penalty, the court must adjudge the unconditional penalty of liberty deprivation only if another penalty or penal measure cannot serve the purposes of the penalty.

Contrary to the 1969 Penal Code, which provided for the fine of a fixed amount, the new Code introduced a system of day fines. The fine is imposed in two stages: first the number of daily rates is defined, and then the amount equivalent to one daily rate according to the individual abilities of the offender, in terms of property and earnings, is decided upon. According to Article 58 § 2 of the new Code, the fine is not adjudged if the earnings of the offender, his/her property situation or earning abilities justify the opinion that he/she will not pay the fine and it will be impossible to get it by means of execution.

3.1.2. Penal measures

The catalogue of penal measures includes the following: deprivation of civic rights, a ban on holding a particular office, performing a certain job or

certain business activities, a ban on driving, forfeiture of objects, the obligation to redress the damage, punitive damages, financial benefit and making the sentence known to the public. The redress of damage, punitive damages and financial benefit are new penal measures, with no equivalents among supplementary penalties in the 1969 Penal Code. The redress of damage in the new Code is a self-standing penal sanction, and in cases defined by the act may be even adjudged as the sole penal measure, without the imposition of the penalty. The obligation to redress the damage in part or in full is adjudged by the court following the motion from the victim or another authorized person in case of a conviction for a crime against life and health, the natural environment, safety in transport, property or economic turnover. In such a case, the victim does not have to take civil action (which was often left unexamined in the penal proceedings).

The legislators considered difficulties which might arise in connection with proving the extent of the damage and, therefore, instead of the obligation to redress the damage, the court may adjudge punitive damages for the benefit of the victim. Punitive damages are a lump-sum indemnity, and cannot exceed the amount equivalent to the lowest monthly remuneration for work multiplied by ten. In the cases specified by the Code, the court may also adjudge punitive damages for a particular public purpose connected with health care or environment protection.

In case of abandoning the imposition of the penalty and in other cases defined in the act, the court may adjudge financial benefit for a specific public purpose. The maximum amount of this benefit cannot exceed the lowest monthly remuneration multiplied by three. The financial benefit does not have a character of indemnity and does not substitute the obligation to redress the damage. The aim of adjudging such a penal measure is connected with the need to shape legal awareness, e.g. in the event of abandoning the imposition of the penalty, the adjudgement of the financial benefit is an external representation of the fact that the perpetrator has committed a prohibited act[23] .

3.2. Probationary measures

In a separate chapter of the new Penal Code there is a list of penal measures related to putting the offender on trial. These measures include: conditional

[23] Justification of the government draft of the Penal Code in: Kodeksy karne z 1997 r. z uzasadnieniami (The 1997 Penal Codes with Justifications). Warszawa 1997, p. 149.

discontinuance of the penal proceedings, conditional suspension of the execution of the adjudged penalty, and conditional earlier release. The common feature of these measures is that they exert an influence on the offender by putting him/her on trial and making his/her future dependent on the result of that trial. Behind the application of probationary measures there is an idea of giving a chance to the offender, so that he/she could adjust to living in society more quickly and at a lower public cost, and thus causing the resolution of the conflict which results from the crime[24].

3.2.1. Conditional discontinuance of the penal proceedings

Contrary to the provisions of the 1969 Code of Penal Procedure, which gave the right of conditional discontinuance of the penal proceedings to the public prosecutor, Article 66 of the 1997 Penal Code provides that the conditional discontinuance of the proceedings can only be applied by the court. According to the 1997 Code of Penal Procedure, if there are certain grounds for conditional discontinuance of the proceedings, the public prosecutor may, instead of bringing an accusation, bring to the court a motion for conditional discontinuance of the proceedings. In such a case, the court adjudges conditional discontinuance of the proceedings during the sitting, without conducting the complete legal proceedings. The accused may, however, object to the conditional discontinuance of the proceedings, which results in the examination of the case during the trial.

Among the premises for conditional discontinuance of the proceedings, the Penal Code enumerates the following: the guilt and the social harmfulness of the deed are not considerable, the conditions of committing the deed are unambiguous, and the attitude of the offender justifies a positive prognosis. The option of conditional discontinuance of the proceedings does not apply to offenders previously convicted of an intentional crime or to crimes punishable by deprivation of liberty for a period exceeding 3 years. If, however, the offender has reconciled with the victim and has redressed the damage or agreed with the victim how to redress it, conditional discontinuance may be applied to crimes punishable by deprivation of liberty for a period not exceeding 5 years.

The trial period in the case of conditional discontinuance of penal proceedings lasts from 1 to 2 years. In the new Penal Code, the conditional

[24] BUCHALA, K., ZOLL, A.: Kodeks karny. Czesc ogólna. (Penal Code. A General Part.). Kraków 1998, p. 477.

discontinuance of the proceedings has a clearly probationary character. The court may put the offender under the supervision of the probation officer, another trustworthy person, an association, institution or social organization. The task of the supervisors is to help the offender in social readaptation and to supervise the fulfilment of obligations imposed on him/her. The obligations imposed by the court aim to educate and verify the accuracy of the prognosis made. The necessary obligation is to redress the damage in part or in full. Moreover, the court may oblige the offender to inform the court or the probation officer about the course of the trial period, to apologize to the victim, to support another person, to refrain from alcohol abuse or the use of other intoxicants. Avoiding the supervision or the fulfilment of the obligations imposed may constitute the grounds for reopening the conditionally discontinued proceedings, which in such a case start anew according to general rules.

3.2.2. Conditional suspension of the execution of penalty

The range of applications of conditional suspension of the execution of penalty has been considerably expanded in the new Penal Code. This institution is applicable not only to the penalty of liberty deprivation, but also to that of liberty limitation and the self-standing fine. As far as the penalty of liberty deprivation is concerned, conditional suspension is applicable to the execution of the penalty adjudged which does not exceed 2 years. Particular rules apply to offenders who committed the crime together with other persons and then disclosed information about the committing of the crimes, the persons who committed them and the circumstances in which crimes were committed. It is even possible in such a case to suspend conditionally the execution of the penalty of liberty deprivation of up to 5 years. However, the Code provides for limitations in the application of conditional suspension of the execution of penalty with reference to repeat offenders and persons who have turned committing crimes into their permanent source of income or have committed a crime as a member of an organized group or a criminal group. The grounds for conditional suspension of the execution of the adjudged penalty is the court's opinion that despite the fact that the penalty will not be executed, its aims will be fulfilled and the offender will not commit another crime. The execution of the penalty is conditionally suspended for the trial period, which in the event of the penalty of liberty deprivation lasts from 2 to 5 years, and in the event of the penalty of fine or liberty limitation, from 1 to 3 years.

3.2.3. Conditions

The new Penal Code, like the previous one, provides for 2 forms of conditional suspension of the execution of penalty: simple and probationary. The latter is connected with the imposition of probationary obligations on the offender, and in case of conditional suspension of the execution of penalty of liberty deprivation, with putting him/her under supervision. When suspending the execution of the penalty adjudged in the sentence, the court may oblige the offender to:

a) inform the court or the probation officer of the course of the trial period,
b) apologize to the victim,
c) fulfil the obligation to support another person,
d) perform a paid job, learn or undergo professional training,
e) refrain from alcohol abuse and the use of other intoxicants,
f) undergo treatment, especially detoxification treatment or rehabilitation,
g) stay away from certain surroundings or places.

The court may also oblige the offender to redress the damage in part or in full. As in the 1969 Penal Code, in the new Code the catalogue of these obligations is not closed. The basic differences consist in the fact that the new Code does not provide for the obligation to work for the public good among obligations imposed within the framework of probationary measures, but it introduces a new obligation which consists of informing the court or the probation officer about the course of the trial period. The imposition of the obligation to undergo treatment (in practice, it is most often detoxification treatment) in the new Code depends on the agreement of the offender. Putting the offender under the supervision of a probation officer or another trustworthy person, association, institution or social organization is possible only in the event of conditional suspension of the execution of the penalty of liberty deprivation and may be connected with the imposition of probationary obligations alongside the adjudged supervision. The conditional suspension of the execution of penalty of liberty deprivation may also be combined with a fine of up to 180 daily rates, and the conditional suspension of the execution of penalty of liberty limitation, with a fine of up to 90 daily rates. If the offender avoids supervision or the fulfilment of the obligations imposed, the new Penal Code provides for the possibility of ordering the execution of the suspended penalty.

3.2.4. *Conditional earlier release*

The last probationary measure - conditional earlier release - similarly to the 1969 Code, refers only to the penalty of liberty deprivation. Decisions in this respect are taken by the penitentiary court. The material premise of conditional earlier release is a positive criminological prognosis, and the formal premise is the completion of a specified part of the penalty. According to the new Penal Code, conditional release is possible on completion of 1/2, 2/3 or 3/4 of the penalty, depending on the person's criminal record. The minimum period of the completed penalty may not be shorter than 6 months. In the case of persons sentenced to life imprisonment, conditional release is only possible after the completion of 25 years of the adjudged penalty.

Questions connected with the execution of conditional earlier release are regulated by the 1997 Penal Executive Code. Regulations of this Code also provide for conditional simple and probationary release. The penitentiary court which adjudges conditional earlier release may put the prisoner under the supervision of a probation officer, another trustworthy person, association, organization or institution, and impose on him/her the same obligations as the Penal Code provides for in the event of conditional suspension of the execution of penalty. The trial period is equivalent to the time remaining before the completion of the entire penalty by the convicted person. It cannot, however, be shorter than 2 or longer than 5 years. As for prisoners sentenced to life imprisonment, the trial period lasts 10 years. During the execution of this probationary measure, the penitentiary court may change the length of the trial period, without exceeding the limits defined above. During the trial period, the penitentiary court may also alter, extend, repeal or impose new obligations, may put the prisoner under supervision (if it did not adjudge so when granting the release), or release him/her from supervision. If during the trial period the prisoner avoids the fulfilment of obligations imposed or the supervision, the penitentiary court may repeal his/her conditional earlier release. The repeal of conditional release, like the decision concerning the execution of the conditionally suspended penalty and reopening of conditionally discontinued penal proceedings, is obligatory if the convicted person commits an intentional offence during the trial period. Detailed premises of the obligatory repeal are defined for each of the probationary measures in a different way.

3.2.5. Supervision by Probation

An institution similar to probationary measures, but not mentioned in the Penal Code is to put the prisoner who leaves the penitentiary under the supervision of a professional probation officer for the period of up to 2 years, following the prisoner's motion. According to Article 167 of the new Penal Executive Code, such a motion may be submitted by the prisoner to the penitentiary court during the period before his/her release from the penitentiary, especially in those cases when the living conditions after release are likely to make his/her social readaptation difficult. Putting the prisoner under the supervision following his/her motion, the penitentiary court may impose, upon his/her agreement, probationary obligations. A specific institution applied in the case of offenders addicted to drugs was introduced by the Counteraction of Drug Abuse Act of 1997.

Applying the rule which assumes that treatment is more important than repression, the legislator provided for the possibility of suspension of the preparatory proceedings by the public prosecutor, on condition that the suspect undergoes detoxification treatment. Once the treatment is completed, the public prosecutor, depending on its results, either continues the preparatory proceedings or applies to the court for the conditional discontinuation of the penal proceedings. In the latter situation, the court may conditionally discontinue the proceedings if the crime is punishable by the penalty of not more than 5 years of liberty deprivation. The range of application of the conditional discontinuation of the proceedings in the case of drug addicted offenders is, therefore, more extensive than the one provided for in the regulations of the general part of the new Penal Code. If an addicted person is convicted of a crime connected with drug taking and sentenced to liberty deprivation with the conditional suspension of its execution, the court always imposes the obligation on the offender to undergo detoxification treatment. If such a person is sentenced to unconditional deprivation of liberty, the court may direct the offender to a detoxification centre before the execution of this penalty.

3.3. Work for the public good in the new Penal Code

The 1997 Penal Code does not provide for work for the public good within the framework of probationary measures. In this respect, parliament accepted the draft of the Penal Code which was critical of this institution. Work for the public good is envisaged as a substitute penalty for the unpaid

fine and as an obligation connected with the sentencing to the penalty of liberty limitation. In the regulations of the new Penal Code, the penalty of liberty limitation is treated as an alternative to that of liberty deprivation and that of a fine in the situation when the court cannot adjudge the penalty of a fine as the offender is not able to pay it. The penalty of liberty limitation is imposed for the period between 1 and 12 months. This penalty consists of the ban on changing the permanent address without the court's agreement, the obligation to perform work specified by the court and the obligation to give explanations concerning the course of the penalty. Subsequent drafts of the new Penal Code provided for only one form of liberty limitation connected with unremunerated, supervised work for the public good.

Finally, however, parliament also maintained the other form of this penalty, which consisted of leaving the offender in his/her previous work post with the obligation to deduct 10-25% of the remuneration. Unremunerated work for the public good may be performed in an appropriate establishment, a health care institution, a public care institution or a charitable organization or institution. The monthly number of hours of such work ranges between 20 and 40. According to Article 35 § 3 of the new Code, the place, duration, kind or way of fulfilment of the obligation to work is defined by the court after having heard the convicted person. The legislator decided to leave this statement, which had been criticized for its lack of precision. The justification of the government draft of the Penal Code implies that this statement includes the assumption that the offender has accepted the obligation to work and the limitation of liberty connected with it[25].

As compared to the 1969 Penal Code, the new Code provides for an extended possibility to sentence a person to liberty limitation, eliminates the form of the penalty connected with taking up paid work on the basis of the court's decision and reduces not only the duration of the penalty but also imposes a monthly limit on unremunerated work for the public good. An important change is also the fact that in the new Penal Code the penalty of liberty limitation is similar in character to probationary measures. The court may put the person sentenced to this penalty under the supervision of a probation officer, another trustworthy person, an association, institution or social organization. Irrespective of the supervision, the court may also oblige the offender to apologize to the victim, fulfil an obligation to support

[25] Justification (see point 23), p. 140.

another person, refrain from alcohol abuse or the use of other intoxicants, and redress the damage in full or in part. In the teaching of the penal law, it is held that such obligations, even though troublesome for the offender, may fulfil important resocialization functions.[26]. A conscientious performance of work and fulfilment of obligations imposed may constitute the basis for unconditional release of the offender from the remaining part of the penalty of liberty limitation on completion of at least half of this penalty.

A substitute penalty provided for in the event of the offender avoiding the performance of the penalty of liberty limitation is the imposition of a fine. The court, when specifying a substitute penalty of a fine, assumes that one day of liberty limitation is equivalent to one daily rate of the fine, and also defines the amount of one rate of the fine. If adjudging a substitute penalty of fine was pointless, as the offender would not be able to pay it, and also if the offender has not paid the substitute fine, the substitute penalty is the penalty of liberty deprivation according to the formula: 1 day of liberty deprivation is equivalent to 2 days of liberty limitation.

Substituting the fine with work for the public good is regulated in the 1997 Penal Executive Code. According to Article 45 of this code, the court may substitute a fine not exceeding 100 daily rates with work for the public good if the execution of the fine has turned out to be pointless. Substitution requires the agreement of the offender. The court specifies the kind and duration of work, which will last between 1 and 12 months. A monthly limit of hours is the same as in the case of the penalty of liberty limitation (i.e. 20-40 hours). If the offender does not agree to this form of substitute penalty, or, despite agreeing, does not take up the work, the court adjudges the carrying out of the substitute penalty of liberty deprivation. In such a case, one day of liberty deprivation is equivalent to two daily rates of the fine. The upper limit of the substitute penalty of liberty deprivation for the unpaid fine amounts to 12 months. A substitute penalty may not exceed the upper limit of the penalty of liberty deprivation provided for in the case of a given crime, and if the crime is not punishable by the penalty of liberty deprivation, it may not exceed 6 months.

4. The Probation Service in Poland

According to the 1969 Penal Code, the court could put the offender, sentenced to the suspended imprisonment or conditionally earlier released

[26] BUCHALA , K., ZOLL, A.: (see point 24), p. 325.

from prison, under the supervision of an appointed person, institution or public organization. In practice, however, supervisions were exercised, with few exceptions, by court probation officers. The inception of the Probation Service in Poland in the 1920s is connected with the establishment of separate courts for minors. The institution of probation officers for adults was introduced after the Second World War. The Polish system of probation was based on the Belgian model, in which professional probation officers were to supervise the work of public probation officers. For many years, the ratio of professional probation officers to public ones was approximately one to twelve, and only in recent years have these proportions begun to change to the advantage of professional probation officers.

Professional probation officers are court employees. Probation officers for minors are employed in court departments for families and juveniles, and probation officers for adults are employed in penal departments. Public probation officers fulfil their function voluntarily and do not receive any remuneration. They do, however, receive reimbursement for the costs connected with exercising the supervision.

The regulation of the Minister of Justice of 1986 now in force on court probation officers provides that the person who fulfils the requirements specified below may become a professional probation officer. The appropriate candidate:

a) has Polish nationality and fully enjoys civil and civic rights,
b) has never been convicted of a crime,
c) has not been deprived of parental powers,
d) guarantees proper fulfilment of obligations entrusted in him/her,
e) is over 24,
f) is a university graduate in the field of pedagogy, psychology or sociology, and in - exceptional cases - in other areas, or has completed secondary education and has fulfilled, professionally or voluntarily, obligations from the area of prevention, resocialization or education,
g) has completed a year of practical training as a probation officer,
h) has passed a qualifying examination for a probation officer.

The articles of this regulation do not require any specific education for public probation officers. Any person who fulfils the requirements specified in the above points a up to and including e, and in exceptional cases, even a person over 20 (rather than over 24) if he/she has qualifications and life experience that will be useful during the performance of educational work, may become a public probation officer.

The tasks of public probation officers primarily include supervising persons put in their care and conducting interviews concerning matters indicated by the court. Professional probation officers perform the same tasks, and, in addition, organize and check the work of public probation officers, offer advice and help to them, and organize workshops for them. Exercising supervision over the charge includes monitoring and educational functions. The supervising probation officer has the obligation to inform the court at specific time intervals about the behaviour of the charge and his/her fulfilment of the obligations imposed by the court. Moreover, the tasks of the probation officer include help in the readaptation of the charge into society by establishing contact with, giving advice and helping him/her to solve various life problems, such as finding work, undertaking treatment or getting financial help. The rights of the probation officer include applying to the court with the motion for the repeal of probationary measures, for the alteration, extension or lifting of the obligations imposed by the court, or exempting the charge from supervision.

The work of probation officers, both for minors and for adults, has been the subject of extensive empirical research[27]. In the light of the results of this research, the condition of the Probation Service in Poland is suffering from serious problems. Public probation officers often lack appropriate qualifications to fulfil their function. Professional probation officers are mostly persons with education in the field of law, for whom fulfilling the function of a court probation officer is quite frequently only the transition phase during their preparation for practising the profession of judge or barrister. Even though the reconstruction of the Probation Service was initiated in the 1990s, it has not been completed. According to the statistical data of the Ministry of Justice for the years 1992-1999, the number of professional probation officers for adults increased from 823 to 1,627 and the number of public probation officers increased from 10,161 to 12,840. At the same time, however, the number of supervisions exercised over convicted adults increased considerably. In 1992, probation officers for adults exercised a total of 99,910 supervisions, and in 1999, 178,168 supervisions, including 150,1332 supervisions over persons sentenced to suspended imprisonment, and 28,035 supervisions over prisoners conditionally released from penitentiaries.

[27] STEPNIAK, P.: Funkcjonowanie kurateli sadowej (The Functioning of the Probation Service). Poznan 1992, p. 64 and the following.

5. Problems connected with fulfilling the underlying assumptions of the new penal codification

The new penal codes (the Penal Code, the Penal Executive Code and the Code of Penal Procedure) are based on the underlying assumption that rational penal policy is the policy, which in the case of petty and average crimes resorts to widely applicable probationary measures and non-isolation penalties. The fulfilment of these assumptions may, however, face certain problems. The 1997 Penal Code extended the possibilities of adjudging probationary measures, and increased the range of exercising supervision. According to this code, supervision may be adjudged by the court not only in case of the conditional suspension of execution of penalty of liberty deprivation and conditional earlier release, but also in case of conditional discontinuation of the penal proceedings and the imposition of the penalty of liberty limitation. According to the new Penal Executive Code, supervision by a probation officer may be also adjudged following the motion of the prisoner who leaves the penitentiary, and the professional probation officer is to fulfil functions related to the organization and monitoring of the performance of the penalty of liberty limitation. However, a proper performance of these tasks requires further changes in the system of the Probation Service. What is particularly needed is a considerable increase in the number of professional probation officers and to provide them with more freedom of action, since in the light of regulations in force now, a professional probation officer stands somewhere between an administration officer and an independent tutor.

Another factor which may complicate the adoption of the rational penal policy is the lack of social backing for such a model of penalizing. Just after the political breakthrough in 1989 in Poland, police statistics registered a sudden increase in crime[28]. It is difficult to assess to what extent this statistical data reflected the real increase in crime, and to what extent it was conditioned by a greater readiness of the citizens to inform the police about crimes and the resignation from manipulating the statistics for political reasons. But it cannot be denied that there appeared after 1989 in Poland certain forms of organized crime that until then were unknown, and that the number of serious crimes with the use of violence increased. At the same time the fear of becoming a victim increased considerably among citizens.

[28] GRUSZCZYNSKA, B., MARCZEWSKI, M.: Recorded Crime and Penal Policy. In: Crime Control in Poland. Polish Report for the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Warszawa 1995, pp. 11-15.

It should be pointed out that the level of crime in Poland is still lower than in some western European countries. The phenomenon of a sudden increase in fear of crime, characteristic also of other post-Communist countries, is to a considerable extent conditioned by the way of presenting crime in the mass media. The fear of becoming a victim, even though not commensurate with the real danger, encourages criticisms of the underlying assumptions of the new Penal Code, based on the conviction that the period of increased crime is not the right time for the liberalization of the penal policy. Some Polish criminologists in the mid 1990s indicated the need for launching a campaign against fear and a general discussion on the professional and reliable way of presenting crime in the mass media[29]. The idea, however, has not been put into practice. During the last years, the general population in Poland commonly shared the opinion concerning a dramatic rise in the amount of crime. The proposals of some politicians to amend the 1997 Penal Code in order to ensure more restrictive reactions to crimes have been supported by a large majority not only in the general public, but also in the parliament. As a result, a radical reform of the 1997 Penal Code aiming at implementation of drastically punitive criminal policy in underway in Poland.

Table I: Penalties imposed in the years 1988-1999 (absolute numbers)

Year	Penalties total	Life imprisonment[a]	25 years of liberty deprivation	Unconditional deprivation of liberty[b]	Liberty deprivation with conditional suspension	Liberty limitation	Self-standing fine	Other[c]
1988	137,159	-	57	39,071	50,689	21,014	25,715	613
1989	93,379	-	41	24,733	41,007	9,758	17,188	646
1990	106,464	-	20	29,120	52,030	5,230	19,487	577
1991	152,333	-	34	40,601	76,579	5,291	29,714	114
1992	160,703	-	29	39,642	84,350	5,405	31,259	18
1993	171,622	-	35	36,954	91,295	6,389	36,920	29
1994	185,065	-	23	33,636	99,856	7,223	44,308	19
1995	195,455	-	28	32,296	105,796	7,306	49,997	32
1996	227,731	1	62	31,240	123,669	10,612	62,082	65
1997	210,600	3	51	25,752	116,159	10,934	57,689	12
1998[d]	233,773	19	93	31,455	128,034	14,088	59,974	110
1999[d]	220,375	18	103	29,056	132,096	16,785	42,064	253

[29] KRAJEWSKI, K.: Fear of Crime and Criminal Law Reform in Post-communist Societies. In: SZAMOTA-SAEKI, B., WÓJCIK, D. (ed.): Impact of Political, Economic and Social Change on Crime and its Image in Society. Warszawa 1996, pp. 153-154.

Table II: Penalties imposed in the years 1988-1999 (percentages)

Year	Penalties total	Life imprisonment[a]	25 years of liberty deprivation	Unconditional deprivation of liberty[b]	Liberty deprivation with conditional suspension	Liberty limitation	Self-standing fine	Other[c]
1988	100	-	0.0	28.5	36.9	15.3	18.7	0.4
1989	100	-	0.0	26.5	43.9	10.5	18.4	0.7
1990	100	-	0.0	27.4	48.9	4.9	18.3	0.5
1991	100	-	0.0	26.7	50.3	3.5	19.5	0.1
1992	100	-	0.0	24.7	52.5	3.4	19.5	0.0
1993	100	-	0.0	21.5	53.2	3.7	21.5	0.0
1994	100	-	0.0	18.2	54.0	3.9	23.9	0.0
1995	100	-	0.0	16.5	54.1	3.7	25.6	0.0
1996	100	0.0	0.0	13.7	54.3	4.7	27.3	0.0
1997	100	0.0	0.0	12.2	55.2	5.2	27.4	0.0
1998[d]	100	0.0	0.0	13.5	54.8	6.0	25.7	0.0
1999[d]	100	0.0	0.0	13.2	59.9	7.6	19.1	0.1

Notes:

a. Life imprisonment was introduced in 1995. Death penalty has not been carried out in Poland since 1988.

b. The penalty of liberty deprivation according to the 1969 Penal Code was imposed for a period of between 3 months and 15 years, according to the 1997 Penal Code it has been imposed for a period of between 1 month and 15 years. 25 years of liberty deprivation constitutes a separate category.

c. In years 1988-1998 „other penalties" were supplementary penalties imposed independently, this is without imposing a primary penalty. On coming in force of the Penal Code of 1997, this is since 1 September 1998, „other" has meant penal measures imposed without imposing a penalty.

d. As for the years 1998-1999, only statistics concerning sentences of lower courts, that have not been confirmed on appeal, are available. 214 penalties imposed by regional courts as courts of the first instance in 1998 and 142 penalties imposed by these courts in 1999 are not included, because they cover penalties other than liberty deprivation and are not divided into liberty limitation, fine and penal measures.

Statistical data comes from: Statystyka sadowa. Czesc III. Prawomocne osadzenia osob doroslych *(Court statistics. Part III. Sentences of Adults Confirmed on Appeal)*. A yearly publication of the Ministry of Justice. The statistical data for the years 1998-1999, however, comes from: Statystyka sadowa i penitencjarna. Czesc I *(Court and Penitentiary statistics. Part I)*. Ministry of Justice, Warsaw 2000.

Table III. Persons sentenced to liberty deprivation with conditional suspension in the years; 1992 – 1997; supervision applied, obligations imposed (absolute numbers)

Supervision and obligations	1992	1993	1994	1995	1996	1997
Total number of convicted persons including:	84,350	91,295	99,856	105,796	123,669	116,159
With the application of supervision	26,908	29,113	32,982	37,491	43,650	41,961
With the imposition of obligations including:	27,761	28,267	29,094	31,224	37,884	30,255
Redress of the damage	9,408	10,209	10,873	10,861	12,527	4,696
Apology to the injured party	495	570	496	478	514	404
Support of another person	9,513	10,442	10,704	11,062	12,633	4,939
Performance of work for the public good	2,784	2,918	3,245	3,550	5,974	6,792
Performance of a paid job/ learning	2,640	2,201	2,181	2,790	2,940	2,303
Refraining from alcohol abuse	13,612	12,356	12,002	12,882	14,302	13,681
Undergoing treatment	2,171	2,345	2,270	2,652	3,403	3,248
Refraining from staying in a given place	921	751	594	554	646	431
Others	1,321	163	1,378	1,461	1,941	573

Table IV. Persons sentenced to liberty deprivation with conditional suspension in the years; 1992 – 1997; supervision applied, obligations imposed (percentages)

Supervision and obligations	1992	1993	1994	1995	1996	1997
Total number of convicted persons including:	100. 0	100. 0	100. 0	100. 0	100.0	100.0
With the application of supervision	31. 9	31. 9	33. 0	35. 4	35.3	36.1
With the imposition of obligations including:	32. 9	31. 0	29. 1	29. 5	30.6	26.0
Redress of the damage	21. 9	23. 7	24. 9	23. 5	22.8	12.7
Apology to the injured party	1. 2	1. 3	1. 1	1. 0	0.9	1.1
Support of another person	22. 2	24. 2	24. 5	23. 9	23.0	13.3
Performance of work for the public good	6. 5	6. 8	7. 4	7. 7	10.9	18.3
Performance of a paid job/ learning	6. 2	5. 1	5. 0	6. 0	5.4	6.2
Refraining from alcohol abuse	31. 8	28. 6	27. 4	27. 8	26.1	36.9
Undergoing treatment	5. 1	5. 4	5. 2	5. 7	6.2	8.8
Refraining from staying in a given place	2. 1	1. 7	1. 4	1. 2	1.2	1.2
Others	3. 1	3. 2	3. 2	3. 2	3.5	1.5

Statistical data comes from: Statystyka sadowa. Czesc III. Prawomocne osadzenia osob doroslych. *(Court Statistics. Part III. Sentences of Adults Confirmed on Appeal).* A yearly publication of the Ministry of Justice.

Table V: Percentage of persons sentenced to the penalty of liberty limitation in particular forms in the years 1988 - 1997

	Total number of persons sentenced to liberty limitation		Percentage of persons sentenced to liberty limitation in the form of		
Year	Number	%	Unremunerated work for the public good	Deduction from the remuneration for work	Directing to work with the deduction from the remuneration
1988	21,014	100. 0	28. 0	57. 2	14. 8
1989	9,758	100. 0	34. 3	52. 8	12. 9
1990	5,230	100. 0	56. 1	38. 0	5. 9
1991	5.291	100. 0	77. 9	21. 1	0. 9
1992	5,405	100. 0	89. 3	10. 4	0. 3
1993	6,389	100. 0	93. 2	6. 6	0. 2
1994	7.223	100. 0	95. 6	4. 3	0. 1
1995	7,306	100. 0	97. 1	2. 9	0. 0
1996	10.612	100.0	98.5	1.2	0.3
1997	10.934	100.0	98.4	1.6	0.0

Statistical data comes from: Statystyka sadowa. Częsc III. Prawomocne osadzenia osob doroslych. *(Court Statistics. Part III. Sentences of Adults Confirmed on Appeal).* A yearly publication of the Ministry of Justice.

Community Sanctions and Measures in Portugal[1]

LUÍS DE MIRANDA PEREIRA

1. Introduction

Portugal – like other countries – is continuously searching for a balance between the desire for security in relation to crime phenomena and a system that would guarantee an effective response to crime, while at the same time safeguarding human dignity. Also, in Portugal – as in other countries – there are paradoxical tensions between the legislative adoption of responses to less serious criminal offences – which do not necessarily have to be punished by imprisonment – and the refusal by most politicians and key judicial players to accept those responses for the sake of a diffuse but proclaimed existence of a representative and opposed public opinion. Most certainly, the step forward two hundred years ago that incarceration represented in the safeguarding of human dignity as opposed to corporal punishment must have had its opponents in the name of public opinion...

The current lack of an alternative solution to imprisonment for more serious criminal offences – along with its immediate apparent effects and the feeling of protection resulting from the temporary incapacity of the offender to re-offend while incarcerated – means that the notion of the criminalizing effects of prison (already uncontested in the 1960s) is simply being ignored by a large number of the system's key players. To this we can add some blindness to the obvious impossibility of allowing the prison system to grow without limits from both the economic and the social perspective.

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[1] This article was finished in July 1998 and was expected to be published in 1999 at the latest. In order to update the article for publication three years later, the option was to add footnotes where considered necessary, to correct or update data or to add commentaries. Where appropriate, some of this updating was added directly to the original text. All footnotes relating to 2001 are printed in bold type.

Those in favour of implementing CSMs are fighting a hard battle to change people's minds, considering that it is impossible to ignore the virtual, media-oriented and demagogic world we live in today.

The understanding of crime phenomena and the social response to it as inherent to cultural evolution is linked – and will inevitably continue to be linked – with respect for the main values of human dignity, citizenship and social solidarity. It will also be linked to the fight against the feeling of insecurity through a notion of crime prevention scientifically integrated, socially accepted and developed in practice – a completely different notion from the traditional one and free of its primary content, which has proved to be poor and inefficient.

In spite of this, the traditional, repressive concept of crime prevention is still preferred by many, since it limits crime prevention to actions by the police, judicial and prison authorities, in the hope that this will quickly result in the lasting incapacity of the offender to commit new crimes. In their opinion, this is the only way to protect the well-being and peace of the general public.

Within this framework, we will now focus on the Portuguese case, taking into consideration the definition of CSMs modelled on the glossary annexed to Recommendation no. R (92) of the Council of Europe.

Starting from a generic notion of the Portuguese sanctioning system, we will move on to a brief historical review of probation and CSMs, i.e. the enumeration of CSMs and their characteristics, the creation and development of the Instituto de Reinserção Social (IRS; the Portuguese Probation Service), and the application of CSMs in the last years. We will conclude with an overview of the current situation and problems, as well as by taking a glimpse into the future.

2. Principles of criminal policy and sanctioning[2]

2.1. Principles

In 1982, the new Penal Code philosophy established a new criminal policy paradigm based on the essential principles of a democratic state under the rule of law, with reference to the Constitution:

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[2] The first part of this section is based on Prof. FIGUEIREDO DIAS's book Portuguese Penal Law: the Juridical Consequences of Crime, pp. 70-76 (Aequitas. Editorial Notícias.93); the second part partially reproduces, with updating and the author's permission, the text about the Portuguese sanctioning system by MARIA JOÃO ANTUNES & PEDRO CAEIRO from the University of Coimbra, published in Criminal Law– Suppl. 6, Kluwer Law International (May 1995).

- The principle of legality – or the conformity of penal law and the law of penal procedure with the idea of the rule of law.
- The principle of constitutionality – which means that penal intervention is only possible by necessity or subsidiary need, and that only the aim of prevention can justify the specific responses of penal law.
- The principle of culpability – human dignity is inviolable; there is no sanction without culpability and the measure of the sentence can never be greater than the measure of that culpability.
- The principle of solidarity – the state is responsible for helping the convicted person, not by imposing any kind of compulsory treatment but by acknowledging his/her voluntary acceptance and understanding of the adequacy and fairness of the sentence.
- The principle of priority of the use of CSMs – as a principle, this is a direct result of the previous ones. Whenever a CSM is sufficient to fulfil the aims of punishment, a prison sentence must be avoided.
- The principle of focusing on victims – which led to the theoretical and practical evolution of the penal law from a dual perspective (i.e. state and offender) towards a triangular perspective from which the victim's interests are more and more considered and protected. Although it does not derive directly from the Constitution, the importance of this principle justifies its inclusion with the others.

The sanctioning system – the main aspects of which will be developed next – must be seen in the light of these principles.

2.2. Sanctioning system

The Portuguese sanctioning system employs punishment and security measures.[3] However, a security measure that deprives an individual of his/her liberty is applicable only to offenders who are not responsible for their crimes on the grounds of mental illness. Portuguese criminal law distinguishes between three types of punishment, i.e. principal, substitutive, and accessory.

[3] The subject security measures in the sanctioning system is referred to in the text but will not be dealt with further because it is not very relevant to the discussion of CSMs. However, it is important to mention that the probation service is responsible for the supervision of those non-custodial measures, which can be included in the notion of CSMs.

2.2.1. *Principal punishments*

Principal punishments are imprisonment and fines. These are penalties that are expressly seen by law as a consequence of an act considered as a crime, and are determined independently by the judge without the need to stipulate any other penalty. Imprisonment pursuant to Article 30 of the Constitution is neither of a perpetual nature nor unlimited or indefinite.

Thus, in accordance with Article 41 PC, the maximum duration of imprisonment is 20 years on average, and the minimum is one month. However, imprisonment can be extended to 25 years in cases referred to by law. Exceptionally, the minimum duration may be as short as five days. Such is the case with imprisonment at weekends (Art.45 PC) and in some cases of the non-payment of fines (Art.49 PC).

Another characteristic of imprisonment is that this punishment is seen as unique – in the sense of being the only form of incarceration – and simple, in the sense that the prisoner does not automatically lose his/her political, civil and/or professional rights (Arts. 30-4 of the Constitution & 65 PC). The only way to distinguish between different types of imprisonment is in terms of their duration: short term (< six months), average term (< three years) and long term (> three years). Punishment by fine is regarded in Portuguese criminal law as either an autonomous punishment (i.e. the only sanction applicable to a described criminal act) or an alternative. This system is known as '*sistema dos dias de multa*' (day-fine system) and is an attempt to satisfy the demands made by the Constitution in terms of the principles of 'culpability/equality and burden of sacrifice'.

Fines are established through the performance of two mandatory acts (Art. 47 PC): The first is to stipulate the period of the fine (a minimum of 10 and a maximum of 360 days) based on the normal criterion for sentencing (Art.71 PC). The second is to establish the amount of money the convicted person must pay for each day. The legislator decides the minimum and maximum amounts, but the judge establishes the specific value, taking into account the economic and financial situation of the offender, along with his/her personal expenses. As a third possible act, the court may authorise payment in instalments or defer payment, within certain time limits to be set by the law. In the case of the non-payment of fines, two things are possible: The offender's goods can be confiscated or the offender can be imprisoned (Art.49 PC). It should be pointed out that the latter is the last of the alternative solutions to be adopted, which shows that sentences depriving persons of their liberty are of a subsidiary nature.

2.2.2. *Substitutive punishments*

Substitutive punishments are characterised in two fundamental ways: they substitute a fixed principal punishment and do not deprive persons of their liberty. Thus, they are based historically and theologically on the political movement against imprisonment, especially with regard to short-term sentences. In this context, Portuguese law recognises various substitutive punishments:

- Reprimand – if the punishment is a fine up to the limit of 120 days (Art. 60 PC). It consists of a solemn and adequate oral reproach made before a public audience.
- Community service – if the punishment is for a sentence of no more than one year. After having obtained the offender's consent, it takes the form of services rendered without pay to the state or other collective or private entity, which the court considers in the interests of the community.
- Fines – if the established period of imprisonment is not more than six months (Art. 44 PC).
- Suspended sentence – if the established period of imprisonment is less than three years (Art. 50 PC). The suspension of a sentence can be simple, or it can impose upon the offender duties, certain conditions or probation. In the last-mentioned case, an individual project for the offender's social reintegration must be elaborated and carried out in collaboration with a probation officer.
- Criminal law also allows for the application of alternative punishments with deprivation of liberty, i.e. weekend-detention and a system of semi-detention if the established period of punishment is no longer than three months (Arts. 45 & 46 PC). The enforcement of these penalties does not necessarily imply the intervention of the Probation Service.

The political-criminal principle of the subsidiary nature of imprisonment for less serious and petty crimes is established in Art. 70 PC, which states that it is the duty of the court to give priority to non-custodial forms of punishment when such punishment is shown to be sufficient to achieve punishment objectives. In conclusion – and according to the law (Arts. 40-1 & 70 PC), legal writers and case law – imprisonment is always substituted by a non-custodial punishment when this is does not militate against the demands for the (re)socialisation of the offender and when the confidence of the community in the validity of the law is maintained (special and general prevention).

2.2.3. *Accessory punishments*

Accessory punishments are those which depend on the fixing of a principal punishment. As such, they are applied together with the principal punishment. Accessory punishments allowed by Portuguese criminal law are dismissal from public service, temporary suspension from public service and a ban on driving vehicles. In respect of foreign citizens, the courts can use the accessory sanction of expulsion in conjunction with certain kinds of prison sentences and in other circumstances defined by law.

2.2.4. *Sentencing criteria*

Sentencing – sentencing is carried out with absolute respect for the principle of legality (Art. 29 of the Constitution) within a system of frames of punishment. The punishment falls somewhere between a minimum and a maximum. The criteria for sentencing are laid down in Article 71 PC, which establishes the rule that "the sentencing should be within the defined limits of the law and should take into account the culpability of the offender as well as the needs of prevention". In short, bearing in mind the factors that the legislator deems as indicative, it can be concluded that sentencing is based on culpability and the need for general and specific prevention.

The Article also mentions two other fundamental rules: First, the principle of the prohibition of double valuation: i.e. the court cannot take into account factors that were already considered by the legislator when initially elaborating the criminal framework. And second, the principle of necessity of justification: i.e. the court must justify the decision; thus, it is possible to appeal the sentencing decision.

2.2.5. *Other relevant information*

- Articles 281 and 282 of the Penal Procedure Code (PPC) establish a form of intervention that is the Public Prosecutor's initiative and responsibility (the provisional stay of proceedings at the conclusion of the inquiry phase) in which the principle of opportunity and even mediation predominate. We will return to this in the context of CSMs.
- In the same CSM topic, we shall deal also with parole, the regime of which was significantly toughened by the 1995 revision of the Penal Code.

- It seems important to introduce some ideas about the legal framework, which is still in force (July 1998), the social reports prepared by the Probation Service: In Art. 1°, n°1, g) PPC, the social report is defined as "a document elaborated by the Probation Service ... in order to help the court or the judge to gain knowledge about the offender's personality and possibly that of the victim as well, including their social, professional and family integration." The courts can request social reports at three different times during the procedure, i.e. when someone is remanded in custody for the re-examining of the decision's legal requisites, by judge's decision at the end of the instruction phase, and at any other given moment during the trial. As well as on request, the Probation Service can on its own initiative submit to the court a social report or its update concerning the situation of offenders who are remanded in custody.
  The request for a report for trial is mandatory if at the time of the offence the offender was under 21 and if it is possible that, amongst other possibilities, he/she might be convicted and punished by a non-custodial penalty requiring supervision by a probation officer. The present system, which has just been briefly described, will be radically changed due to the revision of the PPC, which is about to come into force and will bring with it a severe reduction of the Probation Service's power of intervention as well as of the theoretical and practical importance of social reports.[4]
- The court where the actual trial and sentencing took place is responsible for enforcing and lifting a sentence (Arts. 470 & 475, PPC).
- Any decisions that modify or substitute a prison sentence being served are the responsibility of the Tribunal de Execução das Penas (Court for Sentences Execution).
- The use of electronic monitoring will be examined below in Section 4.
- As an autonomous measure (generally understood as a sort of a preventive security measure) Art. 109 of the Criminal Code provides the possibility of confiscation by the State of instruments and proceeds directly related to the commission or the preparation of a criminal offence if they are dangerous in nature, or in other situations described by law. The same can happen with regard to any reward given or promised, di-

[4] The Act of Parliament no. 59/98, 25 August 1998, enacted the revision of the PPC. The changes introduced regarding the social report are discussed further on (sections 6 and 7).

rectly or indirectly, to the perpetrator of an act considered as crime (Art.111 PC).

- At present, mediation does not exist in the criminal system.
- According to Act of Parliament no. 30/2000, 22 November 2000, the abuse, acquisition and possession of drugs for personal purposes is no longer a crime, those acts being punishable under administrative sanctions (*contra-ordenações / Ordnungswidrigkeiten).* The conditions and obligations used in this administrative procedure are similar to those used in the criminal procedure: a form of provisional stay of the proceedings is used as well.
- In the pre-trial stage, special measures regarding drug addicts exist under special legislation (Decree-Law 15/93, 22 January 1993) allowing the judge to order compulsory treatment as an alternative coercive measure to remand in custody.

3. Historical background of CSMs and probation

The history of the probation service in Portugal as an organised system whose vocation is social intervention in the field of penal justice dealing with CSMs is very recent. It began with the creation of the Instituto de Reinserção Social (IRS) in 1982. However, historically speaking, the roots of the movement towards the social integration of offenders and the implementation of organisations aiming at the same purpose were legally established in 1867. But if we take into account the Misericórdias (a specific Portuguese Catholic institution dating from the 15th century, which still maintains an important social role concerning poverty and health-related problems), the care and aftercare of prisoners has existed in Portugal since that time. As a matter of fact, in each Misericórdia one specific officer was responsible for prisoners, preparing for their release, ensuring better living conditions inside the prison, and caring for those sentenced to death and to compulsory labour in the galleys, with proper authority given by the King.

In more recent times, regarding the ancestors of CSMs, the suspended sentence and parole have been applied in the Portuguese penal system for over a hundred years.

The probation order (*regime de prova*) was introduced for the first time in the 1963 Penal Code project, by Prof. Eduardo Correia. After long and interesting discussions (for almost twenty years), this project with its original philosophy (the implementation of which was only possible because of

the democratisation process which started in 1974) became the core of the Portuguese New Penal Code, which was published in 1982 and has been in force since 1983. In this project, the rules for the enforcement of the probation orders were extended to parole and the inevitable need arose for a specialised service to support the courts and to be responsible for non-custodial penalties and parole. The clear acknowledgement of the harm caused by a prison sentence and the movement that was then forming against its unnecessary use were the basis of the choices and proposals presented by the author of the project. The project adds, within the group of what nowadays comprises CSMs, to the already existing suspended sentence and fine, the probation order, a new regime of parole and weekend detention as well as semi-detention; the community service order (CSO) was introduced only a short time before the publication of the Penal Code in 1982.

Social reintegration of the offender was the main objective of the clearly non-detention philosophy in which the project was embedded, and basically so was the Code. Non-custodial penalties, as can be seen in the published work of the Revision Committee of the Penal Code (1963 and 1964), were then considered to be more severe punitive measures than imprisonment itself due to the control to which the individual was subjected in the community. Since then, the grounds for CSM in the penal legislation have not been formally altered.

4. CSMs

CSMs should be understood, as mentioned, as "sanctions and measures that keep the offender in the community by restricting his/her liberty through the imposition of certain obligations which demand the active cooperation of the offender and are implemented by such bodies as the Probation Service designated in law for that purpose". CSMs, as it turns out from what has been mentioned about the sanctioning system, are included in the Penal Code and in the PPC.

4.1. Provisional stay of proceedings (Arts. 281 & 282, PPC)

This consists of the suspension of the procedure in its inquiry phase after obtaining the consent of both victim and offender and verifying that the offender has no prior criminal record, as well as after having analysed the

seriousness of the offence committed. The course of the normal procedure is replaced by a maximum two-year supervision period that has specific conditions and rules of conduct attached to it (e.g. compensating the victim, donating to solidarity institutions, prohibition to practice certain professions). This is applicable to those crimes punishable by a sentence of up to three years imprisonment or with a non-custodial sanction. The provisional stay of proceedings is based on a decision made by the public prosecutor, with the agreement of the judge of instruction. The Probation Service can be called in to supervise and monitor the offender.

4.2. Substitution of the fine for working days (Art.48 PC)

This comprises serving working days for a period that can vary between 36 and 380 hours at either government organisations or private social solidarity institutions. The substitution of the fine for days of work is applied if the penalty is deemed appropriate to and adequate for the offence committed, and if the offender requests to pay his/her fine in this manner. As a rule, the Probation Service is the supervising entity.

4.3. Community service (Arts. 58 & 59 PC)

This substitutes a prison sentence of up to one year and has the same duration as the substitution of the fine for working days. It can only be applied with the consent of the offender and consists of performing unpaid work for the state or a public institution, or for private entities, as long as its aims are considered by the court to be in the interests of the community. The duration of these working periods cannot conflict with the offender's normal working day and cannot exceed daily what is permitted and stipulated in the extraordinary working hours regulations (normally up to two hours). The IRS supervises and monitors the enforcement of the sentence.

4.4. Suspended sentence (Arts. 50-58 PC)

This consists of the suspension of a prison sentence of up to three years for a period of one to five years. It can assume four forms: simple, where the court decides that a reprimand and the threat of detention are sufficient; with duties, intended to make up for the harm caused (e.g. to give compensation or moral satisfaction to the victim); with rules of conduct, intended

to facilitate the reintegration of the offender into society (e.g. not to go to certain places, not to work at certain activities, etc.); or with probation, also with the intention of facilitating the offender's social reintegration, but with a personal plan of re-adaptation, established and carried out under the supervision of the Probation Service.

The court will include the personal re-adaptation plan in the sentence if the necessary conditions are met. Otherwise, or if it is found to be necessary in order to complete the plan, the Probation Service has 30 days to do so and to submit the plan for the court's approval (Art.494 PPC). The Probation Service can also be called upon to intervene in the other two modalities mentioned above. The court, in the same decision, can apply all three last-mentioned modalities. The suspended sentence with probation substitutes the probation order, which was eliminated in the 1995 revision of the Penal Code.

4.5. Parole (Arts. 61-65 PC)

This consists of the substitution of a period of the prison sentence by a period of liberty subject to certain conditions. The Court for Sentence Execution applies the decision based upon the reports supplied by the Prison Service and the Probation Service. The parole period has the same duration as that of the time left to be served, but is never longer than five years. It can only be applied with the offender's consent.

Parole can only be granted after half the sentence has been served (not possible for sentences of or under six months) if it is believed that, once released, the offender will act in a socially responsible manner – that is, without committing further crimes – and simultaneously ensures that his/her freedom will be compatible with the protection of the legal and social order. It will be granted after two-thirds of the sentence has been served if it is believed that the offender once released will not commit crimes. It will be granted only after two-thirds of the sentence has been served if the sentence was longer than five years for a crime committed against people or involving public danger, and after verifying the two requisites for conditional release when granted after half the sentence has been served. Finally, it is mandatory after five-sixths of the sentence has been served for sentences longer than six years. Parole has three possible forms, i.e. with duties, with rules of conduct, or with probation (a system similar to that described for the suspension of a sentence). The IRS's intervention

in the case of parole with probation is mandatory. In other situations, the court can order this.

4.6. Freedom with probation – psychiatric parole (Art. 94 PC)

This refers to a situation where a person subjected to an internment measure is released under the supervision of the IRS. Therefore, it can only be applied to those not legally responsible for their actions. The aim is to ensure a period of resettlement prior to the final release. This measure is similar to that of a suspended sentence with specific conditions or probation.

4.7. Suspension of the internment measure – psychiatric probation (Art. 98 PC)

Also related to a security measure, this is a type of suspension measure, before or after the deprivation of liberty is initiated, with treatment in the community, under supervision of the IRS, instead. The Court for Sentence Execution is responsible for the enforcement of these security measures (4.6 and 4.7).

4.8. Special enforcement modalities (by administrative decision)

Although this does not fall directly within the already stated concept of CSMs, it is of interest to mention that, while serving a prison sentence, an inmate can be placed in an open regime (*regime aberto voltado para o exterior*), which really means a type of prison regime with some similarities to semi-detention, where the inmate is given permission to leave prison during the day in order, for example, to work, study or attend a training programme. Permission comes from the Director-General of the Prison Services in accordance with certain requisites and conditions. The IRS, in cooperation with the Prison Services, supervises this measure[5].

[5] In the near future, the IRS will cease the supervision of this kind of prison regime due to the recent changes in both the Prison Service and the IRS main objectives (the changes were determined by the new Organic Act for the Ministry of Justice – Decree-Law no. 146/2000, July 18th). Concerning the enforcement of prison sentences, the IRS will cease its 17-year intervention within the prison walls without any official and valid evaluation of its work.

4.9. Electronic monitoring of offenders. Due at the end of 1998 / beginning of 1999[6].

In the chapter of the PPC dealing with coercive measures, Art. 201 establishes under certain circumstances the possibility of using house arrest as a coercive measure instead of, for instance, remand in custody or on bail.

The electronic monitoring of offenders - according to the law project recently presented for public discussion - will be an instrument aimed at putting the aforementioned coercive measure into practice, which has occasionally been done.

Therefore, what is intended in this first phase is to have electronic monitoring in force in order to improve the application of a coercive measure already legally established. The offender's consent will be essential for the application of this measure, and the offender will be able withdraw such consent at any time. According to the project, supervision will be carried out by the IRS, which will have the latitude to intervene beyond simple monitoring. An evaluation period of three years has been established, and a commission specially created for the purpose will carry out such evaluation.

5. Instituto de Reinserção Social (Portuguese Probation Service)

In order to comply with the criminal policy and to implement the new penalties laid down in the 1982 Penal Code, it was necessary to create a specialised service to provide the courts with support and to guarantee the execution of CSMs. The model of the Portuguese Probation Service is based on previous Portuguese experience and tradition, as well as on knowledge about the UK, Dutch, French and Belgian systems. Initial studies, visits and contacts received support from the Council of Europe. From the very start (August 1982), the IRS faced the challenge of a large range of interventions, which would eventually have to be limited. Starting from zero and

[6] Act of Parliament no. 122/99, August 20th, legally established the use of electronic monitoring as a house arrest condition. During the first implementation phase of this Act, it is intended to test the use of electronic monitoring, only in specific Pilot Courts, which will be officially indicated in the near future. A three- year pilot scheme will start at the end of 2001 or early 2002. There is awareness of the difficulties posed by this kind of scheme, which is a starting point for further developments.

finding itself confronted by an adverse external environment, the IRS had to deal with ignorance, contention and resistance to change (mainly during the four first years of its work) on the part of the judiciary, politicians and the media. This kind of reaction still exists today.

Nevertheless, the Probation Service managed not only to survive but also to grow. It established units all over the country in a 'de-concentrated' structure near the community, basing its action on a modern and innovative concept of multidisciplinary teamwork, where the interaction of knowledge is integrated in a wide notion of responsibility and self-management.

Each team was generally made up of two clerks and five to seven probation officers, each of whom held a degree in Social Services, Psychology, Law or another area of Social Sciences, and was selected in accordance with a pre-established profile and subjected to further specific training.

The IRS has turned out to be a civil service with major human potential owing to the youth and ability of its probation officers, who are appointed according to a strict policy of selection and training. The IRS has become an important pillar of support for the courts' activities and a strong influence on the Prison Service, even if the Prison Service does not openly recognise this.

The role played by the Probation Service as an informal mediator between the courts, other public services and the community, represents a new value, one that is socially recognised and accepted. The IRS also played a major role in the establishment of the first voluntary movement in Portugal for the support of victims of crime. Since 1982, the development of the Portuguese Probation Service has gone through what we could consider as four phases: The first phase involved taking the first steps along a difficult road characterised by a strong reaction against the new Penal Code. The second phase (1986–1990) was a period of great and consolidated growth. The third phase (1991–1997) was initially characterised by the political decision to incorporate within the IRS the service that until then had been caring for children and juveniles under the age of criminal liability. This process, formally concluded only in 1995, was a long, hard one carried out without the means and support needed to make the process work as previously expected. The fourth phase was initially characterised by the existence, felt by a great number of probation officers and staff, of a climate of some uncertainty and loss of motivation regarding the future. This was also brought about by organisational changes occurring in 1997[7]

[7] In the last four years the IRS chairmanship was changed three times by the Government.

and by a certain subsequent managerial instability, by several legislative reforms that were expected soon to be in force (penal procedure, prison system, and minors[8] and juveniles) and would have undeniable effects on the structure and organisation of the Probation Service[9] and by the questioning and rebuilding of the barely existing, shaky balance between the IRS and the Prison and Judiciary Systems.

In accordance with the law[10], the IRS's objective and intervention areas (1998) are as follows: Objective: the IRS is the auxiliary organ for justice administration with the mission to secure social intervention with the aim of protecting the rights and interests of minors, preventing social marginalisation and delinquency and contributing in this manner to a judicial and socially integrated life for minors, juveniles and adults.

Intervention areas: the IRS provides support to courts (especially in the fields of penal, juvenile and family jurisdiction); secures psychosocial support for minors, juveniles and adults by intervening in judicial processes in cooperation with the responsible public and private entities; and contributes to the cooperation between the justice administration system and the community, mainly by providing specialised and/or financial support to projects run by private institutions and volunteer groups.

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[8] New legislation was enacted in September 1999 (Acts nos. 147/99, 1 September 1999 and 166/99, 14 September 1999). A compromise between a protection system and a justice system was achieved in a legal solution influenced by the existing penal and penal procedure laws. A first evaluation of the legislative changes will perhaps be possible in three years' time.

[9] The legislative changes and their effects are very recent and the consequences for the IRS's activity not yet completely foreseeable. A certain instability still exists, a feeling of institutional use for political short-term purposes, a lack of coherence or clear aim regarding the definition of long-term operational directives. In any case, a positive adaptation to the new frameworks of action is taking place and consolidating within the IRS. Interesting new projects have been developed. A specific initiative dealing with drunken drivers deserves particular mention. In response to long awaited expectations, better salaries were recently granted to probation officers and some staff, thus acknowledging the IRS's importance in a social field where insecurity is increasingly felt by society.

[10] The IRS's legal ends after the last amendments to its Organic Act (Decree-Law no. 204-A/2001, 26 July 2001, in accordance with the already mentioned new Ministry of Justice Organic Act) remained essentially the same with respect to the 1983 first Organic Act. The main amendments concerned intervention in the prisons, which disappeared as we have seen, and the new approach to juveniles and institutions for juveniles with delinquent behaviour. The new wording stresses the importance of the IRS's intervention in relation to crime policy, crime prevention and community sanctions and measures.

6. Practical results of the criminal policy and of CSMs

The difficult initial period experienced by the new criminal policy and the Probation Service was overcome at the end of 1986 mainly due to the new PPC published in 1987. The new Code gave a clear sign to field operators that the change started with the Penal Code of 1982 was a process impossible to stop. It also put an end to the innumerable pieces of legislation that had been added one by one since publication of the previous 1929 PPC. For the first time, the definition of social report, personality expertise and the use of those instruments by the courts were laid down in a PPC. The same happened with the notion of the Probation Service and its importance for the system as a whole. The first revision of the 1982 Penal Code took place in 1995 and is especially relevant to this discussion as far as the probation order, parole and CSO regimes – not forgetting the new, maximum length of a sentence established at that time – are concerned.

6.1. What are the results of the new criminal policy after fifteen years[11] (1983-1998)?

Of the West European countries, Portugal has the longest average incarceration period (25 months) and the highest percentage of inmates per thousand inhabitants: on 15 March 1998, the latter figure was 145/100,000; of these, 28.3% were remand prisoners. On this date, the prison occupancy

[11] Three years later (2001), the general perspective shown in 1998 has not changed in essence, although some evolution needs to be pointed out: in spite of a big effort to increase prison system capacity (more 2372 places between 1996 and 2000, which caused the occupancy level to drop from 157.5% in 1996 to 114.9% on 15 August 2001), Portugal still has the longest average period of incarceration (26 months), and one of the highest percentage of inmates per thousand of inhabitants: 127/1000.000, on 31 December 2000. On the same day, 30% of the existing 12,771 inmates were prisoners on remand. The occupancy rate was 114%. On 30 June 2001, the total number of inmates was 13,115, which was 13,106 on 15 August (2001 data are provisional). A small increase in parole decisions has been noticed recently.
Concerning the CSO, the general views on results show an increase due to recent efforts to build a partnership framework with local authorities. However, the attitude of the courts still needs to change fundamentally in order to foster a real growth in the future. Concerning imprisonment, we can see that the number of sentenced persons has tended to decrease since 1995. Fines show the opposite tendency. It is important to mention that prison sentences became longer and conditional release more difficult, which could explain the numbers referred to above. Short-term imprisonment has clearly dropped.

rate was 133.2%. Over the last few years, there has been a clear tendency towards reduction of the number of parole decisions; this occurred mainly after the new regime was introduced with the 1995 revision of the Penal Code. Almost no community service orders are issued, despite the fact that the framework of the penalty was changed from three months to one year in 1995, and that in 1997 regulatory norms were issued. The provisional stay of proceedings by public prosecutors has been used scarcely. The probation order as an autonomous substitutive sanction disappeared in 1995, having taken the form of a type of suspended sentence, necessary but compatible with the first one because it aims at a different target. Thus a sanction – a useful one in many cases, and with a specific pedagogic and symbolic value – has disappeared without valid reason.

To a great extent, the present special legislation for young adults has not been used because of the lack of institutional responses, which had been provided by law but never implemented. Weekend detention and semi-detention decisions are almost non-existent. The courts flooded the IRS with demands for social reports mainly regarding juveniles, whereas they seldom used reports when making non-custodial decisions concerning adults or young adults, and caused a breakdown of the capacity of the IRS to answer those requests, especially in Lisbon and Porto[12]. The IRS's potential for implementing sentences with supervision and control obligations has not been given full use due to the courts' preference for requesting social information. More than 50% of the social reports delivered to the courts dealt with juveniles or family law. Either during the preparation period of the merging process with the service responsible for juveniles, or during its implementation, it was the management of the juvenile institutions - the majority of which were close to breakdown[13] - that took up a large part of IRS resources.

Apart from a few sporadic studies on some specific aspects of the penal system in action and its results, and the existence of more or less organised

[12] The number of social reports requested by the Courts seems to be decreasing, as predicted three years ago at the end of this article. Unfortunately, statistics on the last two years are not available from the IRS at present.

[13] The present situation has completely changed following the aforementioned amendment of legislation (September 1999). The IRS' responsibility now concerns only juveniles who perpetrate an act considered as crime, and no longer juveniles in danger of becoming "criminals". They are now the responsibility of the Welfare System. Some of the IRS institutions have been transferred to the Welfare System, and the number of juveniles under the IRS's care has fallen drastically.

statistics, Portugal still lacks a systematic approach to research in the penal field, as until now the criminology research institutes and universities (with a few positive exceptions) have not shown an active interest in this kind of research. Therefore, legislative penal reforms have been based only or mainly on subjective approaches to and intuitive ideas on sociological reality and the level of law enforcement.

At present (1998), some legislative reforms in relation to penal procedure, the prison system, juveniles and electronic monitoring have reached the final phase of preparation. As a whole, the underlying reason for these reforms seems to have very little to do with the investment made in order to apply CSMs. Nevertheless, in spite of the negative experience in other countries with this particular kind of schemes, there are some expectations concerning the introduction of electronic monitoring and its capacity to change house arrest into an alternative way of reducing the number of those remanded in custody. Legislation reforms concerning juveniles and the courts responsible for the enforcement of prison sentences are also under way.

In short:

- Preference for traditional penalties continues to be the normal rule for courts;
- CSMs have no statistical expression except for parole and suspended sentences;
- Some of the latest reforms have toughened the system, especially regarding parole, a fact that accounts for most of the prison overcrowding;
- The use of the Probation Service by the courts has been intense but mostly oriented towards the production of social reports concerning family law and juvenile law;
- Legislative reforms are being prepared which will affect the Probation Service. No plan aimed at motivating probation officers to make the changes has been proposed;
- Criminology research and evaluation of the work done by the services is, in general, non-existent.

7. Conclusion, old and new problems and a glimpse into the future

In his *Portuguese Penal Law: the Juridical Consequences of Crime* (1993), Prof. Figueiredo Dias states that: "Difficulties are not arising from the theoretical configuration of the Portuguese system of penalties or from its ade-

quacy to the rising paradigm of criminal policy, but from the way and the degree to which the system has been put into practice" (pp. 85-86).

Figueiredo Dias thus points out three levels of resistance i.e. the legislative, the structural, and the mentality of the judicial decision-makers. In general, the difficulties at the legislative level were solved by the substantive law reform of 1995. However, as we have seen, some new distorted aspects have resulted from this reform. In procedural law, some aspects will be resolved by the newly revised PPC, but others will not. We specifically wish to point out some very negative aspects relating to Probation Service intervention and CSMs.

At the structural level and in relation to the IRS, the difficulties that have occurred since 1994 were in the area of responding to the requirements of juveniles and family court, and in the area of the management of institutions for juveniles. In the penal area, the Probation Service's capacity to respond has not shown any particular problem. A structural difficulty solved only recently[14] (June 1998) was the lack of an active official criminology research service. As far as the attitude of judicial decision-makers is concerned, Figueiredo Dias summed it up with: "It is mainly in the unjustifiable and unacceptable mistrustful and resistant attitude against the criminal policy programme by the judiciary operators that lies the deeper reason for the unsatisfying accomplishment of that programme and, consequently, for the partial failure of the system...".

Besides the already mentioned resistance, another level of difficulty is emerging from the legal reforms being prepared, with potential and foreseeable effects on the non-conformity between theory and practice. This arises, for instance, from (but not only from) the new draft of the PPC, as already pointed out. This draft does indeed establish a new regime for social reports, mainly because of the described bottleneck in the response capacity of the IRS due to the huge number of court requests. And the project attains this new regime with possible severe consequences for the future, which may not yet have been foreseen. Requests for reports will be limited to only two moments in the procedure: re-examination of the remand decision and (in contrast to the Code in force, where the report can be requested

[14] This service had indeed been created, but was abolished almost immediately. An Academic Observatory on the Justice field established at the University of Coimbra is producing some studies for the Ministry of Justice. Sporadic research appears, coming mainly from Universities, but an official or private institution dealing exclusively and systematically with criminological research still does not exist.

at any moment during the trial) when the need arises for a "correct definition of the penalty to be applied, consequent upon the evidence produced in the court hearing". But, since the rules on postponement of the hearing determine that the interruption may not exceed thirty days (otherwise all the evidence produced until then will be lost), the Probation Service will have to deliver the report within ten or fifteen days at the most, and this will be quite impossible in the vast majority of cases.

What, then, will be the Service's image if – as may easily happen – it will not be possible to give the necessary response in time? How many judges will risk asking for a report knowing there is only a slight possibility that it will be delivered within the designated period? Besides, what will the consequences be for the use of CSMs, bearing in mind that the draft also mainly reduces the use of alternative sanctions to a new simplified form of procedure, based on a proposal made by the Public Prosecutor for a non-custodial sentence, which will become definite if the judge agrees to it and the offender's consent is obtained – in other words, a procedure in which there is no longer any room for social reports? The use, if required, of social reports in the penal field will then perhaps be limited to helping to establish the length of the prison sentence[15]. But, if one of the scenarios admitted by the Commission responsible for reform of the prison system is to be accepted – i.e. allowing for the possibility of the Probation Service no longer to intervene in prisons[16] – it will be up to the Prison Service to respond to the requests for reports about inmates on remand. The IRS will then act only outside prisons.

If the Probation Service leaves the prisons, the principle of unity of support and treatment that should cover pre-care, through-care and after-

[15] It seems that the courts' attitude regarding social reports is to ignore the new PPC provisions and to ask for reports when necessary, being flexible concerning their delivery period. The courts are using the wide power of searching for evidence and truth at any moment during the trial, also given by the same procedural law. If this indication is confirmed, the consequences of the theoretical critical approach used three years ago will not have turned out to be so negative in current practice because of the courts' pragmatic response. In any case, as already said, provisional, unofficial information about the number of social reports requested by the courts seems to indicate a slight drop.

[16] As we have already mentioned, the new changes to the IRS and Prison Service objectives establishes that there will be no more IRS intervention within the prison system. However, pre-trial reports and parole supervision still remain the IRS' responsibility. Bearing this in mind, the commentaries made three years ago on this subject are still valid.

care will be seriously impaired, no longer leaving room for the Probation Service to develop a coherent and continuous work programme right from the beginning of the procedure, involving in many situations the offender, his/her family and the community. Then, in parole situations, the IRS will be responsible for carrying out a decision made without its direct cooperation and, even then, probably only until the moment when that responsibility is assumed by the prison system in the name of the same logic now about to be broken. Once again, should this be the case, it will be without any evaluation having been made of the results of fourteen years of the Probation Service's unique intervention in the prison system (1984 – 1998).

Therefore, some indications exist that, in the near future, the IRS may intervene less frequently in the field of CSMs; with the probable exception of CSOs and possibly electronic monitoring, in a few cases, in addition to the traditional intervention in matters of parole and suspended sentences. If the scenario mentioned above is fully adopted, the Probation Service will have little power to intervene in relation to pre-care, through-care and aftercare. What, then, will remain of the original reasons to create a Probation Service intended as a support service for the courts, either by producing competent, independent and reliable information about the personality and conditions of the defendant's life, or in terms of the implementation of CSMs, or in allowing – in Prof. Eduardo Correia's words – some "fresh air" into the prison system's monolithic culture?

There seems to be only one answer to this: if there is interest in the success of a criminal policy governed by the basic principles of the social reintegration of offenders and the implementation of CSMs, it is impossible to overlook the evidence that the correct enforcement of a sentence is as important as the court's decision itself.

Therefore, it is impossible to overlook the importance of the relationship between the probation officer and offender, on which the success or failure of the sanction's implementation depends to a great extent.

How can this be combined with a court decision made without the relevant personal and social information, information which can be obtained only from a social report, thus requiring the probation officer to make something walk that was born without any legs? Or put another way, how can results be obtained and worthwhile efforts made in a parole case where it is not possible to establish from the very beginning, through the intervention of different services, a link between the inmate, his/her family and the community to which he/she will be returning?

Unless some changes are made, the criminal policy underlying the penal legislation will not be fully implemented. The system that endorses the defence of principles would then be creating the paradox of their impossibility in actual practice. This could apparently happen for the pragmatic reason of giving priority to investment in services other than Probation. It could also be due to circumstances caused by the influence of corporatists' interests served by political decision-makers more interested in circumstantial and short term effects than in a coherent and long-term implementation of the main principles of established crime policy.

Obviously, it is not sound practice to try to foresee the future simply for the sake of foreseeing it.

What is important is to point out possible dangers, which in Portugal have already been experienced, arising from legislative procedures based mainly on good or bad intuition, subjective judgements and political and mass-media circumstances, instead of a timely and scientifically constructed evaluation of reality; or, should this not be possible, at least based on knowledge derived from a careful analysis of the work already done in the field and of practices and experiments which have often produced quite interesting results. In any case, this kind of situation is not exclusively Portuguese. The same happens in other countries, where high-quality scientific research has frequently been ignored or used cleverly for political ends. Let us hope that the risks, possibly due to the absence of a fully integrated notion of interactivity among legislation reforms, that are now menacing the field of probation and the results of sanctions and measures in the community, can be overcome with little harm to the defined 'criminal policy paradigm'.

This is an important victory we must preserve, on the one hand because the criminal policy in force has not yet been questioned officially, and on the other hand, because the necessary strong investment in community service has not yet been made, regardless of its potential (good) results. In fact, it is almost certain that a continuous and intensive 'marketing campaign' aimed at the courts would reverse the actual situation, strongly reinforcing the mind-changing processes. It is still impossible to ignore the following axiom: If we want to put the 'new criminal policy paradigm' into action, we must discover the appropriate working conditions for those in the field who are responsible for the implementation of CSMs. At the moment, Portugal has a Probation Service whose network structure – which is based on competent, trans-disciplinary work teams throughout the country -

has unquestionable potential for social intervention. Such potential should not be ignored, bearing in mind that in any social intervention - and especially in penal social intervention - the technical perfection of the law is of no use without a field response with the adequate human resources and high-quality management solutions. This is of great importance in a field in which discussions are taking place about preventing delinquent behaviour not only by way of intervention by the Probation Service but also the Service's interaction with other public services and – last but not least – with community synergies. Crime prevention should, therefore, encompass not just the abstract ends of penal sanctions but also a combined notion of a penal, social and situationally interactive policy of prevention projects in the community. We also have to accept the partial failure of a system supposedly able to implement the new crime policy and to combine the administration of criminal justice by the Courts with its enforcement by administrative authorities: a system based on the 1982 Penal Code and the 1987 Penal Procedure Code, pillars of the Portuguese crime policy deemed to be essential to the principles of the rule of law and of democracy.

Community Sanctions in Russia: Past, Present and Prospects

ALEXEI TARBAGAEV

1. Introduction

In Russia the terms 'probation' and 'community sanctions and measures' (CSMs) are not traditionally used to indicate the criminal law institutions, although there are similar special measures in the Criminal Code of the Russian Federation which can be imposed on persons found guilty of a crime. The essence of these sanctions is that the punishment prescribed by the court (usually, imprisonment) is not executed if the sentenced person does not re-offend during the period of probation and his/her behaviour corresponds to the criterion of rehabilitating his/her character. This is why the terms 'probation' (which is not used by Russian lawmakers) and 'conditional conviction' (the Russian variant of probation) can be considered as synonyms. Other measures established by the Criminal Code of Russia as alternatives to actual imprisonment can also be included in the concept of CSMs. These are postponement of the execution of judgement (1977-1996), deferment of punishment for pregnant women and women with infants, correctional work, compulsory work, and a fine.

According to current law, special learning and training projects are not included in the tasks of penalty execution. Only in relation to juvenile delinquents can a court prescribe the duty to learn at school. However, it is not a special project but the general rule. Community service as condition for the deferment of a sentence (probation, parole, etc.) or as substitute for detention has never been established by Russian law and is absent from the current Code. The Criminal Code of the Russian Federation provides only for correctional work and compulsory work as separate kinds of punish-

ment. But according to the law, these punishments cannot be considered conditions for probation or substitutes for detention; they are only punishments within the context of CSMs. Electronic monitoring and its modifications were not provided for in the former Criminal and Penal Law and are not included in current legislation. They are not used in Russia for various reasons, including the high costs of their implementation. Another main detail is that according to the Russian Constitution and its Criminal and Penal Codes, each intermediate sanction of a punitive character for a crime committed can be prescribed, changed or cancelled only by court decision and never by the Public Prosecutor's office or other state or social body.

2. Probation in Russian criminal law

2.1. Historical roots

The history of the Russian Probation Service is not as long as the Dutch one, but if one searches attentively one can find some evidence of the intermediate sanction of probation in ancient Russian law. According to Professor N. Tagantsev of St Petersburg Imperial University, the most ancient element of Russian criminal law is the duty of bene vivendi - security in relation to the guilty person about his/her future lawful behaviour connected with the threat of imprisonment in the event of its non-observance. This was established in the law Russian Justice, 1113. This duty was ensured by guaranty and was imposed on the peasant community as the joint and several liabilities of members of a community towards each other.[1]

More concrete embryos of probation date back to the Code of Tsar Alexis (1649). The twenty-first chapter of this law established that if during an investigation the guilty person was characterized positively, it was possible to release him/her on bail with the obligation not to re-offend. But this institution was not developed further and was not mentioned in the subsequent codes. During the reign of Emperor Peter the First (1672-1725) the system of probation or conditional pardon was applied. So, for example, according to his Decree 1711, if a soldier ran away for the first time and was caught soon after, he was not punished but warned that next time he would be punished for both crimes.

[1] TAGANTSEV N. S.: Russian Criminal Law. Lectures. General part, Vol. 2, St Petersburg, 1902, p. 1394

Emperor Paul the First (1796-1801), when signing the confirmation of a military court's sentence, sometimes prescribed executing only disciplinary penalties in relation to those carrying out active military service and not to execute the punishment of imprisonment. In the case of recidivism, guilty persons could be punished more severely[2].

During the revision of Chapter 4 of the Military Criminal Procedural Code in 1889, the measure, which was in some ways similar to probation, was included in that Code. According to items 1 and 3 Article 1412, the execution of a sentences concerning a military man was postponed till the end of the war during which the offence had been committed. The same rule was applied if a convicted person re-offended. He was subjected only to the restriction of some of his rights and benefits of military service. But the law gave the exclusive right to regiment commanders to imprison those convicted soldiers who must be excluded from the military according to the sentence and who could have a bad influence on their comrades (ibid. item 4). Therefore, the military authorities decided the question about postponing execution of the punishment. Corrigible convicted criminals were subjected to a probation system, and the incorrigible ones were sent to prison to serve their sentence. The law did not determine the duration of the probation period; this depended on the moment that the convicted person demonstrated his rehabilitation (for example, by displaying bravery during battle). Such persons were released from the punishment by way of a pardon from the Commander-in-Chief of the Army. If the convicted persons did not rehabilitate, they had to serve the punishment after the end of the current war. But the law allowed an appeal to be made to the Emperor to forgive those who had executed their official duties diligently and in an exemplary manner (ibid. items 5-7). This rule was applied only in time of war, when the importance of each soldier to the fighting force increased to a great extent. It is therefore possible to say that at the end of the nineteenth century there was a measure in Russian Military Criminal Law, which would later develop into the full-fledged institution of probation.

2.2. *First discussions of the need to establish probationary measures in Russia*

In Russia, the problem of probation (conditional conviction) was first discussed during the preparatory work for the Fourth International Prison

[2] FALEEV N. I.: Conditional conviction. Moscow, 1904, p.48

Congress (St Petersburg, 1890) by the Penitentiary Commission of St Petersburg Juridical Society, which related to this institution sympathetically. In 1899, the general meeting of the Russian Criminalist's Union decided by majority vote that it was desirable to establish this institution of law for the benefit of justice, humanity and the state, and to do so quickly. But during the official discussion of this problem, the editorial commission of the project of the Criminal Code expressed its opposition to the idea. In 1900, the Special Conference for the project of the Criminal Code organized by the State Council considered the pros and cons of this measure and charged the Ministry of Justice to consider in more detail the problem of establishing the probation institution in Russia. At the end of the nineteenth/beginning of the twentieth century, there were excited discussions within scientific circles about the necessity and expediency of applying probation to persons convicted of a crime.

The supporters of this institution (Professors A. Piontkovsky and S. Mokrinsky) pointed out the harm that short-term imprisonment inflicted on people and regarded a conditional conviction (probation) as a way for the state to avoid the unnecessary expenses involved with punitive sanctions, which did not achieve the legal goals anyway. They defined conditional conviction as a means of keeping 'accidental' criminals away from the harmful influence of prison and as an instrument of positive moral pressure upon the convicted persons.[3]

The opponents of the probation (Professors N. Sergievsky, N. Tagantsev) argued their own opinion that practical significance of this institution establishment would mean that citizens would receive a possibility to commit one crime being unpunished. Besides the use of postponement of the punishment execution demands great confidence for judicial bodies not only from the state authority side, but in particular from both side people and injured persons. Otherwise it would be very difficult to explain why one criminal was punished for a crime while another arrested for the same crime was released without undergoing any real punishment.[4] Professor N. Sergievsky cited Belgian criminal statistics, which showed that after the establishment of the probation institution the number of crimes increased to a great extent; these crimes were those to which a conditional conviction could be applied (they were punishable with a maximum term of impris-

[3] PIONTKOVSKY A.: About the conditional conviction. Moscow, 1904.
[4] TAGANTSEV N. S., op. cit., p. 1402

onment of six months). Of course post hoc does not means propter hoc, but so far there has been no other experience.[5]

According to Professor A. Zshizshilenko, a conditional conviction is not a punishment because in case of its application the compulsory in a field of personal legal goods is absent.[6] The field where probation can be used as an exception to the rule is that of conditional pardon. According to Article 775 of the Criminal Procedural Code, the court could appeal to the Emperor for the complete pardon of a convicted person or for postponement of the execution of the punishment with further non-performance of the appointed punishment in case of a sentenced person's lawful behaviour. The discussions about the necessity of establishing probation in Russian criminal law had no practical significance in connection with the beginning of the First World War or the October Revolution of 1917, which followed it.

2.3. Conditional conviction (probation) in Soviet criminal law (1917 - 1960)

Soon after the October Revolution of 1917, the institution of probation was recognized by Russian judicial practice due to its obvious convenience and social effect. Therefore the Decree of the People's Commissars Council (Government) of the Russian Soviet Federate Socialist Republic (RSFSR) 'About court' of 7 March 1918 established that the courts could apply conditional conviction. But this law did not concretise the grounds or order of probation execution. The Regulations about the people's court (30 December 1918) authorized courts to conditionally or completely release convicted persons without any punishment (Article 23). In Moscow during the first half of 1918, the number of conditional sentences (of the total number of criminals sentenced to imprisonment) increased constantly and amounted to 10% in January, 21% in May and 29% in June. According to information from the People's Commissar of Justice, (Minister) D. Kursky, in the second half of 1918, 33% of all persons sentenced to imprisonment received a conditional sentence.[7]

This direction of judicial practice was consolidated in the Programme of the Russian Communist Party passed by the Eighth Congress in March

[5] SERGIEVSKY N.: Russian Criminal Law. St Petersburg, 1900, pp. 363-364.
[6] ZSHIZSHILENKO A.: Punishment. Petrograd, 1914, p. 62.
[7] KURSKY D.: New criminal law // Selected speeches and articles. Moscow, 1948, p. 54

1919. It was noted that the extensive use of conditional conviction had led to a radical change in the nature of punishment. It has become not only a repressive measure, but had acquired educational importance. This programme was a directive document for all authorities in Soviet Russia. But it should be noted that the mass application of conditional conviction occurred only in relation to criminals from the working class (proletariat) and the poor. Nobles, the bourgeoisie, priests and rich peasants could not hope for such humane treatment from the proletariat dictatorship. The communist philosophy underlying this decision was to help socially and politically friendly offenders and to isolate and destroy the remains of former 'parasitic' social groups. The usual scientific discussions were not held because the decisions of the Communist Party and the government were grounds not for discussion but for execution.

In 1919 a new law 'Directive rules of criminal law' was passed as a first codification after the revolution of 1917. In this law, the grounds and order of conditional conviction were established. If a crime, punishable with imprisonment, was committed for the first time as a result of difficult life circumstances and if the danger of the convicted person did not require his/her immediate isolation, the court could apply conditional conviction by deciding to postpone execution of the prescribed punishment until the convicted person committed a new, identical or similar crime. In case of repetition of this crime, the conditional conviction was set aside and the original sentence was immediately executed (Article 26). It is interesting that law or a court's sentence did not establish the probation period. In Russia, the percentage of conditionally sentenced persons out of the total number of convicted criminals was 30% in 1919, 40% in 1920 and 44% in 1921[8].

Criminal Code RSFSR 1922 established the probation institution in more detail. Article 37 established the limits of the probation period: from three to ten years (the term was defined concretely during sentencing). During this period, a person who had a previous conviction and committed a similar or identical crime was punished for both crimes; however, the total length of imprisonment could not exceed ten years. According to this law, the grounds for application of this institution were having the characteristics of a criminal personality, but not the gravity of the crime committed. The character of a crime was not a barrier to the use of conditional conviction. During the first years following the passing of Criminal Code RSFSR

[8] TARNOVSKY E.: Judicial repression in figures // Weekly Magazine of Soviet Justice, 1922, no. 44-45, pp. 43-44.

1922, conditional convictions took up an important place in comparison with other punishments. In 1923 from the total number of sentenced criminals, 10.2% were convicted conditionally; in 1924, this figure was 13.5%.[9]

The new codification of law began after the formation of the Union of Soviet Socialist Republics (USSR) in December 1924. In that year, the Fundamental Principles of Criminal Law of the USSR and its republics was passed (general part of criminal law). Because of this law, the probation institution underwent a new development. According to Article 36 of the Fundamental Principles, a conditional conviction could be applied not only where imprisonment was prescribed, but also where correctional labour (without deprivation of liberty) was prescribed. The law removed some barriers to the use of probation, such as a first-time crime committed as a result of difficult life circumstances. The grounds for its realization became subjective: i.e. the opinion of the court that the degree of danger posed by a sentenced person did not require his/her isolation from society.

The grounds and order of application of the probation institution were regulated in a more detailed way by the laws of the Union's republics. In 1926, the new Criminal Code RSFSR was passed. This law laid down that conditional conviction was a special variety of punishment serving (execution of sentence). Its sense is that the sentence is not executed as long as the convicted person does not commit a new, more serious during the probation period (from 1-10 years). The court determined the length of probation according to the specified term of imprisonment or corrective labour. According to the opinion of lawmakers, the term of a punishment determined the degree of public danger both of the crime committed and of the convicted criminal.

In accordance with Article 53 of Criminal Code RSFSR 1926, a conditional conviction was applied if the court recognized that the degree of public danger posed by a convicted person did not require his/her isolation from society or the execution of corrective labour. If during the probation period a sentenced person committed a new, more serious crime, the conditionally prescribed punishment was added to the punishment prescribed for the new crime and was to be served.

Since Criminal Code RSFSR 1926 reduced the minimal term of deprivation of liberty to one day, the number of persons sentenced to short-term imprisonment began to increase, and the number of persons conditionally

[9] SHARGORODSKY M. D.: Punishment in Soviet Criminal Law. Moscow, 1958, p. 155.

sentenced with a probation period began to fall to a great extent. According to the information supplied by M. Yakubovitch, in Russia the percentage of probationers within the total number of sentenced persons was 13.2% in 1926 and 2.7% in 1930.[10] In May 1930, the minimal term of imprisonment was established at one year, and the role of conditional conviction again began to increase. In 1934, the percentage of probationers increased to 7.8%. In the USSR at the beginning of World War II, the percentage of conditionally convicted persons decreased (3.4% in the first half of 1941), but at the end of war it increased again (14% in the second half of 1944).[11]

The institution of conditional conviction (probation) was included in Russian (USSR) criminal law only after the October Revolution of 1917, and had its intended effect. However, scientists noted such defects of law as the absence of obligatory social patronage (supervision and educational work) for all conditionally convicted persons during the period of probation. It was suggested to cancel a conditional conviction not only in cases of the committal of a new crime of the same gravity, but also in cases of any re-offending, because such re-offending demonstrated that the goals of probation (i.e. rehabilitating criminals and preventing new crimes from being committed) had not been reached in the specific situation.

2.4. Conditional conviction according to the Criminal Code of the RSFSR 1960

On 25 December 1958, the Supreme Soviet (parliament) of the USSR passed a new Fundamentals of Criminal Law of the USSR and its Republics. Based on it, in the period 1959-1961 new Criminal Codes were passed by the Union's republics. These Codes included the text of the new Fundamentals word for word, and developed and supplemented its rules. Criminal Code RSFSR was passed on 27 October 1960 and became law on 1 January 1961. New rules about conditional convictions had more precision and concreteness. The exact limits of probation were established. Article 38 of the Fundamentals laid down that a conditional conviction could be applied only if the court prescribed imprisonment or correctional work as the punishment. The conclusion of the court about the inexpediency of actually serving a sentence must be based on the consideration of two fac-

[10] YAKUBOVITCH M.: About legal nature of conditional conviction // Soviet State and Law, 1946, no. 11-12, p. 55.

[11] YAKUBOVITCH M., op. cit., p. 56.

tors: an objective one (the circumstances of the case) and a subjective one (the personality of the offender). The court prescribed the period of probation for a conditionally convicted person. Its duration was not laid down in the Fundamentals. The prescribed punishment was not executed unless during the probation period the sentenced person committed a new, premeditated crime. If during the probation period a conditionally convicted person committed a new, premeditated crime for which he/she could be sentenced to imprisonment, the conditionally prescribed punishment was added to the punishment prescribed for the new crime according to the rules established by Article 36 of the Fundamentals. The additional measures of punishment could not be prescribed with a conditional conviction.

The contents of part 5 Article 38 of Fundamentals were new. This norm dealt with the rule that the court could impose the duty to discipline and rehabilitate the probationer on the social organizations of collectives of workers, peasants and salaried personnel, taking into account the circumstances of the case, the offender's personality and any petitions of these organizations or collectives. Criminal Code RSFSR 1960 concretised, developed and supplemented the rules of Fundamentals related to conditional convictions. According to Article 44 Criminal Code RSFSR, the court prescribing the punishment (such as imprisonment or corrective labour) can decide, taking into account the circumstances of the case and the offender's personality, on the conditional inapplicability of the punishment if, in the court's opinion, it is pointless for that person to serve the prescribed punishment. In this situation, the court decides not to execute the sentence if during the probation period determined by the court the convicted offender does not re-offend and justifies the confidence shown in him/her by behaving lawfully and performing honest labour.

On 4 March 1961, the Plenum of the Supreme Court of the USSR passed the Regulation 'About the court practice of conditional conviction', which interpreted the legal norms and made recommendations for the application of conditional convictions. According to the Russian Constitution, the Regulations of the Supreme Court are not the source of law. Thus, according to these Regulations the inexpediency of serving a punishment as a ground for the use of a conditional conviction is a category of subjective valuation. This means that in a certain situation the court has to come to the opinion that to achieve the punishment goals (rehabilitation of the offender, general and special prevention) it is enough to pass only a sentence in order to express state censure of the criminal, and to threaten actual punishment if the probation conditions are broken.

Although the law did not limit the infliction of Article 44 Criminal Code RSFSR by the category of crime, the Plenum of the Supreme Court of the USSR recommended as a rule not to apply a conditional conviction to persons who had committed grave crimes (an exhaustive list is included in Article 7-1 Criminal Code RSFSR) and to apply it very carefully to recidivists. When deliberating whether to apply a conditional conviction, the court evaluated the facts of the case taking into account any mitigating circumstances (those mentioned as well as those not mentioned in Article 38 Criminal Code RSFSR) and the attitude of the offender both before and after the commission of the crime (e.g. attitude towards labour and education). Together with conditional conviction, additional punishments could be prescribed (except confiscation of property). In this situation, the complete (i.e. both the basic and the additional) punishment was considered as conditional.

The court established the probation period at between one and five years. According to the law, the length of the probation period did not depend on the size of the punishment prescribed. It is possible to say that the size of the punishment depended on the gravity of the crime committed, and the continuation of the probation period depended on the offender's attitude, who had to manifest his/her own rehabilitation during this period.Article 44 Criminal Code RSFSR 1960 supplemented the rule of Article 38 of Fundamentals about involving social bodies with the probation procedure. Therefore the court could impose on a labour collective or individual (with their consent) the duty to supervise the conditionally sentenced offender and to carry out the educational work even if this petition had not been declared originally. According to the petition of the social body (e.g. labour unions, political leagues, etc.) or labour collective, the court could reduce the originally prescribed probation period. A reduction of the probation period could not be sought until half of this period had been served.

The court passing a sentence carries out the general supervision of the convicted person's behaviour. A territorial department of internal affairs (the inspectorate of corrective work and precinct inspector of police) carried out the concrete control for the offenders' behaviour because a conditional convicted offender continues to live at a former place of residence.

If during a probation period a sentenced person had not commit a new crime, had worked honestly and his behaviour was lawful, after the completion of this period he should be released from punishment execution and without a preservation of a previous conviction (criminal record) automatically. The special court's decision was not necessary.

The behaviour was recognized as lawful if during a probation period the conditionally convicted person did not commit offences against public order, followed rules of behaviour at home, with his/her family, in public places and at work. An honest attitude to labour means that the probationer obeys the rules of the factory, office or other organization and executed the target and the norms of individual output. Another main condition was that he/she was not punished for disciplinary wrongs during the same period. It should be remembered that there was a constitutional duty to work in the USSR. Every person coming of age had to be engaged in socially useful labour. Evading this duty did not correspond with the principles of a socialist society (Article 60 Constitution of the USSR). The December 1991 Criminal Code of RSFSR established the punishment for 'sponging off the State' as imprisonment for between three months and two years (Article 209).

If a conditionally convicted person did not sustain the probation during the prescribed period, the conditional conviction was cancelled and the offender was ordered to serve his/her punishment (imprisonment or corrective labour). The law laid down three grounds on which a conditional conviction could be cancelled during the probation period. The first was if a probationer violated public order systematically and he/she was punished with administrative penalty or with the measure of social pressure. This could involve such wrongs as petty hooliganism (vandalism), disobeying the lawful orders of a policeman, appearing drunk in public places (injuring human dignity), or drinking strong alcohol in public places. The courts recognized as 'systematic' such offences that caused administrative penalties (fine, arrest for up to fifteen days, corrective work for up to two months) or a measure of public pressure (warning, censure, reprimand from a social organization or comrade's court) not less than twice in any one year. If the same offences were committed systematically but for some reason were not punished by these sanctions, such facts could not become a ground for the cancellation of a conditional conviction.

According to the report of the territorial body of internal affairs (in relation to juveniles: the report of commissions on juvenile affairs of local authorities) the court had the right (but not the duty) to cancel the conditional conviction and to order a person to execute the prescribed punishment. Another ground for cancellation was a situation where the probationer, who was under the supervision of a social organization or labour collective for rehabilitation, broke his/her promise to demonstrate his/her

own rehabilitation and left the collective with the intention of evading educational influence. These types of probation violation could take the form of drinking strong alcohol at the workplace, appearing drunk at the workplace, being absent from or voluntarily leaving the workplace, and evading social supervision and educational influence by way of leaving the workplace. In this situation, according to the petition of the labour collective or social organization, the court could cancel a conditional conviction and order the offender to serve the prescribed punishment. The court made its decision taking into account the reasons behind the violation committed, its character and the degree of social danger.

The third ground for cancellation of conditional conviction was committing a new offence during the probation period. Originally in accordance with Article 38 of Fundamentals and Articles 44 and 45 Criminal Code RSFSR, if the probationer committed a new crime for which he/she was sentenced for a punishment not connected with deprivation of liberty, it meant that he/she had not broken the probation conditions and had to serve a punishment only for the second crime. The probation period was not interrupted because (and this was paradoxical) it was considered that by serving a sentence for the second crime, the probationer had successfully served probation for the first crime. Only if the probationer committed a new crime during the probation period for which he/she had been sentenced to imprisonment was it recognized that he/she had not met the test of conditional conviction. It this situation, probation was cancelled and the punishment prescribed for the first crime was added to the punishment prescribed for the new crime according to the special rules of Article 41 Criminal Code RSFSR.

However, both scientists and law protective bodies noted an illogical and internal contradiction of the position when the probation's re-offending did not constitute a violation of probation conditions, his/her commission of an administrative offence could bring about the cancellation of conditional conviction. On 1 January 1983, new versions of Article 38 of Fundamentals and Article 45 Criminal Code Russia came into force. Since then, the probationer's commission of any new crime meant a violation of probation conditions and brought with it the cancellation of conditional conviction and the prescription of punishment for both crimes according to the rules of Article 42 Criminal Code RSFSR (the addition of punishments is limited to certain, prescribed kinds of punishment), and ordering the convicted person to serve the punishment.

In 1990, 'Criminality and offences in the USSR' was openly published for the first time. According to this publication, there had been a constant increase in the use of conditional convictions in the period 1985-1989: in 1985, 48,242 persons (3.8%) were conditionally convicted out of the total number of 1,269,493 persons sentenced; in 1989, 50,123 persons (7.3%) were conditionally convicted from the total number of 684,070 sentenced people.[12] This increase in the number of conditional convictions was followed by the simultaneous and considerable reduction (by almost half) of the total number of sentenced persons. This, of course, was the result not of a reduction of the crime level in the country (on the contrary, the number of registered crimes increased from 2,083,501 in 1985 to 2,461,692 in 1989),[13] but of general disorder and strong reduction of crime-exposure level during the last years of the USSR's existence.

In 1991, 2,173,074 crimes were registered in Russia, and 593,823 persons were sentenced, including 59,738 persons who were given a conditional conviction (10.1%). In 1993, 2,799,614 crimes were registered, and 792,410 persons were sentenced, including 124,198 persons who were given a conditional conviction (15.5%).[14] The increase in the use of probation shows that state authorities tried to make a court's practice more humanistic within the framework of criminal law and to reduce the load on those places used to deprive persons of their liberty.

2.5. *Postponement of execution of sentence according to the Criminal Code of the RSFSR 1960*

In March 1977, a new Article 46-1 was included in Criminal Code RSFSR. This norm established the postponement of the execution of sentences imposed on juveniles. According to this law, the court passing a prison sentence of up to three years for juveniles and taking into account the character and degree of public danger of the crime committed, the personality of the offender, other circumstances and the possibility of his/her rehabilitation and re-education without being isolated from society could postpone the execution of the sentence for a period of six to twenty-two months. The court could also postpone the execution of additional punishments. The be-

[12] CRIMINALITY AND OFFENCES IN THE USSR. Moscow, 1990, p. 97.
[13] CRIMINALITY AND OFFENCES IN THE USSR, p. 13.
[14] CRIMINALITY. STATISTICS. LAW. Moscow, 1997, pp. 210-211; Alterations of criminality in Russia. Moscow, 1994, p. 254.

haviour of the person sentenced to postponement (it is possible to call this a variant of probation) had to fulfil a number of conditions and demands, which partly did not coincide with the conditions imposed on a person serving probation or a conditional conviction. This is why it is necessary to note that the postponement of sentence execution (on a level with conditional conviction) was an original institution of criminal law, included in a number of intermediate sanctions-alternatives to the actual serving of imprisonment.

The application of the postponement of sentence execution for juveniles had a positive effect, and from 1 January 1983 a version of Article 46-1 Criminal Code RSFSR was fundamentally changed. From that moment, the postponement of sentence execution could be applied to any person whatever his/her age. The grounds for postponing a sentence remained the same: first conviction for imprisonment for a period of up to three years, the character and degree of public danger of the crime committed, the personality of the offender, and the possibility to rehabilitate him/her without isolating him/her from society. Only the period of postponement was changed (from one to two years). As the circle of persons involved with this institution became wider, there was a serious change in the conditions of its realization. The number of duties the court could impose on the probationer became much larger. These were the duty of the sentenced person to: compensate within a set period for the damage caused; take a job or attend classes; not change the place of residence without the consent of the relevant agency of internal affairs; inform this agency before changing workplace or educational establishment; and visit regularly the agency of internal affairs for registration. The court could also impose other duties: e.g. not to visit certain places; not to leave the place of residence without notifying the relevant agency of internal affairs; and to undergo treatment for abusing strong alcohol.

On 21 June 1985, the Plenum of Supreme Court of the USSR passed a Regulation entitled 'About the court practice of the postponement of sentence application'. This regulation interprets the character of the duties and other aspects of alternative sanction application. So, for example, when imposing the duty to take a job, the court had to take into account that the workplace must be situated within the region of the probationer's place of residence because he/she has to return home each evening. According to the law, compulsory education concerns only incomplete secondary school attendance (nine classes). Further study is continued only on a goodwill

basis. The regularity of visits from a territorial agency of internal affairs for registration may be prescribed as once or twice a month. When prescribing a prohibition on visiting certain places, the court did not mean libraries or museums, etc. but places of possible criminal activity (for example, restaurants, bars, markets, railway stations and airports). According to the law, the aim of imposing these duties was to improve the rehabilitation of the sentenced person. The list of duties was exhaustive and the court could not impose a duty not provided for by law. During the first period of this institution's application, there were situations in which the court imposed postponement of punishment execution on a person sentenced for rape the duty to marry the victim. But this was not in accordance with the law, and the appellate court reversed the judgements.

On its own initiative, the court could impose on a certain labour collective (where the probationer worked) or person (with their consent) the duty to supervise a probationer and carry out educational work. The special inspection body from the internal affairs agency supervised the behaviour of persons sentenced with postponement of execution of the sentence. In relation to juveniles given a postponed sentence, it was a mutual duty of both the inspection body and the commission for juveniles' affairs of local authorities. The law established some grounds for cancellation of postponement of sentence execution. In accordance with part 4 Article 46-1 Criminal Code RSFSR, if the probationer did not fulfil the duties prescribed, the court could pass a decision about cancelling that postponement and order the person to serve the prescribed term of imprisonment. The court could make this decision based on the report from the supervising inspection body or commission for juvenile affairs. In making such a decision, the court had to take into account the reasons why these duties had not been fulfilled. For example, the non-fulfilment of a duty to take a job could not be grounds for cancelling the postponement of sentence execution if there were no available workplaces within the region of the probationer's place of residence. If the probationer left a place of living for urgent reasons (to e.g. attend a parent's funeral) without notifying the inspection body, this could not be grounds to order him/her to serve actual imprisonment.

The second ground for cancelling the postponement of sentence execution was the breaking of public order or labour discipline during the period of postponement. If during the probation period the convicted person committed two or more offences against public order (e.g. petty hooliganism or

vandalism, appearing drunk in a public place, abusing human dignity and social morals, etc.) or labour discipline (e.g. absence or voluntary withdrawal from work, visiting a workplace while drunk, etc.), and each of these offences could reasonably be punished with an administrative or disciplinary penalty, then the court could cancel the postponement and order the person to serve the prescribed punishment. The basis for this decision was a special report from the supervising inspection body of the internal affairs agency (for juveniles, a commission for juveniles affairs) or an application from the labour collective whose duty it was to supervise the probationer and carry out educational work.

Unlike a conditional conviction (Article 44 Criminal Code RSFSR), postponing execution of a sentence had certain requirements. According to the law, it was not made automatically but by a special court decision. In accordance with a report from the supervisory body about the probationer's behaviour and his/her attitude to work or education during the period of postponement, the court passed a judgement releasing this person from punishment or ordering him/her to serve the prescribed imprisonment if that person's behaviour showed that he/she was incorrigible, but there were no grounds for the advance cancellation of probation (for example, committing administrative offences did not incur the penalty). If a person sentenced with postponement of sentence execution re-offended during the probation period, the court added the former punishment to the new one according to rules of Article 41 Criminal Code RSFSR (the total not to exceed the maximum term of imprisonment).

At first look, a conditional conviction (Article 44 Criminal Code RSFSR) and postponement of the execution of a sentence (Article 46-1 Criminal Code RSFSR) had numerous general features. However, independent criminal law measures were prescribed for criminals. The Supreme Court of the USSR explained repeatedly that the postponement of sentence execution was a more strict measure than a conditional conviction, and could be applied only if on due legal grounds it was impossible to prescribe a conditional conviction. The extra strictness of postponement could be explained by two circumstances. The first was the court's possibility to prescribe additional duties, the execution of which was a condition of successful probation serving. Conditional convictions had duties only of a general character (lawful behaviour, good work, non-commission of new crimes). As a result, there was a new ground for cancellation of sentence postponement, i.e. non-performance of these duties.

Besides, if the completion of a probation period meant automatic release from punishment and the previous conviction of a conditionally sentenced person, expiry of the postponement period allowed the court to make one of two decisions: i.e. to release the person from punishment if probation conditions had been fulfilled, or to order him/her to serve the punishment prescribed if probation conditions had not been fulfilled (but during the postponement period, legal grounds for cancellation were absent). The courts of the USSR and the Russian Federation actively applied the institution of postponement of sentence execution. In the USSR in 1985, 117,872 persons were sentenced with postponement (9.3% of the total number of convicted persons), and in 1989, 89,597 persons (13.1%) were similarly sentenced.[15] In Russia in 1994, conditional convictions and postponements of sentence made up 35.6% of the total number of prescribed measures. In 1995, this figure was 41.9%, and in 1996, 44.5%.[16]

2.6. Deferment of punishment according to Criminal Code RSFSR 1960 for pregnant women/women with infants

In June 1992, Article 46-2 was included in Criminal Code RSFSR. This norm established a new kind of punishment deferment for certain persons, i.e. pregnant women and women with a child under three. The essence of this humanistic criminal law measure was to provide more comfortable conditions for the birth of the child and for the child's education, even though his/her mother had committed a crime. It was a new variant of intermediate sanctions. The grounds for such punishment deferment were pregnancy (certified by a medical certificate) or having a child under three. The rules of Article 46-2 Criminal Code RSFSR applied to women serving a term of imprisonment or corrective work whose sentence had entered into force, excepting those sentenced to a term of imprisonment exceeding five years for grave crimes committed against a person.

The body responsible for punishment execution presented a report to the court concerning punishment deferment. The final decision was made by court order. A child did not represent an important circumstance to the court, whether the child together with his/her mother in a kindergarten or reformatory; together with his/her father or other relatives, or in a residential children's home. The deferment of punishment could not be imposed

[15] CRIMINALITY AND OFFENCES IN THE USSR, p. 97.
[16] RUSSIAN JUSTICE, no. 6, p. 50.

on a woman if she had been deprived of her parents' rights by a court decision as a result of non-performance of her parents' duties. As a deferment of punishment was given in the infant's interests, the law required the conditions of the future life of the woman and her child after release to be checked. It was necessary to receive the written consent from other members of the family and relatives if a woman and her child were to live in their flat/house; such consent was not necessary if the flat/house was the property of the sentenced woman. The court had to check the woman's source of income for her and the child's future living expenses. A released woman went to her place of residence independently; if necessary, and if relatives did not meet the woman, the administration of the reformatory could, taking into account her state of health (pregnancy), organize her escort by reformatory personnel.

The deferment of punishment could be applied for the period laid down by Labour Law for release from a work order owing to pregnancy and childbirth. According to Article 165 Labour Code RF, the usual period of release is 70 days before and 70 days after childbirth; in case of a complicated childbirth, 86 days; and in case of the birth of two or more children, 110 days. The territorial agency of internal affairs supervised the woman's behaviour and her execution of a mother's duties. The law provided for the possibility to apply sanctions if the woman did not educate her children or committed an offence against public order. In this situation, she must be officially warned by an agency of internal affairs independently of an administrative penalty application. The territorial agency of internal affairs could send a report to the court about the cancellation of punishment deferment and the execution of the punishment prescribed, if after the warning the woman continued to fail to provide for her child's education or refused to do so or handed a child over to a residential children's home because she could not fulfil the probation conditions. The same report about cancellation of punishment deferment would be sent to a court if a convicted woman left her place of residence and deliberately hid. Besides these situations, deferment of punishment could be cancelled in case of an infant's death. The court had to take into account how the woman took care of a child while the child was ill and whether there was any connection between the level of care and the death of the child.

When the infant reached the age of three, the supervision agency of internal affairs sent a report to the court characterizing the sentenced woman from the point of view of her behaviour at her place of residence, her atti-

tude to labour (if she worked), and her care for her child/children. The court evaluated these circumstances as well as the character of the crime committed, the amount of served and not-served punishment, and her attitude during the actual serving of the punishment, and passed one of several possible orders, i.e. to release her from the punishment in advance, to change the punishment into a softer kind of penalty, or to return the woman to the reformatory to continue serving the sentence. If the court decided that a woman had not fulfilled her obligations and must be sent to reformatory to serve out the remainder of the prison term, the period of the deferment could be counted as part of the term of punishment partly or in whole. However, the court, taking into account the indicated reasons, could refuse this offer. If the court decided to continue the punishment, the woman would be arrested and transported to the reformatory under guard. If during the period of punishment deferment the sentenced woman re-offended, the new punishment was prescribed according to the rules of Article 41 Criminal Code RSFSR (formation of punishments prescribed for both previous and new crimes).

3. Current conditional sanctions and measures

3.1. Conditional conviction according to the Criminal Code of the Russian Federation 1996

Because a conditional conviction (Article 44 Criminal Code RSFSR) and a postponement of a sentence execution (Article 46-1 Criminal Code RSFSR) had many similarities, lawmakers constructed a combined, intermediate alternative sanction in preparation for a new Criminal Code RF based on both old measures. This sanction consists of the most effective elements combining a new integrated institution of conditional conviction (Article 73 Criminal Code RF 1996). Lots of scientific discussions were held before this law was passed. One of the main topics concerned a probation institution, because it was necessary to reduce the number of prison sentences. The Russian prison system is now in crisis because the number of prisons (reformatories) available is insufficient for the number of prisoners. Prisons are overcrowded and do not have room to accommodate all convicted prisoners. The state's financial sources are not enough because the budget is in permanent crisis. All scientists called for the modernization and humanization of the probation institution.

Another reason to develop the probation institution was the need to integrate offenders into the community, because it is impossible to isolate most them for life. The philosophy was laid dawn as the basis for the new Code to be in accordance with international law, its norms and principles. On 1 January 1997, when the new Code became law, the number of punishments that can be accompanied by a conditional conviction increased (not only imprisonment or corrective work, but detention in a disciplinary military unit, restriction on military service and restriction of freedom). The grounds for the application of a conditional conviction were determined more concretely by the new elements. In accordance with part 1 Article 73 Criminal Code RF, the basis for the use of conditional conviction is a court opinion concerning the possibility to discipline the offender without him/her having to actually serve a punishment. In this situation, the court considers the prescribed punishment as conditional. When deciding about conditional conviction, the court takes into account the character and degree of public danger of the crime committed, the personality of the offender, and any aggravating or mitigating circumstances.

The conditions for the probationer are clear: he/she must manifest his/her rehabilitation by his/her own behaviour. The demand of Criminal Code RSFSR 1960 "to live up the exercised confidence by means of honest labour and exemplary behaviour" was not so concrete and definite. When prescribing a conditional conviction, the court establishes the probation period. The probationer must manifest his/her own rehabilitation during this period. As opposed to Criminal Code RSFSR 1960, which established a general probation period for all cases of conditional conviction (from one to five years), the new law differentiates the continuation of a probation period in relation to the extent of the punishment prescribed: if the prescribed imprisonment term is up to one year (or another kind of punishment), the probation period may not be less than six months or more than three years; if the term is more than one year, the probation period must be between six months and five years. Together with conditional conviction, the court can impose additional punishments (but not the confiscation of property).

According to Criminal Code RF 1996, the institution of conditional conviction acquired some elements of the postponement of a sentence execution under the former Criminal Code. In accordance with the new law, the court can impose on a conditionally convicted person various duties, e.g. not to change the place of residence, work or study without the consent of

the state supervising body. Other duties can be to not visit certain places (for example, restaurants, bars, dance halls), to undergo treatment for alcoholism or drug/substance abuse, or to financially support his/her family (a duty absent from the former law). Unlike Criminal Code RSFSR 1960, the new Code provides an open, non-exclusive list of duties. The court can impose on a conditionally convicted person other duties if such would be useful for his/her rehabilitation. It should be pointed out that the imposition of duties is a right of the court and not an obligation.

According to part 6 Article 73 Criminal Code RF, the special state body supervises the behaviour of convicted persons (if the convicted person is a member of the armed forces, supervision is carried out by his/her military unit). The new Code does not establish a duty to prescribe supervision of the probationer's behaviour on social organizations or labour or study collectives. It is solely the duty of state agencies. On 1 July 1997, the new Penal Code of the Russian Federation became law. This new Code lays down the more detailed procedure for the supervision of conditionally convicted persons. On 1 July 1997, the Minister of Internal Affairs of the Russian Federation confirmed the 'Instructions about an order of punishments execution that are not connected with deprivation of liberty and about execution of supervision of a probation's behaviour'. The task of supervision was given to a new, special state agency (the Penal Inspectorate), which was set up in each district or city of Russia as a subordinate part of the Penal (Punishments Execution) Section of the Department (Ministry) of Internal Affairs of every subject (region, area, national republic) of the Russian Federation. It could be said that in Russia the system of the Penal Inspectorate is similar to the Probation Service in the Netherlands in relation of their goals, tasks, rights and duties.

On 8 October 1997, the President of Russia passed a decree concerning the better organization of the penal system according to recommendations made by the Committee of Ministers of the Council of Europe on the unification of European penal rules. In accordance with this decree, the procedure of gradual transfer of the penal system (including the Penal Inspectorate) from the Ministry of Internal Affairs to the Ministry of Justice has begun. It is interesting to note that at first the penal system was the responsibility of the Ministry of Justice of the Russian Empire and Russian Federation in the period 1895-1925. Later, it was handed over to the Ministry of Internal Affairs, and has now been returned to its old 'home', the Ministry of Justice. A governmental commission acting under the chairmanship of

the prime minister has been set up to organize the overhaul of the penal system. On 28 July 1998, the President of Russia passed a decree 'About passing the penal system from the Ministry of Internal Affairs to the authority of the Ministry of Justice'. This decree prescribed handing over the penal system as a whole to the Ministry of Justice until 1 September 1998. Before this date, the Penal Inspectorate was a structure within the Ministry of Internal Affairs. On 1 September 1998, it became a subdivision of Ministry of Justice.

The Penal Inspectorate supervises probationers' behaviour, checks the observance of public order by conditionally convicted persons and the execution of duties prescribed by the sentence. In relation to probationers having been sentenced to duties connected with their job, study or treatment for alcoholism, drugs/substance abuse or venereal disease, the inspection body submits a special report to the administration of labour institutions, study bodies or hospitals. The Penal Inspectorate of the probationer's place of residence supervises his/her behaviour with the help of other personnel of the territorial agency of internal affairs. The probation period begins the moment a sentence enters into force.

The conditionally convicted person is registered and summoned to report to the Penal Inspectorate for an interview. The inspector explains the probationer's duties, the consequences of their non-fulfilment, the responsibility not to commit offences against public order or other types of crime, and makes the probationer sign a document stating that he/she clearly understands these conditions. The inspector then checks and verifies the personal data of the probationer, and gathers information about his/her close relatives and persons who influence him/her. The personnel of the Penal Inspectorate organize regular interviews with probationers and their relatives.

If the probationer behaves lawfully and painstakingly executes his/her prescribed duties during the probation period, the court can abolish partially or fully these duties according to the report of the inspection. If a conditionally convicted person has manifest his/her rehabilitation by his/her behaviour before the end of the probation period, the court in accordance with a report from the Penal Inspectorate may abolish the conditional conviction and withdraw the conviction. In this case, the conditional conviction may not be repealed until at least half of the prescribed probation period has been served. Details characterizing the personality of the probationer, his/her behaviour and execution of imposed duties must be included in the inspection report. The written reports concerning the places of work,

study and residence must be appended to this report as well as to that of a police precinct inspector concerning the probationer's behaviour and way of life, and other documents proving his/her rehabilitation. The court can refuse to accept the report if its arguments are not convincing.

According to a report of the Penal Inspectorate, the court can impose on a probationer other duties if during supervision it becomes clearly necessary to add to the number of earlier imposed duties (for example, if a convicted person commits an insignificant offence). If a conditionally convicted person fails to fulfil the imposed duties or violates public order and is brought to account, the Penal Inspectorate notifies him/her in writing about the possibility of cancelling the conditional conviction. If after such written notification the probationer continues to fail to fulfil the imposed duties, the Penal Inspectorate sends to the court a report concerning prolongation of the probation period taking into account the probationer's personality, the character of the crime, the personal relation of the offender to the crime committed, his/her job and study. The court can prolong the probation period, but only by a maximum of one year. The Penal Inspectorate informs the organization where the probationer works and the police precinct inspector about any such prolongation.

In case of systematic or malicious evasion of imposed duties by the probationer during the probation period, or if the probationer has evaded supervision, the Penal Inspectorate submits a report to the court about the cancellation of conditional conviction and execution of the punishment prescribed. Unlike Criminal Code RSFSR 1960, the new law provides that systematic offences against public order or labour discipline for which the probationer has been brought to administrative or disciplinary account are not grounds for the cancellation of a conditional conviction, but only for the prolongation of the probation period. But there is a position in Commentaries to Criminal Code RF 1996 (under the general editorship of the General Public Prosecutor of Russia, Yu. Skuratov, and the Chairman of the Supreme Court of Russia, V. Lebedev) that offending against public order which brings with it an administrative penalty can be evaluated as the malicious evasion of imposed duties, which is grounds for cancellation of the conditional conviction.[17] But in our opinion, such an interpretation is very broad and cannot be applied in practice.

[17] COMMENTARIES TO THE CRIMINAL CODE OF THE RUSSIAN FEDERATION. General Part, Moscow, 1996, p. 206.

Systematic evasion of imposed duties includes the commission of forbidden actions and the non-fulfilment of obligatory actions more than twice during a year, and the long-term (i.e. for more then 30 days) non-fulfilment of the duties prescribed by the sentence (point 6.5 of the Instructions). The malicious evasion of imposed duties becomes the non-fulfilment of these duties after written notice from the Penal Inspectorate concerning the inadmissibility of these offences. The probationer is regarded as having evaded supervision if he/she was not searched within 30 days after the carrying out of the initial search measures by the Penal Inspectorate (point 6.7 of Instruction).

The new law changed to a great extent the consequences of re-offending during a probation period. According to the former Code, such re-offending meant that the probationer had not complied with the probation order and therefore should have his/her conditional conviction cancelled. In accordance with Article 74 Criminal Code RF 1996, the question about cancelling or maintaining a conditional conviction is decided by the court hearing the case about a new crime if the probationer has committed a not very serious crime. The conditional conviction can be cancelled if during the probation period the probationer's behaviour was negative (i.e. was not according to the rules). In this situation, the punishment is inflicted based on 'totality of sentences' rules. The punishments are added together, but the final term of imprisonment may not be more than thirty years. If the court decides that it is possible to maintain a conditional conviction for the first crime, the punishment for the second crime is executed independently.

If the probationer has committed a new, intentional crime of average gravity or a more serious crime, the court cancels the conditional conviction and prescribes a punishment based on the 'totality of sentences' rules.

Because the majority of intermediate sanctions will not come into force until the year 2001 (arrest, restriction of freedom, compulsory work), Russian courts more often apply the sanction of probation. In 1996, the percentage of conditional convictions and postponements of sentence execution made up 44.5% of the total number of prescribed punishments. In 1997, this figure was 51.2%.[18] In our opinion, the new version of conditional conviction (probation) is the more effective criminal law intermediate alternative sanction, one that can achieve the goal of punishment without having to actually execute it.

[18] RUSSIAN JUSTICE, 1998, no. 6, p. 56.

3.2. Deferment of punishment for pregnant women and women with infants according to the Criminal Code of the Russian Federation 1996

The new Criminal Code RF has changed to a great extent and made more humanistic the institution of deferment of punishment for pregnant women and women with infants. The ground for this alternative intermediate measure is the inexpediency of punishing a pregnant woman or a woman with a child. Pregnancy is a very specific physiological state, one often connected with complications and change of character. It makes punishment execution and the achievement of its goals more difficult. The same applies to the mother of an infant, who invariably has lots of additional concerns about herself and her child. On the other hand, the interruptions of a pregnancy, the birth of a stillborn child or the death of an infant are not grounds for deferment of the punishment.

Although Criminal Code RSFSR 1960 provided for this intermediate sanction to be prescribed for women only while they were serving their sentence, the new Code allows it to be assigned also at the moment of passing a sentence. Another point is that in the former Code, this norm related only to women serving a term of imprisonment, whereas the new law (Article 82) allows application of this institution to women sentenced to any kind of punishment. The current Criminal Code provides for the deferment of the punishment of women with an infant up to the age of fourteen. The former Code limited this age to three. Now the only limitation is to apply this institution to women sentenced for a term of imprisonment exceeding five years for grave and very grave crimes against persons (human life and health).

The Penal Inspectorate at the woman's place of residence supervises her behaviour during the period of deferment. The new Criminal Code excludes such obligatory conditions of deferment established by Criminal Code RSFSR 1960 as the existence of relatives and their consent for joint living or the possibility for a woman to organize good conditions for her infant's education. Experience will show whether or not this norm application is a good one. The main demand on a woman during the probation period is the proper upbringing of her child. She must also observe public order and labour discipline. The conditional character of release means that it can be cancelled if the probation conditions are violated. If a woman neglects her child and continues to neglect his/her upbringing after notifica-

tion by the Penal Inspectorate, the court can cancel the deferment and order the woman to undergo the prescribed punishment according to a report from the Penal Inspectorate.

In accordance with point 5.2 of the Instructions of the Ministry of Internal Affairs, a female probationer is recognized as neglecting an infant's upbringing in the following situations:

- if she does not neglect the child but left him/her in a maternity hospital or sent him/her to a residential children's home;
- if she follows an antisocial lifestyle and does not bring up and look after the child;
- if she left her place of residence;
- if she left the child with relatives or other persons.

Within ten days of discovering such an offence, the inspector sends for the woman concerned or visits her, holds an interview and makes a written notification. If such actions are repeated, the Penal Inspectorate submits a report to the court recommending cancellation of the punishment deferment. If a sentenced woman officially abandons the child, the Penal Inspectorate immediately submits a report to the court recommending cancellation of the punishment deferment and the ordering of this woman to serve the earlier prescribed punishment.

When the child reaches the age of fourteen, the court can pass one of several possible decisions based on a report from the Penal Inspectorate. These variants are: releasing the woman from serving of the remaining part of the punishment; changing the remaining part of the punishment into a milder kind of punishment (if, of course, the limitation on criminal prosecution has not expired). The court decides this question taking into account the character and degree of the crime committed, the woman's behaviour at home and at work, her attitude to the child's upbringing, and the served and not-served portion of the sentence. If a woman having a deferment of punishment commits a new crime during the probation period, the deferment is cancelled and the punishment is prescribed for both crimes according to the 'totality of sentences' rules.

3.3. Prospects for the development of conditional conviction in Russia

On 19 October 1992, the Committee of Ministers of the Council of Europe adopted a Recommendation to member states (no. R (92) 16) on European Rules on Community Sanctions and Measures. This is a regional variant of

the UN Standard Minimal Rules on Measures, which are not connected with deprivation of liberty (Tokyo Rules). In connection with Russia joining the Council of Europe, the problem of how to bring Russia's internal legal system into accordance with international standards has increased. The legal mechanism of realizing international standards within national law and court practice allows both the direct action of these principles and norms (self-execution) and their inclusion (implementation) in Russian law. The first way is established by international treaties (pacts, conventions) ratified by Russia if internal laws do not correspond to international ones. According to point 4 Article 15 Russian Constitution, Russia must comply with ratified international treaties. In accordance with part 2 Article 3 Penal Code RF, if an international treaty establishes rules of punishment execution and treatment of prisoners which are not provided for by Russian Law, then the rules of the international treaty must be applied.

However, European Rules on Community Sanctions and Measures were passed by resolution of the Council of Ministers of the Council of Europe. This means that these Rules are only the recommendations of an international governmental organization, and not an international treaty. These Rules are not yet internationally recognized principles or norms of international law, which is why they can only be realized by changing Russian criminal, penal and criminal procedural legislation. In accordance with part 4 Article 3 Penal Code RF, the recommendations and declarations of international organizations related to punishments execution and the treatment of prisoners are realized in the penal law of Russia only if necessary economic and social possibilities exist. In our opinion, this is a correct decision because the life led by criminals in prison should not be any better than that led by lawful citizens living in freedom.

It should be pointed out that the official Russian translation of the European Rules on Community Sanctions and Measures has not yet been edited. The Rules have not been discussed in academic circles or been mentioned in educational literature. If one compares current Russian criminal and penal legislation with the European Rules of 1992, then Russia's internal law corresponds in a general sense to the principle sentences and concrete recommendations of international standards. There are, however, still some discrepancies, and their elimination shows the prospects of development of the institution of probation. There is an obvious discrepancy between part 2 Article 74 Criminal Code RF, part 3 Article 190 Penal Code RF, and the contents of Chapter 10 of the European Rules 'Operations of the sanction or measure and consequences of non-compliance'. If probation conditions

are broken (evasion of imposed duties, violation of public order), Russian law provides for such sanctions as prolongation of the probation period. European Rules recommend a modification of or the partial or total revocation of a CSM, but not its prolongation if these measures have become pointless. In our opinion, to prolong an unsuccessful measure is not only a vain action but also a harmful one.

According to part 1 Article 74 Criminal Code RF, the only ground for a court to reduce a probation period or to cancel probation ahead of time (as encouragement) is a report from the Penal Inspectorate. But Rule 13 of the European Rules recommends mollifying or cancelling probation ahead of time according to the petition of a probationer made by him/herself. In our opinion, the best solution, for both the Penal Inspectorate and the probationer, would be to allow the possibility to report on reducing the probation period or its cancellation. It could help to avoid both the groundless refusal of the Penal Inspectorate to prepare a report for a court and the passing to the court of decisions not in accordance with the real situation.

Another main aspect of international standards realization for national legislation is to involve a community in the procedure of realizing alternative sanctions and measures. The European Rules are orientated towards the maximum participation of organizations and individuals drawn from the community for the application of alternative sanctions and measures (Rule 45). The participation of the community is recommended to be used in different forms: contacts with mass media, educational programmes, and the direct participation of volunteers in the realization of these measures. It can be a supplement to the official body's activity in the field of alternative measures execution. European Rules define the term 'community participation' as "all forms of help, paid or unpaid, carried out full time, part time or intermittently, which are made available to the implementing authority by public or private organizations and by individuals drawn from the community".

There were lots of situations in the former Criminal Code RSFSR where community bodies and organizations and individual volunteers were involved in the procedure of prescribing community sanctions, its realization, and release from criminal responsibility and conviction. For example, as a rule, a conditional conviction could be prescribed and a probation period could be reduced on the grounds of a petition from a labour collective or a social organization. A court, in order to supervise a probationer's behaviour and education, could appoint these bodies as well as individual volunteers.

The legislators' refusal to involve community forces in the execution of alternative sanctions and measures, which we can see in today's Russian criminal and penal law, fully contradicts the contents of the European Rules. During the last few years, there were no such situations in Russian Law where community activity could have had any juridical meaning. Specifically, it relates to petitions from labour collectives and social organizations about reducing the probation period or the number of duties imposed, and the activities of observer commissions, social inspectors and instructors. It should be pointed out that there were about 10-20 volunteers, social inspectors and instructors for each professional, full-time inspector in former times (i.e. when the USSR was still in existence). Now there are no volunteers involved with the Penal Inspectorate because criminal and penal law do not provide for them. The Penal Inspectorate has only the function of supervising a probationer's behaviour, but not his/her education or training. According to the former law, the latter was a function of labour collectives, social organizations, and individual volunteers from the workplace or residence of the probationer.

In our opinion, excluding the community from the execution of alternative sanctions is a very serious deficiency of current Russian criminal and penal law. International standards regard the involvement of community bodies and volunteers as a very important factor for strengthening connections between offenders, their families and society, and as a way for members of a community to make his/her own contribution to the protection of society. European Rule 48 states that participating organizations and individuals drawn from the community shall undertake supervision only in a capacity laid down in law or defined by the authorities responsible for the imposition or implementation of CSMs. As new ideas are often the first to be forgotten, the prime future task for the Russian legislature is to convert the marked tendencies into law and to pass the international recommended standards by including them in the current criminal and penal codes of the Russian Federation.

3.4. Correctional work according to the Criminal Code of the Russian Federation 1996

Correctional work is a very well known form of punishment in Russian. It was first established by socialist legislation just after the October Revolution of 1917. Today, it is a highly used punishment. For example, in the

period 1985-1989, the percentage of sentenced persons prescribed correctional work amounted to 23-25%.[19] In the period 1991-1993, the figure was 18-21%.[20] During the last few years, however, the figure has dropped; it was 8.4% in 1996 and 7.5% in 1997.[21] The high level of unemployment in Russia can explain this. According to Article 50 Criminal Code RF, correctional work was to last between two and twenty-four months and is served at the convict's workplace. The former Code provided for another kind of correctional work served at places determined by an internal affairs body. As usual, it was hard, unqualified work that did not correspond to the profession of the convict. But the new Code rejected this type of community sanction because the growth of unemployment amidst the conditions of the new, wild market economy made this type of correctional work impossible to execute.

Deductions should be made from the earnings of the person sentenced to correctional work in favour of the state; the court should establish the amount in relation to the sentence (5-20% of earnings). In case of malicious, deliberate evasion by the person sentenced to correctional work, the court may substitute for such work restriction of freedom, arrest or imprisonment at the rate of 1 day of restriction of freedom for 1 day of correctional work, 1 day of arrest for 2 days of correctional work, or 1 day of imprisonment for 3 days of correctional work. According to the new Penal Code RF, the only body responsible for executing this punishment is the Penal Inspectorate of the Internal Affairs Department. Today, no community bodies or individual volunteers are legally involved in the supervision, education or rehabilitation of convicts, because the idea of letting professionals display their professionalism has won. In our opinion, this does not correspond to European Rules and the situation must be changed as soon as possible.

3.5. Compulsory work according to the Criminal Code of the Russian Federation 1996

This kind of punishment is new compared with the former Criminal Code of the socialist period; however, in the history of Russian criminal legislation there were kinds of punishment that were extremely close to it (for

[19] Criminality and offences in the USSR, p. 97.
[20] CHANGING OF CRIMINALITY IN RUSSIA, p. 225.
[21] RUSSIAN JUSTICE, 1998, no. 6, p. 56.

example, public work, sentenced by the district's courts in Russia before revolution of 1917). It should be pointed out that compulsory work is currently 'on the back burner' because in accordance with Article 4 Federal Law 'On Carrying the Criminal Code of the Russian Federation into Effect', the regulations in relation to compulsory work should be put into effect in accordance with Federal Law after the implementation of the Penal Code of the Russian Federation as soon as the necessary conditions for the execution of this punishment have been created, but not later than the year 2001. Although the new Penal Code became law on 1 July 1997, compulsory work remains 'on the back burner' because special federal law has not yet been passed. Perhaps the necessary conditions for its execution are not ready. However, we have few months to change the situation.

According to Article 49 Criminal Code RF, compulsory work consist of the execution by a convicted person of unpaid public work which should be supervised by municipal bodies at a time when the convict is not engaged with his/her main work or study (at school, college, university). Local authorities define the type of such compulsory work. According to the scientific idea supported by the lawmaker, unpaid work should develop respect for community and social interests. This is why compulsory work should be executed not in a favour of any specific organization or person (for examples, victims of crimes), but for community profit. Compulsory work lasts for 60-240 hours; the daily norm is not more than four hours because a convict must have time to perform his/her main work or study and to rest. The sentenced person performs a job that does not require any special preparation or qualification (cleaning streets and parks, and other kinds of unqualified work).

If a convict maliciously and deliberately evades compulsory work, he/she is subject to restriction of freedom or arrest. In such a case, the period of restriction or arrest is determined at a rate of 1 day for every 8 hours of compulsory work. As compulsory work is situated higher on the punishment scale (Article 44 Criminal Code RF 1996), it is a softer kind of the punishment than correctional work. According to the law, compulsory work is not applied to first- or second-grade invalids, expectant mothers, women with children under 8, women of 55 or older, men of 60 or older (the age of pension), or persons performing compulsory military service. Only the future will reveal the effectiveness and social use of compulsory work.

4. Fine according to the Criminal Code of the Russian Federation 1996

The fine ranks top of the list of sanctions. In 1996, 13% of punishments involved a fine. In 1997, the figure dropped to 7.7%.[22] This was due to the growth of unemployment and poverty among the majority of the population. A fine is financial retribution, prescribed within the limits envisaged by the Code, and its amount should correspond to a certain percentage of the minimum wage as established by the legislation of the Russian Federation at the moment the punishment is prescribed, or to a part of the salary or other income of a convicted person for a certain term. At the moment, the minimum wage in Russia is 100 new roubles (+/- US$ 4). The second method of fine determination is a result of foreign legislation influence (German in particular). It helps to individualize the responsibility of persons with different levels of income. The former Criminal Code permitted the size of the fine to be determined relative to the amount of damage caused by the crime committed. However, this is not provided for in the new Code.

The size of the fine ranges from twenty-five to one thousand times the minimum wage, or corresponds to a part of the salary or other income of the convicted person for a period of two to fifty-two weeks. The court established the size of the fine. The gravity of the crime and the property status of the convict are taken into account. A fine can be either the main or an additional punishment. As the latter, it can be prescribed only in cases provided for in the relevant Articles of the Special Part of the Criminal Code. In cases of the malicious, deliberate evasion of fine payment, the fine is replaced by compulsory work, correctional work or arrest respective to the rate of prescribed punishment within the limits established by the Code for these punishments. The scales for substitution are absent from the current Criminal Code. As per judicial practice, the Commentary to Criminal Code RF recommends substituting the fine using the scale 1 minimum wage equals 1 week of arrest, 2 weeks of correctional work, or 60 hours of compulsory work.[23] The fine became a more popular punitive measure after the beginning of the economic reforms in Russia, when the differentiation of income among the population developed rapidly.

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[22] RUSSIAN JUSTICE, 1998, no. 6, p. 56.

[23] COMMENTARY TO CRIMINAL CODE OF RUSSIAN FEDERATION. Moscow, 1996, p. 74.

5. Conclusion

The system of CSMs has been fundamentally revised by recent Russian criminal law. This was a result of the general legal reform of the Constitution and almost every branch of law. The new Criminal and Penal Codes of Russia correspond to the internationally recognized principles and norms of international law, and in particular to rules concerning the protection of human rights. However, some disparities indicated in this article still exist. The task for Russian lawmakers and law science is to take into account positive foreign and international experience and to introduce the changes and additions into current law and when passing the new one.

Community Sanctions and Measures in Spain and Catalonia

M. DOLORES VALLES PORT*

1. Background to the development of CSMs over the last 20 years

After 15 years of different Criminal Justice Bills and drafts, parliament finally passed a new Penal Code[1], which came into force in May 1996, at the end of the socialist legislature. Some critical reviews say that this code does not follow the demands of any politically progressive programme[2]. Penalties are very long, custodial sentences have maintained their central position and there are still more prohibitions than actions freed from penalty. Since the democratic transition, reforms have been called for and some have finally been laid down in law, i.e. a day-fine system, suspended sentences with conditions or obligations attached, and Community Service Orders (CSO). Thus the Spanish sanction system is closer, as to legislation, to other European systems. First attempts to reduce the use of prison sentences did not appear in the academic field but in the field of social work and the judiciary. Movements calling for the introduction of CSMs in Spain - especially in Catalonia - came from some welfare organizations as well as from democratic judges and prosecutors. They pressed the government

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[1] LAW: 10/1995, 23 November, on the Penal Code, Boletín Oficial del Estado, Ministerio de la Presidencia 1995, nº 281.

[2] By "progressive" we mean, technically, correct and coherent in the criminal policy it sets out, as used by: DÍAZ GARCÍA CONLLEDO, M.: *El actual Código Penal ¿un Código Penal progresista?*. In: Panóptico 3. Virus 1997. 22-35.

throughout the 1980s to introduce alternatives to prison. At that time, they identified probation as an alternative to prison, as most western European countries already had probation services to implement CSMs.

An NGO, the Institut de Reinserció Social, a sector of Jueces para la Democracia and the Unión Progresista de Fiscales led the movement that defended the incorporation of a probation system in our country[3]. They tried in 1983 and 1989 to force the introduction of probation into Spanish penal law. First they proposed an amendment to the 1983 Bill, which was rejected by the government, which argued lack of financial resources to fund an implementing system. In 1989 the chief of the Catalan Justice Department urged the government to introduce a probation system in Spain. However, this did not succeed. This failure has been attributed to the fact that a probation order needs two elements: intensive social supervision and an implementing authority to control the fulfilment of the conditions and obligations attached, under pressure of revocation. The government would have had to invest in social welfare organizations within the criminal justice system. At that moment, the state did not want to invest money in social welfare, and still does not want to. Besides, creating a probation service would have been detrimental to the interests of the Prison Services, a well-established organization[4].

In the five different draft bills for a new Penal Code that appeared between 1980 and 1994, legislators aimed to abolish prison sentences of fewer than six months, following the German project. Table 1 serves to illustrate that prison sentences under 6 months had a central position.

[3] A result of this movement was the book DE SOLA DUEÑAS, A; GARCÍA ARÁN, M; HORMAZÁBAL MALARÉE, H.: Alternativas a la prisión. PPU 1986. The publication is in favour of regulating a system of non-custodial penalties in Spain, similar to other European systems. The authors explain and evaluate the various possibilities of suspending and substituting custodial sentences and they make a proposal to integrate alternatives to prison into Spanish legislation and create an implementing authority.

[4] See on this the suggestions made by: BERGALLI, R.: "Resocialización y medidas alternativas. Extravíos conceptuales, políticas sinuosas y confusiones piadosas en las pràcticas penitenciarias de España y Catalunya". Jornades sobre compliment de la pena. Lleida 1991, pp. 21-38.

Table 1: Sentencing in 1991 in Barcelona's Criminal Courts

	1991 N= 2314
3-6 years prison	71
6 months – 3 years prison	176
1 day – 6 months prison	732
Fines	494
Fines & withdrawal of driver's license	193
Withdrawal driver's license	15
Acquittal	465
Unknown	168

Source: Justidata 7, p.6

The underlying philosophy was to replace short custodial sentences with non-custodial sanctions, such as fines, weekend detention and (only in the 1994 Bill) community service[5]. The underlying idea was to use prison only for more serious crimes. In fact, criminal policies in Spain during the last two decades were not orientated towards a reduction in the use of prison. As is shown in Table 2, there has been a clear expansion of the use of prison and remand custody.

[5] CSOs do not figure as a penalty nor as a substitute in the Criminal Justice Bills of 1980, 1983, 1990 and 1992. The first attempt to introduce the CSO was an amendment to the 1980 Bill from the Communist Group. It was called "Work of Social Interest" and was presented as a substitute for both custodial sentences and fines. We find this proposal again 13 years later in 1993 when the new communist group - Izquierda Unida and Iniciativa per Catalunya - introduced it for the first time into parliamentary debate. This proposal was inspired by the German Alternative Project, but the Socialist party did not accept it.In the 1994 Bill almost all the parliamentary groups suddenly accepted CSOs as a new penal substitute although with different characterizations. The Socialists only accepted CS as a substitute for the fine and weekend detention. The Communists proposed that CS should also be a substitute for custodial sentences of up to two years, but this was never accepted in any of the Bills. In 1994 a report by the Consejo General del Poder Judicial accused the Government of having improvised the introduction of CSOs. Finally it was enacted in the 1995 PC for the first time in Spanish penal law.

Table 2: Prison population in Spain (1985-1996)

Years	Sentenced	Remands	Total	Prisoners per 100,000 inhab.
1985	11,651	11,151	22,802	59
1986	13,384	11,872	25,256	66
1987	15,414	11,659	27,073	70
1988	16,705	12,763	29,468	76
1989	18,004	13,469	31,473	81
1990	19,787	13,332	33,119	85
1991	23,224	13,315	36,539	94
1992	27,287	13,726	41,013	105
1993	31,815	13,601	45,416	116
1994	35,262	12,948	48,212	123
1995	35807	11,484	47,291	121
1996	33,610	10,589	44,199	113

Source: Cid & Larrauri 1997, p.25

The reasons for starting discussions about alternatives to prison were the crisis in custodial sentences and the need to reduce the prison population[6] and to fulfil the aim of re-education and re-socialisation that penalties should achieve, according to the Spanish Constitution. Since the 1980s, several writers have been occupied with the subject of alternatives to prison, in the conviction that our penal system makes excessive use of imprisonment. But the most accepted reason for defending the alternatives was their assumed capacity to achieve the aims of rehabilitation.

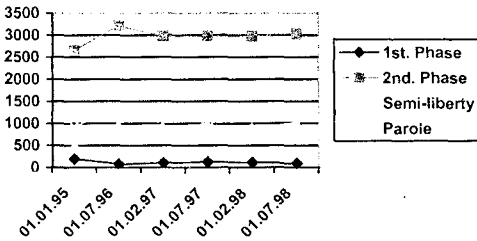
In Catalonia, research by J. Funes (1994) regarding repeat offenders attempted to establish a relationship between the length and degree of punishment of prison sentences and the commission of further offences[7]. The research shows a direct relationship: an increase in the degree of punishment increases further offences. It also shows that parole or open regimes

[6] The prison population has increased considerably in Spain during the last 22 years. In 1976 there were 9.937 inmates while in 1998 the number has gone up to 45.411.

[7] The research studied the characteristics of all inmates released from the Catalan prisons during 1987 and followed them up to see whether they committed further offences, up to the end of 1990.

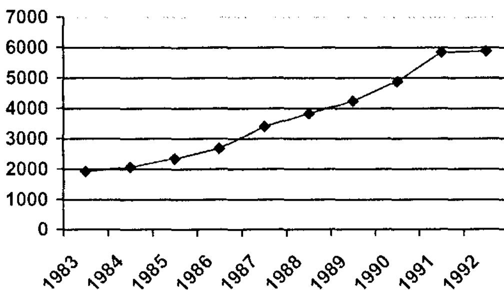
reduce such offences. They show the beneficial effects of maintaining contact with the outside world during the serving of a custodial sentence. The research also established that parole prisoners had a significantly lower rate of re-offending. Both this research on recidivism and the fact that public opinion is concerned about the ineffectiveness of prison sentences led the Catalan government to promote the application of special modalities, which had traditionally been used. It is significant that parole and semi-liberty are more applied nowadays in Catalonia. Figure 1 shows some of the changes that have occurred between 1995 and 1998. Figure 2 shows the evolution in the application of parole in Spain between 1983 and 1992.

Figure 1: Use of parole and semi-liberty in Catalonia (1995-98)



Source: Generalitat de Catalunya. Departament de Justícia. Direcció General de Serveis Penitenciaris i de Rehabilitació. Prison Statistics.

Figure 2: Use of Parole in Spain (1983-92)



Source: Anuario Estadístico 1996, p.153.

Under the former Spanish Penal Code[8] some forms of non-custodial sanctions could be used, such as suspended sentences, fines, house detention, exile, stay of certain rights, treatment for alcoholics, drug addicts and mentally ill offenders, etc. Prison sentences could also be shortened by using parole or by remission through working while in prison. The problem was that most of these sanctions were in addition to prison and had a limited use for a variety of reasons.

We shall now deal with the main changes referring to the sanction system introduced by the new Penal Code (PC). The Code lays down a minimum prison sentence of six months. However it also introduces weekend detention that has to be fulfilled in prison. Also, in the case of unpaid fines, the court may impose a default detention. In this way, weekend and default detention can again take the form of a short prison sentence of less than six months. The number of non-custodial sanctions is very limited; the legislator has only introduced a day-fine system, the CSO, and has added the possibility of attaching conditions (e.g. treatment or participation in learning or training projects) to suspended sentences. The disappearance of house detention is considered the great loss in the new Code. This sanction had been in force since the end of last century. The advantages of house detention over weekend detention are obvious, as the offenders stay in their own environment. It was controlled through a system of unexpected police visits and no electronic monitoring was used. Another negative change is the abolition of remission through work in prison, which will cause an important increase in the length of prison sentences.

2. Legal framework of CSMs

2.1. CSMs in the new Penal Code

The CSMs available in Spain under the 1995 PC are CSOs, learning and training projects, treatment orders, suspended sentences with conditions attached, semi-liberty, parole, fines and some forms of restitution. Let us begin with an examination of the relevant aspects of these CSMs.

[8] The former Penal Code dated from 1973 but had its origin in the 1848 Code, and was in force until April 1996.

2.1.1. Community Service (Art. 49 PC)

CSOs are an alternative to short custodial sentences. They are included in the group of penalties that deprive offenders of rights and require explicit consent to be given by offenders. CSOs can only be used for less serious and light offences[9]. They are not a penalty in themselves but a substitute for weekend detention or for the custodial sentence arising from a non-paid fine. The tariff for CSOs is: one weekend's detention equals two days' work and 1 day of a custodial sentence equals 1 day's work. The work rate per day can be from 4 to 8 hours.

In the sentence the offender can be required to perform from 16 to 384 hours' work; this upper limit is quite high compared to other western European countries. Failure to comply does not constitute a new offence. The court can revoke the order, which implies that the original prison sentence has to be fulfilled, but only as to the number of hours still to be worked. On the question of criteria of suitability for CS, it is intended for first offenders who are willing to repair the damage caused by the offence through unpaid work. The legislation recommends avoiding assigning offenders to situations where there is clear evidence that they would not have the commitment or stability in their lives to report for work consistently and comply with the rules and regulations.

2.1.2. Learning or training projects

These can be imposed:

- as a condition attached to a suspended prison sentence (Art. 83.4 PC);
- combined with fines, weekend detention or CSOs (Art. 88.1 PC);
- as a security measure[10] (Art. 105.1.f PC) instead of a non-custodial sentence;
- as a condition attached to parole (Art. 90.2 PC).

The law regulates quite clearly the possible projects: learning, cultural, labour training, driving education, sex education or similar. The Code also offers the possibility of connecting the projects to the offence (such as sex

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[9] The new Spanish Penal Code includes three categories of offences/penalties: serious, less serious and light (art. 32 PC).

[10] Security measures are regulated in articles 95 to 108 in the 1995 PC. A Judge and a Court may impose them on someone who has committed a criminal offence when the prognosis for the future is that the convicted person is likely to commit another offence, having regard to his personal circumstances.

education for sex abuse) in such a way that they may be linked to reparation or mediation, or confronts the offender with the damage caused. In practice - in Catalonia - the sentencing judge or court gives an approximate idea of the type of activity, but leaves a broad margin to the implementing authority to develop and specify the conditions of the project. The authority determines the hours and duration, and establishes an individual work plan.

2.1.3. *Treatment orders*

Treatment orders can be imposed:

- as a condition attached to a suspended prison sentence (Art. 87 PC) if an offence has been committed as a consequence of drug dependency;
- as a security measure[11] (Art. 96.2 and Art. 105.1.a PC) if, when the offence was committed, the offender was under the influence of drugs or it was caused by withdrawal syndrome (Art. 20.2 PC);
- as a condition attached to parole (Art. 90.2 PC);
- as a condition for semi-liberty (Art. 182 PR[12]) if the prisoner voluntarily agrees to drug-addiction treatment.

These orders refer to programmes for drug or alcohol addicts, which can fully or partially replace a custodial sentence.

2.1.4. *Suspended sentence with conditions attached*

Provided a custodial sentence is not longer than two years, the judge or court may suspend it. Weekend detention and default detention in the case of unpaid fines can also be suspended with no conditions attached. However, fines or those penalties that withdraw rights cannot be suspended. Our legislator has chosen a model where, on the one side, the intention is to avoid sending to prison individuals who have committed a crime of no special gravity and on whom their time in this institution would in all probability have a de-socialising effect. Thus we see that the essential condition - which could be the only one - is that no further offence is committed during the period of suspension. On the other hand, the possibility of attaching conditions and the fact that the judge must take into account the offender's 'criminal danger', demonstrate a rehabilitation concept of pen-

[11] See explanatory note number 10.

[12] New Penitentiary Rules (PR) were passed following the 1995 PC. Law: Real Decreto 190/1996, 9 February, on the Penitentiary Rules.

alty, tending to modify those conditions of the individual in which are found the origin of his/her criminal activity.

There are three requisites relative to the subject: that there is no criminal danger, that it is the person's first offence, and that the civil responsibilities derived from the crime have been satisfied. The 1995 PC established for the first time two possible probationary periods, i.e. between two and five years for penalties of up to two years, and between three months and one year for light penalties[13]. The general condition is that the convicted person commits no further offences during the probationary period. There is a wider regulation for drug addict offenders (Art. 87 PC). The Code lies down longer prison sentences to be suspended - for up to three years instead of two - and they can be repeat offenders with other suspended sentences.

The 1995 PC introduces new conditions that can be attached when suspending a prison sentence (Art. 83 PC). These are considered an important change in our penal legislation in an effort to individualize sentences. The first two conditions – a ban on visiting a designated area and a ban on leaving his/her residential area without court permission – contain the problem that they cannot be controlled in practice by our Criminal Justice system. The third condition obliges the offender to report and justify his/her activities. The fourth is to participate in learning or training projects and the fifth[14] is so indefinite that it may provoke an arbitrary use of conditions attached to suspended sentences. If the convicted person commits no further offence and keeps to the conditions attached during the probationary period, no penalty is imposed. The sentence is not then recorded in the criminal records.

Failure to comply does not constitute a new offence. If the offender infringes the conditions attached the çourt may:

- change the conditions attached;
- extend the probationary period up to five years;
- revoke the suspended sentence.

When the court revokes the order, this implies that the whole original prison sentence has to be served, and not merely the remaining probationary period. In the case of revocation, the prison sentence will be recorded in the criminal records.

[13] See explanatory note number 9.

[14] Art. 83.5 PC enables the Judge or the Court to attach any other adequate and convenient condition appropriate for the social rehabilitation of the offender, with his consent, as long as the activities do not prejudice his integrity.

2.1.5. *Fulfilment modalities: semi-liberty*[15] *and family custody*

Semi-liberty precedes parole. It is the third phase in the Spanish progressive system of serving prison sentences. This progressive system does not mean that every prisoner serving a sentence has to go through all the phases: depending upon the offender's personality and prognosis, he/she may start serving his/her sentence in the second or third phase right away. Semi-liberty is served in an open institution called *régimen abierto*[16]. Under this regime prisoners can be allowed to spend the day outside for work, training, family duties, doing therapy or any activity orientated towards their reintegration. They are given weekend and bank holiday leave. The periodicity and duration of the leave is not limited by law, but determined according to each prisoner's profile. Normally prisoners in semi-liberty remain a minimum of 8 hours in prison per day as well as being there overnight. However, the 1996 PR lays down the possibility of avoiding this obligation if they voluntarily accept electronic monitoring.

The prison Treatment Board is empowered by law to revoke the grant of semi-liberty when negative changes occur in the prisoner's personality, behaviour and/or prognosis. In this case the prisoner still has the right to appeal against the revocation of semi-liberty to the JVP[17]. Family custody is one of the non-custodial security measures[18] (Art. 105.1.e PC). Under this measure, the offender is controlled under the guardianship of a relative who voluntarily accepts such responsibility. The special judge for the fulfilment of penalties (JVP) supervises this measure.

2.1.6. *Parole*[19]

Parole is not granted automatically, but is a benefit to be earned by the prisoner through his/her conduct during the serving of the sentence. It can

[15] For further information on semi-liberty see: PAZ RUBIO, J.M. et al.: Legislación Penitenciaria. Colex 1996, pp. 367-369.

[16] The 1996 Penitentiary Rules set up three different semi-liberty establishments: *Open Section*, a special section inside an ordinary prison, for those inmates serving the third phase; *Open Centres*, special penitentiary establishments for those prisoners serving the third phase; and finally the *Dependent Units*, located in the community, outside any prison centre, and run by non-governmental organisations.

[17] There is a special judge for the fulfilment of penalties. The Spanish name for this judge is *Juez de Vigilancia Penitenciaria* (JVP).

[18] See explanatory note number 10.

[19] For further information see: NAVARRO VILLANUEVA, C.: La reducción de beneficios penitenciarios en la legislación vigente. In: Penas Alternativas a la prisión. Bosch 1997, pp. 225-249.

be obtained after serving at least two-thirds of a custodial sentence (in the former PC it was after serving three-quarters). The new regulation introduces the possibility that a special judge for the fulfilment of penalties[20] may attach conditions to the parole (Art. 90.2 PC). Further offences or failure to comply with the conditions attached will cause revocation of the parole. This implies that only the remaining part of the original prison sentence has to be served. The prisoner has the right to appeal against revocation of parole to the JVP. Conditional liberty has a double rationale in the new Code: on the one hand it is an instrument which will help to diminish the effects of the extremely harsh penalties envisaged in the 1995 PC, and on the other it will avoid the de-socialising effects which the custodial sentences bring with them.

2.1.7. Compensation and restitution[21]

The 1995 Spanish PC has not regulated reparation as a principal autonomous sanction, nor does it allow the possibility of substituting reparation for a custodial sentence, and with respect to suspension it only mentions payment of the civil responsibility as one of the conditions to suspend a sentence. For a reduced number of offences, reparation permits exemption of the penalty[22]. Meeting the civil responsibility as a condition for obtaining suspension of the penalty creates two problems: the risk of subordinating the re-socialisation objectives to those of reparation for the victim, and - a practical question - that when instalment payments are imposed for civil responsibility and the person pays only the first instalment, the judge will already have suspended the penalty and lacks the machinery to enforce payment of the remaining instalments.

The mediation-reparation model is regulated in Spain but only in the field of the juvenile courts (Law 4/1992, 5 June). As applied in Catalonia, extra-judicial mediation-reparation consists of the case being diverted by the prosecutor to the mediation team. In the case of a victim-offender agreement, the prosecutor declares the non-continuance of proceedings.

[20] See explanatory note number 17.

[21] For extensive information see: LARRAURI PIJOAN, E.: La reparación. In: Penas Alternativas a la prisión. Bosch 1997, pp. 169-195.

[22] These offences are related to tax evasion and fraud (art. 305.4, 307.3 and 308.4 PC), to perjured evidence (art. 462 PC) and to employment discrimination (art. 314 PC).

2.1.8. *Fine system*[23]

Fines are imposed as day fines (minimum 5 days, maximum two years) and can be used for less serious and light offences. Fines can be a penalty in themselves and also a substitute for a custodial sentence (a prison sentence of up to 2 years and weekend detention). The sentencing judge determines the amount of the day fine and the only factor that is taken into account is the defendant's financial and economic circumstances. The minimum amount of the day fine is 200 and the maximum 50,000 pesetas. The fine has a long duration period, and for this reason the level of day fine imposed may be reduced if the offender's financial circumstances deteriorate during the payment period.

In the case of unpaid fines, the sentencing court imposes a default detention. This is fixed at a rate of 1 day of detention for every 2 days of unpaid fine, to be fulfilled as a custodial sentence or weekend detention. The sentencing court has the power to suspend default detention and also to replace the detention by community service at a rate of 1 day's detention for 1 day's work.

2.1.9. *Electronic monitoring*[24]

In the pre-trial stage there is no juridical regulation that clearly establishes the possibility of replacing remand custody by electronic monitoring. However, it could be one of the answers to the excessive number of prisoners on remand who fill the Spanish jails.[25] As we have said, in the trial stage suspended sentences with conditions attached can be imposed. We find among these conditions bans on visiting a designated area and bans on leaving the offender's residential area without the court's permission. In these cases electronic monitoring could be imposed, as Art. 83.5 PC enables the court to impose any other adequate and convenient condition. Nevertheless, up till now there has been no attempt in this respect, principally because of the

[23] For further information see: CACHÓN, M & CID, J.: La pena de días-multa como alternativa a la prisión. In: Penas Alternativas a la prisión. Bosch 1997, pp. 37-57.

[24] For extensive information see: ESCOBAR MARULANDA, G.: Los monitores electrónicos (¿puede ser el control eléctrónico una alternativa a la cárcel?). In: Penas Alternativas a la prisión. Bosch 1997, pp. 197-223.

[25] In 1988 43% of prisoners in Spain were on remand custody. In 1994 the percentage has been reduced to 25 % but is still high. Source: JUSTIDATA, 10. Centre d'Estudis Jurídics. Departament de Justícia. Generalitat de Catalunya. Barcelona 1995, p.6.

requirement for a substantial initial financial investment. In the post-trial stage, the Penitentiary Regulations (Art. 86.4 PR) have regulated the use of electronic monitoring as a possible condition for semi-liberty. This regulation introduces as an innovation that prisoners in semi-liberty are released from the obligation of remaining a minimum of 8 hours in prison and overnight, when "the inmate accepts voluntarily the control of his/her presence outside the Centre through appropriate telematic devices".

In this way the government has incorporated electronic monitoring without holding any previous debate. It seems that the intention is to 'leave prison beds empty' more than the desire to rationalize the obligation of staying in prison overnight when in semi-liberty. Nor is it clear whether the person being monitored must remain in any specific place. Finally, it is difficult to apply this precept at the present time as there is not only none of the necessary infrastructure, but also the problems and the cost of putting it into operation are unknown. On the question of the possibility of combining different CSMs under the 1995 PC, learning and training projects can be combined with fines; CSOs and parole and also treatment orders can be combined with parole and semi-liberty.

2.2. *Consent and revocation*

To round off this section on the legal framework of CSMs in Spain, we will deal with the question of the offender's consent and the conditions of revocation.

2.2.1. Consent

With respect to the offender's consent, the express consent of the convicted person is only required when imposing a Community Service Order[26] and also, in the case of a suspended sentence with conditions attached, if the judge or court wishes to fix a different condition from those mentioned in the Penal Code (Art. 83.5 PC). In some other cases, the judge or court must hear the parties before taking a decision. This is the case of the substitution of imprisonment of up to two years by a fine. The parties must also be

[26] The present law requires the explicit consent of offenders to be sought before sentences involving community service can be passed. Consent is also required to accept the placement. The main reason for seeking the offender's consent is to prevent the imposition of hard labour, which conflicts with the European Convention on Human Rights.

heard in the case of infringement of one of the conditions attached to a suspended sentence before a decision is taken over the consequences of such infraction. Up till now there has been no attempt in Spain to make any change with regard to whether the consent of the offender should be a formal prerequisite.

2.2.2. Revocation

The judge or court who/which delivers the sentence of a community sanction or measure is also empowered by law to revoke it or to modify its conditions and obligations, except for parole and semi-liberty. In these cases it is the *Juez de Vigilancia Penitenciaria* (a special judge for the carrying out of penalties) who will decide on the consequences of non-compliance and, where appropriate, whether to revoke the sentence or not. The regulation regarding CS and parole, with respect to the consequences of revocation, is more favourable than that with respect to the suspended sentence with conditions attached. Here we see that in the two first cases the original penalty is discounted in terms of time already served, while if a suspended sentence is revoked the whole of the original sentence must be served and not merely the time remaining in suspension.

It is in the treatment orders where there is greater discretion with respect to the decision as to whether there has been a breach and whether it should result in revocation. Judges do not act in a uniform manner in those cases in which relapses occur in treatments for drug dependency. For some it is part of the process, for others it is sufficient reason for revocation. It is necessary to reach a consensus among the judges and some common criteria (guidelines) established, based on therapeutic arguments. In the cases of revocation of a CSM, the offender has no right of appeal to any other court and therefore his/her rights are not at present sufficiently protected. Also, except for the general recommendations made by the Penal Code itself, there are no official guidelines for applying or refusing the CSM.

3. Implementation of CSMs and the Implementing Authority

The sentencing judge or court is responsible for implementing and controlling the majority of CSMs, i.e. CSOs, suspended sentences with conditions attached such as treatment orders, task penalties and fines.

The *Juez de Vigilancia Penitenciaria* (JVP) is responsible for the implementation and control of parole, semi-liberty and all the security measures, especially those that imply loss of liberty[27]. Under the former Penal Code, this judge controlled only those measures, which apply when the individual is already serving a term of imprisonment (parole, semi-liberty). With the new Code his/her control functions have been broadened to the security measures and also to the conditions that may be fixed for the granting of parole. This change has not pleased the JVPs, who oppose carrying out these functions of control, which in fact should belong to a probation service, if this were to exist in Spain. In practice, it is not being carried out and there have been initiatives on the part of this group to obtain legal reform in this respect.

In Spain we do not have a probation service to develop CSMs, although we do have the possibility of using some forms of community sanctions and measures (CSMs). How could that be without the creation of an implementing authority? It is clearly an important obstacle in the development of these measures. We have to differentiate between two distinct and paradoxical situations in a single country with a single Penal Code: Catalonia and the rest of Spain. Catalonia is the only autonomous community to which competence in penitential matters has been transferred, that is to say, in everything referring to the carrying out of sentences. The region receives state finance for this purpose, a factor, which allows it to have a different organization. Also in Catalonia, there had been a different policy for juvenile offenders since the promulgation of the Law 4/92, which already put into practice many of the CSMs, including probation, with much success[28].

[27] Custodial security measures have to be controlled by the *Juez de Vigilancia Penitenciaria* who should provide, at least once a year, a proposal as to maintenance, termination, substitution or suspension to the sentencing judge or court (art. 97 PC).

[28] It is significant that there has been previous experience of community service for juveniles in Catalonia. A law introduced CS for juveniles from 12 to 16 in Catalonia in 1992 and it was implemented in 1993. It started with 74 orders in 1993; the number rose to 168 by 1994 and to 249 by 1995. As we can see, the number tripled in two years. CS for juveniles is a penalty in itself, not a substitute. It varies from 5 to 200 hours of work, a maximum which we find too high for young people under 16. It can take a whole year to complete the order. In fact it is quite common that the boy/girl does not complete the order; sometimes they do not even sign the agreement. Work placements are in practice very similar to those for adults: it is unpaid work, it should help the minor to understand the consequences of his acts, it should not interfere with his studies or his job, it should involve work which the beneficiary confirms would not otherwise be done by paid employees. The difference should be that the work

For these reasons, the Catalan government commissioned a special service[29] – one very similar to a probation service – to decide on and be responsible for the practical implementation of CSMs. This service was regulated by a government decree on 23 July 1998, after the new sanction system introduced into the Spanish PC came into force. It advises the court and is responsible for the implementation of non-custodial sanctions for adults and juveniles, such as CSOs, suspended sentences with conditions attached, treatment orders and learning or training projects. The Catalan regional authorities fund it and it is part of the Catalan Department of Justice.

In the rest of Spain there is no any 'implementing authority', nor does the current law envisage creating one. In practice what happens is that there is a great reduction in the possibility of the application of these measures becoming extended among the judges, given that professionals are required to put them into practice and control them. Nevertheless, in the case of the CSOs, there have been advances. Recently a collaboration agreement was signed - as a kind of convention - between the Federation of Spanish Municipalities and the Justice Ministry, for the city councils to take on the receiving and following up of individuals sentenced to CS. In the Basque country there are the Offices of Orientation and Assistance to Detainees, which already existed under the former Code. These implementing bodies are under the Basque Government State Office for Human Rights and operate as a social service at the disposal of judges and courts. Currently, they take the initiative for the judges to hand down some of the CSMs, and can also take control of the alternative measures and sanctions.

4. Empirical data and evaluation

The overall picture of the implementation of the CSMs enacted in the 1995 PC is the following:

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placement should be related to the offence and that it should be close to the offender's environment, so that he can be in touch with the social/educational resources in his area.

[29] The Catalan implementing authority is called *Direcció General de Mesures Penals Alternatives i Justícia Juvenil.* Community sanctions and measures are therefore called 'penal alternative measures'. These measures are similar to those that were already implemented in Catalonia with juveniles by a former service called *Direcció General de Justícia Juvenil* since 1993. That was the origin of the 1996 service for both juveniles and adults.

- Judicial authorities tend to use mainly the day-fine system, which is easier to implement and control, as an alternative to imprisonment.
- There is a lack of information about the new possibilities of CSMs.
- There is selectivity in the implementation due to the fact that long sentences and repeat offenders are excluded, and by the legal restrictions relating to criteria of suitability for the suspension of a sentence and the application of substitute sanctions/measures.
- A reduced number of proposals during the pre-trial period and different application depending on the court.
- A lack of learning and training projects to be implemented as conditions for suspending a sentence or as security measures.
- Difficulties in evidencing drug or alcohol addiction during the pre-trial period and the trial itself.

The Catalan implementing authority has been running for two years now and it is too early for any real evaluation. However, let us look at some figures on Table 3.

Table 3: Offenders sentenced to CSMs in Catalonia (May 1996 - June 1998)

Community Service	181
Suspended sentences with conditions attached	78
Obligation to attend learning or training projects	17
Treatment order	43
Other obligations	18
Learning or training projects	12
Combined with fines, weekend detention or CSOs	7
As a security measure	5
Treatment orders	325
As a security measure	85
Under the former Penal Code regulation	240
Family custody	5
TOTAL	601

Source: Generalitat de Catalunya. Departament de Justícia. Direcció General de Mesures Penals Alternatives i Justícia Juvenil.

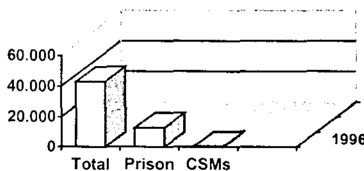
Under the 1995 PC and for the period May 1996–June 1998, 361 measures were implemented in Catalonia, consisting of 181 CSOs, 78 suspended

sentences with conditions attached, 12 learning or training projects, 85 treatment orders and 5 family custody orders. It is interesting to consider that a high percentage (60-70%) of the offenders have a drug addiction problem. The Catalan government is disseminating information about non-custodial sanctions so that they are perceived as an adequate and credible reaction to criminal behaviour, and is pressing the judicial authorities to apply them, though with little success.

One of the measures gaining popularity and in which an increase in demand on the part of the judges is expected, is that of the 'learning and training projects'. In Catalonia up till now, courses of sex education had been implemented for sexual abuse offenders but, as the penalties that the Code provides for this crime are high, it is very difficult to apply a suspension of the sentence in these cases. Currently, and in collaboration with a private institution (the Spanish Red Cross), courses for traffic offences due to alcoholic intoxication are to be put into operation. These courses will deal with the problem of the abuse of alcohol or other drugs, notions of first aid and the Highway Code. Also in Catalonia there are two special programmes that aim to develop treatment orders, for both mentally ill and drug or alcohol addicted offenders.

As we have already mentioned, Catalonia is the only autonomous community to which competence in penitential matters has been transferred and which receives state finance for this purpose. Figure 3 shows the financial means attributed to the implementation of CSMs (470 million pesetas), compared with the total expenditure of the Catalan Department of Justice in 1996 (43,017 million pesetas).

Figure 3: Financial means attributed to the implementation of CSMs in Catalonia in 1996 (in millions of pesetas)



Source: Memoria 1996, p.7

Recently in Catalonia research has been done on the costs of CSMs in relation to the costs of imprisonment[30]. According to this research Catalonia spends 2,164,000 pesetas per prisoner per year. The research shows a much lower cost for CSMs were our legislation to be closer to that of most western European countries: i.e. 232,432 pesetas per offender per year, almost ten times less than the cost of imprisonment!

5. Probation Service: the Catalan implementing authority

Let us now look at the nearest body to a probation service in Spain, the Catalan implementing authority *Direcció General de Mesures Penals Alternatives i Justícia Juvenil* (DGMPA), established by governmental decree in July 1996. The joint budget for 1996 amounted to 470.5 million pesetas. There is a general manager for all Catalonia and four branch offices, one for each Catalan province.

The DGMPA is carrying out four key tasks with adult and juvenile offenders and victims:

1. Social enquiries and advice to the judicial authorities.
2. Development and organization of CSMs[31]: supervision and control of CSOs, learning and training projects, treatment orders and suspended sentences with conditions attached, as well as counselling and aftercare aimed at the social settlement of the offender.
3. Organization of victim-offender mediation and restitution programmes in the pre-trial stage.
4. Organization of a network of public offices providing assistance to victims of criminal offences.

The unit for social enquiries and advice to the judicial authorities is concerned with personal information and the background of a suspect, as well as the circumstances that led to the offending behaviour. The chances of rehabilitation are considered as well. This information may play a part in the judicial decision. However, a written report from this unit is not a pre-

[30] See: REDONDO,S. et alia: El cost de la Justícia Penal. Privació de llibertat i alternatives. Centre d'Estudis Jurídics i Formació Especialitzada. Generalitat de Catalunya. Barcelona 1997, pp. 119-142.

[31] Parole and semi-liberty are under the supervision and control of a different body, the Catalan Prison Services, which reports to the special judge for the fulfilment of sentences (JVP).

requisite for getting a CSM accepted; it is a personal decision of the sentencing judge whether to ask for the report or not.

The unit for developing CSMs is called the Unit for Implementation of Measures (UIM) and is subdivided into Community Service and other Community Sanctions and Security Measures. For instance, as to Community Service, the UIM acquires project posts, places the offenders, supervises the development and reports their progress and any breach to the sentencing judge or court. Professionals working at this unit are called DAMs. They are specially trained officers and need to have a qualification for social work, i.e. a degree in education, psychology or another similar field. DAMs operate within a certain area, thus enabling a close collaboration with other institutions. Nowadays there are 40 DAMs operating in Catalonia. The number of offenders allocated to per professional is quite low (35 as a maximum). Volunteers are often involved in the implementation of CSOs.

6. Problems to be solved and expectations for the near future

Ultimately, then, while we finally have some CSMs in our PC, we must admit that they can only be used to avoid the need to imprison offenders given short prison sentences. In any event, the increase in the length of prison sentences and the abolition of remission through work in prison will cause an important increase in the prison population. It is not likely that the use of such limited non-custodial sentences will change this tendency. Perhaps they will prevent an even higher number of imprisonments. First we shall deal with the legal framework of the obstacles found in the 1995 PC and the underlying philosophy.

CSMs have a limited use as they can only substitute short prison sentences (from 6 months to 2 years). In addition, suspension or substitution is excluded for repeat offenders. This is a consequence of the rehabilitation focus, based on treatment, which considers that short sentences are inadequate for rehabilitation, without taking into account the many criticisms that have been aimed at this focus.

The severity of the alternatives to prison is also a detectable feature. Perhaps through their desire to be credible, substitutes for prison finish up by being configured in comparison with prison itself. Thus there is an increase in the risk of re-imposition of the prison sentence through non-compliance

with the alternatives. Examples of such severity would be the high limit of hours of the CSOs (384 hours) and the possibility of attaching obligations to suspended or substituted sentences. The phenomenon detected in Europe may well happen in Spain: suspended sentences with conditions attached will substitute suspended sentences without conditions, but with custodial sentences keeping their central position.

Finally, the severity of the regulation of alternative penalties shows up in the fact that the commission of any further offence carries the revocation of the suspension, without taking into account whether the new offence is punishable by imprisonment. On the question of the fine, there are a few cases where the legislator employs a fine directly instead of a prison sentence, but it is used more as a substitute. For example, in the fields traditionally considered suitable for the application of a fine (e.g. offences against property without violence) prison sentences have been assigned. This criterion starts from the prison sentence being appropriate for all kinds of offences and delegates to the judge the decision as to whether, using the route of suspension or substitution, in those cases where it is possible, he/she may or may not apply it, based on his/her individual judgement of the person sentenced.

There is a lack of coherent sentencing guidelines for suspending or substituting a sentence, attaching conditions and obligations, fixing the number of conditions and the number of hours. The court decides when it is convenient to suspend or substitute a sentence according to the individual offender's profile. It seems that the code maintains the judge's discretion in sentencing. Outstanding examples of this discretion granted to judges are the possibility of suspending the penalty or not "according to the danger of the offender" (Art. 80 PC); the absence of criteria which indicate when the judge should choose substitution or suspension of the penalty and the possibility that he/she can impose conditions or obligations "should he deem fit" in the suspension (Art. 83 PC) and substitution of prison (Art. 88 PC). Particularly noteworthy is the totally indeterminate formulation of some of these (Art. 83.5 PC). It seems that there exists the opinion that the conditions and obligations attached are of help or assistance to the party convicted, something which would explain why the judge can freely increase the severity of the alternatives and even configure authentic penalties 'to measure'.

In the Spanish Penal Code, CSMs are the only non-custodial ways of applying a penalty and they are incorporated into the criminal justice system,

keeping their retributive character. So they still stigmatise. Prison is placed in the foreground as the last resort in the case of failure; in a way the CSMs re-legitimise its existence. Consent is required, but this is conditioned by the fact that CSMs are generally 'not as bad as' prison. So it would appear that in Spain we now have the possibility of using some forms of CSMs without the creation of an implementing authority. This poses the question whether these sanctions and measures are really going to be imposed by the judicial authority. In Spain we do not have a probation service to develop CSMs and they may end up being enforced by law but not implemented. As we have said, in actual fact judges prefer to use the fine system.

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Community Service in Switzerland: Implementation, Recidivism and Net-Widening. Experimental evidence as an alternative to speculation

MARTIN KILLIAS

1. Background

Community service as a sanction for minors has existed in Switzerland since 1974. Even before then it was possible to 'pay' a fine, at the convict's request, by performing community service, although this option was not often used, mainly because of the rather modest size of fines in the Swiss sentencing system. For minors, community service rapidly developed into one of the most widely used sanctions, with more than 2,000 such orders being meted out each year to juvenile offenders, out of a total of fewer than 10,000 convicted minors[1]. On 1 May 1990, community service became available also as a sanction for adults, and since then it has achieved considerable popularity. Thus – although with some delay and under rather unusual circumstances – Switzerland is following the general trend in Europe[2].

One essential characteristic of community service for adults in Switzerland is that it is available only as an optional form of serving a short prison

[1] J. Zermatten, 'La prestation en travail en Suisse', in *Nouvelles Tendances dans le Droit Pénal des Mineurs*, F. Dünkel & J. Zermatten (eds.), Freiburg/Germany: MPI 1990, 166. This means that community work concerns about as many minors as in the Netherlands, which has about twice the population of Switzerland. L. W. Bleers & M. Brouwers, *Takstraffen voor minderjarigen. Toepassing en uitvoering opnieuw belicht*, Den Haag: WODC 1996, 16.

[2] A. van Kalmthout & P. Tak, *Sanctions Systems in the Member States of the Council of Europe*, Deventer/Boston: Kluwer, 1992; J. Junger-Tas, *Alternatives to Prison Sentences: Experiences and Developments*, Den Haag: WODC and Amsterdam: Kugler 1994.

term. Thus the sanction is not officially available to sentencing judges; in fact, the criminal code does not mention it at all. However, section 397bis of the criminal code does allow the federal government to offer local governments the option to innovate, in the form of experiments, in the area of corrections, including the introduction of certain alternatives to executing custodial sentences in prison. Among these experiments is detention in a halfway house, where employed prisoners can pursue their daily work as usual and return to prison in the evenings and at weekends. In 1990, community service was introduced as another innovative form of execution of custodial sentences not exceeding one month[3]. The decision whether or not this option will be used remains, however, with the local (cantonal) government. So far, nearly all cantons have introduced a community service scheme. Of about 9,000 prison sentences executed in 1997, no less than 2,000 were in the form of community work; in 1998, this number increased to 2,358.[4]

A few of the cantonal projects have been evaluated separately.[5] Most cantons, however, agreed to a common evaluation performed by our institute. This report covers 14 cantons, encompassing more than half the country's population. In the report, priority is given to the institutional aspects of community service orders, such as factors which increase the risks of dropping out, recidivism and the extent of net-widening side effects.

2. Profile of persons admitted to community service[6]

The sentences commuted to community service were typically short. In about a third of the cases, they did not exceed eight days; in another third,

[3]Since 1 January 1996, prison terms of up to three months can be executed through community service.

[4]Office fédéral de la statistique, *Le travail d'intérêt général en 1997*, Neuchâtel: OFS 1998, 16; A. Kuhn & P. Villettaz, Le Travail d'intérêt général en Suisse, 1996-1998, Lausanne: IPSC-UNIL 2000.

[5]See e.g. for the Canton of Berne K. L. Kunz & Th. von Witzleben, *Gemeinnützige Arbeit - Modelleversuch im Kanton Bern*, Bern/Stuttgart/Wien: Haupt, 1996. In one Canton (Vaud), subjects were randomly assigned to either community service or prison (see section 5 below).

[6]The data presented in this and the following sections (3 and 4) are from the evaluation report prepared by the Institute of Forensic Science and Criminology (Martin Killias, Patrick Rösli, Yves Cottagnoud, Catherine Crisinel), *Die gemeinnützige Arbeit in acht Kantonen*, Lausanne: IPSC 1996. The more recent data available (for 1997) published by the Office fédéral de la statistique do not differ substantially from those given here, see *Données sur les travaux d'intérêt général effectués et leur exécution*, Neuchâtel: OFS 1998, and *Le travail d'intérêt général en 1997*, Neuchâtel: OFS 1998.

they were between nine and 15 days; and the remainder varied between 16 and 30 days. Over 20 percent were sentenced to custody as a substitute for a fine they had failed to pay before the deadline. Given that one day in prison was considered equal to eight hours of community work, the time to be invested did not exceed 64 hours for one third and 110 hours for one half, and was more substantial (i.e. more than three weeks of full-time work) only for the upper third. After the extension of community service to sentences of up to three months, the number of hours did not change much because, simultaneously, the rate of conversion (i.e. the number of hours to be performed per day in prison) has been reduced from eight to four hours.[7]

About half of the convicts whose sentence was commuted to community service had been convicted for a traffic offence (mostly driving under the influence), about one fourth for a military offence[8], and the remainder for a criminal code offence (mostly minor theft) or drug use.

Of those serving community service, eight percent were women, i.e. slightly more than the percentage of those sent to prison (six percent). The average age was 37 – substantially higher than among prisoners – and 84 percent were Swiss, again much higher than among those sentenced to immediate custody (61 percent in 1995). In terms of education and economic background, the population in the programme faired much better than prisoners in general, although they ranged somewhat below the Swiss average. Twenty-four percent were unemployed, a high rate which certainly reflects a selection effect since only employed prisoners are eligible for detention in a halfway house.

In sum, those whose custodial sentence was commuted to community service can be considered as comprising a typical low-risk group. The relatively low percentage of drop-outs (see below) could, therefore, reasonably be expected. The most prominent reason given (by 80 percent) for choosing community service was the desire to avoid prison

[7]The average number of hours was (in 1997) 98, and the median 80. Twenty-one percent of sanctions exceeded one month; Office fédéral de la statistique (note 4), 15.

[8]Until 1994, male Swiss civilians who had not served in the army and who failed to pay a special (compensatory) tax were liable to criminal prosecution, usually ending with a very short custodial sentence. Many of these were admitted to community service. This law's amendment led to a temporary drop in community service orders in 1995.

3. Kind of work performed

Roughly 60 percent of the jobs required only limited or minimal qualifications. Often they consisted of work in forests, on the shores of lakes or rivers, or in natural resort areas. Clerical or nursery jobs were assigned in less than 10 percent of cases. The candidate's profile and the kind of jobs available were the most prominent assignment criteria.

According to the original idea, community service should deprive the defendant of some of his or her leisure time. The evaluation has shown, however, that most candidates prefer working during the day and on a full-time schedule. For unemployed persons, this priority certainly is not surprising. For those with a job, the reason may be that, in many cases, community service is short and can easily be performed during one or two weekends. In 80 percent of cases, the community work assigned was performed within the time limits set by the Correctional Service; in 10 percent the delay did not exceed 20 days. Drug users were more often late in completing their job, probably because of continued heavy drug use or health problems.

4. Reasons for dropping out

In nine percent of all cases, the Corrections Department repealed its former decision to commute a short custodial sentence to community service[9]. The reason usually was the defendant's failure to perform the work assigned without legitimate reason, mostly despite having been formally warned. In 84 percent of all cases, the community service was successfully completed. In the remaining cases, the final outcome was not certain, mainly because the service had not been completed at the time the evaluation was terminated.

4.1 Bivariate correlations

Those who failed to complete their community service successfully were more often male, somewhat younger, more often unmarried, less educated and more often unemployed. Those convicted for a drug or a criminal code offence were less often successful, as were those with a criminal record.

[9] In 1997, this rate was almost identical (eight percent), Office fédéral de la statistique (note 4), 5.

On the other hand, those convicted for a military offence rarely failed to complete their job[10].

The kind of work assigned was only moderately associated with dropping out (those sent to work in forests or resort areas had a lower success rate). However, the assignment of inadequate work, requiring clearly too high or too low qualifications given the candidate's profile, had a relatively strong influence on success or failure. Interestingly, those who were never controlled during their work by an assistant of the Correctional Service had higher drop-out rates than those who felt some kind of control (and who might, therefore, have received additional, indirect motivation). Finally, the number of hours of community service had a strong and significant impact on success or failure rates (which, as we shall see, did not survive in the multivariate analysis, however). With the extension of community service, the number of failures increased steadily and reached nine percent in 1998, and as high as 19 percent among those serving a commuted prison term of 60 days or more.[10a]

4.2 Multivariate analysis

The bivariate associations given so far are difficult to interpret, since several independent variables are strongly interrelated. Therefore, only multivariate analyses allow an assessment, with some certainty, of the relative weight of the several variables – *as long as other relevant variables are kept constant.* Given the dichotomous nature of the dependent variable – successful completion of community work or failure to do so – logistic regression analysis has been retained as the most appropriate method.

Several models have been computed, and all correctly classify more than 90 percent of individuals. After eliminating variables which were not significantly associated with dropping out of community service in the bivariate analysis, as well as those with unacceptably high proportions of missing values, the following variables turned out to contribute significantly to dropping out:

[10] The recent decriminalization of many of these offences might, thus, indirectly increase the failure rate of community service orders.

[10a] A. Kuhn & P. Villettaz (note 4).

- Being unemployed, or working irregularly and/or only part time[11], is strongly correlated with failure to perform community work (odds ratios ranging between 2.81 and 4.14). Given that the independent variable measures (in the Swiss context, poor integration in the labour market), its importance in the present context – i.e. regarding the successful completion of work – is rather plausible.
- The assignment of inadequate work, requiring too high or too low qualifications given the candidate's education, turned out to be significant also in the multivariate analysis. The odds ratio being 5.55, one can say that the risk of failure is more than five times higher if the work assigned is inadequate.
- The lack of control, or of follow-up by and support from the Correctional Service, is also significantly associated with dropping out of community service, with an odds ratio of 3.03.

Perhaps even more interesting are the variables which, despite significant bivariate associations with the dependant variable, failed to produce significant scores[12] in the multivariate models:

- Contrary to the bivariate analyses, all other personal characteristics of those admitted to community service turned out to be no longer significantly related to dropping out of community service. This applies to age, being unmarried or divorced, and to educational status. The results are less consistent for the fact of having previously been convicted, but in no model does the significance of this variable exceed $p < .08$.
- The type of offence[13] as well as the kind of work assigned (as long as it was 'adequate' in view of the candidate's profile) was not significantly related to the dependent variable.
- Most interestingly, the number of hours of community service the offender had to perform turned out to be no longer significant once other variables were introduced into the model. The strong bivariate association reported above was produced by those convicted of not having paid the military tax: they tend to receive extremely short sentences (and thus, few hours to perform), are particularly well integrated and,

[11] With an average age of 37, and the predominance of men, performing part-time work may, in the Swiss economic structure with low unemployment rates, indeed be related to an unstable work record.

[12] In order to prevent type-two errors, all variables have been considered with $p < .10$.

[13] With the exception of failure to pay the military tax (see note 8 above) which was significantly related to successful completion of community work in one model.

therefore, are extremely unlikely to drop out. Since most policy makers consider the number of hours of work as strongly related to the risk of failure, we decided to dichotomize this variable in three different ways, i.e. at 110 hours (average), at 200 hours (upper quartile), and at 40 (lower quartile). At none of these cut-off points did the negative results change.

- Many feasible interaction effects have been checked, with no significant finding. For example, there is no significant interaction effect on dropping out between being unemployed (or not fully employed) and not having completed one's education. Nor is the interaction term between the inadequacy of the assigned job and the number of hours of community service significant.[14]

4.3 Interpretation

It seems that dropping out of community work is mostly associated with the offender's work record, a finding which is plausible since community service orders typically require the convicted person to perform some kind of work. Obviously, those who are successful at work in general may better succeed in this task as well. The drop-out rate will, therefore, depend heavily on the kind of offenders considered eligible for community service.

Among the institutional variables, the number of hours to be performed does not play the prominent role many policy makers intuitively assume. Efforts to improve the rate of successful completion of community work by reducing the number of hours to be performed, e.g. through setting the number of hours of community work per day in prison at four (or even less)[15] rather than eight might, therefore, do little to achieve this goal.

On the other hand, taking care to assign tasks which are somehow in line with the offender's educational profile and former work experience will probably be much more promising. The same is likely to apply to increasing follow-up visits at the offender's community service job, i.e. some sort of control showing that the Correctional Service cares about the defendant and his or her work[16]. Both recommendations imply, however, ad-

[14]The underlying hypothesis was that inadequate work assignment produces negative effects only if the number of hours exceeds a certain threshold.

[15]A former draft penal code contained e.g. a proposed 'conversion rate' of two hours of community work per one day in prison.

[16]Similar results were found in Scotland, G. McIvor, 'Social Work Intervention in Community Service', *Brit. J. of Social Work* 21 (1991), 591-609.

ditional investments in time, manpower and initiatives by the social workers involved in the programme. This underlines that community service is neither an easy nor a cheap sanction[17], and that good results require money and goodwill on the part of those running the scheme. At a time when community service is likely to be expanded to more and more 'difficult' categories of offenders, it may be good to keep these elementary facts in mind. Otherwise the extension of community service may involve less assistance, support, supervision and care in assigning adequate jobs[18].

5. Comparison of recidivism after community service and that after prison

Rather uniquely, the Swiss trials with community service included a controlled experiment in the Canton of Vaud, a French-speaking area north of Lake Geneva[19]. The researchers charged with the evaluation randomly assigned two-thirds of those eligible for community service to such service, and the remainder to prison. From a legal viewpoint, conducting this experiment was feasible since community service is not an ordinary, 'legal' sanction, but an option for the execution of short prison sentences. Thus, only volunteers were admitted to community service; all those who were eligible (i.e. those who volunteered and were found 'fit' by the Correctional Service) were free to opt for the 'legal' punishment, i.e. custody, although nobody was formally entitled to insist on serving his or her sentence in the form of community work. In an ethical respect, the experiment was feasible since only prisoners sentenced to 14 days of custody at most[20] were included, and given the lack of sufficient resources to satisfy the de-

[17]Some authors may have severely overstated the 'profitability' of community service orders in economic terms, K. L. Kunz & Th. von Witzleben, *Gemeinnützige Arbeit - Modelleversuch im Kanton Bern*, Bern/Stuttgart/Wien: Haupt, 1996, 33.

[18]This concern has also been expressed in the Netherlands, L. W. Bleers & M. Brouwers (note 1), 18, as well as in the United Kingdom, G. McIvor, 'Community Service Work Placements', *The Howard Journal of Criminal Justice* 30/1 (1991), 19-29.

[19]See on this project, M. Killias, M. Aebi, D. Ribeaud, 'Does Community Service Rehabilitate Better than Short-term Imprisonment? Results of a Controlled Experiment', *The Howard Journal of Criminal Justice* 39/1 (2000), 40-57. See also M. Killias, M. Aebi, D. Ribeaud, 'Learning Through Controlled Experiments: Community Service and Heroin Prescription in Switzerland', *Crime and Delinquency* 46/2 (2000), 233-251.

[20]With sentences so short it would be hard to argue that exposing people to the prison experience might cause irreversible harm to their career.

mand for community service[21]. However, in order to preclude possible resistance from the social workers involved, they were allowed to admit up to 25 percent of those eligible for the programme to community service without randomization. This purposefully selected group was, during the evaluation, analysed separately from the two randomized groups. This provided many interesting insights into the selection criteria prevailing among social workers[22].

Those participating in this experiment had their criminal record checked two years after having been assigned either to prison (39 persons) or to community service (84 persons). In addition to records of convictions, the police files were checked in order to detect any possible offences committed but not referred to the courts[23]. Finally, all persons participating received a questionnaire concerning job careers, private (partner) life, and attitudes to the police, the courts, the sanction received, the experiences during serving the sanction, the correctional service and – last but not least – their feelings about the experiment. Sixty-five percent of those who had served community work and 51 percent of prisoners completed and returned the questionnaire[24].

Although the number of persons participating in the experiment was low[25], requiring some caution in the interpretation of the results, the findings are noteworthy because they do not necessarily confirm what one might have expected:

- Reconviction rates were lower in both groups (compared to a similar preconviction period, i.e. two years), but more frequent among former

[21]Randomization is indeed easier to justify whenever the demand exceeds available resources. In the present case, the number of social workers available for placement, assistance and supervision was insufficient to satisfy the full demand during the trial period.

[22]As the analysis revealed, social workers tended to select for this group (consisting of 36 persons) those who faced particularly difficult life circumstances and/or who represented a particularly low risk of recidivism. The latter hope has turned out to be justified, as the final evaluation shows.

[23]This decision has been helpful in identifying significant differences between the two groups, given the relatively small number of individuals included in the experiment. Reconviction has indeed turned out to be much less frequent than getting a new police record (23 vs. 35 percent). Thus, considering also police files increased the chance to find statistically significant differences between the two groups.

[24]Before a reminder (including a cheque for 40 francs) was sent out, the response rate in the two groups differed even more (and significantly, $p < .01$).

[25]It is, however, not unusual for controlled experiments to be based on rather limited numbers of individuals.

prisoners. However, the improvement in the two groups did not differ significantly due to the low reconviction rates in both groups.

- The analysis of police records confirmed that among those serving their sentence in the form of community work, delinquency dropped more (over the follow-up period of two years) than among those sent to prison. The difference was statistically significant ($p < .03$) when incidence rates were considered; with prevalence rates, the difference was still significant at the .10 level[26].
- By showing that community service is more efficient in preventing re-offending than short custodial sentences, the experiment has, in some ways, confirmed conventional wisdom about the 'harmful' consequences of imprisonment. However, the findings did not confirm any harmful outcomes among former prisoners with respect to job records and private life circumstances. This leads to the question how the difference in re-offending might be explained.
- The answer may come from the differences between the two groups in terms of attitudes. Those sent to prison are much more critical about the court (which had refused to suspend their sentence) and the sanction, viewing the latter as too severe and unfair. They also tend more often to blame others for the offence they were convicted of, whereas those having served community work are more reconciled with the sanction and recognize more fully that they were at fault. Interestingly, these differences are not due to the experimental setting as such: a similar proportion of both groups recognized the merits of the trial's design.

In sum, re-offending is not related to undesirable side effects of short custodial sentences, as conventional wisdom often has claimed, but to 'thinking errors' among prisoners, i.e. their tendency to blame others for the offence they were convicted of, and perhaps their more hostile attitude towards the criminal justice system in general. It is not certain how this difference can be explained. Drawing on findings from other evaluations, one might speculate that those assigned to community service might have got the feeling of 'having had another chance' and of having been treated 'fairly', which often means 'better than expected'[27]. From this viewpoint,

[26]By prevalence is meant the percentage of persons who had a new police contact over the two-year period (whatever the number of such contacts), whereas incidence refers to the *number* of police contacts during the reference period.

[27]Some recent (experimental) studies could assess the importance of 'fair treatment' on risks of re-offending, R. Paternoster et al., 'Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault', *Law & Society Review* 31/1 (1997), 163-204.

community service might indeed help to reduce re-offending. This effect may, however, be contingent on the feeling that, thanks to cooperation by the Correctional Service, an undesirable experience (i.e. custody) could be prevented[27a]. If this is true, it is questionable whether this positive effect will continue once community service becomes an ordinary sanction, imposed by the judge like any other form of punishment.

6. Risks of net-widening

As explained, the Swiss trials introduced community service as an alternative to the execution of short, unsuspended custodial sentences. In the view of lawyers, this pragmatic solution may be acceptable as an experiment but not as a permanent solution. Introducing community service as an independent sanction into criminal law[28] – i.e. making it available to judges as a full-fledged sanction, comparable to any other punishment – may create new risks lawyers may pay too little attention to. It also would jeopardize a certain number of practical advantages related to the way this sanction is currently implemented.

Despite its status as an 'experimental' sanction (or a way of executing short custodial sentences), community service plays a significant quantitative role in the Swiss criminal justice system. In 1997, 2,010 sentences were commuted to community service, compared to 7,207 persons actually sent to prison to serve a custodial sentence[29]. Since its introduction for adults in 1990, the share of community service has dramatically increased, although it still is not as popular as in the Netherlands[30]. Interestingly, this progress has been achieved with only moderate net-widening. It should be noted that the test in Switzerland was almost experimental in nature and thus was particularly convincing, since it has been possible to follow the

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[27a] A careful reader (Professor Frank Vitaro, University of Montreal) of our research reports (note 19) commented that the positive outcome might be due to the choice left to those who served community work, and not to their experience as such. The evidence available does not allow such a possibility to be ruled out.

[28] This is proposed in the draft of the new criminal code, which is currently before parliament (section 37).

[29] Office fédéral de la statistique (note 4), 16. The increasing popularity of community service has considerably increased the waiting period (to over four months in 1998), see Kuhn & Villettaz (note 4).

[30] On the Dutch experience see E. C. Spaans, 'Community Service in the Netherlands: Its Effects on Recidivism and Net-Widening', *International Criminal Justice Review* 8 (1998), 1-14.

development of sentencing practices in two groups of four cantons each where community service was introduced in 1991 and 1992, respectively, and in four other cantons where this sanction was been available during the entire period. As it turned out, the sentencing practices developed quite differently in the community service cantons on one hand, and in the remaining cantons on the other hand. In the two groups of 'experimental' cantons taken together, the likelihood of persons convicted of minor theft being sentenced to immediate custody (of 30 days or less) increased by 28 percent, whereas longer sentences and suspended sentences decreased by five percent each. In the 'control-group' cantons, the trend was exactly the opposite: short immediate custodial sentences (of 30 days or less) decreased by five percent, and longer ones and suspended short sentences increased by 38 and 19 percent, respectively[30a]. In sum, judges tended, at least in cases concerning theft, to replace short suspended sentences by unsuspended ones whose length was set just below the upper limit compatible with community work.

Compared to other countries[31], however, this shift seems rather modest. One reason for the absence of a major net-widening effect (at the sentencing stage) may be that community service is not directly available to judges. Of course, judges can impose sentences just below or above the threshold (now three months) in order to allow the defendant to serve his or her sentence in the form of community work or to prevent such. The experience has indeed shown that they sometimes do so. However, a much more significant shift occurred at the level of the way short custodial sentences are executed. In 1991, before community service became available, more than 4,288 prisoners opted to serve their sentence in a halfway house; in 1997, only 1,475 served their sentence in this manner[32]. Therefore, the shift typically observed in other countries occurred also in Switzerland, but concerned two 'alternative' forms of execution of short sentences, rather than the choice of sentences as such.

[30a] M. Killias, P. Camathias, B. Stump, 'Alternativ-Sanktionen und der 'Netwidening'-Effekt: ein quasi-experimenteller Test', *Zeitschrift für die gesamte Strafrechtswissenschaft* 112/3 (2000), 637-652.

[31] In England and in the Netherlands, it has been estimated that community service has replaced a prison sentence in about one in two cases only, Ken Pease, 'Community Service Orders', in M. Tonry & N. Morris (eds.), *Crime and Justice. An Annual Review of Research* 6 (1985), 51-94, and Spaans (note 30).

[32] Office fédéral de la statistique (note 4), 16.

In the future, community service should, according to section 37 of the proposed new criminal code, become an independent sanction. It is not hard to foresee that, under this future form, community service will replace suspended custodial sentences rather than imprisonment. According to abstract legal principles, it might indeed be preferable to leave the choice of the sanction to be imposed to the judge, rather than to the Correctional Service. Our feeling, however, is that it should be possible to reconcile the current practice with these legal standards by introducing an appeal to a judge against decisions made by the Correctional Service related to the form in which a sentence is to be executed. Leaving to the Correctional Service all practical decisions in the first place, with the possibility of an appeal to a judge, offers practical advantages which, in the longer run, may be decisive for the survival of community service as a mass sanction. The reasons for this are:

- In the first place, judges do not have to care about the conversion of short prison sentences into community service. This means that they do not have to pay attention to the availability of suitable jobs, to the adequacy of the defendant's profile with the jobs in question, or to the likelihood of the success or failure of such a sanction.
- Under the current pragmatic system, if the defendant fails to perform his or her community work the judge does not have to deal with the conversion into custody, whereas this will be the case under the future system. Given the intended extension of community service to wider and presumably more problematic categories of defendants, the rate of failures (and revocations/conversions) is likely to increase to perhaps 15 percent, as in the Netherlands[33]. If so, the resulting workload for judges would not be negligible, particularly because these defendants are likely to consume a disproportionate share of judges' and court officials' time[34]. Judges may react to this workload by restricting community service to defendants who are particularly unlikely to fail, such as married bank employees. Compared to the current state of affairs, where community service is applied to unemployed defendants with problematic life circumstances, such a shift would sacrifice much of what community service has offered so far. Therefore (and ironically),

[33] Spaans (note 30).

[34] Defendants who live in unstable life circumstances and who, for this reason, fail to complete community work, are hard to call to court due to changed or unknown addresses, or are more likely to fail to appear in court for a variety of reasons.

giving community service a stronger position in criminal law might reduce its role in practice.

- The current pragmatic system offers another advantage over making it an official sanction. Currently, the Correctional Service has to convert the number of days (or weeks) of custody into a certain number of hours of community work, computed according to some formula. Before 1996, the number of hours was set at eight per day in prison; today, however, it is four, and is likely to remain so in the future. Such a fixed rate introduces much rigidity into the system. If community service is to deprive the defendant of leisure time[34a], why should the number of hours not be adapted to his or her employment status and life circumstances? Why should a person working full-time perform the same number of hours as a person who does not have a job (for whatever reason)? Why should a handicap which limits the defendant's ability to work not be taken into account? Ignoring such factors makes community service unattractive to those with limited leisure time or who are unfit for full-time work. It would, therefore, seem preferable to set in the law a range of, say, three to six hours of community work to be performed per day in prison, leaving the correctional service the power to set the exact rate of conversion, with the possibility of judicial review.
- As the evaluation of the Swiss trials has shown – and as many practitioners of community service know – the jobs available for community work vary considerably in attractiveness. Who should get the 'best' job, and who the 'worst' one? In deciding who should do what kind of work[35], the Correctional Service will maintain a critical position which is likely to produce many inequalities among defendants and, concomitantly, considerable frustration. Giving the Correctional Service the powers to set the precise formula of conversion within some limits would allow the attractiveness of the work assigned to be taken into account. Defendants who accept unattractive jobs might, thus, get some 'compensation' in the form of a more favourable rate of conversion.

[34a] The study by Kuhn & Villettaz (note 4) has shown that 68 percent perform community work during ordinary working hours. Therefore, the idea of 'depriving the offender of his leisure time' is rather questionable.

[35] According to section 378.2 of the proposed new criminal code, the Correctional Service would keep all relevant powers in this respect.

7. Conclusions (in d-minor)

Of course, these pragmatic possibilities may sound strange to those who prefer leaving it to the judge to decide all relevant issues related to sentencing[36]. But pragmatism may help much more to make community service a popular sanction, whereas judicial formalism is likely to restrict it to a marginal role. This pragmatism has so far helped to make community service one of the most frequently used sanctions and to keep the usual net-widening effects within acceptable limits. With some flexibility in the conversion rate (i.e. the number of hours of work to be performed per day in prison), the system may become more fair and more responsive to the individual circumstances of defendants and the attractiveness of the work assigned.

All this may be true and empirically informed. But why should anybody abroad pay attention to this, given that the Swiss legislators have, so far, ignored all the lessons these trials have provided? Another possible conclusion would be that evaluations are needed for the sake of 'organizing' some policy shift, and not for learning anything relevant for the future. Since community service (and virtually all 'alternatives' to imprisonment) are currently viewed as 'good' in most Western societies, many will not necessarily regret this state of affairs. However, what today is viewed as attractive and 'progressive' will probably, in ten or twenty years from now, be seen as old-fashioned. By neglecting the careful evaluation of new sanctions, or by paying little attention to the lessons to be learned, today's legislators are depriving new sanctions of the chance to be efficiently defended against contrary movements (of the kind of 'prison works') in the future, when sound arguments will be needed to do so.

[36]It should be noted, however, that (unlike the Netherlands, Spaan, note 30), Greece has a similar system for commuting short custodial sentences to 'alternatives' (fines and community service), C. Spinnelis, 'Attacking Prison Overcrowding in Greece. A Task of Sisyphus?', in *Festschrift Günther Kaiser*, Berlin: Duncker & Humblot 1998, 1273-1289.

Community Penalties in the United States

MICHAEL TONRY

1. Introduction

It is simultaneously true to say that community penalties have proliferated in the United States since the early 1980s and that, conceptualized as 'alternatives to incarceration', they have conspicuously failed as a device for diverting otherwise prison-bound offenders from institutions. This is in marked contrast to countries like England, Scotland and the Netherlands, where credible research suggests that approximately half of offenders subject to community service orders otherwise would have been sentenced to imprisonment (Pease 1985; McIvor 1995; Tak 1997), Germany where use of financial penalties drastically diminished the imposition of short terms of imprisonment (Weigend 1997), and Holland and Germany where increased use by prosecutors of conditional dismissals (Germany) and transactions (Holland) appear to have reduced prison use (Tak & van Kalmthout 1998; Albrecht 1997). Why American jurisdictions have been comparatively unsuccessful in their use of community penalties as alternatives to incarceration and whether that lack of receptivity can be changed are discussed in the conclusion. First, however, I discuss some background matters concerning the US criminal justice systems that may provide useful context for non-US readers, summarize the main general conclusions about the operation of community penalties from two decades' research, and briefly summarize research concerning each of the major penalties that has been attempted.

2. Overview of US Sentencing and Corrections Systems

The United States has a federal constitutional system in which the national government has overlapping jurisdiction concerning criminal law matters

with state governments, territorial governments (e.g. Puerto Rico, the American Virgin Islands), and the District of Columbia (Washington, DC). Each jurisdiction has its own criminal justice system, including a criminal code, police, courts, prosecutors and a corrections system. This means that some crimes can be prosecuted and punished under both national and state laws. Because of peculiarities of US constitutional law, double jeopardy concerns do not preclude prosecution under both bodies of law, although as a practical matter this happens only in notorious cases. More importantly, many crimes, particularly those involving drug trafficking and bank robberies, fall within both national and state criminal codes so that law enforcement officials may decide under which legal system to prosecute.

There is not one US sanctioning system but many. An even greater background complication, however, is that no two are organized in precisely the same way. Each jurisdiction has only one criminal code, but no other universal organizational generalization can be offered. Police are organized at both state and local (county, city) levels and at the last count there were more than 13,000 police agencies. In most states, prosecuting attorneys are elected at county level (more than 3,000 counties) and select their own assistants, though in a few states an elected state attorney general appoints prosecutors. Trial judges also are mostly elected at county levels. Counties generally operate jails for pre-trial detainees and people sentenced to terms of one year or less; a locally elected county sheriff typically manages the jail. Every state has a prison system managed by a state corrections department. Depending on the state, the corrections department may at minimum operate state prisons and at maximum may manage prisons, jails, probation and parole. Complicating matters even more, in many states jails, prisons, probation and parole are separately organized, and in some states both county and state agencies operate probation and parole programs. The important point is that 5,000 to 10,000 different state corrections departments, sheriffs, state probation agencies, state parole agencies and local probation and parole agencies have responsibility for administering community penalties.

Thus, in one jurisdiction several agencies may operate their own versions of a single penalty; for example, a sheriff may use electronic monitoring both for people diverted from pre-trial detention and for those released early from a short jail term, a judge may sentence an offender to probation with an electronic monitoring condition, the prison department may place a prisoner on furlough or work release subject to electronic monitoring, and a

parolee may be subject to electronically-monitored home detention. As a result, it is difficult to describe what is happening at any one time within a single jurisdiction, and impossible to answer detailed questions about 'the US community-penalties system'.

3. Main Conclusions from Community Penalties Research

The US Department of Justice has supported a series of evaluations of a wide range of newly developed community penalties (generally called 'intermediate punishments'). The evaluated programs include house arrest, electronic monitoring, intensively supervised probation, mandatory drug treatment, community service, day-reporting centers, restitution centers and day fines. Another body of evaluations examines boot camps, which though not 'community penalties', are generally considered 'intermediate sanctions' because they are sometimes used as substitutes for lengthy prison terms. Here are the main conclusions.

3.1 Net-widening.

'Front-end programs' to which judges make assignments are seldom on balance 'alternatives to imprisonment' because judges prefer to sentence people to them who would otherwise receive probation. As a result, such programs seldom achieve their other goals of reducing corrections costs or reducing demand for prison space. In particular, judges are seldom willing to use either community service or fines in place of confinement sentences and are typically unwilling to use electronic monitoring except for trifling offences or non-threatening offenders. Efforts to establish day-fine systems based on the German or Scandinavian models have been completely unsuccessful.

3.2. Prison diversion.

'Back-end programs', by contrast, to which corrections officials make assignments from among imprisoned offenders, can reduce costs and reduce demand for prison space. Various boot camps, day reporting centers, work-release programs and others are used in this way. Because of the net-widening problem, a number of jurisdictions reorganized their 'front-end'

boot camps to which judges assigned offenders into 'back-end' programs to which prison officials controlled entry.

3.3. Recidivism reduction.

Neither front- nor back-end programs have been shown to reduce or increase recidivism rates measured by arrests, convictions or re-incarcerations, but intensively supervised programs typically result in higher rates of technical (non-criminal) violations and higher revocation rates.

3.4. Increased costs.

When the net-widening problem (point 1) occurs in tandem with the increased technical violation rate problem (point 3), the result is often to increase prison populations and system costs. If offenders sentenced to community penalties breach a curfew, stop performing community service, get drunk or violate a no-drug-use condition, closer monitoring makes the chances of discovery high. Once the discovery is made, punitive actions—typically revocation and confinement—often follow.

3.5. Rehabilitation.

There are a few promising findings concerning treatment programs. The drug treatment literature demonstrates that participation in treatment, whether voluntary or coerced, can reduce both drug use and crime by drug-using offenders (Anglin & Hser 1990). Because Drug Use Forecasting data (e.g. National Institute of Justice 1994) indicate that 50 - 75% of arrested felons in many cities test positive for recent drug use, community penalties may hold promise as a device for getting addicted offenders into treatment and keeping them there (Gendreau, Cullen & Bonta 1994). The drug treatment literature provides the fundamental premise for the 'drug court' movement. In addition, evaluations of intensive probation and boot camps have shown that such programs can increase treatment participation.

3.6. Drug courts.

In more than 700 places drug courts have been established in which eligible offenders are placed in various residential and non-residential treatment programs under direct judicial control. This builds on the treatment evaluation findings that time-in-treatment is the best predictor of treatment suc-

cess and that intensive control can increase treatment participation. In typical programs, offenders return to court each week and relapses are promptly punished by use of a series of gradually increasing penalties. Results have not yet been published from rigorous evaluations, but early results promising. (Because no substantial evaluation literature is yet available, drug courts are not discussed in the following literature review section.)

3.7. *Public opinion.*

A wide range of opinion surveys shows the general public to be more willing to support use of community penalties in place of prison terms than most elected officials realize or are willing to acknowledge. Public opinion strongly supports use of 'burdensome' sanctions (e.g. boot camps) or 'payback' sanctions (e.g. community service and restitution), but provides little support for 'soft' sanctions (e.g. fines and house arrest).

4. Experiences with Community Penalties

The evaluation literature for the most part raises doubts about the effectiveness of community penalties at achieving the goals their promoters commonly announce. This does not mean that there are no effective programs. Only a handful have been carefully evaluated, and many of those have in the aftermath been altered. Many sophisticated and experienced practitioners believe that their programs are effective, and some no doubt are. The evaluation literature does not 'prove' that programs cannot succeed but only that many have not and that managers can learn from that past experience. Sometimes that learning may be expressed as program adaptations intended to make achievement of existing goals more likely. Sometimes it may lead to a re-conceptualization of goals.

The available literature consists of a handful of fairly sophisticated evaluations funded by the US Department of Justice, a larger number of small, typically less sophisticated studies of local projects, and a large number of uncritical descriptions of innovative programs. There have been a number of efforts to synthesize the evaluation literature on community penalties, sometimes in edited collections (McCarthy 1987; Byrne, Lurigio & Petersilia 1992; Tonry & Hamilton 1995), sometimes in books by one or two authors (Morris & Tonry 1990; Anderson 1998), and sometimes in article-length literature reviews (Clear & Braga 1995; Tonry & Lynch 1996).

A major book on the effectiveness of crime prevention and control efforts also surveyed the literature (Sherman et al. 1997, Ch. 9).

This article devotes only a few pages to each community penalty and emphasizes the more substantial evaluations and literature reviews. In some cases, for example concerning intensive supervision probation (ISP) (Petersilia & Turner 1993) and boot camps (MacKenzie 1995; MacKenzie & Piquero 1994), relatively recent and detailed literature reviews are available for readers who want more information. In other cases, for example concerning fines (Hillsman 1990) and community service (Pease 1985), the best literature reviews are more dated; there has been relatively little American research on these last-mentioned subjects in recent years, however, and those articles despite their dates cover most of the important research. In yet other cases, notably including day-reporting centers, most of the available literature is descriptive and no literature reviews are available.

4.1 Boot Camps

The emerging consensus from assessments of boot camps is discouraging to their founders and supporters. Although promoted as a means to reduce recidivism rates, corrections costs and prison crowding, most boot camps have no discernible effect on subsequent offending, and they increase costs and crowding (Parent 1995; MacKenzie 1995). Most have been front-end programs that have drawn many of their participants from among offenders who otherwise would not have been sent to prison. In many, a third to half of participants fail to complete the program and are sent to prison as a result. In most, close surveillance of offenders after completion and release produces rates of violations of technical conditions and of revocations that are higher than for comparable offenders in less intensive programs. Some observers attribute the poor results to inadequate aftercare programs. They argue that although inmates in boot camps learn improved self-discipline and gain enhanced self-esteem, these gains are soon lost when offenders return to their former surroundings and former colleagues. As a result, some jurisdictions have attempted to improve their aftercare programs for boot camp graduates (Bourque, Han & Hill 1996 provide an overview).

The news is not all bad. Programs to which imprisoned offenders are transferred by corrections officials for service of a 90- or 180-day boot camp sentences in lieu of a longer conventional sentence do save money and prison space, although they also often experience high failure rates and higher than normal technical violation and revocation rates. Boot camps

vary widely in their details (MacKenzie & Parent 1992; MacKenzie & Piquero 1994). Some last for 90 days, some for 180. Admission in some states is controlled by judges, in others by corrections officials. Some primarily emphasize discipline and self-control; others incorporate extensive drug and other rehabilitation elements. Some eject a third to half of participants, others less than ten percent. Most admit only males, usually under age twenty-five, and often subject to crime of conviction and criminal history limits, though there are exceptions to each of these generalizations.

One tentative finding concerning possible positive effects of rehabilitative programs on recidivism merits emphasis. Although MacKenzie and her colleagues concluded overall that boot camps do not by themselves result in reduced recidivism rates, they found evidence in Illinois, New York and Louisiana of "lower rates of recidivism on some measures" that they associated with strong rehabilitative emphases in those states' boot camps (MacKenzie 1995, p. 155). An earlier article observes that graduates who are closely supervised after release "appear to be involved in more positive social activities (e.g. work, attending drug treatment) than similar offenders on parole or probation" (MacKenzie & Shaw 1993, p. 465).

4.2. Intensive Supervision

Intensive supervision for probationers and parolees (ISP) was initially the most popular community penalty, has the longest history, and has been the most extensively and ambitiously evaluated. Contemporary programs, with caseloads ranging from two officers for twenty-five probationers to one officer for forty probationers, are typically based on surveillance, cost and punishment rationales. ISP has been the subject of the only multi-site experimental evaluation involving random allocation of eligible offenders to ISP and to whatever the otherwise appropriate sentence would have been (Petersilia & Turner 1993). Two exhaustive syntheses of the American ISP literature have been published (US General Accounting Office 1990; Petersilia & Turner 1993) and do not differ significantly in their conclusions from those offered here.

Evaluation findings parallel those for boot camps. Diversion programs in which judges control placement tend to draw more heavily from offenders who would otherwise receive less restrictive sentences than from offenders who would otherwise have gone to prison or jail. The multi-site experimental evaluation was unable to evaluate ISP programs for which judges controlled entry when judges refused to accept the outcomes of the ran-

domization system (Petersilia & Turner 1993). Like the boot camp evaluations, the ISP evaluations have concluded that offenders sentenced to ISP do not have lower recidivism rates for new crimes than do comparable offenders receiving different sentences, but typically (because of closer surveillance) experience higher technical violation rates. ISP did succeed in some sites in increasing participants' involvement in counseling and other treatment programs (Petersilia & Turner 1993).

Notwithstanding the discouraging evaluation findings, ISP was adopted in most states in the 1980s and 1990s. Often this was more attributable to institutional and professional goals of probation agencies and personnel than to the putative goals of the new programs (Tonry 1990). A General Accounting Office survey in 1989 identified programs in 40 states and the District of Columbia (US General Accounting Office 1990; Byrne & Pattavina 1992). In 2000 they existed in every state.

4.3. House Arrest and Electronic Monitoring

House arrest – often called home confinement – may be ordered as a sanction in its own right or as a condition of probation or parole (Ball, Huff & Lilly 1988). Most affected offenders, however, do not remain in their homes but instead are authorized to work or participate in treatment, education or training programs. Finally, electronic monitoring sometimes – but not necessarily – backs up house arrest; Renzema (1992), for example, reports that 10,549 people were on house arrest in Florida in August 1990, of whom 873 were on electronic monitoring. House arrest comes in several versions. In an early Oklahoma program (Meachum 1986), for example, prison inmates were released early on furlough subject to participation in a home confinement program. In Florida, which operates the largest and most diverse home confinement programs, most are programs to which judges are supposed to sentence 'otherwise prison-bound offenders'. In some states, especially in connection with electronic monitoring, house arrest is used in place of pre-trial detention (Maxfield & Baumer 1990).

House arrest programs expanded rapidly beginning in the mid-1980s. The earliest programs were typically small (from 30 to 50 offenders) and often were used mostly for driving while intoxicated (DWI) and minor property offenders (this was also true of most of the early electronic monitoring programs) (Morris & Tonry 1990, Ch. 7). Programs have grown and proliferated. The largest program is in Florida, where more than 13,000 offenders

were on house arrest in 1993 (Blomberg, Bales & Reed 1993). Programs coupled with electronic monitoring, a subset, existed nowhere in 1982, in seven states in 1986, and in all 50 states in October 1990 (Renzema 1992, p. 46). Electronic monitoring spread rapidly. In 1986, only 95 offenders were subject to monitoring (Renzema 1992, p. 41), a number that rose to 12,000 in 1990 (Baumer & Mendelsohn 1992, p. 54) and to a daily count of 30,000 to 50,000 in 1992 and 1993, respectively (Lilly 1993, p. 4). The number by 2000 exceeded 200,000.

No American evaluations of the sophistication of the best of those on boot camps or ISP have been published. One analysis of agency data for Florida's front-end house arrest program concluded that it draws more offenders from among the prison-bound than from the probation-bound (Baird & Wagner 1990), but that conclusion was based on dubious analyses (for a detailed discussion, see Tonry 1996, Ch. 4). There are no other large-scale evaluations. House arrest coupled with electronic monitoring has been the subject of many small studies and a linked set of three studies in Indianapolis (Baumer, Maxfield & Mendelsohn 1993). Two major literature reviews stress the scantiness of the research evidence on prison diversion, recidivism and cost-effectiveness. On recidivism, Renzema (1992, p. 49) notes that most of the "research is un-interpretable because of shoddy or weak research designs." The most comprehensive review observes: "we know very little about either home confinement or electronic monitoring" (Baumer & Mendelsohn 1992, p. 66). Baumer and Mendelsohn (1992, pp. 64–65) stress that "the incapacitative and public safety potential of this sanction has probably been considerably overstated" and predict that house arrest will continue primarily to be used for low-risk offenders and will play little role as a custody alternative.

4.4. Day-reporting Centers

The earliest American day reporting centers – places where offenders spend their days under surveillance and participating in treatment and training programs while sleeping elsewhere – date from the mid-1980s. The English precursors, originally called day-centers and now probation centers, began operation in the early 1970s. Most of our knowledge of American day-reporting centers comes from descriptive writing. As yet there is no published literature that provides credible findings on the important empirical questions, but unpublished reports are available from the National Institute of Justice (e.g. Craddock & Graham 1996). A 1989 survey for the

National Institute of Justice identified 22 day-reporting centers in eight states (Parent 1990), though many others have since opened. The best known (at least, the best-documented) centers were established in Massachusetts, i.e. in Springfield (Hampton County Sheriff's Department) and in Boston (the Metropolitan Day Reporting Center).

Programs vary widely. Many are corrections-run programs into which offenders are released early from jail or prison. Some, however, are sentencing options to which judges sentence offenders and some are used as alternatives to pre-trial detention (Parent 1991). Programs range in duration from 40 days to nine months and program content varies widely (Parent 1991). Most require development of hour-by-hour schedules of each participant's activities, some are highly intensive with ten or more supervision contacts per day, and a few include round the clock electronic monitoring.

4.5. Community Service

Community service is used primarily as a probation condition or as a penalty for trifling crimes, like motor vehicle offences. This is a pity because community service meets with widespread public approval (e.g. Doble & Immerwahr 1997), is inexpensive to administer, produces public value, and to a degree can be scaled to the seriousness of crimes. Because community service did not come into widespread use as a prison alternative in the United States, there has been little substantial research on the effectiveness of community service as an intermediate punishment (Morris & Tonry 1990, Ch. 6).

The only well-documented American community service project, operated by the Vera Institute of Justice, was initially established in 1979 in New York City. The program was designed as a credible penalty for repetitive property offenders who had previously been sentenced to probation or jail and who faced a six-month or longer jail term for the current conviction. Offenders were sentenced to perform 70 hours of community service under the supervision of Vera foremen. Participants were told that attendance would be closely monitored and that non-attendance and non-cooperation would be punished. A sophisticated evaluation concluded that recidivism rates were unaffected by the program, that prison diversion goals were met, and that the program saved taxpayers' money (McDonald 1986, 1992).

4.6. Monetary Penalties

Monetary penalties for nontrivial crimes have yet to catch on in the United States. That is not to deny that millions of fines are imposed every year:

fines are virtually the sole penalty for traffic offences, and in many courts are often imposed for misdemeanors (Hillsman, Sichel & Mahoney 1984; Cole et al. 1987). Nor is it to deny that convicted offenders in some jurisdictions are routinely ordered to pay restitution and in most jurisdictions are routinely ordered to pay growing lists of fees for probation supervision, for urinalyses, and for use of electronic monitoring equipment. A survey of monetary exactions from offenders carried out in the late 1980s identified more than 30 separate charges, penalties and fees that were imposed by courts, administrative agencies and legislatures (Mullaney 1987). These commonly included court costs, fines, restitution and payments to victim compensation funds and often included a variety of supervision and monitoring fees.

The problem, however – as George Cole and his colleagues reported when summarizing the results of a national survey of judges' attitudes about fines – is that "at present, judges do not regard the fine alone as a meaningful alternative to incarceration or probation" (Cole et al. 1987). There have been a number of experimental efforts to introduce day fines to the United States. The initial pilot project was conducted in Staten Island, New York, in 1988–89, again under the auspices of the Vera Institute of Justice. Judges, prosecutors and other court personnel were included in the planning, and implementation was remarkably successful. Most judges cooperated with the new voluntary scheme, the distribution of fines imposed changed in ways that showed that judges were following the system, the average fine imposed increased by 25 percent, the total amount ordered on all defendants increased by 14 percent, and 70 percent of defendants paid their fines in full (Hillsman & Greene 1992).

The Staten Island findings are subject to two important caveats. First, the participating court handled only misdemeanors; the use of day fines for felonies thus remained untested. Second, applicable statutes limited total fines for any charge to $250, $500, or $1,000, depending on the misdemeanor class, and thus artificially capped fines at those levels and precluded meaningful implementation of the scheme in relation to other than the lowest-income defendants.

A second modest pilot project was conducted for 12 weeks in 1989 in Milwaukee (McDonald, Greene & Worzella 1992) and projects funded by the Bureau of Justice Assistance were established in the early 1990s in Arizona, Connecticut, Iowa and Oregon (Turner 1992). The Milwaukee project applied only to non-criminal violations, resulted in reduced total collec-

tions, and was abandoned. The Phoenix project, known as FARE (Financial Assessments Related to Employability), was conceived as a mid-level sanction between unsupervised and supervised probation. The Iowa pilot included only misdemeanants and the Oregon projects included misdemeanants and probationable felonies (excluding Marion County, the largest, which covered only misdemeanants). Only in Connecticut did the pilot cover a range of felonies and misdemeanors. By mid-1998, only the Phoenix project remained in operation; the others had ceased operation.

A RAND Corporation evaluation of the Arizona, Connecticut, Iowa and Oregon projects was funded by the National Institute of Justice; except in Phoenix, the findings were disappointing (Turner & Petersilia 1996). A Bureau of Justice Assistance manual is conspicuously uninformative about the evaluation findings but hints at the pilots' limited success: "It is clear from the experiences to date that much careful thought must be given to making day fines an option in specific jurisdictions" (Bureau of Justice Assistance 1996, p.

5. Is There a Future for Community Penalties in the United States?

Despite the seemingly disheartening evaluation findings that suggest that most community penalties do not reduce recidivism, corrections costs and prison crowding while simultaneously enhancing public safety, there is a future for community penalties. Three major obstacles stand in the way. The first, the most difficult, is the modern American preoccupation with absolute severity of punishment and the related widespread view that only imprisonment counts. The average lengths of prison sentences are much greater in the United States than in other Western countries (Tonry 1996, table 7-1). The ten-, twenty- and thirty-year minimum sentences that are in vogue for drug and violent crimes are unimaginable in most countries, as is the proliferation in the 1990s of 'three strikes' laws requiring very long or life sentences for third-time offenders.

This absolute severity frustrates efforts to devise community penalties for the psychological (not to mention political) reason that few other sanctions seem commensurable with a multi-year prison sentence. By contrast, many offenders convicted of violent crimes in Sweden, Germany and England are sentenced to fines, community penalties, or prison sentences

measured in months. In those countries, the prison sentences thereby avoided would have involved months, making a burdensome financial penalty an imaginable alternative. By contrast, most of the American day-fine pilot projects used day fines as punishments for misdemeanors or non-criminal ordinance violations or as a punishment between supervised and unsupervised probation. Likewise, with the rare exception of New York's community service project started by the Vera Institute, except for the most venial offences CSOs are generally ordered as probation conditions and not as sentences in their own right.

The second, not unrelated, obstacle to fuller development of community penalties is widespread commitment to 'just deserts' rationales for punishment and the collateral idea that the severity of punishment should vary directly with the seriousness of the crime. This has been translated in the federal and most state sentencing guidelines systems into policies that tie punishments to the offender's crime and criminal history and little else. Such policies and their commitment to 'proportionality in punishment' constitute a gross oversimplification of the cases that come before criminal courts. Crimes that share a label can be very different: robberies range from kids taking a basketball in the playground to gangland assaults on banks. Offenders committing the same crime can be very different: a thief may have been motivated by a sudden impulse, the need to feed a hungry child, a craving to buy drugs, or a conscious choice to make a living as a thief.

Punishments likewise vary. Despite a common label, two years' imprisonment can be served in a maximum-security prison of fear and violence, in a minimum-security camp, at home under house arrest, or in some combination of these and other regimes. Even a single punishment may be differently experienced; three years' imprisonment may be a rite of passage for a young gang member, a death sentence for a frail seventy-year-old, or the ruin of the lives of an employed forty-year-old man and his dependent spouse and children. Nonetheless, commitment to ideas of proportionality is widespread and it circumscribes the roles that community penalties can play. If guidelines specify a two-year prison term for offence X with criminal history Y, it seems unfair to sentence one offender to community service or house arrest when another like-situated (in the narrow terms of the guidelines) is sentenced to two years. It seems more unfair to sentence one offender subject to a two-year guidelines sentence to house arrest, when another offender convicted of a less serious crime receives an eighteen-month prison sentence.

Commitment to proportionality interacts with the modern penchant for severe penalties. If crimes punished by months of incarceration in other countries are punished in years in the United States, comparisons between offenders are starker. If in Sweden, two offences are ordinarily punished by thirty- and sixty-day prison terms, respectively, imposition of a day-fine order on the more serious offender, out of consideration for the effects of a prison term on his family and employment, produces a contrast between a thirty-day sentence and a sixty-unit day fine. Convert the example to American presumptive sentences of two and four years, and the contrast is jarring between a community penalty in lieu of a four-year sentence and two years in prison for someone convicted of a less serious crime. Net-widening is the third obstacle to further development of community penalties. There are two solutions. The first is to shift control over program placements from judges to corrections officials wherever possible. For some programs such as boot camps and some forms of ISP and house arrest, this is relatively easy and would make it likelier that such programs would achieve their goals of saving money and prison space without increasing recidivism rates.

The alternative is to structure judges' decisions about community penalties by use of sentencing guidelines. A substantial body of evaluation and other research demonstrates that well-conceived and implemented guidelines systems can change sentencing patterns in a jurisdiction and achieve high levels of judicial compliance (Tonry 1996, Chs. 2 & 3). Most state guidelines systems, however, establish presumptions for who is sent to state prisons and for how long, but do not set presumptions concerning non-prison sentences or choices between prison and other sanctions. Two broad approaches for setting guidelines for non-prison sentences have been tried (Tonry 1998, Chs. 3 & 4). The first, which seems to have met a dead end, is to establish 'punishment units' in which all sanctions can be expressed. Thus a year's confinement might equal ten units, a month of house arrest three units, and a month's community service two units. A 20-unit sentence could be satisfied by any sanction or combination of sanctions equaling 20. This idea was taken furthest in Oregon, where sentencing guidelines, in addition to setting presumptive ranges for jail and prison sentences, specified a number of punishment units for every crime/criminal history combination. Oregon, however, never set policies governing unit values, and neither there nor anywhere else has the idea been taken further.

The other approach is to establish different areas of a guidelines grid in which different presumptions about choice of sentence govern. Both North

Carolina (Wright 1997) and Pennsylvania (Kramer & Kempinen 1997) adopted such systems in 1994. One set of crime/criminal history combinations is presumed appropriate only for prison sentences; a second is presumed subject to a judicial choice between prison sentences or intensive community sanctions (including split sentences with elements of both); a third is presumed subject to a choice between intensive or non-intensive community sanctions (or some of both); and a fourth is presumed subject only to non-intensive community sanctions. The Pennsylvania and North Carolina systems took effect in the autumn of 1994, both in conjunction with programs of state funding for development of local community penalties programs. Early indications are that they have achieved partial success as means to increase judicial use of intermediate sanctions and to make their use more consistent (Lubitz 1996; Kramer & Kempinen 1997).

6. Conclusion

Experience to date supports a number of generalizations about community penalties. First, for offenders who do not present unacceptable risk of violence, well-managed community penalties offer a cost-effective way to keep them in the community at less cost than imprisonment and with no worse later prospect for criminality. Second, community penalties are highly vulnerable to net-widening when judges control entry. Sentencing guidelines may be able to diminish that problem by setting standards for judges' decisions, and for some penalties discretion over admission can be shifted from front-end judges to back-end corrections officials. Third, community service and monetary penalties remain woefully underdeveloped in the United States and much could be learned from Europe. Fourth, community penalties are unlikely to come into widespread use as prison alternatives unless sentencing theories and policies become more expansive and move away from oversimplified ideas about proportionality in punishment. Fifth, community penalties may offer promise as a way to get offenders into drug and other treatment programs and keep them there.

Unfortunately, 'law and order' politics remains vigorous in the United States, and at the federal level and in many states, legislators and other elected officials – notably including local prosecutors – continue to promote and adopt demagogic and repressive policies of a severity unknown in other Western countries (Beckett 1997; Windlesham 1998). Efforts to adopt rational sentencing policies and effective community penalties coex-

ist with law and order politics and are likely to remain under-funded and imperfectly realized until the political climate changes. When that time comes, the public will support efforts to develop more constructive policies that rely less on imprisonment and more on treatment programs designed to enable offenders to live satisfying, law-abiding lives and on burdensome but constructive programs like restitution, community service and work release.

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From Community Service to Community Sanctions: Comparative Perspectives

ANTON M. VAN KALMTHOUT

1. Community sanctions: Old ideas parading as new ones?

An interesting aspect of the still continuing search for alternatives to (short time) imprisonment is that many of the alternatives that recently have been introduced in European legislation are in fact revivals of old ideas and concepts dating back more than hundred years ago. After all it is not the first time in the history of European Criminal Law that European countries in close co-operation try to invent penal sanctions that could be less costly, more effective in preventing crime and more humane than the current custodial penalties.[1]

Nowadays, it is more than a full century ago that influential penal reformers like Bonneville de Marsagny[2] and Franck[3] in France and Tallack[4] in England criticised the short-term imprisonment and advocated non-custodial alternatives to incarceration as penal reaction to criminality. This criticism of imprisonment was manifested less than a hundred years after the deprivation of liberty had been taken up into the criminal codes of Western

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[1] For a general overview of the history and development of alternatives to imprisonment, see A.M. van Kalmthout and P.J.P. Tak, Sanctions Systems in the Member States of the Council of Europe, Deventer/Boston 1988 (Part 1) and 1992 (Part 2); J. Junger-Tas, Alternatives to Prison Sentences: Experiences and Developments, Amsterdam-New York 1994.

[2] Bonneville de Marsangy, De l'amélioration de la loi criminelle, vol.l, Paris 1855, vol2, Paris 1864.

[3] A. Franck, Philosophie du droit pénal, Paris 1864.

[4] W. Tallack, Defects in the criminal administration and penal legislation of Great Britain and Ireland, London 1872.

European countries as a principal sanction. Under the influence of the ideas of the Enlightenment penalists and legislators this new penalty was generally considered as a promising alternative to the penalties in use at that time: the death penalty, corporal punishment, forced labour and the galleys. Imprisonment was not only considered to be a humane and rational alternative, but also as a sanction that could make a real contribution to the rehabilitation and improvement of the delinquent.

In contrast to what was expected, a century later it became clear that these high expectations to a large extent could not be realised. The criticism focused especially on the failure to realise the aim of rehabilitation and on the counter-productive effects of actions under the concept of special deterrence. Imprisonment did not result in improvement of the offender. On the contrary, it turned out to damage the offender's self-respect, to deprive him of his responsibility, to mental resilience and to hinder his reintegration after release. Also the financial and social costs that imprisonment entailed and the discriminatory way short-term prison sentences were imposed on financially weak offenders gave impetus to an international crusade against custodial sentences, especially against the short detentions.

This crusade was not without success. It was strongly influenced by the various International Penitentiary Congresses[5] and by the ideas of the 'Modern Movement' initiated by Von Liszt and his 'Internationale Kriminalistische Vereinigung'[6]. To the current date the influence of this campaign is still detectable in the administration of criminal justice and criminal policy in almost all Western European countries. It has lead to the introduction and development of special provisions for mentally ill or dangerous offenders, it has resulted in special provisions for juveniles and in some countries even in a separate Criminal Code for young offenders. It has introduced suspended sentences and probation in different modalities and it has stimulated the upgrading of the fine - in particular the day-fine - and other pecuniary sanctions.

However, for many of the ideas promoted vigorously by this international movement the spirit of the times was not ripe yet. It took about a full century, before in the 1970s almost all European criminal justice systems again started a search for new alternatives. This resulted in the introduction

[5] See in particular: Actes du Congrès Pénitentiaire International de Rome, November 1885, Volume I, Rome 1887.

[6] See: F. von Liszt, Strafrechtliche Aufsätze und Vorträge, Volume I, 1875-1891, Berlin 1905.

of what today is called 'alternative sanctions', 'intermediate sanctions' or 'community sanctions'. To a great extent, these new sanctions are old concepts invented by the international reform movement of last century. Especially this is the case with respect to 'community service', 'public reprimand', 'bail', 'compensation', 'house arrest', 'training programs' and the withdrawal or restriction of certain rights.

2. The current need for new alternatives

The current revival of proposals and concepts developed more than one century ago has several causes. First of all, in almost all Western European countries there is an increasing rate of recorded crimes. For one part, these concern traditional crimes like violent crimes, property crimes, petty crimes like vandalism or traffic offences, such as drunken driving and speeding and for another part these crimes are modern types of crimes, like drugs- and drugs related crimes, environmental crimes, computer crimes, and appearances of organised crime, especially weapons trade, drugs dealing and trafficking, terrorism, women- and children trade and man smuggling.

These rising crime rates on the one hand and concomitant increasing numbers of offenders registered by the police are obviously frustrating the activities of criminal justice organs: police, public prosecution service, judiciary, probation service. All over Europe the growing workload of the judicial apparatus is hampering the fulfilment of their normal tasks and duties. This has led to a considerable overburdening of the judicial system and serious prison capacity shortages in almost all countries. Resorting only to imprisonment as a remedy to these increasing crime rates fell through in many countries because of the economic crises in Western Europe since the beginning of the 1970s. Like hundred years ago national budgets could and cannot longer effort the heavy financial burden caused by the rapidly growing number of offenders and prison sentences. Even in those countries where despite these economic crisis ambitious and expensive prison building plans have been carried out, like in Belgium, France, and the Netherlands, the prison capacity still remained inferior to the calculated prison and pre-trial institutional capacity needs.

3. The interest of Governmental Organisations in sentencing matters

In contrast to the reform movement of last century, the search for alternatives to short term prison sentences and the exchange of knowledge and

experiences is no longer the exclusive domain of non-governmental organisations like the Association Internationale de Droit Pénal, the International Penal and Penitentiary Foundation, the Conférence Permanente Européenne de la Probation, Penal Reform International and the Societé International de Défense Sociale. It is also the proper concern of governmental organisations such as the European Committee on Crime Problems of the Council of Europe, the Committee on Crime Prevention and Control and the Economic and Social Council of the United Nations. Studies, brought out by these organisations and resolutions prepared by the Committee of Ministers of the Council of Europe and the five-yearly United Nations Congresses on the Prevention of Crime and the Treatment of Offenders, have had and still have an important influence on the development and implementation of non-custodial sanctions and measures.[7]

Another important difference of today's situation compared with that of a century ago is the sharp increase in short term imprisonment. This is not, as it was then, due to excessive use of fine default detention, but mainly is due to a marked increase in the number of pre-trial detentions. There has also been a shift in the types of offences for which the short principal sentence of imprisonment is used over the last hundred years: away from minor offences and towards offences that are of the middle range of criminality. This makes the development of adequate alternatives extra difficult. All this does not take away the fact that the arguments put forward a hundred years ago to show the pointlessness and harmfulness of short-term imprisonment are still very relevant today. The working paper of the United Nations Secretariat, written on the occasion of the sixth United Congress on the Prevention of Crime and the Treatment of Offenders at Caracas in 1980 - a congress devoted entirely to the theme "De-institutionalisation of corrections and its implications for the residual prisoner" - argued for de-institutionalisation in the administration of criminal justice as follows:

[7] See e.g.: Eighth Congress of the United Nations on the Prevention of Crime and the Treatment of Offenders, Havana 1990, a/conf. 144/28/Rev.1; Council of Europe: 1) Resolution (65) on suspended sentences, probation and other alternatives to imprisonment; 2) Resolution (70) on the practical organization of measures for the supervision and after-care of conditionally sentenced or conditionally released offenders; 3) Resolution (76) 10 on certain alternative penal measures to imprisonment; Recommendation R (82) 16 on the European Rules on Community Sanctions and Measures.

> "Besides the traditional arguments regarding the inherent contradictions in the custodial and rehabilitative functions of the prison, other factors such as the dehumanising aspect of incarceration, the debilitating impact of total institutionalisation on the human personality, the increasing awareness that imprisonment is unlikely to improve the offender's chances of living a law-abiding life or to reduce crime rates have given a new impetus to the movement towards the treatment of offenders "outside" prisons or "without" prisons".[8]

4. Recommendations of the Council of Europe

Due to the developments mentioned above, in Europe since the 1970s a wide range of new sanction options have been introduced. They have been put into practice while being backed up by several Recommendations of the Council of Europe. Amongst these is Recommendation 914 (1981)[9], which defined in one of the recommendations the first basic principle of criminal policy as follows:

> "It is desirable to encourage the current tendency in Council of Europe member countries to replace as far as possible short term prison sentences by other measures which have the same effectiveness without drawbacks".

While in this recommendation short-term imprisonment was mainly criticised because of ideological and humanitarian considerations, in the recommendations issued later the pragmatic and economic arguments became more dominant. The first clear indication of this shift in reasoning can be found in Resolution 3 "On economic crisis and crime" of the thirteenth Conference of European Ministers of Justice, which pointed to the disadvantageous effects of economic crisis on the well functioning of the criminal justice system. To eliminate these harmful effects this resolution stressed among other things the importance of:

> "a. the desirability of avoiding any increase in the use of remand in custody and short term custodial sentences, and of devising suitable alternatives which can be applied at a time of economic crisis;
>
> b. the need to restrict, wherever possible, the imprisonment of young offenders, for whom rehabilitation is especially difficult at a time of economic crisis;

[8] United Nations Secretariat, Alternatives to imprisonment, op.cit., p.3.

[9] This resolution was adopted by the Assembly on 29th January 1981 (25th sitting).

c. the possibility of developing measures of diversion and decriminalisation."[10]

In the report "Alternative Measures to imprisonment"[11], published four years later, emphasis was put even more on the financial and economic necessity of finding alternatives to imprisonment, by stating that:

> " ...the economic costs connected with imprisonment have skyrocketed at such speed that economy has in several places become a very decisive factor in criminal-political development. Practicians, faced with the problem of prison overcrowding, no longer argue simply in terms of criminological criteria (recidivism, punitive nature of the sanction), but also of socio-economic criteria (financial and social costs of penal measures, social effects of sanctions)."

The strive for humanisation and de-institutionalisation on the one hand and the need to control the cost of the judicial machinery on the other hand, have resulted in many initiatives at national and international levels to reduce short-term prison sentences. Major impetus for this development came from the Council of Europe. In 1976 the Committee of Ministers of the Council of Europe adopted the Resolution (76)10, which was based on the above mentioned report "Alternative penal measures to imprisonment". In this resolution, entitled "On some alternative penal measures to imprisonment", the governments of the member states were asked not only to spare no effort in developing existing alternatives like probation and the fine, but also:

> "To study various new alternatives to prison sentences with a view to their possible incorporation into their respective legislation, and in particular:
> a. to consider the scope for penal measures which simply mark a finding of guilt but impose no substantive penalty on the offender;
> b. to consider the expediency of deferment of sentence after guilt has been established so as to enable a sanction to be imposed which will take account of the offender's progress after his conviction;
> c. to look into the advantages of community work and more especially the opportunity it provides:

[10] Thirteenth Conference of European Ministers of Justice, Athens, 25-27 May 1982, MJU-13(82) Concl., Strasbourg 1982.

[11] W. Rentzmann and J.P. Robert, Alternative Measures to imprisonment, Report of the 7th Conference of Directors of Prison Administration, Council of Europe, Strasbourg 1986.

-for the offender to make amends by doing community service,
-for the community to contribute actively to the rehabilitation of the offender by accepting his Cupertino in voluntary work;
d. to consider what contribution could be made by semi-detention as a milder form of punishment than total imprisonment, which would enable the convicted offender to preserve or resume his links with society."

A few years later similar recommendations came from the United Nations. In 1990 these recommendations were concretised in the United Nations Standard Minimum rules for non-custodial measures (the Tokyo Rules). In 1992 they were followed by the European Rules on community sanctions and measures. In subsequent years these European Rules have been amended by some more specified Recommendations of the Committee of Ministers, such as:

1) Recommendation No. R (97) 12 on staff concerned with the implementation of sanctions and measures;
2) No. R (99) 22 concerning prison overcrowding and prison population inflation; and
3) R (2000) 22 on improving the implementation of the European Rules on community sanctions and measures.

5. General features of the new non-custodial sanctions

5.1 Consent and commitment

Stimulated by these resolutions almost all European countries have taken many initiatives to find an adequate answer to the problems sketched above. The majority of these initiatives were aimed at the reform of sanctions-systems. Sometimes these reforms were part of comprehensive reforms of the Penal Code, like in France, Poland, Portugal, Russian Federation and Spain. In other countries, the reform was mostly limited to the sanctions-system as such (Belgium, Germany, Italy, Luxembourg, the Netherlands and Switzerland).

Comparing the current sanctions systems with those of twenty-thirty years ago, one has to conclude that the former simple, surveyable sanction systems: imprisonment, fine and conditional or suspended sentence or probation as core sanctions have disappeared in almost all countries. The list of penalties and measures has been expanded with a series of non-custodial sanctions as community service, compensation and restitution, victim-

offender mediation or community mediation. withdrawal of certain rights or licences, training courses, cognitive-behaviour-oriented learning and training programmes, treatment programmes (especially for drug and sex offenders), supervision and attendance orders, placement in probation hostels or day centres, intensive supervision or probation orders, curfew orders, house arrest and electronic monitoring, deferment of sentence with supervision, family custody, controlled freedom, combination orders (consisting of a combination of two or more of these sanctions) and many others.

A peculiarity of this new category of sanctions is that they are only meaningful when the offender is willing to co-operate. In this sense, they differ essentially from traditional penalties. Because the new sanctions require the co-operation of the offender, the legislations of most countries require the offenders' consent. Exceptions to this are the legislations of the Czech Republic, England and Wales, Germany, the Netherlands and the Russian Federation. A second reason why most legislative provisions are seeking the offender's consent is the persistent belief that otherwise some of these sanctions (in particular community service) might be in conflict with provisions that forbid forced or compulsory labour. For a long time this was the opinion of the English and Dutch legislature. Nowadays in these and also in some other countries the legal condition is abolished, which says that the offender must have agreed at forehand if the court can impose a community sanction. Whether in these countries a community sanction conflicts with provisions on forced or compulsory labour is not dependent on a previous consent, but rather on the type of work or activities requested from the offender and on the circumstances and conditions (as number of hours, length of the sentence, working place and legal position) under which these activities must be carried out.[12] Even in those countries where the legislature puts emphasis on the consent of the offender to offer the best guarantee against forced or compulsory labour, this consent is seldom a real informed consent. In practice this consent means only that the offender is assumed to have accepted the obligation to work

[12] This was also the opinion of the German Constitutional Court in its judgement of 14-11-1990 –2, BvR 1462/87, NstZ 1991, 4, p. 181. See also A.M. van Kalmthout, 'Instemming 'in de aanbieding; en de rest? , De feitelijke afschaffing van het aanboden instemmingsvereiste bij de veroordeling tot 'dienstverlening', in: R.D. Vriesendorp, M.L.W. Weerts and W.J. Witteveen, Het actuele recht, Lelystad 1993, pp. 95-99.

and the liberty limitations connected with it. This is for example the case in Poland where, as Stando-Kawecka reveals, the place, duration and kind or way of fulfilment of the community service is defined by the court only after the court hearing.[13]

Most of these new sanctions have in common that the community is given an explicit role in the enforcement process. This phenomenon occurs for the first time in history. The remarkable level of community and political interest in this aspect of the administration of criminal justice is explained in the literature in the following terms: 'The main difference between current trends and the recent past is that while alternative approaches once consisted of sporadic and scattered experiments, especially on the part of charitable organisations, today they are planned and implemented as part of a differentiated strategy intended to deal with the problem of criminality in a global perspective, where the various sectors of criminal justice are viewed as an integrated system. Governmental efforts and resources are increasingly being devoted to the development of new or the redevelopment of old alternatives in the wake of a growing realisation of prison's inability to rehabilitate, and as part of the over-all trend towards deinstitutionalisation which also characterises the mental health field. Society, in fact, does not remove all the mentally disturbed and retarded to asylums, exile the poor or send the aged to workhouses. The care and support of such persons has gone back to the community. By returning these responsibilities to the community, and by providing it with the appropriate means for dealing with those persons, society seems to cope more effectively with them, while at the same time reducing the sense of powerlessness and fragmentation of its members'.[14]

Societal commitment is particular important and, moreover, is a conditio sine qua non for sanctions as community service, social training courses and victim oriented sanctions. It is just because of society's involvement that the term 'community sanctions, or community based sanctions' is appropriate. According to Council of Europe's Recommendation No. R (92) 16, community sanctions and measures are to be understood as 'sanctions and measures which maintain the offender in the community and involve some restriction of his/her liberty through the imposition of conditions and/or obligations, and which are implemented by bodies designated in

[13] See: B. Stando-Kawecka, Community Sanctions in Polish Penal Law, in this volume.

[14] United Nations Secretariat, Alternatives to imprisonment, International Review of Criminal Policy no. 36, 1980, New York 1983. p. 9.

law for that purpose'. The term, furthermore, 'designates any sanction imposed by a court or a judge, and any measure taken before or instead of a decision on a sanction as well as ways of enforcing a sentence of imprisonment outside a prison establishment'.

In this description the place and meaning of the community in the enforcement of the community sanctions still is unclear. It focuses only at the non-custodial aspect of the sanction, not at all at the involvement of the community. However, the intrinsic value of these new types of sanctions must go beyond the simple fact that the offender remains in the community during the enforcement of the sanction. The real value and meaning of community based sanctions or measures must be sought in the fact that they really contribute to the reintegration of offenders into society. This is realized by stimulating and improving the offenders' sense of responsibility and his social skills by confronting him with the consequences of his offending behaviour and by asking him to perform some resocialisation activities. Because community based sanctions put the emphasis on the offender's inclusion in, rather than his exclusion from society, it means also that the involvement and commitment of the community - in particular the local community - is indispensable. Community based sanctions and measures can only be applied within a community-oriented infrastructure geared to the specific requirements of these sanctions.

5.2 CSM's and Probation Service

Obviously, the implementation of community sanctions is to a large extent dependent of the existence of an organisation whose working methods, mission statement, goals and attitude are in close keeping with the concept on which these CSM's are based. For many years and in many countries probation services guided, supervised and controlled offenders while they underwent the first forerunners of community sanctions as 'probation order', 'conditional or suspended sentence' and 'conditional release' or 'parole'. In that sense, it is evident that when it came to extending the package of new CSM's, the probation services were assigned a major role in this. In many countries this role goes way beyond the original tasks of the probation service: from then its work was not limited anymore, as it was in the old days, to suitability reports, counselling, support and supervision. The responsibility for the preparation, organisation and enforcement of the

community sanctions in close co-operation with private, semi-public and public organisations or institutions was added to this.[15]

This has generated increasing possibilities for probation services to enhance their societal profile. But, on the other hand, it is now impossible for today's probation services to deny the responsibility as co-executor of sanctions and measures. As might be clear, this has resulted in a sharpening of the classical tension with the basic orientation of probation, i.e. to serve the interests of the offender. Nevertheless, in some countries social workers and probation officers are reluctant to act as executors of penal sanctions and resist the idea that probation is equivalent to sentence execution in freedom. As Mikusch and Pilgram point out in this volume, this is the case in Austria where a probation officer is not required to actively control the way an offender complies with the imposed restrictions and/or conditions[16]. In contrast to most other countries some appearances of community sanctions that require a strict control as community service and electronic foot cuffs are perhaps therefore not existent in Austrian adult criminal law. There, community sanctions and measures are still limited to probation (mostly linked to a deferment of sentence or conditional sentence or release), out of court settlement (mediation) and health-related measures for drug addicts.

Of course, it is an improvement that because of the extended package of modalities for sanctions and their execution, probation has secured room for developing programmes and methods specifically aimed at individual offenders or categories of offenders. In many countries, these kinds of specific programmes are part of a probation order or a combination order. For example, in Sweden, England and Wales a wide range of programmes has been developed, including care-offenders' programmes, drunk-driver programmes, violence and anger control programmes, domestic violence programmes, racist attack programmes, sex offender programmes, women offender programmes and general crime-prevention programmes.

Apart from CSM's as total substitutes for custodial punishments, hybrid CSM's have been developed. These sanctions and measures do not com-

[15] See for an overview of the role and meaning of the Probation Services in the European criminal justice systems: J.T.M. Derks & A.M. van Kalmthout, A Palette of European Probation Service Systems. In: A.M. van Kalmthout & J.T.M. Derks (Eds), Probation and Probation Services, a European Perspective, Nijmegen 2000.

[16] See: G. Mikusch and A.Pilgram, Community sanctions and measures in Austria, in this volume.

pletely replace custodial sanctions, but are alternative forms of executing already imposed short prison sentences. Although in the majority of European countries periodic detention, semi-detention, semi-liberty, weekend detention, work release, placements outside the prison, home detention and partial suspended sentence are methods of implementing custodial sentences, they are not seen as real alternatives for prison. Compared with a full unconditional custodial sentence, they have the advantage that in the custodial part a more effective process of resocialisation and reintegration can be implemented than would otherwise be feasible in jail.

5.3 Frontdoor and backdoor CSM's

The search for new non-custodial sanctions had also an enormous impact in the pre-trial and post-trial phase of criminal procedure. In many countries (Austria, Belgium, Germany, the Netherlands, Norway and Poland) the Public Prosecution Services, the examining magistrates or sometimes even the police (as in the Netherlands[17]) obtained sentencing powers that formerly were considered to belong exclusively to the courts. Conditional waiver or discharge, financial settlement or transaction, compensation, mediation and restitution, conditional pre-trial release, community service and training courses in many countries can now be applied as part of out-of-court settlements in order to reduce the pressure on the overburdened judicial apparatus and overcrowded prisons.

But the endeavour to minimise as far as possible the damaging effects of prison sentence and to reduce the actual period spend in prison has also led to a rich variety of 'backdoor' sanctions and measures. Many of these modalities are virtually modifications of existing judicial sanctions and measures like semi-liberty, electronic monitoring, semi-detention, conditional release, penitentiary programmes, assignment to the probation service and community service. However, an essential difference is that the decision to apply these sanctions is not taken by the trial judge but by the prison authority or a specialised sentencing judge after trial (as is the case in Portugal, Italy, France and Spain). Their powers can reach so far that a custodial sanction imposed by the trial judge can be transformed in a non-custodial sanction or measure with a completely different character as the trial judge had in mind when sentencing the offender. For example in Italy, where the tribunal of surveillance is empowered to substitute prison sen-

[17] See: J. Junger-Tas, Sentencing in the Netherlands in this volume.

tences up to three or even four years if the sentence is imposed on a drug addict by a non-custodial sanction. This is called 'affidamento in prova al servizio sociale', a sort of probation[18].

Another general characteristic is that legislatures increasingly are making a strong distinction between the large number of offenders of petty offences or one time offenders on the one hand and offenders of serious crimes (mostly career offenders) on the other hand. While the non-dangerous offenders or one time offenders should be eligible for non-custodial criminal sanctions and should be diverted from the prison system, the ongoing process of bifurcation is reserving prison sentences and custodial security measures for serious, dangerous offenders being sentenced to very long periods of liberty deprivation. In order to uphold the ideal of rehabilitation at least in case of serious but corrigible offenders and to reduce the length of time to be served in prison, frontdoor alternatives increasingly are also introduced as backdoor alternatives. A selection of serious offenders who comply with the objective and subjective criteria receive the privilege to be released in an earlier stage via backdoor alternatives like semi-detention, open prisons, special conditional release and parole, commitment to the Probation service, house arrest with electronic surveillance and penitentiary programmes that are carried out outside prison (for example in Italy and in the Netherlands).

The frontdoor alternatives are generally open only to offenders of less serious crimes, sometimes only to first offenders. These frontdoor alternatives can be roughly divided in two categories: they have in common that they do not deprive the offender completely from his liberty but remain restricted to the deprivation or the limiting of some rights. The first category of these non-custodial sanctions consists of sanctions that limit the freedom of the offender, such as: electronic monitoring (for example in Belgium, Canada, France, Ireland, the Netherlands, Scotland, Sweden, Spain, Switzerland, the UK and the US) and controlled freedom (in France, Italy and Malta). Also in this category are financial sanctions that strike the offender in his financial liberties. Especially the day fines, based on the offender's daily income, are applied increasingly as alternatives to custodial sanctions (in Austria, France, Germany, Portugal, Denmark, Sweden, Spain and Finland).

Frontdoor alternatives in the second category differ from these in the first in so far as they are not only aimed at restrictions from rights and free-

[18] See the contribution of V. Fanchiotti, in this volume.

doms, but also have a more positive intent. The idea behind these sanctions is to confront the offender not only in a painful way with his criminal act, but to confront him at the same time with his responsibility for himself, and for society. This is done by giving him the opportunity to do a good deed to the victim and/or to society. Restorative justice is the modern slogan for these way of sanctioning. In this category are sanctions as: damage reparation, compensating of the victim, mediation, social-training courses, alcohol-traffic courses, unpaid services to the community and probation.

Sometimes, both categories of alternative sanctions can be combined or the sanction in itself is a combination of two sentencing concepts: on the one hand the limitation of freedom and on the other hand the stimulation of a positive response from the offender. An example of this is the community service order. Some legislatures, for example the French, the Norway and the Dutch legislation (the latter as from January 2001), have allowed also a combination of alternative sanctions with a custodial sentence. This combination is a contradictio in terminis and has the intrinsic risk of being counterproductive by not reducing but rather stimulating the use of short term imprisonments by the courts.

6. How successful are the CSM 's?

If one takes stock of the daily sentencing practice in most of the countries, one has to admit that in spite of the ample arsenal of CSM 's that has been developed during the last decades, most have been only used on a very limited scale. Community service seems to be an exception to this. Along with the traditional alternatives (such as fine and suspended sentence/probation) community service seems to be the only new substitute sanction that has played more than a marginal role in reducing the number of short-term prisoners. In many European countries, 'short-term' means a sentence of between 3 and 6 months; in others, it means a sentence of up to 12 months. In only one country (Greece) does it mean a sentence of up to three years.

In theory these short, unconditional prison sentences can be replaced by community service or by other community-based sanctions. This last category includes - besides the conditional or suspended sentence and probation, whose roots go back to the beginning of this century - sanctions which have only recently been developed, such as intermediate treatment, non-residential treatment programs, social training courses, courses for

drink-drivers, compensation and several forms of supervision. This is the case in, for example, Portugal, France, Luxembourg, the Netherlands, Czech Republic, England, Scotland, Ireland, Germany, Norway and Denmark. These community-based sanctions often can be imposed under conditions comparable with the imposition of a community service sanction. The popularity of and belief in the viability of these community sanctions is also demonstrated by the fact that some years ago the UN and the Council of Europe published a series of standard minimum rules on non-custodial CSM 's.

In practice however, only the community service order seems to have been accepted by judiciary and society as viable penal sanction and has gained firm footing in most of the European Penal Codes. In some countries this penalty of performing unpaid work for the community is already gone up to the third place on the list of alternatives to imprisonment (after the fine and suspended sentence/probation), and the number of such community service orders is increasing annually. This is especially the case in England, France and the Netherlands, where each year more than 47,000, 15,000 and 20,000 community service orders or combination orders, respectively, are imposed on adult offenders, either as a principal sanction or as a special condition attached to a suspended sentence. Also the Czech Republic and Finland report an increasing application of community service orders since they were introduced in 1996 (Czech Republic) and 1991 (Finland). In 1998, this new sanction was imposed approximately 1,800 times in the Czech Republic (3% of all sanctions imposed).[19] In Finland after a five years experimental period (1991-1996) community service in 1997 definitively has been adopted as a general form of punishment throughout the country. In 1998 about 3800 offenders started a community service, only about 12% less than those who commenced their prison sentence in 1997.[20] In Switzerland, too, community service is gaining more and more ground, despite its experimental stage and the limited scope of its application. Although originally only applicable as a back-end substitute for prison sentences of up to one month (since 1996, of up to three months), in 1998 more than 2,300 out of roughly 9,000 prison sentences

[19] See: Z. Karabec, Czech Republic, in: A.M. van Kalmthout & J.T.M. Derks, Probation and Probation Services, A European Perspective, Nijmegen 2000, p. 116.

[20] See: T. Vogt-Airaksinen, Finland in: A.M. van Kalmthout & J.T.M. Derks, Probation and Probation Services, a European Perspective, Nijmegen 2000, p. 197.

were commuted to community service.[21] In Belgium the introduction of community service and training orders took place relatively late. However, the Belgium report shows that especially the community service order since its introduction in 1994 can boast a modest, but growing quantitative success. From 199 cases in 1994 the total amount of community service orders imposed as a condition for penal mediation or as a condition for probation increased to 1738 in 1997. The number of training orders, which are still in an experimental stage, increased from 29 in 1995 to 675 cases in 1997[22]. In such other countries as Germany, Italy, Poland, Portugal, Spain and Switzerland, community service functions mainly as an alternative to default detention or weekend detention (Spain) and rarely as an alternative to the principal prison sentence.

However, statistics concerning the number of unconditional prison sentences imposed during the last decade, especially in countries where these community sanctions have been applied on a very large scale, show that there has been no major reduction of prison sentences or of the prison population. In fact, the contrary is the case if we take into account the enormous increase of prison capacity in such countries as England, Wales, France and the Netherlands during last decade. A positive exception to this is Canada, where the number of offenders under community supervision, in particular probation is rising faster than the number of people in prison.[23]

7. Limits and shortcomings

Although this does not mean that these community sanctions are ineffective they still rank low on the list of sanctions imposed. Also it forces us to investigate why, in spite of their - in a quantitative respect - successful application, they have not succeeded in reducing the number of prison sentences to a greater extent. In other words, what are the limits and shortcomings of these alternative sanctions, and - second question - what is the impact of these alternatives on prison conditions?

The first reason why community sanctions are playing only a marginal role as substitutes for custodial sanctions is that their nature and sentencing

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[21] See: M. Killias, Community Service without Net-Widening- A Question of Implementation? Some lessons from the Swiss Experiment, in this volume.

[22] See: I. Aertsen and K. Lauwaert, Community sanctions and measures in Belgium, in this volume.

[23] See the contribution of A. Leschied and A. Cunningham in this volume.

aims are still very unclear and questionable. Should they be seen primarily as punitive sanctions with a repressive-retributive aim, like imprisonment and fine, or should they be more aimed at rehabilitation and resocialization of the offender, as is the case with parole, suspended sentence and probation? Or should they be considered from a victim-oriented perspective? In most countries, the judiciary and legislature tend to prefer the first option, while probation authorities and community organizations involved in the implementation of these new sanctions put more emphasis on the rehabilitative and victim-oriented aims. This indistinctness is clearly illustrated by French legislation where, for example, such a sanction as community service can be imposed as the principal penalty, as a special rehabilitative condition attached to a suspended sentence, as the execution modality, or as a supplementary penalty, which can even be combined with an unconditional prison sentence. In other countries, too, the combination of a community sanction with an unconditional prison sentence is not uncommon, which of course does not favour its application as a real substitute. A striking example of this conceptual confusion is provided by the Model Law on Juvenile Justice, drawn up by the UN Centre for International Crime Prevention.[24] While in many countries community service is classified as an educational sanction, the Model Law classifies it as a punitive sanction. In the Netherlands, social training courses for adults and juveniles are regarded as sanctions that fall between imprisonment and a fine, in such countries as Belgium, Denmark, Germany, Spain and Austria (1997 Draft) they are seen as rehabilitative conditions attached to a suspended sentence or parole.

This lack of clarity in the law, the lack of clear and uniform objectives, and the different rationalities surrounding community sanctions undermine both their credibility and their application. Due to this incomplete ideological base, in most countries community sanctions are still considered as alternatives, which means they are subordinated to the real sanction (i.e. imprisonment) rather than being a sanction in their own right. Consequently, many judges who could impose this penalty have serious reservations about its punitive character. If the characteristic feature of a penalty is that it inflicts punishment, this aspect has been given very little exposure in legal and political discussions. This is all the stranger in view of the fact that in the legal regulations of many countries, community-based sanctions

[24] UN Centre for International Crime Prevention, Model Law on Juvenile Justice, Vienna September 1997.

are substitutes for quite long prison terms. This is in spite of Rule 6 of the European Rules on Community Sanctions and Measures, which states that the nature and duration of CSM 's must not only take into account the personal circumstances of the offender but also be 'in proportion to the seriousness of the offence'.

Given the relatively low maximum of community service and comparable community sanctions - i.e. 200 hours (Finland), 240 (Belgium, Denmark, Ireland, Luxembourg, Russian Federation, Sweden, UK,), 300 (Scotland), 360 (Norway, Switzerland,) 380 (Portugal), 384 (Spain), 400 (Czech Republic), 480 (Italy, the Netherlands, Poland)[25] - it is understandable that the judiciary tends to consider these alternatives only as a special favour to those who commit certain types of non-serious crime (mostly property crimes and traffic offences), which are normally punished with a very short prison sentence, a fine, probation or a suspended sentence. It is generally known that these community sanctions are actually substituted for prison sentences only in roughly 50-60% of cases. In the other cases, they are used as substitutes for other non-custodial alternatives.

A lack of belief in the punitive character of community sanctions, the perseverance of the traditional orientation towards retribution and deterrence, a lack of adequate education, information and interest in other ways of dealing with offenders amongst prosecutors and judges, combined with the growing tendency towards a more repressive sentencing policy, means that the judiciary less and less accepts the obligation to carry out such activities as community work or social training courses for a period of 240 hours - or, in some countries, 360 hours - as a real alternative to prison sentences of more than 1, 2 or 3 months. This can be demonstrated by the fact that:

1) in practice only a few of these longer prison sentences are actually commuted to these new alternatives, and
2) more and more community-based sanctions are being combined with other sanctions, such as conditional sentences, fines, probation, and electronic tagging and even unconditional sentences. Especially their combination with unconditional sentences undermines the basic concept of reintegration and rehabilitation. This is also the case with the

[25] An exception to these relatively law maxima of community service hours offers Greece where up to two years imprisonment can be substituted by community service according to a conversion rate of at least 2 hours and 6 hours at the most for one day imprisonment. See the contribution of A. Tsitsoura in this volume.

ongoing shift away from the original 'professional-therapeutic' and offender-oriented concept of community sentencing towards the 'punitive-administrative' and offence-oriented approach with its emphasis on punishment and control.[26] According to Sue Rex the just desert thinking that came up in England and Wales in the late 1980s and early 1990s resulted in a radical different approach towards the existing non-custodial options, that were not longer seen as alternatives to custody but as sanctions in their own right.[27] The same is the case in the Netherlands since the recent reform that introduced the possibility of combining a community service or training order as main penalty with a prison sentence up to six months. The same reform made it possible to use these "task" penalties instead of a suspended sentence or a fine, or as a condition attached to the conditional waiver of the procedure by the public prosecutor. For that reason in the Netherlands too these sanctions, that originally only could be applied as alternatives to unconditional custodial sentences are now re-conceptualised in terms of the restrictions they place on offender's liberty.[28]

3) even the legal stipulation in the Penal Code that a community sanction has to be given priority over a prison sentence hardly seems to have any impact on the court when meting out sentences. This is especially the case in Portugal where Miranda Pereira concludes that despite the legal principle that "whenever a CSM is sufficient to fulfil the aims of punishment, a prison sentence must be avoided", community sanctions like community service hardly are being issued or even completely disappeared (probation order)[29].

Another important reason why community sanctions have so far only partly fulfilled their purpose is the lack of a well-equipped financial and organisational infrastructure. This is in particular the case in Spain where apart from Catalonia and to a certain extent from the Basque country the

[26] See T. May, 'Probation and Community Sanctions', in: Maguire, Morgan and Reiner, The Oxford handbook of Criminology, Oxford 1994, pp. 861-887.

[27] See: S. Rex, The Development and use of community sanctions and measures in England and Wales in this volume.

[28] See: A.M. van Kalmthout, Community sanctions and measures in the Netherlands: Recent developments in this volume.

[29] See: L. Miranda Pereira, community Sanctions and Measures in Portugal, in this volume.

introduction of CSM's in the new penal Code has not been followed by setting up an organisation to implement these new sanctions. According to Dolors Valles Port this is a serious and important obstacle in the development of these new sanctions and measures. According to this author CSM's as a consequence of that "may end up being enforced by law but not implemented".[30]

In spite of what is said in the European Rules on Community Sanctions and Measures (Rules 38 and 42) , the implementing authorities in most of other European countries do not have adequate financial means provided from public funds to create the necessary infrastructure for the implementation of community sanctions. In contrast to Rules 39 and 40, there is an obvious lack of financial means and trained professional staff. Even when sufficient budgetary means have been provided they are mostly financial means that have been taken away from other activities of probation services rather than additional means. This is the case in almost all European countries. It shows that politicians' belief in the viability of non-custodial sanctions is not very high - at least, not as high as their belief in the viability of the prison system, into which they are willing to pour hundreds of millions each year in order to expand capacity.

Most striking example is the situation in the Russian Federation where under the new Penal Code the community has been excluded completely from the enforcement of alternative sanctions. According to Tarbagaev this must be considered as a very serious deficiency of the new Penal Code, which means that the new provisions on community sanctions in the new Penal Code as yet will get hardly any change to prove that they can really contribute to a reduction of the high Russian prison population.[31] Not without reason the Committee of Ministers of the Council of Europe in Recommendation (20000 22 call up the governments of member states that "adequate services for the implementation of community sanctions and measures should be set up, given sufficient resources and developed as necessary with a view to securing the confidence of judicial authorities in the usefulness of community sanctions and measures, ensuring community safety, and effecting an improvement in the personal and social situation of offenders"

[30] See: M. Dolors Valles Port, Community sanctions and measures in Spain and Catalonia, in this volume.

[31] See: A. Tarbagaev, Community Sanctions in Russia: Past, Present and Prospects, in this volume.

Of course, probation services and social work units within the criminal justice system have been extended considerably since the 1960s, mainly due to the development of these community-based sanctions. However, this trend came to an end in the 1990s, a decade during which the general policy has been to drastically reduce budgets. As a result, most probation officers and social workers in the criminal justice system are weighed down by a huge caseload and have to cope with this problem by simplifying the community sanctions procedures. Instead of being 'custom-made' sanctions, community sanctions are increasingly becoming 'ready to wear' sanctions that are not adapted to the personal and individual needs, skills and circumstances of the offender - thus neglecting some of the core aims of community sanctions, i.e. to enhance the offender's skills as much as possible and to develop his or her sense of responsibility to the community in general and his or her victim/s in particular, as laid down in Rules 67, 71 and 30 of the European Rules.

In order to reduce transport and accommodation problems, probation services are giving highest priority to facilities that are close to the offender's home. Because searching for new reception facilities consumes too much time and energy, probation services tend to offer the same organisations where the sanction can be carried out. For reasons of efficiency, there is an increasing tendency to let the sanction be carried out in as short a time as possible. Although community service and other community sanctions are meant as 'fines on time' - i.e. the require the offender to perform his or her activities during leisure time - research has shown that in many countries, not only the probation service but also many (especially unemployed) offenders prefer to work during the day and on a full-time basis. However, this jeopardises the original concept of a community sanction being 'a fine on time' devised in order to oblige the offender to perform his or her tasks over a relatively long period of time in a community-oriented environment.

As a consequence, the community sanction is losing its formative and reintegrate character, because the way it is carried out does not give the offender the required time to make a real commitment to the community.[32] An other negative aspect of the overwhelming caseload and lack of resources is that probation services and other criminal justice bodies are not longer able to fulfil their rehabilitative tasks but are forced to limit them-

[32] See: J.Faget, 'Le TIG, beaucoup d'espoir..., des résultats mitigés', Bulletin du CLCJ, 1 February 1997.

selves to a rather bureaucratic and formalistic role. As Fanchiotti indicates this retreat from an active resocializing treatment and supportive intervention can stimulate the ongoing expansion of other 'costless', pure punitive measures, aiming at reducing the prison population, and supervised and controlled not by the probation service but by the police "whose intervention in terms of arrests and criminal complaints against offenders granted alternative measures becomes the first source of any measures' revocation".[33]

An understaffed probation organisation and too high caseloads have also consequences for the way the supervision of the offender during the performance of his or her sanction can be carried out. Several researches have shown that there is an obvious relation between failure rate and the quality and intensity of supervision: the less control and supervision, the higher the dropout rate.[34] Apart from the lack of sufficient staff and financial resources, there is another reason why the probation service does not always pay the required attention to supervision and control. As Worral points out, many probation officers are still notoriously reluctant to take breach actions because they seem to consider a failure to complete the imposed conditions as a breakdown of the therapeutic relationship or the consequence of the offender's chaotic lifestyle.[35] In several countries, probation officers still consider the supervision of a penal sanction difficult to bring into line with their professional principles. Probation officers steadily are being criticised because of the pretended too casual and lenient way the carry out their supervisory and controlling tasks. Probation officers react to these critics by expressing, in the words of Paul Larsson: "that they have to be "loose handed" to establish a relationship based on trust from the offenders"[36].

The different approach by probation officers is also partly due to the fact that in many countries strict and uniform rules with respect to breach criteria and procedures are lacking, in spite of Rule 24 of the European Rules.[37]

[33] See the contribution of V. Fanchiotti in this volume.

[34] See: M. Killias, 'Community service without net-widening: a question of implementation? Some lessons from the Swiss Experiment', in this volume, and G. McIvor, 'Social Work Intervention in Community Service', Brit. Journal of Social Work 21 (1991), pp. 591-609.

[35] A. Worral, Punishment in the Community: the Future of Criminal Justice, London 1997.

[36] See: P. Larsson, Punishment in the Community; Norwegian Experiences with community sanctions and measures, in this volume.

[37] Rule 24 states: "Any instructions of the implementing authority, including in particular

Probation officers, public prosecutors and judges do not respond to breaches in a uniform way. Not only is this questionable because of the principle of equality, but it also creates mistrust and resistance on the part of public prosecutors and the judiciary. This is especially the case in countries where a professional relationship between magistrates and social work agencies (probation services) is lacking or does not function well. As a consequence of this lack of mutual co-operation and trust, there is a risk that judges and public prosecutors will lose their confidence in community sanctions. This has also contributed to the disappointing result that in many cases community sanctions no longer function as substitutes for imprisonment, but as substitutes for fines or other non-custodial sanctions.

That community sanctions are only partly successful is also due to the fact that especially with respect to minor crimes no social inquiry reports are requested, which means that in these cases very often the offender, when standing trial, will not have had any contact with a probation officer or councillor. As a consequence, the chances of receiving an alternative sanction instead of a short prison sentence will be very small. Only in a few countries (Czech Republic, Denmark, Finland, Sweden, UK) must the probation service draw up a pre-sentence report concerning the suitability of the offender for a community sanction, and his or her consent to such a sanction. But even then this does not mean that the consent is informed and explicit, as is stipulated by Rule 36 of the European Rules. Nor is this the case when consent is asked for during trial. In most countries, asking the offender's consent is only a formal ritual maintained in order to preclude the presumed violation of forced or compulsory labour regulations.

Especially in countries where persons can be convicted in their absence, a high percentage of such convictions are of persons who have committed a minor crime. In those cases, a community sanction cannot be imposed because of the absence of the required consent. Only in France is it possible (since 1989) to request the tribunal to commute a prison sentence to an alternative sanction afterwards. In practice, however, this possibility is very seldom used because of the inconsistency and deficiency of the legal regulation and the reluctance of many judges to commute prison sentences.

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those relating to control requirements, shall be practical, precise and limited to what is necessary for the effective implementation of the sanction or measure."

8. Counter-productive effects

The second category of limits and shortcomings comprises the so-called counter-productive aspects of these community sanctions. They are counter-productive in the sense that the mere existence of these community sanctions stimulates and provokes custodial sentences. This can happen in several ways.

The first way is that investigating judges - who do not like such soft options as community sanctions - sometimes try to avoid these sanctions by imposing pre-trial detention in cases where such is not or is no longer necessary from the point of view of the investigation. However, these pre-trial decisions - which are intended to be a 'short, sharp shock' - mean that a later, non-custodial sentence cannot be passed, because the only thing the judge can do during the trial is impose a custodial sentence of the same length as the time already spent in pre-trial detention. The existence of non-custodial alternatives also stimulates the (ab)use of pre-trial detention for this purpose.

Thus, the concept of community-based sanctions points also to the need to develop strict criteria which will help to prevent pre-trial detention being (ab)used as a form of pre-trial custodial penalty. It also underlines the need to not only develop alternatives in the sentencing phase but also to search for non-custodial alternatives in the pre-trial phase, or at least to use the existing alternatives to a larger extent, such as bail, controlled freedom and house arrest. This goes also for those countries like France, Germany and Italy where a growing tendency exists to apply special procedures that are designed to deal with cases on an immediate hearing basis so that the offender is being tried as quickly as possible. These procedures do not leave sufficient time for the offender and his counsellor to present a well founded alternative to the court nor, as is rightly noticed by Kinsey, leaves the court sufficient time to study the indispensable factors in devising an alternative sanction to imprisonment, such as personality factors and those of the social situation of the defendant.[38]

The second way in which non-custodial alternatives can lead to an increase rather than a decrease in the rate of imprisonment is when, because of non-compliance with the community sanction, a case will be brought back to court to be punished with a custodial sentence. The increasing effect is

[38] See A. Kensey in this volume.

very obvious when the original community sanction was imposed as an alternative not to a prison sentence but to another non-custodial sanction, or when a community sanction is combined with a suspended sentence or as is the case in Canada is embedded in a probation order.[39] This happens in almost 50% of all community sanctions.[40] Although both the UN's and the Council of Europe's Standard Minimum Rules (Rule 86) on non-custodial sanctions explicitly reject the idea that a decision to revoke a community sanction or measure necessarily leads to a decision to impose imprisonment, this is in most European countries the general policy of the judiciary.

In spite of the Standard Minimum Rules (Rule 84) some countries - e.g. France, Ireland, Luxembourg and Portugal - have even laid down in their penal code that non-compliance with the obligations of the community sanction must be considered a form of contempt of court, which can be punished as a separate crime with a prison sentence that can be much higher than the one that could have been imposed for the original crime. A special problem is that contrary to the standard minimum rules (Rule 13) in many jurisdictions no appeal is possible against a prison sentence imposed after a breach of a community sanction.

In this respect, it is also of paramount importance (in particular as regards the acceptance of CSM 's by the judiciary and the public) that there are clear and rational conversion rates between the various penalties incorporated in the system of criminal sanctions. Community based sanctions on the one hand and financial and custodial sanctions on the other hand must be related to each other and be made comparable on one or several dimensions. This is one of the weakest points in many jurisdictions. For example, it does not seem very convincing that a 12-month sentence commuted to 240 hours of community service will - because of the individual's refusal to comply - be converted to a prison sentence of no more than 120 days; while at the same time in case the community sanction turns out to be a failure each 2 hours which are not worked off can be substituted by a subsidiary imprisonment of only 1 day. This means in fact that one year, originally substituted by 240 hours community service, because of the refusal to comply, will be again substituted in a prison sentence, which

[39] See the contribution of Alan Leschied and Alison Cunningham in this volume.
[40] See e.g. G. McIvor, 'Community Service and Custody in Scotland', Howard Journal 1990, 29/2, pp. 101-113 and the contribution of B. Lockhart and Colette Blair in this volume.

can be no more than 120 days. Such a legal provision, which allows calculating offenders to wheeler-deal is certainly doomed to failure. There are two dimensions on which various penalties can be compared. The first dimension refers to the time an offender is subject to a criminal penalty. The second dimension concerns the intensity of restrictions that are placed upon the offender. These should be elaborated in a set of sentencing guidelines.

The third way in which community sanctions can have a counter-productive effect is what we call the net-widening or inverse effect of non-custodial sanctions. It is obvious that the popularity of these types of sanction and their broad acceptance by society can seduce politicians and legislators into using them also for crimes which previously were sanctioned with fines, suspended sentences or probation, or for which a conditional or unconditional waiver was the normal procedure. CSM's are welcomed as gap-fillers between on the one hand such soft options as conditional waiver, fine and suspended sentence, and on the other hand, imprisonment. This tendency is obvious at a time when repressive justice and neo-classical ideas are gaining more and more ground, as for example is obviously the case in the United States.

As Tonry points out, front-end programmes consisting of non-custodial sanctions such as community service are seldom used by judges in place of confinement sentences. In practice "judges prefer to sentence people to them who would otherwise receive probation".[41] For that reason we have to pay serious attention to the Swiss scheme of community service as back-end sanction leaving the decision to substitute a prison sentence by community service or semi-detention to the Correctional Service and not to the trial judge. According to Killias this is the main reason that in contrast to other European countries the net-widening effect in Switzerland has stayed out. Also in countries where penal mediation is increasingly applied there are clear indications that it is primarily used as a substitute for an unconditional waiver and much less as an alternative to prosecution.[42]

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[41] See: M. Tonry, Community penalties in the United States, in this volume.

[42] S. Davreux et al., Evaluation de l'application de la loi organisant une procedure de médiation pénale en Belgique du 1/1/1996 au 31/12/1996, Bruxelles, Ministère de la Justice 1997. For the net-widening effect in England/Wales and the Netherlands see: Ken Pease, 'Community Service Orders' in: M. Tonry and N. Morris (eds.), Crime and Justice. An Annual Review of Research 6 (1985), pp. 51-94 and E.C. Spaans, 'Community Service in the Netherlands: its Effects on Recidivism and Net-Widening', International Criminal Justice Review 8 (1998), pp. 1-14.

9. Two other negative effects

When discussing the counter-productive effects of community sanctions, attention should be paid to two other effects that generally are fully neglected in the literature. The first is that as far as community sanctions are actually used as an alternative to prison sentences, they are in principal only imposed on 'normal, decent' offenders or less serious criminals who lead a more or less stable life. Rule 20 of the European Rules prohibits discrimination in the imposition and implementation of CSM's on grounds of race, colour, ethnic origin, nationality, gender, language, religion, political or other opinion, economic, social or other status, or physical or mental condition.[43] However, this rule seems to be very difficult to comply with, considering that many community sanctions require the offender to live under relatively stable conditions and to be capable of fulfilling the demanding obligations attached to a community sanction. When we look at the characteristics of offenders sentenced to a community sanction, we have to conclude that very important categories of offenders (e.g. drug addicts, foreigners and homeless persons) are highly underrepresented. Also some types of offences (e.g. drug crimes, violent crimes, drink-driving and sexual crimes) are underrepresented in many countries, because formal regulations or sentencing practices exclude them from community sanctions. Not infrequently, offenders with a previous criminal conviction are also excluded.

This corresponds with the characteristics of the prison population, which is changing dramatically and becoming more and more the refuse dump for certain categories of offenders for which no community projects are available, due partly to lack of financial means and partly to lack of political will. As Albrecht asserts: "neither available community sanctions nor plans to add variations to community sanctions will present solutions to those offender groups still increasing in numbers which - because of their unsettled and marginal life - are placed outside communities and therefore fall also outside the reach of community sanctions".[1] In this sense the application of non-custodial alternatives not only has very discriminating and stigmatic effects, but also negatively affects the rest of

[43] For that reason Recommendation (2000) 22 of the Committee of Ministers underlines the important guiding principle that: "consideration should be given to reviewing and reducing formal provisions that prevent the use of community sanctions and measures with serious and repeat offenders".(guiding principle no. 2.3)

the prison population by implicitly or explicitly excluding these categories of offenders from community sanctions. The consequence is that the remaining prison population is increasingly being seen and treated as a group of dangerous, unmanageable and incorrigible criminals, who have to be locked up in special units or prisons and whose former prison rights are more and more restricted. This changing attitude towards prisoners on the part of society and politicians is partly caused by the fact that as a consequence of the absence of 'small-time' criminals, the effectiveness of imprisonment in terms of recidivism and resocialisation is becoming worse and worse. There has also been an apparent change in the role and attitude of the social services (e.g. the probation service): they are more and more neglecting and giving up on the prison population. For several reasons (lack of financial resources, pressure from politicians and the ministry of justice, burnout symptoms, and increasing desire to achieve higher success rates) these services are giving the highest priority to community based sanctions and consequently withdraw from probation work for prisoners and released prisoners.

The recent trend towards extending the scope of alternatives to detention to the post-trial phase by giving prison or executive authorities the power to fully or partly substitute non-custodial execution modalities for prison sentences should also be seen from this perspective. The lack of adequate judicial control and fixed criteria effect to aleatory and subjective use of discretionary powers. As is said by Fanchiotti in his chapter on Italy it can also result in undue manipulations of the sentencing system and render too flexible the criminal sanction, thus nullifying the principle of equality and the rule of law and delaying the general reform of the whole criminal sanctioning system.

10. In conclusion

As is said before, observing the results achieved with the new types of community sanctions over the last three decades, it is not possible to a rather optimistic conclusion. However, this is insufficient reason to also use the expression 'nothing works' with respect to these new sanctions. What can be learned from the experiences gained is that community service and other community-based sanctions play only a modest role in re-

[44] See the contribution of H-J. Albrecht in this volume.

ducing custodial sentences, and in as far as they are successful one must also take into account the counter-productive aspects in other areas.

In order to place community sanctions in a broader perspective and to give them more viability in the long run, it will be necessary to not only take into account the positive aspects inherent to them. By being aware of the shortcomings and the counter-productive effects of community-based sanctions, it seems to be better to avoid them during the further process of renewing, inventing and implementing existing and new ones. The minimum basic requirement for the development of community sanctions is to invest more energy in evaluation research, especially with respect to the items mentioned in Rule 90 of the European Rules[45]. Also the recent Recommendation (2000) 22 of the Committee of Ministers of the Council of Europe emphasises the importance of qualitative and quantitative research for the viability and successful development of existing and new community sanctions[46].

As is also stated by many of the authors of the chapters in this volume, research is particularly needed because the dearth of independent empirical evaluations of community sanctions impairs their viability and credibility, especially now the call for tougher and more deterring sentencing practice is gaining more and more approval amongst politicians and mass media. However, contrary to what is commonly suggested by politicians, mass media and criminal justice authorities, there are clear and sufficient indications (derived from opinion surveys) that, generally speaking, society supports the use of CSM's. The majority of the public prefers community service, restitution and intensive treatment or training pro-

[45] Rule 90 states: "Evaluation of community sanctions and measures should include, but not be limited to, objective assessment of the extent to which their use:
-conforms to the expectations of law makers, judicial authorities, deciding authorities, implementing authorities and the community concerning the goals of community sanctions and measures;
-contributes to a reduction in the rates of imprisonment;
-enables the offence-related needs of offenders to be met;
-is cost-effective;
-contributes to the reduction of crime in the community.

[46] With respect to research on community sanctions and measures the following guiding principles this Recommendation has formulated the following guiding principles:
"24. Adequate investment should be made in research to monitor the delivery and evaluate the outcomes of programmes and interventions used in the implementation of community sanctions and measures.

grammes to imprisonment and other custodial sanctions.[47] As Jana Válková reports, also in the Czech Republic various public opinion surveys show that despite the increasing crime rate and the call for harsher repression, in general if citizens play the role of a fictitious judge they would impose less severe penalties on offenders compared to those imposed by real judges.[48]

Also Tonry mentions in his report that public opinion strongly supports use of 'burdensome' sanctions like community service and restitution and seem to allow little support for 'soft' sanctions such as fines and house arrest.[49] In this respect it is becoming more and more important that especially probation services in future will "devote more attention and resources to public relations and to the development of communication strategies which inform the public and also its commitment to the work to which the Probation service aspires"[50]. But without reliable evaluation studies community sanctions will soon lose this support, especially since the response to crime is increasingly being characterised as 'populist punitiveness'.

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25. Research should seek to identify both the factors that lead offenders to desist from further crime and those that fail to do so.
26. research on the effects of community sanctions and measures should not be limited to the simple recording of post-supervision convictions but should make use of more sensitive criteria. Such research together with personal and social indicators of adjustment in the community, and the views of offenders on the implementation of community sanctions and measures.
27. To the greatest possible extent research should enable comparisons to be made of the effectiveness of different programmes.
28. Statistics should be developed that routinely describe the extent of use and the outcomes of community sanctions and measures.
29. Quantitative and qualitative assessments of staff workloads in connection with the various tasks undertaken in implementing community sanctions and measures should be undertaken from time to time in order to achieve high levels of efficiency, staff morale and staff mental health.

[47] See e.g. J.G. Andersen, Borgerne og lovene (The Citizens and the Laws), Aarhus Universitetsforlag 1998; J. Doble and S. Immerwahr, Delawareans favor prison alternatives, in: M. Tonry and K. Hatlestad, Sentencing reform in overcrowded times, Oxford, New York, 1997, pp. 259-269; NIPO, Groot maatschappelijk draagvlak voor Taakstraffen (Great Societal Support for Task Penalties), Den Haag 1998; VBSA, 40-Jahre, Der Bericht 1997, Wien 1998.

[48] See the contribution of J. Válková in this volume

[49] See: M. Tonry, Community penalties in the United States in this volume.

[50] As was argued by the Chief Probation Officer in Northern Ireland, Mrs. Breidge Gadd and quoted in the contribution of B. Lockhart and Colette Blair in this volume.

We cannot ignore the conclusion of Killias that "by neglecting the careful evaluation of new sanctions, or by paying little attention to the lessons to be learned, today's legislators deprive new sanctions of the chance to be efficiently defended against contrary movements ("prison works") in the future when sound arguments might be needed to do so".[51] Without further evaluation of the community sanctions and measures no effective measures can be taken to counterbalance their limits, shortcomings and negative side effects as mentioned in this article. But as Kyvskaard points out in her analysis of CSM's in Denmark, an encouraging factor is that most of the important obstacles to and problems concerning CSM's are more secondary than primary, as they derive not from the CSM's themselves but from the circumstances that surround them.[52]

[51] M. Killias, Community Service without Net-Widening- A Question of Implementation?, in this volume.

[52] B. Kyvsgaard, Community sanctions and measures in Denmark, in this volume

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