

'One cannot legislate kindness':¹ Ambiguities in European legal instruments on non-custodial sanctions

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Abstract

Non-custodial sanctions, particularly those that are implemented in the community, have different historical roots in common and civil law jurisdictions. Nevertheless, various European instruments seek to shape the imposition and implementation of such sanctions uniformly across the continent. These instruments reflect an apparent consensus about penal values, culminating in 1992 with the adoption of the European Rules on Community Sanctions and Measures and of the Recommendation on Consistency in Sentencing. In spite of the apparent pan-European consensus, some tensions remained as a result of underlying doctrinal differences and of the compromises that were required to accommodate them.

In the 21st century further European initiatives have sought to go beyond the 1992 instruments and focus on 'what works' and on the development of probation services. In the process, the central objective of penal reductionism, so important in 1992, has become somewhat marginalised. This shortcoming can be addressed by reconsidering the approaches that had been rejected in the earlier search for consensus and by developing a more comprehensive understanding of the human rights safeguards to which all penal sanctions should be subject.

Keywords: community sanctions and measures, probation, Europe, suspended sentences, international standards, human rights, social control, rehabilitation.

Introduction: Setting standards

In Europe the late 1980s and early 1990s saw the apogee of standard setting for non-custodial sanctions. This was particularly true of community sanctions and measures, the implementation of which requires more detailed regulation than less interventionist non-custodial sanctions.² This process culminated in 1992 with the adoption by the Committee of Ministers of the Council of Europe of both the European Rules on Community Sanctions and Measures and the Recommendation on Consistency in Sentencing.

Taken together these instruments developed a comprehensive European penal policy on non-custodial sanctions. This policy set a clear course towards embracing what Christine Morgenstern (2002: 63) identified as the two broad solutions at the time for addressing the problems facing penal law: the

development of non-custodial sanctions that complied with the rule of law, and their substitution for imprisonment.

By simultaneously and unanimously adopting the two instruments, the Committee of Ministers demonstrated that considerable consensus existed about the values the instruments contained. In next section we consider the historical process by which this consensus was created. We then turn to the arguments that were rejected in the course constructing this consensus, before considering 21st Century attempts to go beyond the 1992 framework by developing further instruments focussed on the implementation of community sanctions and measures. It argues that these instruments unmoored the debate about non-custodial sanctions from their broader objective of reducing the level of penal intervention. Finally, we offer some thoughts on how to retain that priority.

The basis of the underlying consensus

What makes the consensus of the early 1990s surprising, in Europe in particular, is that historically there had been significant differences between the approaches to alternatives to imprisonment in the various jurisdictions. These differences are best illustrated by a brief and somewhat ideal-typical portrayal of their historical basis.

The 'pure' suspended sentence.

According to the classical model of criminal law, which dominated continental Europe from the late 18th century onwards, offences should be precisely defined,

with fixed penalties for every offence. When an offence has been committed, it should be prosecuted without exception; following a conviction, the fixed penalty should be imposed without variation by the courts; and the punishment, typically imprisonment, should be implemented in full. In its extreme form this model is usually associated with the idealistic legality of the revolutionary French Code of 1791, which gradually proliferated across much of Western Europe. The model sought to prevent the abuse of discretion by abolishing it at different stages in the process. Supporters argued that if punishment has been set appropriately in legislation, it would be proportionate to the crime and that it should apply equally to all who chose to break the law (Dupont, 1979). Their equal ability to choose how to conduct themselves was simply assumed (Pieth, 2001).

From the second half of 19th century onwards the continental classical ideal came into conflict with positivist challenges to the notion of untrammelled choice. For positivists, offenders could be seen primarily either as innocents, whose crimes were the result of circumstance, or as hardened habitual criminals, whose capacity to choose not to offend had all but disappeared. Evidence showed that a depressing number of offenders committed further crimes, particularly those subjected to imprisonment. What was to be done?

For those whose primary thinking was shaped by the classical ideal, the answer was to try and preserve resistance to abuse of discretion inherent in that model, while dealing with the reality that it did not always prevent crime effectively. Leaving aside the question of the 'habitual' offenders, the answer was an

alternative to imprisonment: a suspended sentence, at least for more (morally) innocent first and young offenders. Such offenders would have a proportionate term of imprisonment imposed upon them, but its coming into effect would be (wholly or partially) suspended for a period of time. If during that time the offender did not commit an offence his sentence would not come into effect. This approach had the advantage of preserving the notion that the offender had a choice to offend. He was simply given a further choice with the threat of additional punishment underlying the decision.

Further conclusions flowed from this approach. Since the offender was capable of rational choice, there was no need to offer him any assistance or impose any restrictions during the period of suspension, other than the actual sentence if he was convicted of a further offence. Indeed, the distrust of discretion worked in the opposite direction. It was considered undesirable for the courts to have the power to judge individuals and to order tailored intervention in their lives – other than the loss of liberty which formally applied equally to all who were subject to it. For the same reason there should be no discretion in bringing suspended sentences into effect against those who had reoffended during the suspension period.

The initial appearances of suspended sentences of imprisonment in legislation closely followed the restrictiveness of the classical model. Belgian and French legislation, of 1888 and 1891 respectively, provide primary examples of laws that permitted suspension of short sentences of imprisonment on the sole condition that the convicted offender not reoffend during the suspension (Ancel,

1971: 13-14). Much the same effect was achieved after 1895 in the territories that would become modern Germany, by routinely pardoning offenders on condition that they avoid reoffending (Meyer-Reil, 2005).

From the late 19th century onwards, provision also began to be made in these countries for early release from prison. In its 19th century incarnation in France and Belgium, early release was often a form of 'parole' in which released offenders, unlike those whose sentences were suspended from the point of conviction, were subject to supervision in the community by civilian 'comités de patronage' (Christiaensen, 2004). Early release in these systems had a close connection to the ancient power of the sovereign to pardon, but was deployed more systematically to a growing range of offenders (Whitman, 2003).

Probation

While the suspended sentence was emerging as an alternative to imprisonment within the broadly classical tradition, a very different model was developing in common law jurisdictions. This model was 'probation', regarded, initially at least, simply as a way of avoiding the formal imposition of punishment entirely and replacing it with some form of community-based supervision. Probation emerged almost simultaneously in England and in the US (Timasheff 1943a: 1-2). This reflected the pragmatism of the common law, with developments in the US serving as a source of continual inspiration for those in England.

Probation in Europe undoubtedly began in the United Kingdom (Vanstone, 2008). Although formally enshrined as a state institution only in 1907, the English probation movement traces its origins back further. In his centenary review of its development, Timasheff (1943a: 12-13) identified the origins of British probation in the work of a Birmingham judge in 1841, who was prepared to place 'juvenile delinquents' under the supervision of parents, masters, or volunteers. Nellis (2007: 28) also pointed to a tradition in English penal practice as early as the 18th century of exercising 'preventative justice', which aimed to avoid the imposition of punishment in favour of judicial oversight.

The institutionalisation of English probation was primarily a product of Victorian civil society, rather than a principled development of the criminal justice system. 19th century English public discourse was characterised by both explicit moralism and considerable emphasis on charity as a response to social problems (Mair and Burke, 2012: 7-24). Both strands contributed to the formation of rudimentary analogues of modern probation institutions. Crime was viewed principally as a product of social and moral decay, which led, it was feared, to the creation of a 'criminal class' united against the prosperous middle-class mainstream (Emsley, 2010: 177-187). This inspired the intervention of numerous charitable organisations into the lives of offenders, which aimed to secure the spiritual and social 'salvation' of offenders by engaging with alcohol addiction. These organisations played a similar role to the civilian 'comités de patronage' in Francophone Europe, with the important difference that, unlike their continental

counterparts, they focused on offenders prior to (or instead of) formal sentence, rather than on released prisoners.

Gradually these activities were incorporated into statute and the charitable interveners replaced with a formal secular institution, the probation service, created in 1907 (Nellis, 2007: 28-31). The activities comprising English 'probation' are diverse, having been accumulated piecemeal over the service's existence (see McGarva, 2008: 269-278 for a comprehensive overview of modern functions). From the outset, the probation service was responsible for non-custodial supervision of offenders, especially juveniles. During the interwar years, the probation service expanded its role in adult justice and the probation officers' trade union, the National Association of Probation Officers, campaigned with some success for probation supervision to be seen as a specialised 'part of a wider social work "profession"' (Nellis, 2007: 34). Critically, until the 1990s, this supervision was largely regarded as an alternative to punishment, the imposition of which was postponed conditionally: on the offender not reoffending or infringing other requirements of probation (Mair, 1998: 263). The focus was on the social work aspects of probation, summed up by the service's famous injunction to 'advise, assist, and befriend' offenders (Canton, 2011: 30). Their responsibilities in this area continued to expand as a range of 'community sentences' other than supervision developed during the second half of the 20th century.

The English probation service also developed a key role in the 'aftercare' of ex-prisoners from the 1920s onwards, initially alongside wider civil society, but

formally taking over in 1965. This, in turn, morphed into a formal responsibility for the supervision of offenders released early from prison on parole (Maguire, 2007: 399-401).

Consensual synthesis or a synthetic consensus?

The suspended sentences of continental Europe and the probation systems of the common law did not exist in separate silos. Even before the English probation system was enshrined in legislation, probation had been the subject of debate in the civilian-dominated 'scientific' conferences of the 19th and early 20th centuries, which adopted resolutions that were the early forerunners of the European standards of the 1990s. To take one example: the International Penal Law Association, established in 1889 by the three leading continental European criminal justice experts of their generation, Professors van Hamel of the Netherlands, von Liszt of Germany and Prins of Belgium, included in its constitution that the Society regarded the substitution of short terms of imprisonment by other equally effective punishments as possible and desirable.³ From its inception the meetings of the Society were also attended by representatives of common law countries, including both the UK and the US, who could and did accept this article of constitutional faith and simply interpreted it as applicable to the existing probation system. They also supported proposals for the increased use of carefully calibrated fines as less interventionist alternatives to imprisonment.⁴

Gradual changes in national practice followed from this. In particular the continental European systems began to attach conditions to some of their grants of

suspension of sentences: this happened not only in the Franco-Belgian-German core but also in most other northern, western and southern European countries (Timasheff, 1943b: 1-62; van Kalmthout and Durnescu, 2008: 3-5, 10-12).

As in England, volunteer bodies that had assisted prisoners in the Netherlands and other countries began to be transformed into 'professional' probation organisations. Typically, they too were employed directly or indirectly by the state and approached their task with a strong 'social work' focus, but operated inevitably in the penal shadow of the criminal justice system. From the beginning these organisations had much in common when it came to dealing with released prisoners. Gradually their affinity increased in the area of implementing community sentences too, as suspension of imprisonment in continental Europe increasingly became conditional on submission to community sanctions and measures. By 1981, their interests were sufficiently common across Europe to allow the establishment of the 'Conférence Permanente Européenne de la Probation' (CEP) (Scott, 2006). The CEP included not only probation officers for the United Kingdom, where this term originated, but also officials responsible for working with offenders serving suspended sentences or who had been released conditionally in other European countries.

After the Second World War, scientific conferences about non-custodial sanctions continued. In the early years the United Nations played a prominent part in shaping the debate in Europe and elsewhere. Thus in 1952 a *European Seminar on Probation* was held in London under the auspices of the Social Commission of

the Economic and Social Council of the United Nations. It revealed that there were still significant differences between continental European systems, in which the simple suspended sentence was the norm, and the common-law probation model, which still did not require a formal criminal conviction.

Common ground was sought in probation techniques rather than law. At the London seminar, Marc Ancel noted the increasing professionalization of social workers involved in supervising offenders throughout Europe. He observed that various continental systems were making legal changes:

The admission, timid at first, of probation into the criminal law of the Continent may thus contain the germ of later reforms which will tend to transform the old Continental criminal procedure into a modern procedure of *défense sociale*. (Ancel, 1952: 38)

Ancel observed, however, that the concerns of the lawyers for procedural probity should and could be met, by linking probation to the existing institution of the suspended sentence.⁵

The United Nations continued to play a significant role in the development of alternative sanctions in Europe, particularly through the work of its formal affiliate, the Helsinki Institute for Crime Prevention and Control (HEUNI). A major HEUNI conference in 1987 brought together participants from Western and Eastern Europe to discuss a study of non-custodial alternatives in Europe, which HEUNI had commissioned (HEUNI, 1988; Bishop, 1988).

At the same conference it became clear, however, that the (regional) initiatives of the Council of Europe had begun to overtake the United Nations on non-custodial sanctions. The first of these was a failure: In 1964 a European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders was adopted by the Council of Europe. However, in practice the Convention has been used very rarely: by 2008 it had been ratified by only 12 states, several of which made lengthy reservations.

Subsequently, however, the Council of Europe was much more successful in shaping the European debate about the form that non-custodial punishments should take. This was reflected in an impressive list of Resolutions and Recommendations of the Committee of Ministers. Three stand out. The first was the 1965 Resolution that dealt briefly with 'Suspended Sentences, Probation and Other Alternatives to Imprisonment'. It emphasised the 'disadvantages' of imprisonment and in its key substantive provision combined the 19th Century view of the place of the suspended sentence with notions of probation, recommending that Member States legislate to allow for the alternation of imprisonment with 'a conditional measure (suspended sentence, probation order, or similar measures)' for first-time or minor offenders.

A second resolution in 1970, on the 'Practical Organisation of Measures for the Supervision and After-care of Conditionally Sentenced or Conditionally Released Offenders', further blurred the differences between suspended sentences and probation by encouraging the general use of conditional non-custodial sentences. It

also supported conditional release for offenders with criminal records, as part of its explicitly stated objective of avoiding the use of imprisonment.

In 1976 a third Resolution, 'on Some Alternative Penal Measures to Imprisonment', followed. It confidently identified a 'tendency, which is observable in all member states, to avoid prison sentences', and proposed that Member States adopt a common crime policy. The substance of the Resolution recommended that member states remove legal obstacles to imposing alternatives to imprisonment and suggested the expanded use of various practical measures, such as increased housing for probationers and community work, as well as the use of fines on a broader basis.

The 1976 Resolution was based on a detailed study conducted by the European Committee on Crime Problems (1976) of the *Alternative Penal Measures to Imprisonment* that were then available in the Council of Europe member states. A feature of this study was the depth of its analysis. It began by situating criminal justice in the context of wider social policy and emphasised that other systems of social control had a key part to play, not only in assisting the criminal justice system but in avoiding invoking it at all. It recognised the stigmatising effect of every institutional form of social control including criminal justice interventions and therefore argued that all penal interventions, custodial or otherwise, ought to be used as minimally, and to intervene in offenders' lives as little as possible. While it noted that 'for many offenders supervision on probation was likely to be at least as effective in preventing recidivism as a custodial sentence', it unanimously

supported the more extensive use of fines, which it found had even lower recidivism rates than imprisonment or probation (European Committee on Crime Problems, 1976:28).

In 1986 Rentzman and Robert built on this study as the basis for a further report, *Alternative Measures to Imprisonment*, which they presented to the annual Conference of Directors of Prison Administrations, held by the Council of Europe. In this report, the differences between a suspended sentence and probation order are effectively buried: they were simply described as 'different legal forms of probation' (Rentzman and Robert, 1986: 9). The Conference of Directors of Prison Administrations endorsed the 1976 Resolution, but went further and called for the Council of Europe to develop 'basic rules for the administration and implementation of non-custodial sentences once the offender had been declared guilty' (Rentzman and Robert, 1986: 35). Such Rules, the Conference of Directors insisted, should include a code of ethics for those responsible for enforcement and safeguards for offenders' rights, which would protect human rights in the implementation of non-custodial sentences.

The Rentzman and Robert report formed the basis for deliberations on what would eventually become the 1992 European Rules on Community Sanctions and Measures. One should not lose sight of the fact that the consensus that the Rentzman and Robert report represented was also consistently underpinned by a call for the reduction in the use of imprisonment.

Comprehensive standards adopted (1988-1992)

Immediate support for the emerging European consensus was provided by two international instruments, the 1988 Standard Minimum Rules for the Implementation of Non-Custodial Measures involving the Restriction of Liberty (Groningen Rules) and the 1990 United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules). In order to understand the scope of the 1992 European instruments, the European Rule on Community Sanctions and Measures and the Recommendation on Consistency in Sentencing, it is necessary to refer to the Groningen and Tokyo Rules too, as they crystalized the ideals of the time. Their influence on these key European instruments was considerable, not least because many of the same experts were involved in drafting them. Taken together, the four instruments give a snapshot of international standard-setting at perhaps the most crucial point in its development.

The 1988 Groningen Rules were the first in this series. Although produced by an NGO, the International Penal and Penitentiary Foundation (IPPF), and thus carrying no formal legal status, they were taken seriously because the IPPF's predecessor organisation, the International Penal and Penitentiary Council, had drafted what became the United Nations Standard Minimum Rules for the Treatment of Prisoners. The Groningen Rules represented ground-breaking standards drafted by a group of influential international academics and civil servants who, both as individuals and through the IPPF, sought to shape other standards being developed around the same time. Indeed, the preamble to the Groningen Rules noted that both the United Nations and the Council of Europe were already working in this area and invited them to make use of these new Rules.

The Groningen Rules focussed narrowly on interventionist non-custodial measures. The Commentary to the Rules specifies that (1) they were not intended to be 'instruments to promote the increased use of non-custodial sanctions and measures in general' (IPPF, 1988: 18) and (2) they did not deal with general crime and sentencing policy. They focused primarily on the authorities responsible for enforcement and emphasised the human, civil and political rights of those subject to liberty restrictions in the community (Rule 4).

In contrast to the Groningen Rules, the Tokyo Rules dealt predominantly with sentencing policy and safeguards against abuses. They were intended ensure that Member States develop non-custodial measures 'to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies...' (Rule 1.5). According to the official Commentary, the purpose of the Tokyo Rules was an overall reduction of imprisonment, i.e. both the number of custodial measures imposed and the actual length of any such deprivation (United Nations, 1993: 7). The Rules were to 'be part of the movement towards depenalization and decriminalization' (see Rules 2.6 and 2.7). The official Commentary warns presciently:

Respect for individual rights and freedoms as set out in international instruments requires that penal measures should not be imposed where they cannot be justified using strict criteria. Since non-custodial measures are less intrusive than custody there is a danger that they may be imposed even

when the development of society would no longer require it. (United Nations, 1993: 10)

Though both the Tokyo and Groningen Rules sought to balance their wider penal policy pronouncements with human rights concerns, the Tokyo Rules had one distinct limitation: Rule 1.3 provided that:

The [Tokyo] Rules shall be implemented taking into account the political, economic, social and cultural conditions of each country and the aims and objectives of its criminal justice system.

This qualification rather undermined the thrust of the Tokyo Rules, virtually inviting countries to justify their existing practices on the basis of prevailing conditions instead of re-examining them in the light of human rights principles (Morgenstern, 2002: 86). Could European instruments give tighter protection to human rights, while retaining the reductionist focus of the Tokyo Rules?

The answer is yes. The European Rules on Community Sanctions and Measures more effectively balanced the reductionist focus of the Tokyo Rules with tighter protection of human rights. Additional guarantees included respect for privacy and dignity of offenders (see rules 20 to 29). The principle of legality was also highlighted: community sanctions and measures must be defined in law and cannot be of indefinite duration; procedures for imposing and enforcing them must be specified in law too (Rules 3 -11). In addition, the Recommendation on Consistency in Sentencing, adopted by the Council of Europe in the same year, saw community sanctions as part of a wider range of non-custodial sentences, and met

the reductionist requirements of the Tokyo Rules by requiring that imprisonment become a measure of last resort imposed for the minimum period possible (Ashworth, 1994).

Neither the Recommendation on Consistency in Sentencing nor the European Rules on Community Sanctions and Measures is 'hard law' in the sense of being a binding treaty. At the time, however, they seemed to provide a legal basis for the entrenchment of a comprehensive and eventually binding legal framework that would prevent the abuse of community sanctions within the Council of Europe regime (Van Zyl Smit, 1993). It would not have been unreasonable to predict that, as the legality principle was extended to cover community sanctions and measures more comprehensively, their legitimacy would be increased too. Around that time this was beginning to happen with similar international and European rules for prisons (Van Zyl Smit, 2013), which the European Rules on Community Sanctions and Measures sought to parallel. Before tracing how this would develop further, however, we need to consider some of the ideas that were *not* incorporated in the 1992 instruments.

Existing ideas underplayed in the lead up to 1992

Liberal scepticism

The eventual acceptance of comprehensive European standards for community sanctions and measures meant that some existing ideas had to be abandoned. One,

voiced during the run-up to the Groningen Rules, was a liberal scepticism towards international rule-making in this area. In a remarkable paper presented to an IPPF colloquium in Poitiers in 1987, William Bohan, a senior civil servant in the English Home Office, argued that although interventions aiming to reduce prison populations were desirable, international rules were badly suited to regulating them (Bohan, 1989). In his view, successful intervention emphasised the non-criminal justice aspects of community treatment. His approach reflected a revival of neo-classical ideals, under which offenders were expected to take responsibility for their conduct. Meeting their social needs should not be the function of penal institutions, lest these institutions become disproportionately repressive.

The model of traditional English probation was prominent in Bohan's presentation. He referred approvingly to 'the professional casework relationship in which the probation officer's warm and sincere concern fertilises the probationer's capacity for growth and change' but asked rhetorically: 'are there to be standard minimum rules for the practice of friendship?' Bohan (1989: 46). Although he did not argue that there should be a separation between the social work and purely penal aspects of community sanctions - that is, that steps should be taken to ensure that offenders could be sentenced to social work - Bohan played down the abuses that could arise in both social work interventions and in the more restrictive aspects of community sanctions. He concluded that in any event, given divergent practices in this area, the development of international standards for community sanctions was premature.

Perhaps unsurprisingly, Bohan's conclusions were not supported by any other IPPF member. Many of them, like the chairman, Hans Tulkens (1989), simply stressed that international standards were needed to protect persons subject to community sanctions against abuse.

One of the most interesting responses to Bohan came from Edgardo Rotman, who was already establishing his reputation as a leading theorist of rehabilitation. According to Rotman (1986), rehabilitation should be seen not as a philosophy favouring paternalistic and oppressive forms of intervention in offenders' lives but rather as offenders' right to enjoy opportunities to improve themselves. He conceded that Bohan correctly questioned whether there are minimum standards for friendship but argued that the function of minimum standards was to create 'certain objective conditions that make interpersonal action possible and meaningful' (Rotman, 1989: 170). He explained that such rules 'not only help to avoid abuses in state intervention but also establish positive duties of the state to provide certain services and opportunities with a minimum degree of quality and frequency' (Rotman, 1989: 170). As explained below, this notion of a positive duty on states to provide opportunities for offenders was adopted by supporters of an expanded role for community sanctions in the future.

Bohan's remarks were made in the context of a debate about a specific proposal to introduce rules to govern community sanctions and measures and one can understand why they were resisted. What was missing in the wider debates of the late 1980s was any explicit discussion of the 'traditional' suspended sentence,

that is, one placing no additional burden on the offender other than the injunction not to reoffend.

There was some support for these 'pure' suspended sentences on the grounds that they did not intervene unnecessarily in the lives of those subjected to it. However, proponents of intervention were on the rise. Looking back on this period, the Cambridge criminologist, Sir Leon Radzinowicz expressed his contempt both for the pure suspended sentence and for sentences suspended on more elaborate conditions:

I turned against [the suspended sentence] in the most categorical terms. I tried to show that [it] was largely used on the continent *faute de mieux*, simply because they did not have probation or conditional discharge; that in comparison the suspended sentence was definitely inferior; and if added to probation and conditional discharge it would harm their basic distinctiveness and in practice confuse both the offenders concerned and the courts. (Radzinowicz, 1999: 329).

Radical non-interventionism

Support for the traditional suspended sentence may have been expected, especially for those who favoured various forms of penal non-interventionism. In Europe a movement favouring radical non-interventionism (*cf.* Schur 1973) had been taking shape in academic penology since the late 1960s, and was much bolstered by the widely published finding that in the sphere of rehabilitation, 'nothing works' (Martinson, 1974).

In Europe, radical non-interventionism took the form of an abolitionist critique of the prison as the site of penal processes (van Swaaningen, 1997: 116-130). Some Europeans from this tradition were prepared to work with the Council of Europe in order to propose reforms that would reduce the scope of criminal law in society generally (*Cf.* Hulsman, 1980, 1984). However, they do not appear to have engaged directly in the 1992 standard-setting on non-custodial sanctions.

Perhaps it was the extent to which the standards of this period collectively held out the promise of a reduction in prison population that led European abolitionists to pay little attention to them and certainly not to critique them directly. In fairness, recommendations of the Council of Europe adopted in 1992, and subsequently in the rest of the 1990s, could be seen to give hope to more incremental abolitionists, who reluctantly accepted that the abolition of prisons could not be achieved in a single step. Thus the 1999 Recommendation concerning Mediation in Penal Matters saw its objective as encouraging 'more constructive and less repressive penal outcomes'. Even more to the point was another reductionist recommendation adopted in 1999 concerning Prison Overcrowding and Prison Population Inflation. Basic Principle 1 of this Recommendation provided:

Deprivation of liberty should be regarded as a sanction or measure of last resort and should therefore be provided for only where the seriousness of the offence would make any other sanction or measure clearly inadequate.

Penal abolitionists ought perhaps to have been worried about Basic Principle 4 of the same Recommendation:

Provision should be made for an appropriate array of community sanctions and measures, possibly graded in terms of relative severity; prosecutors and judges should be prompted to use them as widely as possible.

Why did it not continue to say 'in order to replace sentences of imprisonment' or words with similar effect? In the 1990s it may have been reasonable to assume that this was implicit in the context of the Recommendation as a whole. In the following decade, however, this assumption could not readily be made, as the next section demonstrates.

Ambiguities in 21st century standards

Close analysis of 21st century Council of Europe recommendations related to non-custodial sanctions reveals a change of emphasis. The inherent value of these dispositions began to be highlighted and less attention was paid to prison population reduction or offenders' (human) rights.

Effectiveness of community sanctions

This change emerged in 2000 with the adoption of the Recommendation on Improving Implementation of the European Rules on Community Sanctions and Measures. The Commentary to this Recommendation reveals a subtle shift in the underlying attitude. While a 'nothing works' philosophy had previously predominated, Canadian research (e.g. Gendreau and Andrews, 1990)

and extensive meta-analyses supported a more optimistic view. The development of cognitive-behavioural and psycho-social interventions greatly improved the penal state's capacity to help offenders readjust (para.30). The Commentary concluded confidently that:

These methods, based on accepted theories are increasingly being used as a basis for national strategies to improve the effectiveness of community sanctions and measures. (para. 140)

This conclusion reflects the 'what works' strategy championed by Sir Graham Smith, chairman of the committee of experts that advised on this Recommendation, as an antidote to 'nothing works' pessimism. In his preparatory paper, *Community Sanctions and Measures – What Works*, Smith (1998) expressed support for the risk-needs-responsivity model underpinning the 'what works' strategy.

The 2000 Recommendation reflected this positive commitment to the use of community sanctions. While it still referred to human rights, it focused on community sanctions and measures primarily as a means of risk management. Indeterminate community sanctions, previously outlawed by the European Rules on Community Sanctions and Measures, were now acceptable if someone posed a continuing grave threat to life, health or safety in the community. The emphasis was now on the 'effective supervision and control of offenders' (Rule 15) as a way of making 'adequate provision for community safety' (Commentary on Rule 19).

Moreover, the 2000 Recommendation was a tool for propagating the use of community sanctions and measures. The Commentary stated that 'difficulties exist[ed] notably, but not exclusively, in eastern and central European countries where opportunities to use community sanctions and measures [were] often in an early stage of development' (para 154). It hinted that it was up to European countries with well-established community sentencing regimes to overcome these difficulties.

Effectiveness through intervention

The same commitment to community based programmes was reflected in the 2003 Recommendation concerning Conditional Release (Parole). As has become apparent, the mechanism of imposing a sentence, then suspending it conditionally, in whole or in part, and thus releasing the offender was one of the most important bases of non-custodial punishment in Europe. By the beginning of the 21st century many such sentences differed little from the conditional release of prisoners who had already served part of their terms of imprisonment. Statistics in Germany still lump together offenders whose prison sentences are suspended conditionally immediately on imposition and those who are released after having served part of them in prison (Dünkel and Pruin 2010).

Historically, suspension and sometimes also early release were subject only to the single condition that offenders not commit further offences during the period of suspension. Only gradually were further conditions attached. Even so, across much of Europe the majority of suspensions and many releases from prison still

take place subject to the single condition to avoid reoffending. The motivations for not imposing further conditions vary. They may be an expedient way of reducing prison overcrowding as cheaply as possible (Beyens et al, 2013). However, there may also be a principled policy, as in Finland, of making reoffending the only condition that can lead to re-imprisonment of both parolees and those with conditional sentences (Lappi-Seppällä, 2010). Yet Paragraph 1 of the 2003 Recommendation defines conditional early release narrowly, as 'the early release of sentenced prisoners under individualised post-release conditions'. The same Paragraph provides further: 'Amnesties and pardons are not included in this definition.' Paragraph 2 emphasises that: 'Conditional release is a community measure.'

The 2003 Recommendation on Conditional Release thus excludes from its ambit releases on the simple condition of not reoffending, as not sufficiently interventionist to count as 'conditional' for its purposes. What makes this more serious is that in some European countries, such as Germany (Dünkel and Pruin, 2010) and Belgium (Snacken et al, 2010), the period during which a former prisoner will be subject to post-release conditions may routinely be significantly longer than the original prison sentence.⁶ The practical outcome is that where additional conditions are imposed, prisoners refuse release because it means that they will be under state control for longer (whilst subject to a high risk of recall) than if they remain in prison.

The Recommendation on Conditional Release, as its preamble makes clear, was designed to reduce the prison population. Nevertheless, by its narrow definition

of 'conditional', the Recommendation may inadvertently⁷ encourage the setting of conditions, thus ignoring the injunction of the Tokyo Rules that restrictive penal measures should not be unjustifiably imposed. This can be explained by the growing confidence expressed in the Preamble to the Recommendation on Conditional Release that conditional release, in the interventionist way it is defined, is 'one of the most effective and constructive means of preventing reoffending and promoting resettlement'.

Transnational enforcement

The next European instrument to address community sanctions was the 2008 Framework Decision of the European Commission 'on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions' (FD 947). It was designed to set up a more effective system for enforcing community sanctions imposed in one EU state on a national of another EU state. Again, the primary motive seems to have been to increase the use of community sanctions. Arguably though, this was not being done for its own sake but to reduce the use of imprisonment of foreign nationals, by enabling them to serve a community sentence in their own country (Morgenstern 2009). This positive view of FD 947 is reinforced by interpreting it as requiring emphasis of the social rehabilitative function of community sentences in its implementation (Snacken and McNeill, 2012).

In practice though, FD 947 may prove as ineffective as the 1964 Council of Europe Convention. For one thing, FD 947 only applies to the 28 members of the EU. Moreover, despite undertaking to transpose FD 947 into national law by 6 December 2011, by February 2014 only 14 EU member states had done, thus greatly restricting possible implementation for the time being. In addition, states have a right⁸ to opt out of certain Framework Decisions prior to 1 December 2014 and it seems likely that the United Kingdom will do so with FD 947.

The adoption of the FD 947 is significant in that it reflects a growing commitment of the EU to involve itself in penal matters, including non-custodial sentencing (Baker, 2013). Although the focus of the EU is still on implementing sentences on an inter-state basis, it now also has an interest in developing substantive standards for community sanctions, which will make it easier in the future for states to accept - and therefore implement where required - other European states' sentences. However, with this interventionism comes the danger of community sanctions being used alongside, rather than in place of, other penalties.

Legitimacy and effectiveness of probation services

The most recent pronouncement on non-custodial sanctions is found in the 2010 Council of Europe Probation Rules. It follows other 21st century instruments in that its primary purpose is to propagate community sanctions and measures and, in this case, also to entrench the position of probation agencies. To some extent this may be a product of the involvement of the CEP, which lobbied strongly for their

creation, contributed actively to their formulation, and now uses them as an example of what 'Europe' requires.⁹

While the 2010 Probation Rules endorse the human rights protections of the European Rules on Community Sanctions and Measures and on occasion even expand on them, they are in large part recommendations on how probation agencies should be run, and their status protected. One of the 'basic principles' of the Probation Rules is that: 'Probation agencies shall be accorded an appropriate standing and recognition and shall be adequately resourced' (Rule 10). The emphasis is not on the recognition of 'community sanctions or measures', or even 'probation' as an activity, but on 'probation agencies'.

It is of course appropriate for the Council of Europe to attempt to set standards for and generally develop the skills of criminal justice professionals, be they police officers, judges or those involved with the implementation of sentences as prison or probation officers. One of strengths of the Council of Europe as a human rights organisation is that it has good access to the civil servants of its member states. By working with existing national bureaucracies the Council can often achieve greater state adherence to its human rights objectives. However, the important difference between the Probation Rules and similar recommendations about prisons is that, while the latter makes no case for the increased use of imprisonment, the Probation Rules seek to make a positive case for 'probation' as the best way of dealing with a large class of offenders.

What the 2010 Probation Rules have in common with other recent recommendations on aspects of non-custodial sanctions is their reliance on the 'what works' approach.¹⁰ While there are some references to 'desistance' (Rules 57, 76, glossary) and to the strength-based 'Good Lives Model' (Rules 66, 67), the Rules are heavily influenced by the 'Risk-Need-Responsivity' model of 'what works' (Rules 66, 71). What is largely absent is recognition that the 'what works' movement, has been subject to sustained academic critique of both the narrowness of its specific methods (Ward et al, 2012) and its indifference to the wider social impact of its primary focus on dehumanising 'risk factors' (Mair, 2004). Indeed, Rule 66 requires that assessments 'shall' be made using what is essentially the Risk-Needs-Responsivity approach, thus applying concepts that may be literally incomprehensible to officials not schooled in that tradition (Herzog-Evans, 2011: 121).

Missing from the Probation Rules is any systematic attempt to link the Rules to the objective, mentioned in its Preamble, of reducing the prison population. It is likely that expanding probation agencies, which the Rules encourage and promote, will facilitate greater use of particular kinds of community sanctions and measures, but will that necessarily reduce prison numbers? What are the relative costs and benefits both to offenders and broader society of more 'probation' as opposed to less interventionist alternatives? These questions are not posed directly by the Probation Rules or the Commentary on it.

Conclusion: The way forward

Increasingly, pan-European organisations, not only the Council of Europe but now also the European Union, have involved themselves actively in the introduction and implementation of community sanctions and measures (Canton, 2009a, 2009b: 73-74; *cf.* Baker, 2013). Such sanctions are more interventionist than fines and sentences suspended on the sole condition of not reoffending, which in recent years have not been promoted as vigorously. Pan-European organisations such as the CEP have sponsored the development of Western European-style 'probation', particularly in central and eastern European countries. The EU has also played a role through its support for large research programmes on community sanctions and measures (McNeill and Beyens, 2013).

With the extra money and resources being invested in community sanctions and measures, pressures to propagate probation are greater than ever. The distance between the 1992 commitment to (incremental) abolitionism and the modern state of play in Europe – which is swiftly approaching a state of 'mass supervision' (McNeill and Beyens, 2013) – ought not to be understated.

Under these circumstances, the time is ripe to critically re-evaluate arguments from the perspectives of liberal scepticism and radical non-interventionism that were made in the past, as well as those from a human rights perspective, in order to ensure that probation, as it has now evolved, does not become an unnecessarily restrictive response.

Liberal scepticism

The liberal sceptical argument advanced by Bohan (1989) did not reject ameliorative intervention in social problems of the kind offered by traditional social work designed simply to help those in need. It challenged whether this could be done through a regulated system of community sanctions.

That challenge remains. There is a risk that the positive claims made for community sanctions and measures lead to disproportionate interventions. Moreover, taking into account the social vulnerability of many offenders and victims, we should question whether the social work assistance that they require could possibly be better provided outside the penal system.

In particular, the move away from the simple suspended sentence should be re-examined. One needs to ask whether offenders would not be better handled if they were routinely given sentences suspended on the sole condition that they not reoffend for a set period. It would then be left to other, external social support systems to assist them during the period of suspension and make it less likely that they will relapse into crime. Such a development would provide a solution where offenders refuse early release from prison because they find the accompanying conditions of 'probation' too onerous, and object to their being enforced for longer than the duration of the prison term.¹¹

Radical non-interventionism

In its European guise radical non-interventionism focused largely on prison abolitionism. A revival of its ideas would pay much more attention to less interventionist non-custodial punishments such as fines, which in some jurisdictions, such as England and Wales, have been replaced to a significant extent by community sanctions and measures (Cavadino et al, 2013: 120). Such a revival would note that this trend is not universal. In jurisdictions such as Belgium (Snacken, 2007) and Germany (Sevdiren, 2011: 183), fines still play a large part in the overall framework of penal sanctions without any apparent loss of efficacy of the system as a whole. A revived radical non-interventionism could emphasise the contrast between relatively non-interventionist punishments and community sanctions and measures, which restrict liberty to an extent that in some cases can parallel or even exceed the pains of imprisonment. For community sanctions and measures this has been acknowledged by some European scholars (see Boone, 2005) but has not really fed into the European debate about the desirability of the expanded use of community sanctions as opposed to other non-custodial sanctions.

The early critique of rehabilitationism by radical non-interventionists is widely rejected because it allegedly addressed only the straw-man of deterministic forms of compulsory rehabilitation. Defenders of community sanctions argue that a more sophisticated understanding of rehabilitation has now emerged (McNeill, 2009; Canton, 2007, 2011: 41-45; McKnight, 2009). Such an understanding was developed by Rotman (1986, 1989) who argued that the right of the offender to opportunities to rehabilitate himself held the key to constructing forms of

community sanctions that recognise offender agency and are both 'positive' and human rights compliant.

This argument is not without merit. Certainly for offenders in whose lives the state intervenes by way of punishment, a case can be made for recognizing their right to opportunities to improve themselves. However, such a case is subject to two qualifications. First, there must be recognition that even the rehabilitative measures advocated by supporters of the expanded use of community penalties do involve elements of compulsion.¹² To this extent the original radical non-interventionist critique is still directly relevant.

Secondly, it must be recognised that for offenders to be able to exercise a right to rehabilitation in the positive sense that term is used by Rotman (1986) - or a right to reintegration, as it is sometimes termed (*cf.* Dwyer, 2013: 10) - appropriate material and social conditions must be in place. As Carlen (2013) has forcefully observed, the right to rehabilitation based on rational choices being made by the offender may be illusory, for it often presumes socially competent offenders who were at one stage part of a stable, non-deviant community to which they can return. For many offenders in unequal, class-bound societies, such a community no longer exists - if it ever did (Lacey and Zedner, 1995). Under such circumstances, which may be far more prevalent than governments or even scholarly proponents of intervention are prepared to recognise, the judicious exercise of the prerogative of mercy leading to unconditional release may still be more effective in giving offenders opportunities to lead crime free lives.

Human rights

Human rights idealism was a key element in the creation of the instruments discussed in this paper. Whatever weaknesses they may have, these instruments all seek to reinforce the position of offenders who serve their sentences in the community. This was true not only in 1992 but also thereafter. Also, the most recent of these instruments, FD 947 and the Council of Europe Probation Rules, express their commitment to human rights values and seek to entrench them. However, at the same time, these instruments encourage interventions in offenders' lives that may limit their freedom more than is strictly necessary.

How are these negative consequences to be avoided? One way may be by reemphasising one of the longest recognised human rights, namely the right to liberty (Hudson, 2001; Snacken, 2006). Our overview has shown that the 1992 instruments sought to balance the needs for intervention by constantly questioning whether liberty-limiting interventions, custodial or otherwise, were required at all.¹³ A second way of avoiding negative consequences is to reflect on the range of human rights that need to be considered when developing instruments to shape non-custodial interventions, for the pains of probation may encompass a broader range of human rights than liberty alone (Durnescu, 2011). In this regard human rights lawyers may seek, for example, to deploy the European Rules on Community Sanctions and Measures to support arguments that community sanctions that stigmatise offenders by making them wear clothing that publicly identify them as

person undergoing punishment, are degrading and therefore contrary to Article 3 of the European Convention on Human Rights.¹⁴

However, old nostrums may not be sufficient. It may be that a broader appreciation of human rights is necessary for the full consideration of the appropriate use of community sanctions and measures in Europe. In particular, overall socio-economic development, underpinned by a recognition of the minimum social and economic and cultural rights that all members of society are entitled to enjoy, is a more effective way of reducing crime than focusing intensively on the individuals, who are convicted of the relatively routine offences that are the target of community sanctions and measures. Consistently asking broader questions of this kind could allow European penologists to engage with broader social developments and to remain critical towards the wider (human rights) implications of any form of penal intervention (Loader and Sparks, 2013).

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Notes

1 The idea was first expressed by the philosopher and orator, Themistius, in a speech to the Christian emperor Jovian (362-363 AD), congratulating him on *not* seeking to impose his own morality on his subjects by legislation (Lee, 2000).

2 This is because community sanctions and measures, as defined in the European Rules on Community Sanctions and Measures, 'maintain the offender in the community and involve some restriction of his liberty through the imposition of conditions and/or obligations, and which are implemented by bodies designated in law for that purpose'.

3 See Article 7 of the *Satzungen der internationalen kriminalistischen Vereinigung* recorded in (1890) 1 *Mitteilungen der internationalen kriminalistischen Vereinigung* 3.

4 Decided at the third annual meeting of the International Association for Penal Law at Kristiana (Oslo) 25 to 27 August 1891. See the (1892) 3 *Mitteilungen der internationalen kriminalistischen Vereinigung* 265-266.

5 See also the plea at the same Seminar by Paul Cornil (1952) of Belgium for the establishment of guilt before the results of a social enquiry report that might recommend 'probation' was revealed to the trial court that might wish to impose it.

6 Para 10 of the Recommendation does provide that: 'Conditions or supervision measures should be imposed for a period of time that is not out of proportion to the part of the prison sentence that has not been served.' This is a weak provision and the Commentary makes it clear that the duration of such supervision can exceed the term of imprisonment initially imposed by the court.

7 Arguably, it was legitimate to focus the bulk of this Recommendation on the more interventionist conditions as release only on condition of not reoffending does not require rules to ensure that implementation is not harsh or unfair. However, the

unintended consequence is still the impression that wider conditions are required to make the release 'conditional' at all.

8 See art. 10(4), Protocol to the Treaty of Lisbon on Transitional Provisions

9 See <http://www.cep-probation.org/page/332/european-probation-en-prison-rules> accessed 16 February 2014.

10 However, the Commentary goes on to make the point that countries should conduct their own research and remain 'aware that "what works" in one country may not work as well in another' (Official Commentary on Rule 104).

11 See also American studies of 'punishment equivalencies', which have used quantitative surveys of offender opinion to demonstrate that those with experience both of imprisonment and its alternatives often prefer incarceration (Crouch, 1993; Wood and Grasmick, 1999).

12 This is so even in jurisdictions where the offender's consent is a prerequisite of the imposition of community sanctions or measures (*cf.* van Zyl Smit, 1993: 324-326). Central to any penal intervention is the issue of compliance, that is, of ensuring that the requirements of the sanction or measure are adhered to (Canton, 2011: 123-126). Whilst compliance must be secured on several levels (Bottoms, 2001), it is ultimately mandated by law. Failure to engage with requirements imposed in the name of rehabilitation can lead to onerous consequences, potentially including incarceration. Under such circumstances the right to receive rehabilitative assistance easily becomes a duty to rehabilitate oneself. The more intensive the order, the more onerous that compulsion becomes. By contrast, unconditionally

suspended sentences impose only the same compulsion that criminal justice places upon all citizens: not to offend.

13 Some of this sentiment remains at the pan-European political level: See Resolution 1938 (2013) 'Promoting alternatives to imprisonment', adopted by the Standing Committee of the Parliamentary Assembly of the Council of Europe, acting on behalf of the Assembly, on 31 May 2013. This Resolution carefully stresses that:

'non-custodial sentences should be imposed as a replacement for prison sentences and not as a way of further widening the scope of criminal punishment. Thus, minor offences which have hitherto not given rise to any criminal sanctions should not be punished by non-custodial sentences.'

Unfortunately, the resolutions of the Parliamentary Assembly have far less impact than recommendations of the Committee of Ministers of the Council of Europe as the latter represent the consensual views of the governments of member States.

¹⁴ The European Prison Rules have been used very effectively in this way to spell out what should be regarded as degrading treatment of prisoners, contrary to Art 3 of the ECHR: Van Zyl Smit and Snacken 2009.

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