

RE-ASSESSING THE ROLE OF COMMUNITY-BASED SENTENCES IN THE CONTEXT OF THE SUSTAINABLE DEVELOPMENT GOALS

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I. APPLICATION OF COMMUNITY-BASED SENTENCES AROUND THE WORLD

Almost thirty years ago, the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)¹ were adopted by the General Assembly.

So far, no reliable global overview has been prepared of how community-based sentences² are being used in practice in the different jurisdictions.³ No readily available source is available. As noted by the Secretary-General in his report to the Thirteenth United Nations Congress,

Sentencing policies refer to the responses of the criminal justice system to the various offences as regards the types of sentences, including non-custodial measures. A comparative assessment of sentencing policies of criminal justice systems would require the analysis of the type of sentences, including the length of custodial sentences handed out to convicted persons, while taking account of the seriousness of the criminal offences committed. At the international level, there are no available data on the length and type of sentences that allow this type of comparative analysis.⁴

The situation is slowly changing. Comparative statistical data on community-based sentences are being collected in Europe by the Council of Europe. This is only partially good news, since it covers only the European region, the process of collection was begun fairly recently and it is too early to use this data set to assess patterns on other than a very general level. However, it does provide a point of departure for at least one region in the world.⁵

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¹ General Assembly resolution 45/110, annex.

² Although the Tokyo Rules use the wider concept “non-custodial sanctions,” the main focus in this paper is on sentences, which can be defined broadly as punishment imposed by a court (or other duly constituted authority) on an offender, following a formal procedure. It includes decisions made in restorative justice and mediation proceedings.

The terms “non-custodial” and “community-based” are synonyms. The term “alternatives to imprisonment” is widely used but will not be used here, as it implies that imprisonment is the standard and expected response, and other measures somehow exceptions from the norm.

³ The present paper updates and supplements data contained in an unpublished paper, Joutsen 2015. This earlier paper also included data, not repeated here, on the use of restorative justice measures and monetary sanctions.

⁴ State of crime and criminal justice worldwide. Report of the Secretary-General to the Thirteenth United Nations Crime Congress, A/CONF.222/4, para. 37.

⁵ Council of Europe Annual Penal Statistics (SPACE II); available at <http://wp.unil.ch/space/space-ii/>. The most recent publication is from 2018: Aebi and Hashimoto 2018, and Aebi et al., 2019. The Council of Europe project uses the term “alternatives to imprisonment”. The working definition does not include, for

In time, some data may become available also on a global basis. The American Probation and Parole Association, together with Community Supervision Solutions, has launched the “Supervision Around the World” (SAW) Project, which seeks to collect information on community supervision practices in every country around the world.⁶ The SAW Project will identify countries offering supervision services, document current practices and create an interactive Internet repository for the information that it obtains on supervision programmes.

A second initiative launched recently, the Global Community Corrections Initiative, is similarly seeking to collect data on the use of community corrections.⁷ During the initial stage, the initiative is seeking to identify experts in each of the fifty countries with the highest prison populations, and obtain through them information on the use of community corrections, both as sentencing options and as post-release measures.

There are several reasons why data on community-based sentences has been so difficult to collect, and have not been particularly usable for comparative purposes:

- community-based sentences are used primarily at the lower end of offence seriousness, and it is at this end that the scope of criminalized conduct (i.e. conduct that may lead to a response by the criminal justice system) varies considerably from one jurisdiction to the next;
- community-based sentences as a response to criminalized conduct may be imposed not only by the courts, but also by the police, the prosecutor and even other administrative authorities, and decisions may also be taken by community-based bodies (as with the case of mediation and restorative justice measures);
- community-based sentences, even if imposed by a court, are not necessarily entered into a centralized register nor recorded in the statistics; and
- the terminology varies from one jurisdiction to another, and thus even community-based sentences referred to with the same term (for example “probation”) may not be comparable.

More generally, there are the considerable difficulties in making comparisons between how the criminal justice system operates in different countries.⁸ Nonetheless, almost 30 years after the adoption of the Tokyo Rules, it is of interest to try to examine how community-based sentences are being used in different jurisdictions around the world. This paper is based on the available literature and statistical data, and seeks to bring together a number of different observations about patterns.

example, measures imposed on the basis of juvenile criminal law, nor persons under the aftercare of probation agencies. Heiskanen et al., 2014, p. 27.

⁶ <http://communitysupervisionsolutions.com/saw-project/>.

⁷ GLOBCCI.ORG.

⁸ See, for example, Nelken 2007.

A. The Benchmark: International Patterns in the Use of Imprisonment

The patterns in brief:

- *imprisonment (incarceration, custodial treatment) is without question the basic form of punishment in criminal justice systems around the world.*
- *although the global rate of prisoners per 100,000 in population has been stable over the past few years, the rate has been increasing rapidly in some individual countries, and decreasing in others.*
- *the prisoner rate varies considerably from one country to the next, and even from one neighbouring country to the next – even if these countries have somewhat similar legal systems and degree of development.*
- *clear regional and sub-regional patterns can be detected in the use of imprisonment, as measured by prisoner rates. In general, imprisonment is used least in Africa and Asia, and most in North America and Latin America.*
- *in several countries with a high prison population, a present trend is towards “decarceration”, a deliberate policy of lessening the use of imprisonment.*

The best current source of data on prison populations around the world has been developed by Roy Walmsley: the *World Prison Population List*. The most recent version of this list, the twelfth edition, provides data as of September 2018.⁹ The list provides information on the total prison population and the prisoner rate (the number of prisoners per 100,000 in population) in almost all countries in the world. The map below is based on this data.

One point of caution. Sentences, including sentences of imprisonment, are used in different ways by different countries. The use of only one indicator, such as the number of prisoners per 100,000 in population, can be misleading. The data on prisoner rates reflect only one dimension of the use of prisons: how many prisoners are being held at a certain time, as a proportion of the total population. Dünkel notes that prisoner rates are a function of the number of persons entering prison, and the length of stay. Consequently, similar prisoner rates may hide considerable differences in these two factors.¹⁰

Furthermore, overall prisoner rates do not show possible demographic differences within the population. Research has shown that the burden of imprisonment falls unequally on different ethnic, racial and other population groups, with the greatest burden tending to fall on vulnerable population groups.¹¹

The 2018 edition of the *World Prison Population List* shows that the global prison population has continued to grow, exceeding 11 million in 2018. It also draws attention to regional trends, including an almost tripling in the total prison population of South America since the year 2000 (an increase of 175 per cent), a more than doubling of the

⁹ Walmsley 2019.

¹⁰ Dünkel 2015 provides data showing that Sweden, with a prison population rate of 57 per 100,000, and Germany, with a prison population rate of 76 per 100,000, have roughly the same rates. Even so, the average length in Sweden is only two months, while the average length in Germany is four times longer, eight months. Both are highly developed countries, with roughly the same level and structure of crime, and with roughly the same criminal justice processes and efficiency – and yet they use sentences of imprisonment in quite different ways.

¹¹ See, for example, Garland 2014, and in respect of the situation in the United States, Travis and Western (eds.) 2014.

total prison population of south-eastern Asia (an increase of 122%), and an almost doubling in Oceania (an increase of 86%).¹²

In just the three years since the previous edition of the *World Prison Population List* had been published, the total prison population had increased by around one half in such countries as Indonesia (45% increase in prisoners per 100,000 of general population), the Philippines (48%), Egypt (53%), Nicaragua (61%) and Cambodia (68%).¹³

As can be seen from the map, on the regional level, prisoner rates are highest in North and South America, and lowest in Africa and South-Central Asia.¹⁴

There are many differences within regions. For example, while Africa as a whole has the world's lowest prisoner rates, the median prison population rate for western African countries is 53, whereas for southern African countries it is 244.

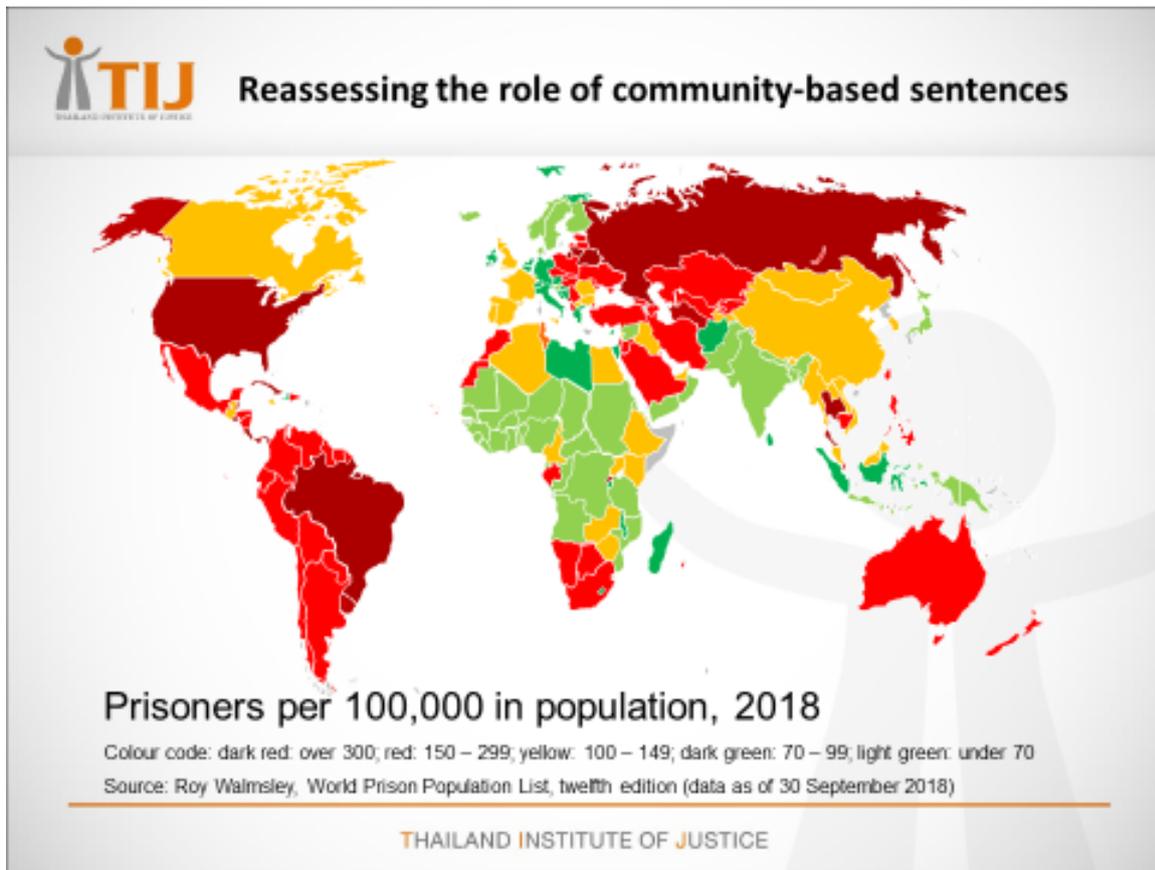
There are even more distinctive differences within Europe. The map shows a relatively sharp divide between west and east, with prisoner rates in the former socialist countries in Eastern Europe considerably higher than in the west. A particularly marked divide can be found between the Nordic countries on one side, with prisoner rates ranging around 50 to 70, and the neighbouring Baltic countries (200 – 300) as well as the Russian Federation (467), on the other.

Although the sub-regional differences in Europe are relatively stable and have existed for a long time, there have been considerable shifts within countries. Dünkel 2015 notes that from 1984 to 2014, there has been a clear increase in the prisoner rate in, for example, England and Wales (from 84 per 100,000 to 149 per 100,000), France (31 to 98), Portugal (70 to 136) and Spain (38 to 140). In some other countries, there has been a decrease; for example, in Finland from 97 to 55. In the Russian Federation, there has been a significant decrease in just a fifteen-year period, from 730 per 100,000 in 1999, to 467 per 100,000 in 2014.

¹² Walmsley 2019.

¹³ Walmsley 2019. The same source notes that during this same relatively brief three-year period, there has been a significant decrease in the Russian Federation (10%), Viet Nam (11%), Japan (15%), Ukraine (19%), Kazakhstan (21%), Romania (22%) and Mexico (23%).

¹⁴ The seminal and in my view most perceptive analysis of national differences in prisoner rates is to be found in the third chapter of Christie 2000. He focuses on the European region. Lappi-Seppälä 2003 contains a global analysis.



To turn to Asia, Thailand had a prison population of 250,000 in 2002 (400 per 100,000 in population), but through greater use of pre-trial diversion and early release for drug addicts, the amount had been reduced to 160,000 by August 2005 (250 per 100,000). More recently, however, the trend has reversed, with an increase to 210,000 prisoners in 2010 and 364,000 in 2018 (320 and 526 per 100,000, respectively). Japan, in turn, has had a relatively stable rate, with gradual growth to a peak of 81,000 in 2006 (64 per 100,000), and a subsequent steady decrease to 52,000 in 2018 (41 per 100,000).¹⁵

B. International Patterns in the Use of Probation

The patterns in brief:

- *the quantitative data on the use of probation, either world-wide or within a region (such as Europe) is so poor that clear patterns cannot be detected. The reason is that probation exists in many forms, and is used for many purposes.*
- *the statistical data does suggest, however, that there are huge differences between countries in the use of probation. Probation is widely used around the world, but some countries use probation extensively, others use it rarely.*
- *qualitative data at least in Europe suggests that the use of probation is expanding, as is the range of functions that probation agencies fulfil.*

¹⁵ International Centre for Prison Studies, available at <http://www.prisonstudies.org/about-wpb>.

Probation is generally understood as a sentence in which the offender continues to live in the community, under the supervision of a judicial authority, probation service or other similar body.¹⁶ The element of “under supervision” is important, and distinguishes this sentence from, for example, simple conditional sentences where the offender is under no obligation to report to anyone. However, it should immediately be noted that the extent to which probation actually involves supervision varies considerably from jurisdiction to jurisdiction.

Probation agencies can be found throughout the world. For example, in Europe they can be found in almost every country, although with a wide variety in structure and in functions. Most of the original probation agencies were state-run, but some were non-governmental, and today some are privately run businesses. The work of many probation agencies covers the entire country, but some are regional or even local. As for functions, before the trial stage some probation agencies prepare social inquiry reports for the prosecutor, and may provide information also to other decision-makers in the criminal justice system. Some probation agencies provide assistance to victims of crime and organize restorative justice interventions. In respect of sentences, probation agencies may organize not only probation, but also community service orders. And in respect of prisoners, some probation agencies provide social support for relatives of inmates, and guidance and support to prisoners themselves (including debt regulation) in order to prepare their release, and assist with aftercare residential homes.¹⁷

Because of the considerable differences in organization and functions of probation around the world, there is little statistical data that can be compared. Even within Europe, where the Council of Europe SPACE II project has sought to collect data since the 1990s, a research team that has taken a close look at this European data warns that cross-national comparisons of the numbers and rates of persons under the supervision of probation agencies may be misleading.¹⁸

Table 2 in Appendix 1 provides European data on use of probation in 1999, 2007, 2013 and 2017. Despite the difficulties inherent in the data, it can be concluded at the very least that there are considerable differences between European countries in respect of how often probation is used. For example, England and Wales, France, Germany and especially Poland appear to use probation very often, in tens of thousands of cases each year, while in some other European countries, only a few hundred (or even fewer) offenders begin to serve probation during a year.

One source that provides some data on the use of “community corrections” in different countries around the world is the Global Community Corrections Initiative referred to in part A. On the website of the initiative, information is provided on the total number of prisoners and the total number of persons in “community corrections” in 2016.¹⁹ This is provided below in Table 1. As a source, it must be treated cautiously, in particular as it does not give country-specific data on how “community corrections” is

¹⁶ Handbook for Prison Leaders 2010, p. 120.

¹⁷ Dünkel 2015. See also Heiskanen et al., 2014, pp. 15 – 16, and tables 1 and 2, on pp. 40 – 41 and 43 – 44.

¹⁸ Aebi et al., 2014, p. 300.

¹⁹ See <http://www.globcci.org/prisonPopulationMap/prisonPop2Map.html>. The project seeks to collect data from the fifty countries in the world that have the highest prison population (presumably on the assumption that these countries would also make extensive use of probation). However, data on probation is apparently available only from 38 of these 50 countries.

defined. However, the implication given is that this involves probation, i.e. supervision in the community.

Bearing in mind that the data in Table 1 should be treated with caution, an examination of the table raises some intriguing questions. Assuming that the data in the “community corrections” column refers to the number of persons on probation, and that how community corrections is defined in the different countries is at least broadly similar, it can be seen that some countries (Malaysia, Morocco, Myanmar, and Nigeria in respect of adults) do not use probation.

A second observation is that some countries use probation very rarely, in proportion to the number of persons kept in imprisonment. The outlier here is Argentina, with some 85,000 persons in prison, and only some 3,400 persons in community corrections. Other countries in which the number of persons in community corrections is dwarfed by the prison population are Australia, Indonesia, Japan, Pakistan, Peru and the Philippines.

Conversely, some countries have a community corrections population that is about three times the size of the prison population: Germany, the Republic of Korea and in particular Poland.

Table 1. Corrections population: total number and per 100,000 in population, by type of sentence, in 2016 (unless otherwise noted in respect of the year)²⁰

country	prisoner population	prisoners per 100,000	community corrections population	community corrections population per 100,000	community corrections population as percentage of prisoner population
Argentina	85,283	198	3,433	8	4%
Australia	42,492	178	14,298	66	37
Canada	41,145	115	101,716	284	247
Chile	49,063	274	58,198	326	119
China	1,649,804	119	707,058	51	43
Colombia	118,925	239	57,099	115	48
France	70,710	110	174,510	272	247
Germany	62,194	70	180,000 (2010)	202	289**
Indonesia	248,389	98	55,000	22	22
Italy	59,135	97	59,554	97	100
Japan*	55,967	44	15,278	12	27
Kazakhstan	33,989	192	22,500	127	66
Kenya	54,000	118	7,861 (1995)	172	146**
Korea, Rep. of	55,198	110	165,818 (2007)	330	300**
Malaysia	55,413	182	no probation	-	-
Morocco	82,512	242	no probation	-	-
Myanmar	79,668	150	no probation	-	-
Nigeria	73,631	40	no probation for adults	-	-
Pakistan	83,718	45	23,396 (2015)	13	28**
Peru	82,023	263	16,110	53	20
Philippines	188,278	190	43,194 (2017)	44	23

²⁰ Source: <http://www.globcci.org/prisonPopulationMap/prisonPop2Map.html>. Note: the 2016 prisoner data provided here differ from that provided in the 2016 edition of the World Prisoner Population List compiled by Roy Walmsley. The calculation of prisoners and community corrections offenders per 100,000 are by the author.

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Poland	73,524	193	290,000	760	394
Russian Federation	582,889	404	423,092	295	73
South Africa	158,111	292	70,356	128	44
Spain	59,087	128	55,342	120	94
Thailand	364,288	540	216,616 (2013)	319	598**
Turkey	232,886	297	292,406	374	126
Ukraine	56,246	154	63,944	176	114
United Kingdom	83,014	146	190,439	202	139
United States	2,121,600	699	4,650,900	1531	219
Uzbekistan	43,900	150	probation est. 2018	-	-
Viet Nam	130,002	140	47,000	50	36

*Data provided by Kitagawa Mika, UNAFEI

**Note different years

Finally, there are vast differences in the number of persons in community corrections (presumably referring by and large to the number of persons under supervision) per 100,000 in population. At one end, there were apparently only eight persons in community corrections per 100,000 in Argentina, twelve persons per 100,000 in Japan, and thirteen persons per 100,000 in Pakistan in community corrections. At the other end of the range there were 760 persons in community corrections per 100,000 in Poland, and over twice that number, 1,531 persons per 100,000, in the United States.²¹

Once again, caution needs to be exercised in interpreting this data, especially since no further particulars are provided on how the data was obtained, and more importantly on how each reporting country had defined the concept of “community corrections” in responding to the request for data.

To look at the *qualitative* data on probation, which are available only for Europe, one pattern that has been noted is the growth in the number of new probation agencies. According to the coordinator for the Council of Europe SPACE II project, these new probation agencies have often been detached from the national prison administration, or have expanded on the basis of local offices. A second pattern is the growth in probation workload, much as a result of the diversification of probation functions at different stages of intervention (e.g. pre-trial, enforcement, management of postponed sentences, conversions or post-release stages).²² In commenting on the observation that the number of prisoners in Europe has not decreased despite the growth in probation, Delgrande notes:

The paradox of increasing patterns for prison and probation is a very complex phenomenon and many researchers try to explain this evolution from judicial, political, security or criminal policy perspectives. It can be concluded that for the period lasting from the early 2000s until now, the part of prisoners sentenced to short custodial terms (less than one-year custody) did not decrease at all. In fact it seemed that there was an overuse of CSM [community sanctions and measures] for the persons who were not supposed to go to prison.²³

²¹ Noting that there were 699 prisoners per 100,000 in population in the United States, it would seem that in 2016, over 2 per cent of the total population of the United States was under the control of the criminal justice system.

²² Delgrande 2015.

²³ Ibid.

Delgrande's point refers to what is called the "net-widening" effect of new community-based sentences. Often, new sentences are developed specifically to replace short terms of imprisonment, but in practice they may replace *less* restrictive sentences.

C. International Patterns in the Use of Community Service Orders

The patterns in brief:

- *community service orders are a new sanction that is clearly increasing in use around the world, although so far, the main area of growth appears to be largely in Europe and North America (with a few notable exceptions in Asia and Africa).*
- *in Europe in particular, community service orders are in wide use.*
- *different forms of community service make comparison difficult.*

A community service order (CSO) requires the offender to perform a certain number of hours of unpaid work, usually for an agency or organization or the benefit of the community.

The community service order was first introduced in England and Wales during the early 1970s. Following a 1976 Council of Europe resolution²⁴ calling for member states to consider adopting community service orders, its use spread to a number of other European countries. In Asia and the Pacific region, CSOs have been introduced in at least Australia, Fiji, Hong Kong, Malaysia, New Zealand, Singapore, Sri Lanka and Thailand, and in the Republic of Korea as a supplement to other sentences.²⁵ In Latin America and the Caribbean, community service exists in at least Brazil, Colombia, Costa Rica and Mexico.²⁶ In Africa, it exists in at least Burkina Faso, Central African Republic, Kenya, Malawi, Mozambique, Namibia, Senegal, South Africa, Tanzania, Uganda, Zambia and Zimbabwe.²⁷

There are considerable differences between countries as regards the total persons undergoing community service. Table 3 in Appendix 1 contains data from Council of Europe member states for 1999, 2007, 2013 and 2017 on the use of CSOs. Perhaps the clearest trend that can be seen is the growth in the number of countries using CSOs, and in the number of CSOs imposed. (Both developments can be seen in respect of Europe in the table.)

A second observation is the large differences in use from one country to another. Some European countries impose only a few thousand CSOs annually, others (in particular England and Wales, France, the Netherlands, Poland and especially Spain) impose it very often.

Examining the available data on the qualitative use of community service orders, McIvor et al. note that the stated and actual functions of CSOs "have always been very unclear and conflicting". According to them, while the various stated functions of a more humane alternative to prison, rehabilitation and reparation "are largely shared across jurisdictions, within different jurisdictions they are assigned varying degrees of

²⁴ Resolution (76)10 (1976), available at <https://rm.coe.int/16804feb80>.

²⁵ Sugihara et al, 1994, pp. 100, 104, 184 and 201; Challinger 1994, p. 263; Singh 2005, p. 90; Rujjanavet 2005, p. 108; Reddy, p. 224.

²⁶ Carranza et al, 1994, p. 407.

²⁷ Penal Reform International 2012, and Saleh-Hanna 2008, p. 387.

importance. Furthermore, the relative importance attached to different aims has changed over time in each jurisdiction.”²⁸ Melvor et al. also say that rehabilitation continues to remain a stated function of CSOs, but it is becoming more narrowly defined as reduction of the risk of reoffending and retributive aspects of CSOs “are being stressed in an effort to garner public and judicial support”.²⁹

Dünkel, in turn, notes that the general experience with CSOs has been positive. By and large CSOs do appear to be replacing short-term imprisonment, and thus the “net-widening effect” may not be particularly strong.³⁰

D. International Patterns in the Use of Electronic Monitoring

The patterns in brief:

- *electronic monitoring is a new measure that has been spreading in many industrialized countries.*
- *electronic monitoring is used not only as a sanction, but also as an alternative to pre-trial detention, and as a condition of parole.*
- *due to the expense of the measure, electronic monitoring is not in very wide use in developing countries.*

In electronic monitoring, the offender is ordered to remain at home or, at specified times, at his or her place of employment, educational institution or other accepted location. The offender has a monitor attached (usually to his or her wrist or ankle) to help in ensuring compliance with the order.

Electronic monitoring was first used in the United States in 1983.³¹ Its purpose is to ensure that the offender remains where he or she is supposed to be, or alternatively that the offender does not enter proscribed areas or approach specific persons, such as potential victims. It can be used as a sentence in its own right, or as a condition of probation (or another community-based sentence). Before conviction, it can be used as an alternative to pre-trial detention (as, for example, in Belgium, France, the Netherlands, Northern Ireland and Portugal), and at a later stage, as a condition of a prison furlough or of parole from prison (as in Finland and Sweden).

Although electronic monitoring is a very recent innovation in corrections, it has spread relatively rapidly from the United States, first to the United Kingdom, and then to Canada, New Zealand, Australia and South Korea, and to a large number of countries in Europe. Table 4 in Appendix 1 provides data showing the rapid spread in Europe. While only five countries in Europe appeared to use electronic monitoring in 1999, in 2007 it was in use in at least ten European countries, in 2013 in at least fifteen, and in 2017 in at least twenty-one. According to Mombelli 2019, electronic monitoring is being used or is being experimented with in some forty countries around the world.³²

Equally impressive is the growth in the use of electronic monitoring in individual countries. Poland, which did not have the sentence as recently as 2007, had almost 17,000

²⁸ McIvor et al., 2010, p. 87.

²⁹ Ibid.

³⁰ Dünkel 2015.

³¹ Burrell and Gable 2008; Albrecht 2005.

³² Mombelli 2019.

offenders starting to serve an electronic monitoring order in 2013 (Poland did not provide data for 2017). In France, almost 30,000 offenders began to serve such an order in 2017. For at least these two countries, electronic monitoring is not just a technological novelty, but something that is in very wide use.

The differences between countries in the use of electronic monitoring are also evident in comparison to population. Aebi et al. have calculated that the average total number of persons in Europe under electronic monitoring in 2010 was quite low (8 per 100,000 population), with the highest rate for England and Wales (42), and the lowest rate in Serbia (close to zero).³³

From the qualitative point of view, Dünkel notes the controversial nature of electronic monitoring, and the evident danger of net-widening. The contribution of electronic monitoring to the easing of prison overcrowding appears to have been very limited, although positive results have been reported in Finland, the Netherlands and Sweden.³⁴

II. ARE COMMUNITY-BASED SENTENCES MORE EFFECTIVE THAN IMPRISONMENT?

Conventional wisdom is that community-based sentences are suitable for only a distinct range of offences: petty offences (and, in some jurisdictions, medium-level offences), and that the response to more serious offences should be imprisonment. That statement needs to be unpacked.

What we deem a petty offence and, respectively, a medium-level and serious offence, varies from one jurisdiction to the next, and from one time to another.³⁵ For example, as noted by Yukhnenko et al. (2019), more or less the same drug trafficking offence can lead to a community-based sentence in one jurisdiction, and a sentence of five to ten years of imprisonment in another.

Furthermore, the *range* of offences covered by, respectively, community-based sentences and imprisonment varies from one jurisdiction to the next, and from one time to another. In some jurisdictions, community-based sentences are used more than imprisonment. In other jurisdictions, in turn, very few community-based sentences are used at all. It would be absurd to conclude that few petty offences (and perhaps even medium-level offences) are committed in the latter jurisdictions and come before the courts.

Both factors suggest that the dominant role of imprisonment in each of our jurisdictions can and should be reconsidered. If some jurisdictions can maintain social control, prevent crime and protect the victim and the community with a low level of imprisonment, we should try to learn from their experience. As noted by the UNODC,

³³ Aebi et al. 2014, p. 300.

³⁴ Dünkel 2015. Also, Graham and McIvor 2015 conclude that electronic monitoring alone does not decrease the risk of reoffending but should be combined with support and supervision.

³⁵ Nils Christie has explained the variation with the concept of the “penal value” of a certain sentence. He argues that in any given society, the “penal value” of, for example, a sentence of ten years of imprisonment can vary considerably over time, depending for example of the amount of conflict in society and the standard of living.

It can be argued that the position of imprisonment as the main punishment for medium-level, and even for more serious, offences is not and should not be self-evident. Other forms of punishment could just as well be used, as long as they can be regarded as credible and as fulfilling whatever the function of punishment is seen to be in society. Imprisonment is not the only type of punishment, nor necessarily the best type of punishment, especially (but not only) in the case of juveniles, and disadvantaged groups such as drug users and the mentally ill. Imprisonment should be reserved for the most serious offences and the most dangerous offenders. In other cases, deterrence, education, rehabilitation, just deserts and even incapacitation can be promoted by other types of punishment, at a significantly lower social, human and economic cost. It is for this reason that the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) were drafted.

It needs to be emphasized that this paper is not intended to suggest that imprisonment is not an appropriate response to crime. As noted above by the UNODC, imprisonment should be reserved for the most serious offences and the most dangerous offenders. It should not be used indiscriminately when the same functions can be achieved through community-based sentences.

In pursuit of this, the following section examines whether imprisonment does indeed fulfil different purposes of punishment, or is any more effective in fulfilling them than community-based sentences. After all, as noted by the UNODC above, imprisonment is widely believed to

- *deter* the person sentenced from repeating his or her offence;
- *rehabilitate* the offender (by increasing awareness and acceptance of norms, and thus by leading the offender to reject a criminal lifestyle);
- *incapacitate* the offender, by placing him or her behind locks and bars, thus presumably keeping the rest of the community safe; and
- *serve as a warning to other potential offenders* not to commit an offence.

As for the “just deserts” purpose of punishment, the question of whether or not imprisonment is “better” than community-based sentences rests essentially on the perception of the severity of each respective sentence.

This section will also consider the cost implications of both imprisonment and community-based sentences.

A. The Claim That Imprisonment Is Better Than Community-Based Sentences at Detering the Offender from Committing New Offences

The “special prevention” function of a sentence, the impact that it has on the offender, is seen to operate through a combination of *deterrence* (warning), *rehabilitation* (education and seeking to ensure that the offender can be reintegrated into the community as a law-abiding member) and *incapacitation*. To the extent that punishment actually has this impact, it is difficult to distinguish between deterrence and rehabilitation. We cannot know for sure that, if an offender does not commit a new offence after being punished,

this is because the offender *fears* new punishment (the deterrence aspect) or is *better adjusted* (is better able to function as a lawful member of society).

A second difficulty lies in researching the impact of punishment. Much as criminologists would welcome the possibility, judges in most jurisdictions would not agree to a massive experiment, in which offenders guilty of more or less similar offences are randomly split into two groups, with one being sentenced to imprisonment and the other being sentenced to community-based sentences, and the researchers then seeing which group is less likely to commit new offences (and possibly even interviewing the offenders in an attempt to see whether deterrence or rehabilitation was the primary factor in such desistance).

A third difficulty lies in drawing conclusions from whatever results can be gleaned from research. Offenders are different, and have different life situations and motivations. Individual jurisdictions have different forms of imprisonment and community-based sentences, and their theoretical deterrent and rehabilitative impact may well be quite different. Finally, even in individual jurisdictions, different sentences may be implemented in different ways, and consequently could well have a different impact on the offenders serving the sentences.

Without seeking to generalize too far, one way to proceed is to examine the deterrence argument from the point of view of short-term imprisonment, as compared to community-based sentences. If the term of imprisonment is only a few weeks or months, the offender presumably could not receive the benefit of very extensive educational, health or social welfare services which would assist him or her in reintegration into the community.

Studies that can shed light on this have been carried out in a number of countries. An example is Wermink et al. (2010), which used the matched samples approach³⁶ in a comparison of reoffending after short sentences of imprisonment (up to six months), compared to reoffending after sentences of community service. The study concluded that the reoffending rate for those sentenced to community service was roughly one half of that of offenders sentenced to short-term imprisonment, a result which is in line with earlier studies carried out in the Netherlands.

Going beyond studies in just one country, a recent review brought together the results of a number of studies conducted around the world, similarly comparing the impact of community service with that of short sentences of imprisonment (Yukhnenko et al. 2019). Once again, the over-all conclusion was that offenders sentenced to community service had a *lower* rate of reoffending than did offenders sentenced to short terms of imprisonment.

From this, it would seem that the belief in imprisonment as a greater deterrent than community-based sentences can at least be questioned. At this stage, we need not try to draw more general conclusions. Imprisonment may well have a deterrent effect on at least some offenders and in some jurisdictions, but in some cases community-based sentences produce better results.

³⁶ The matched samples methodology is one way of seeking to make two samples being compared as similar to one another as possible (such as age, gender and length of sentence).

B. The Claim That Imprisonment Is Better Than Community-Based Sentences at Rehabilitating the Offender

One of the fundamental purposes of custodial corrections is to take the offender away from a possibly criminogenic environment and place him or her in a closed rehabilitative, therapeutic or educational institution for treatment. The treatment may be tailored for the special health and or mental health needs of individual offenders (counselling, anger management, psychiatric treatment, substance abuse), or may be designed to help a wider spectrum of offenders realize the need to abandon a criminal lifestyle (religious counselling, education, vocational training, cognitive skills etc.).

The rehabilitative effect of custodial corrections has been extensively researched.³⁷ Among the classics in the field is Robert Martinson's 1974 article, *What works? – Questions and answers about prison reform*. In it, he summarized a number of studies and concluded that “with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism”.³⁸ David Farabee, in his 2005 book *Rethinking Rehabilitation: Why Can't We Reform Our Criminals?*, also concluded that, on a general level, correctional treatment is not working.

Many reasons have been identified for this failure in corrections. The mind-set that offenders can be forced to change their lifestyle (referred to as “coercive treatment” or “mandatory treatment”) sets up a situation in which offenders may seem to adapt to the regime and change their behavioural patterns in a favourable manner, but on release immediately return to a criminal lifestyle. It has also been pointed out that custodial treatment in itself can do little about the situation in which the offender will find himself or herself on release. Indeed, as has often been noted, being sent to prison may in a variety of ways worsen the offender's ability to function as a member of society.

A major difficulty with custodial corrections in most jurisdictions is that it is under-resourced and overburdened. The availability and quality of counselling, treatment, education and vocational training (as well as other forms of support and assistance) may be severely limited. Due to the over-population of many prisons, the staff is unable to conduct a proper risk and needs assessment, much less provide an individualized treatment plan that addresses the needs of each and every prisoner. Treatment that is specifically tailored to individual offenders (or small groups of offenders with similar characteristics) in individual cultural contexts have been shown to work, but matching offenders and treatment programmes, and successfully implementing such programmes, is very resource intensive.

Without the supervision of the staff, many prisoners will be spending much of their time in a very criminogenic environment, one in which criminal values can be instilled,

³⁷ It should again be emphasized that the research has been conducted primarily in a few industrialized countries, and it is doubtful that the results can be generalized to all jurisdictions. Indeed, some jurisdictions report very low rates of reoffending for entire prison populations after offenders have been released from custodial treatment. However, generally the empirical research to verify these reports is missing.

³⁸ Martinson's conclusions have been summarized in the short phrase, “nothing works”, but Martinson himself has disavowed this. He notes that there are successful forms of treatment, but these are tailored to specific groups, and must be well resourced and managed.

new and better ways to commit offences can be learned, new criminal partnerships can be formed, and in general the offenders can become more deeply committed to a criminal lifestyle.

Poorly resourced and overpopulated prisons may furthermore provide an unhealthy environment, with gang violence, contagious diseases, substance abuse and a variety of factors that result in mental health issues.

This criminogenic prison environment can be compared to community-based sentences, which allow the offender to remain in the community. He or she can continue with family responsibilities, education, vocational training and employment. In most jurisdictions, the quality of community-based health, social services and other services may be basic (the constraint on resources is certainly not limited to prisons), but they would tend to be better than what is available in a custodial environment. Community-based sentences may also reduce the social stigma of being an “ex-convict”. Consequently, if *rehabilitation* is the goal, providing it in a community setting is more effective. As noted in a recent and rigorous meta-analysis of the available research, “Strong meta-analytic evidence indicates that community-based treatment programmes for at-risk or adjudicated individuals, especially juveniles, are more effective than those offered in secure settings.”³⁹

The belief that imprisonment is better than community-based sentences at rehabilitating offenders can thus be questioned. Once again, we need not try to draw more general conclusions. There are cases where offenders can and will benefit from being taken away from a criminal environment and provided with a variety of services. However, we should not be under the illusion that imprisonment in under-resourced and overburdened institutions in general is rehabilitative.

C. The Claim That Imprisonment Is Better Than Community-Based Sentences at Protecting the Community Through Incapacitation of the Offender

A widely held and understandable belief is that imprisonment has an *incapacitating* effect. By placing a criminally active offender who is dangerous to his or her environment behind bars, the community (or a specific victim) is made safer.

Let there be no doubt about it, serious offenders who are a threat to society or a threat to specific victims should be placed in prison: those guilty of deliberate offences involving for example serious danger to life, health and well-being, serious drug trafficking, serious theft, serious fraud, serious economic crime and serious crimes against the environment, and offences that endanger national security.

The research results on the incapacitating impact of imprisonment appear to be mixed, largely due to the methodological difficulties. Two of the main difficulties lie in predicting how many offences a prisoner would have committed (based on his or her criminal history) if he or she had *not* been sentenced to imprisonment, and the extent to which this individual would, in time, have desisted from crime.⁴⁰

³⁹ Weisburd et al., 2016, p. 77. See also pp. 94-95.

⁴⁰ See Travis and Western (eds.) 2014, pp. 140-145.

Furthermore, the belief in the incapacitating effect of imprisonment should not be exaggerated. There are at least three reasons for this. First, offenders may be able to continue to commit offences while in prison. This is true in the sense that offenders may commit, for example, violent or property offences against one another or staff members while in prison, and also because offenders may continue to plan and direct offences from behind prison walls.

A second reason has to do with the possibility (if not probability) in many cases that removal of one offender from the community may lead to him or her being replaced by another offender. This phenomenon has been noticed for example in organized criminal activity, in particular in drug trafficking.

A third reason is that most persons sentenced to imprisonment will in time be released. Although it may seem counterintuitive to say that greater use of *community-based* sentences increases the safety of the community, what is noted above of the inability of most prisons in general to rehabilitate offenders suggests that sending a person to prison may, in the long run, *decrease* community safety. While in prison, offenders in prison may learn new ways of committing crime and may form new criminal attachments. This leads to a cycle of release and imprisonment, which does nothing to build safer communities.

It can also be noted that allowing offenders to remain in the community provides them with greater opportunities to enter into community-based substance-abuse programmes, seek employment, find suitable housing and maintain their family responsibilities, all of which could further contribute to a decrease in the rate of reoffending.

Some recent studies that have examined data on how imprisonment increases the rate of reoffending have concluded that using community-based sentences instead of short-term sentences of imprisonment can indeed *reduce* the number of future offences, and in this way increase public safety.⁴¹ It is clear that this effect depends on a number of variables, in particular the sentencing practice in the jurisdiction in question. In jurisdictions which already make extensive and effective use of community-based sentences, the effect of such a shift would presumably be less than in a jurisdiction which makes heavy use of imprisonment. However, the results of the study do at least draw attention to the periodic need to reassess the approach to sentencing.

D. The Claim That Imprisonment Is Better Than Community-Based Sentences in General Prevention, By Warning Others Not to Commit Offences

Aside from the *special preventive* argument that imprisonment can deter, rehabilitate and incapacitate the individual offender, imprisonment has also been argued to have a *general preventive* impact, by dissuading other members of the community from crime by

⁴¹ For example, a major study in the United Kingdom published in 2019 concluded that replacing short sentences of imprisonment (less than six months) with community-based sanctions reduced reoffending by 13%. See <https://www.gov.uk/government/news/justice-secretary-urges-evidence-led-approach-to-cut-crime>

A study to be published in the Cambridge Journal of Evidence-Based Policing (Cowan 2019; in print) examined the use of police and court diversion in Victoria, Australia. The author calculates, on the basis of an examination of over one million cases, that for each 100 offenders diverted, eight crimes could be prevented per year. Thus, the author estimates that greater use of police diversion in Victoria could have prevented tens of thousands of offences.

example. This general preventive impact is seen to have three components: the severity, the certainty and the celerity (speed after commission of the offence) of the sentence.

Extensive research has been conducted on the correlation (and possible causal connection) between the use of imprisonment and the crime rate. Of the three components (severity, certainty and celerity), the severity of the sentence has been the easiest to change. *If* imprisonment had a clear general preventive impact, then an increase in the use of imprisonment – stipulating imprisonment as the mandatory sentence for a greater range of offences, and using longer sentences (for example through “three strikes” laws) – should result in a decrease in crime. The preponderance of evidence suggests that there may be a slight decrease, but in general this decrease is so modest that it is offset by the social, human and financial costs of the increase in imprisonment.⁴² It could also be argued on the basis of the statistical evidence that increasing the severity of sentences has the opposite effect from what was intended: placing more people into imprisonment tends to be correlated with an increase in the crime rate.⁴³ There are, furthermore, examples of countries, such as Finland, where a deliberate and considerable decrease in the use of imprisonment did not increase crime rates (as one would have assumed on the basis of a purported general preventive impact).

It has been pointed out that persons planning to commit an offence (to the extent that rational planning is at all involved) tend to discount the likelihood of detection, apprehension and conviction. Overall, in many countries the likelihood that an offender will be arrested and brought to justice for such offences as theft, burglary, drug trafficking and trafficking in persons is quite small.

The conclusion is that also the general preventive impact of imprisonment, as compared to community-based sentences, can be questioned.

E. The “Just Deserts” (Retributive) Argument: The Claim That Imprisonment Is Demanded by the Public Sense of Justice

In debates on public policy, an often-repeated argument is that the public “demands” imprisonment as a response to crime. Imprisonment has become such an entrenched institution in our society that it becomes almost a visceral response to offences. Populist politics have, moreover, encouraged such a visceral response by emphasizing individual features of particularly horrific offences, and then generalizing them to cover broader categories of offenders and offences.

Research, however, has repeatedly shown that although simple opinion polls (asking loaded questions along the line of “do you support harsher punishment for rapists and murderers?”) tend to produce predictable responses (“yes, the public does demand longer sentences”), there is considerable variety in the attitudes of different members of the public, and not one general “sense of justice”. More importantly, when respondents are provided with more detailed information regarding the background of individual defendants (criminal record, ethnic background, gender, substance abuse, social history)

⁴² See, for example, Travis and Western (ed.) 2014, pp. 134 – 140.

⁴³ This conclusion has been contested. Much depends on what time period is considered; for example, in the case of the United States, it has been observed that the increase in the use of imprisonment from the 1970s to the 1990s ultimately was followed by a fall in reported crime (beginning during the 1990s) (see, e.g. Travis and Western (ed.) 2014, pp. 33 – 69). However, if imprisonment does have a general preventive effect, this effect should have been seen in a much shorter time span.

and the circumstances of the case, the responses tend to fall more in line with current sentencing practice by the courts.⁴⁴

Along the same lines, Jan van Dijk has used the international data produced from victimization surveys to examine possible correlations between general public opinion (punitiveness) and the rate of imprisonment. He concludes that, worldwide, there is no relationship between public attitudes towards sentencing and actual imprisonment rates.⁴⁵

Indeed, van Dijk has noted that

Public opinion survey research supports the broad proposition that the public, when considering whether hypothetical cases should result in a sentence to prison, is more likely to favor a noncustodial sentence when that option is fully developed. Information at the country level has shown that public attitudes are influenced by available sentencing options. If alternative, noncustodial sentences are introduced in a country, the proportion of respondents favoring this option usually goes up sharply in the aftermath. ... In this regard, it is worth pointing out that noncustodial sentences are not widely available in developing countries. Reliance on prison sentences in developing countries seems partly determined by the lack of viable alternatives for which new institutional arrangements would have to be put in place.⁴⁶

The conclusion is that, when the public sense of justice is assessed, community-based sentences do find wide support as a response to a broad range of offences. The ability of the public to understand and accept such sentences should not be underestimated.

F. The Cost-Effectiveness of Community-Based Sentences

The implementation of any sentence brings with it a variety of costs: human, social and financial. These costs are generally factored into public policy decisions on the administration of justice, and are deemed to be offset by the benefits that are seen to result from bringing an offender to justice.

This raises the question of whether the benefits believed to come from sentences of imprisonment can be achieved through community-based sentences, but at a lower overall cost.

The *human* costs of a sentence extend primarily to the offender, but they also affect his or her family. In the case of imprisonment, the human costs to the offender include of course the loss of liberty, but separate reference could be made to the disruption of contacts with family members,⁴⁷ interruption of education, vocational training or employment, the resulting poorer likelihood of being able to return to the job market at the same level of income and financial stability,⁴⁸ and the possible worsening of health and mental health.

⁴⁴ See, for example, Kääriäinen 2018 and the literature cited.

⁴⁵ van Dijk 2008, p. 264.

⁴⁶ van Dijk 2008, p. 265.

⁴⁷ It should be noted that especially in the case of violent offenders, members of his or her family may welcome the offender being placed in prison. However, the offender will in time be released.

⁴⁸ Research and experience in many countries indicate that potential employers are reluctant to hire persons with a criminal record, and in particular persons who have been in prison.

The impact of imprisonment on family members can take many forms. Offenders who have served time in prison may have difficulties in forming relationships, and thus partnerships would tend to be unstable, leading perhaps to broken families even after the offender has been released from prison. The offender may be the main caretaker of the family, and placing him or her in prison may deprive the family of necessary parental and financial support. Imprisonment tends to weaken family bonds, and affect the well-being of children, to the extent that the children have behavioural problems, such as aggression and delinquency, as well as to drop-out from school.

These same human costs are less likely as a consequence of community-based sentences, since the offender is able to remain at home, at school and at work.

In assessing the *social* costs of sentences, it should be kept in mind that any state-imposed sanction – whether imprisonment or a community-based sentence – is part of a process of state control, a process which also includes policing, arrest of a suspect, the criminal procedure, and conviction. Policing in any society tends to have a focus on vulnerable communities, which are regarded as high-crime areas. When we consider that a sizeable proportion of prisoners come from vulnerable communities, this should raise questions about the impact of multi-layered and concentrated forms of disadvantage in these communities: high crime, but also poverty, poor health, unemployment and intrusive state control. For this reason, it is difficult, if not impossible, to try to assess the social impact resulting from sending an offender to prison instead of applying a community-based sentence.

That said, the fact that the prisons in many countries have an overrepresentation of vulnerable groups such as racial and ethnic minorities strongly suggests that imprisonment increases social, economic and political inequality in society. Those in prison tend to be poor, undereducated, unemployed, in poor health and (in some jurisdictions) disenfranchised. The experience is that the impact of imprisonment will not improve, but in practice worsen their prospects for full integration into society as law-abiding members. Although they have been guilty of offences, and should be brought to justice, the question is whether a sentence of imprisonment is the most appropriate and effective response to their offences.⁴⁹

As for the *financial* costs, and without entering into the accounting and budgetary details of prison management as opposed to the management of community-based sentences (which vary considerably for example in accordance with the level of economic development and the administrative structure in different jurisdictions), these costs include investment in construction and maintenance of prison facilities, capital costs, staff costs, the cost of various health, mental health, educational and other support services for convicted offenders, and technology (whether for example for security in prison, or for electronic monitoring devices in community-based sentencing). There are also hidden costs, such as those associated with taking an offender away from his or her employment (to the extent that offenders sentenced to imprisonment are gainfully employed).

⁴⁹ Travis and Western (eds.) 2014.

Reference should also be made to the financial benefits of correctional administration, including the economic benefit of providing employment for correctional (and affiliated) personnel, and the income from prison industries.

When looking at the bottom line, however, the financial cost per offender of implementing imprisonment as opposed to implementing a community-based sentence is many times higher.

The conclusion is that, from a costs-benefits perspective, community-based sentences can be implemented at lower costs-per-sentence than imprisonment.

G. What Do We Know About the Relative Effectiveness of Different Community-Based Sentences?

The previous section considered whether community-based sentences are more effective than imprisonment according to various criteria. A separate issue is what types of community-based sentences “work”, and why: do they deter, do they rehabilitate, do they serve as a warning to others in the community, do they protect the victim and the other members of the community, does the public regard them as appropriate and are they cost-effective?

This is a large and complicated issue, and it is made more complex by the diversity of types of sentences, the diversity of jurisdictions and the diversity of offenders who are sentenced. What is more, there is perhaps surprisingly little rigorous research on the effectiveness of community-based sentences, and caution has to be used regarding the extent to which research results in one jurisdiction can be generalized to apply elsewhere.

When speaking about community-based sentences, however, the discussion can and should be largely limited to those sentences that are intended to have a *special preventive* impact on the offender.⁵⁰ We can leave aside, for example, monetary fines, which are primarily intended to have a *general preventive* effect.⁵¹

It should first be noted that most offenders will not necessarily commit new offences. The criminological literature on the prediction of reoffending refers to the concepts of “false positives” and “false negatives”. In this context, a “false positive” refers to an individual who, according to risk assessment, is presumed to be likely to reoffend, but in fact would not commit a new offence. A “false negative” in turn, is an individual who is presumed to become law-abiding, but would in fact commit a new offence (an occurrence which may largely be due to situational circumstances). Although in general, risk assessment tools have had poor success in predicting future behaviour, what we do know is that it is easiest to predict correctly who would *not* offend than it is to predict who *would* commit a new offence. Out of a cohort of, for example, one thousand persons who have committed an offence, it is easier for us to predict with relative assurance the several hundred who will not commit a new offence, than it is for us to predict the perhaps one hundred who will commit a new offence.⁵²

⁵⁰ It should be recalled that some sentences or measures, such as restorative justice processes, are designed to have an impact also on other persons affected by the offence.

⁵¹ Fines, however, cannot be totally ignored when discussing the appropriateness of different sanctions. If an offender is unable to pay the fine, he or she may be sentenced to prison for non-payment.

⁵² Longitudinal studies have generally suggested that a small percentage of a population cohort are “hard-core offenders”, who commit the majority of offences, both petty and serious.

Many offenders come from a community that is beset with multiple social problems: poverty, unemployment, lack of economic opportunities, lack of basic services, family breakdown, marginalized populations and poor social cohesion. If the goal is the prevention of reoffending, and thus also the protection of the community, also community-based sentences should seek to come to grips with these problems.

A recent meta-analysis of the available research on “what works” in community-based sentences can be summarized for the present purposes as follows. Those sentences that seek to strengthen informal and supportive social controls and reintegration, and to maintain or repair social bonds (such as restorative justice programmes), have a favourable and statistically significant effect. The authors suggest that this is because such sentences are highly specific and targeted, and they involve one-on-one interactions and the building of personal relationships. On the other hand, sentences that simply place the offender in the community without seeking to provide him or her with a way to internalize or restore conventional values and relationships do not have an appreciable special preventive impact on the offender. The authors conclude by saying that this suggests “that interventions should be implemented at a high level of focus – whether at small places or with high-risk individuals – and incorporate specific risk factors.”⁵³

Along the same lines, the authors conclude that diversion with services is distinctly more effective than simple diversion.⁵⁴

The authors further conclude that electronic monitoring, when compared with traditional or intensive probation, or even with incarceration, was *ineffective* in preventing reoffending. They argue that this is due to the fact that electronic monitoring is based on formal social control and surveillance.⁵⁵ This is echoed by Graham and McIvor, who review international experiences with electronic monitoring, and conclude that

Overall, the electronic monitoring programmes and approaches which are shown to reduce reoffending during and/or after the monitored period are mostly those which include other supervision and supportive factors (e.g., employment and education, social capital) associated with desistance. The effective approaches discussed here have developed on the basis of high levels of integration with supervision and support from Probation Officers and other staff and services. In other words, the more effective programmes and approaches, in Europe in particular, are those where EM is not a stand-alone measure.⁵⁶

Overall, Weisburd et al. conclude,

⁵³ Weisburd et al. 2016, pp. 97-98. The approach used by Weisburd et al. is based on a rigorous assessment of the available research, and, using the same method developed in Sherman et al. 1997, divides measures into what works, what doesn't work, what is promising and what requires more research.

⁵⁴ Weisburd et al. 2016, p. 99.

⁵⁵ Weisburd et al. 2016, p. 100. Also, Dünkel 2015 concludes that the research results on the contribution of electronic monitoring to the prevention of reoffending is not evident, and promising only in combination with social support by the probation and aftercare services.

⁵⁶ Graham and McIvor 2018.

...the potential crime-suppressing elements of the community, such as positive social controls, are not necessarily leveraged by simply placing an offender in the community and assuming that the desire to remain there will act as a sufficient deterrent to recidivism. The more successful community programs suggest that a targeted and focused approach may be required.⁵⁷

This targeting and focusing revolves around the nature of the offence and the offender. For example, substance abusers, offenders with mental health problems, offenders guilty of domestic violence, and sex offenders may respond well to community-based sentences that contain a treatment and support component.

III. PROMOTING WIDER USE OF COMMUNITY-BASED SENTENCES⁵⁸

There is a strong interest throughout the world in replacing imprisonment with community-based sentences. The repeated resolutions and declarations of the United Nations Congresses on this subject, adopted by consensus, show that all member states are agreed – at least in principle – on the need to reduce imprisonment and to expand the use of effective community-based sentences. Even so, when the United Nations adopted the Tokyo Rules in 1990, and asked member states to provide data on the status of community-based sentences, many replied that appropriate community-based sentences are simply not available, or that the available community-based sentences are used far less than they might be or, when used, are used as substitutes for other community-based sentences and not for imprisonment (the so-called net-widening effect).

The available data presented in this paper on the use of community-based sentences around the world suggests that member states continue to meet with these same challenges.

The main reasons for the inconsistency between stated goals and actual practice are to be found in law, sentencing constraints, policy, resources and attitudes. These problems cannot be dealt with in isolation from one another. The use of community-based sentences can be expanded effectively only if all the problems are recognized and dealt with. The steps that should be taken on different levels and by the different stakeholders involved are outlined in the following.

STEP 1 Ensure that the law clearly provides an adequate range of community-based sentences

In most jurisdictions, the courts can impose only those sentences that are expressly provided in statutory law. In these systems, the first step must be to ensure that statutory law provides for an adequate range of community-based sentences, and outlines the procedures and conditions for their imposition and implementation. The legislation should specify the purposes of the sentence and the expectations of the legislator as to the range of offences for which the sentence may or should be used. This would help judges in determining the proper place of the measure in the scale of penal values.

⁵⁷ Weisburd et al. 2016, p. 100.

⁵⁸ This section of the paper is an updated and abridged version of Joutsen 1990.

Another statutory measure would be a requirement that the court justify why it imposes a sentence of imprisonment rather than a community-based sentence. Such a measure would compel the court to consider why none of the available community-based sentences are appropriate in the case at hand. England and Wales has established a Sentencing Council, which has issued mandatory guidelines for courts on the imposition of community-based sentences.⁵⁹ These provide, *inter alia*, that:

A custodial sentence must not be imposed unless the offence or the combination of the offence and one or more offences associated with it was so serious that neither a fine alone nor a community sentence can be justified for the offence.

There is no general definition of where the custody threshold lies. The circumstances of the individual offence and the factors assessed by offence-specific guidelines will determine whether an offence is so serious that neither a fine alone nor a community sentence can be justified. Where no offence specific guideline is available to determine seriousness, the harm caused by the offence, the culpability of the offender and any previous convictions will be relevant to the assessment.

The clear intention of the threshold test is to reserve prison as a punishment for the most serious offences.⁶⁰

When a new community-based sentence is introduced, it may be difficult for the legislator and/or the court to assign its appropriate place in the scale of punishment.⁶¹ Is 40 hours of community service the equivalent of one month of imprisonment, for example? Is it more or less severe than a suspended sentence of a certain length? In sentencing, the court must make a choice among a number of sentences using multiple criteria which relate the seriousness of the offence to what are deemed to be the relevant characteristics of the offender and the penal value of the community-based sentences available, either singly or in combination.⁶²

The introduction of community-based sentences is therefore not enough. The courts should be given clear guidance on how the new custodial sentences fit in with present sentencing policy. This guidance may be provided not only by the legislator, but also by judicial practice (court precedents), and by sentencing guidelines adopted, for example, by the Supreme Court, judicial conferences or professional associations.

⁵⁹ <https://www.sentencingcouncil.org.uk/about-us/>.

⁶⁰ *Ibid.*

⁶¹ Although in theory the legislature could provide specific sentencing guidelines, the currently existing guidelines primarily deal with the length of sentences of imprisonment, and at most with the borderline between imprisonment and suspended sentences (probation). The most widely known guidelines are the Minnesota Sentencing Guidelines, which stipulate a “presumptive sentence” for offences. These have been applied since 1980. The most recent version was adopted in August 2019; Minnesota Sentencing Guidelines 2019. The basic grid can be found on p. 79.

⁶² The Sentencing Council for England and Wales has issued very detailed and mandatory guidelines on a broad range of offences. The Sentencing Council’s guidelines for the imposition of community and custodial sentences (Sentencing Council 2016) provides clear guidance for example on the imposition and length of community service orders, the imposition of electronic monitoring orders, the imposition and amount of fines, as well as the imposition of custodial sentences.

Where this would not be deemed a violation of the principle of the separation of the executive and the judiciary, the executive branch could consider the possibility of providing the court with annotated information on current court practice. This can be done in the form of a publication giving the “normal” sentencing range for the basic types of offences, with indications of how, in court practice, aggravating and mitigating circumstances have affected the sentence. Such information would simply be provided to the courts as a tool, showing the judges what other courts have done in similar cases.

Since the selection of the sentence is often determined by the motion of the prosecutor, or by the way in which the case is presented, also prosecutorial guidelines could be developed to identify cases which would seem suitable for the imposition of community-based sentences.

STEP 2 Review substantive criminal law to ensure that it is in line with the fundamental values of society

Changes in society are often reflected in changed attitudes towards certain behaviour. A review of criminal law may show that existing penal provisions on certain offences were passed at a time when these offences were deemed particularly reprehensible; in the light of present attitudes, a community-based sentence may well be deemed more acceptable and appropriate than imprisonment. The public attitude towards the use of imprisonment may have changed; in many countries, its “penal value” has increased. Where imprisonment at one time was imposed in decades, it may now be imposed in years; where it was once imposed in years, it may now be imposed in months or even in weeks.

At the lower end of the scale of offence seriousness, the possibility of imprisonment could be eliminated entirely through decriminalization and depenalization. Such “offences” as vagrancy and public drunkenness have been decriminalized in many countries. Although these offences are rarely imprisonable offences in themselves, the persons who are fined are usually unable to pay any fines imposed, or because of their circumstances would often be in violation of conditions imposed on, for example, community service. Such non-payment or technical violation often leads to imprisonment. In this way, decriminalization of petty offences reduces the use of custodial measures.

STEP 3 Key stakeholder groups should be provided with information and training on the functions and use of community-based sentences.

Even if the law provides for a wide range of community-based sentences, and even if the courts have clear guidelines on how these sentences should be imposed, community-based sentences will not be used as long as the courts – and other influential groups of stakeholders – do not consider them effective and appropriate in dealing with offenders. The preamble to the Tokyo Rules lists as such key groups law enforcement officials, prosecutors, judges, probation officers, lawyers, victims, offenders, social services and non-governmental organizations involved in the application of community-based measures.

Ensuring that judges and other key stakeholders understand the purpose and rationale of community-based sentences and that they are favourably disposed towards using them requires providing them with information and training. The key groups should be made aware of the general benefits of community-based sentences and the general drawbacks of wide use of custodial sentences. They should be made familiar with the existing community-based sentences and their specific purposes; they should be made familiar with sentencing and enforcement. They should be trained in the basic principles of law, criminology and psychology (as well as other disciplines) required in their respective roles. Finally, they should be made familiar with the rules, procedures and practices of the various other services involved, in order to make it easier for them to understand the problems involved in community-based measures, and the possibilities of working together to solve these problems.

The credibility of community-based sentences can also be enhanced if they are not seen to be excessively lenient. Visibly punitive measures (such as electronic monitoring) might therefore be an attractive option in some jurisdictions. Even terminology might be used to enhance the perception of community-based sentences as punitive. Instead of speaking of the “waiving of measures” or “absolute discharge”, for example (both terms may imply to the general public that “nothing happened”), one might speak of “punitive warnings” or “penal warnings”.

STEP 4 Criminal justice decision-makers and representatives of community-based service agencies should work in closer cooperation in order to identify and respond to the needs of offenders, in particular members of vulnerable populations, such as racial and ethnic minorities, alcohol and drug users, the homeless and foreigners

One theme that has been repeated again and again in the debate over the greater efficacy of community-based sentences over imprisonment is that many offenders have a large range of challenges, ranging from health and mental health issues, lack of education and vocational training, lack of a permanent home, to difficulties in forming stable relationships.

Merely sentencing an offender to a community-based sentence (unless the sentence itself addresses underlying needs, such as with a community-based substance treatment order) will do little to help the offender in responding to these challenges. For this reason, the various agencies as well as appropriate non-governmental organizations (including peer-support groups) and even the private sector, should find ways of working in closer cooperation with criminal justice agencies, and of doing outreach work towards offenders.

Criminal justice practitioners (the police, prosecutors and judges) will be among the first to point out that they are not “social workers”, and that they do not have the training, resources or time needed to provide offenders with various forms of assistance. That said, methods of referrals (with due respect to issues of consent and privacy) can be developed, ranging from simply mentioning to appropriate offenders what services are available and how to use them, through provision of brochures, to the establishment of community liaison offices in connection with police stations or courts to serve as a “one-stop shop” for offenders.

A more direct way of promoting cooperation is to stipulate conditions on police, prosecutorial and court dispositions requiring that the offender be in contact with specific community-based services.

STEP 5 Secure a steady resource base for personnel, training and facilities

The success of community-based sentences in practice depends on the availability of resources for their implementation. Just as imprisonment requires the prison facilities, personnel and a prison programme, for example, probation requires a suitable infrastructure for the arrangement of supervision, and community service requires not only a suitable organization but also designated places of work.

The most efficient route to increase the credibility of community-based sentences and thus promote their use is that the state and local community provide the necessary resources and financial support for the development, enforcement and monitoring of such sentences. Particular attention should also be paid to the training of the practitioners responsible for the implementation of the sentences and for the coordination between criminal justice agencies and other agencies involved in the implementation of these sentences in the community.

STEP 6 Ensure a continuous research component in planning

One area of concern relates to the possible dysfunction of wider use of community-based sentences, in particular the so-called net-widening effect. Statistical evidence from various countries clearly suggest that community-based sentences are either used far less than they might be or, when used, are used as substitutes for other community-based sentences and not for imprisonment. In addition, when suspended sentences are pronounced, the period of imprisonment imposed may be longer than if an unconditional sentence to imprisonment were to be used. In the event of activation of the original sentence, the offender can therefore go to prison for longer than would otherwise have been the case.

Such dysfunctions of the greater use of community-based sentences may detract from the benefits, or even prove to be so serious that rational criminal policy is endangered. Research has an important role in identifying and suggesting ways to overcome these challenges.

In regard to sentencing, research is needed on the factors considered by the sentencing judge or tribunal. Unexpected factors may have a decisive influence on the sentencing process. The little research that is available has suggested, for example, that some judges will not consider community-based sentences that require a social enquiry report. Further in regard to sentencing, it is possible that the imposition of community-based sentences can be made on discriminatory grounds, as has been argued to be the case with sentencing to imprisonment.

One area that is related to research on sentencing concerns attitudes. Certainly, the attitudes of the sentencing judge affect his or her decisions on what available options to use. As important as the attitudes of the sentencing judge are the attitudes of other persons

involved in the implementation of community-based sentences. In particular, the degree to which a community-based sentence is accepted by professionals as well as by the community influences the probability that this sentence will actually be applied.

Research on changes in attitudes (showing the causes and extent of such changes) might be of assistance in the planning of the introduction or expansion of community-based sentences. A key factor in the success achieved with the use of any community-based sentence is the extent to which the policymakers, courts, other practitioners and agencies, and the community are provided with evidence-based data on the effectiveness of this sentence.

IV. CONCLUSIONS

The assumption that imprisonment fulfils the various functions of punishment and thus is suitable for medium level and more serious offences has resulted in a general growth in the number of prisoners. However, societies around the world are becoming increasingly aware that the use of imprisonment has significant human, social and economic costs. With the increase in the number of prisoners, prisons are becoming overcrowded. Since the prisons themselves are often outdated, under-staffed and under-resourced, hundreds of thousands of prisoners around the world are being “warehoused” in poor conditions that impair their physical and mental health, and make rehabilitation programmes difficult.

In adopting the Tokyo Rules almost thirty years ago, the member states of the United Nations agreed that the use of imprisonment should be lessened, and the use of community-based sentences should be expanded.

This review has questioned the basis underlying the predominant role of imprisonment in our criminal justice system. When assessed in the light of the different functions of sentencing (deterrence of the offender, rehabilitation, general prevention, “just deserts”, even incapacitation), we can conclude that imprisonment on a whole has not been able to deliver in accordance with what policymakers and the public have been expecting. In many cases, community-based sentences can fulfil the same functions at less human, social and financial cost. We need to reassess the respective role of imprisonment, and of community-based sentences.

In 2015, the General Assembly of the United Nations adopted a resolution that should cause us to seriously rethink our dependence on imprisonment, and in turn look for a greater role for community-based sentences: the 2030 Agenda for Sustainable Development.

A fair, rational, humane and effective criminal justice system is important in its own right. It protects societies against crime. It brings offenders to justice. It ensures that the rights of the victim are respected and protected. When it fulfils its function fairly, it plays an important role also in ensuring that the conditions are in place to allow for sustainable development.

Our criminal justice system is therefore quite properly seen in the light of Goal 16 of the Sustainable Development Goals, which deals with the promotion of a just, peaceful and inclusive society through peace, justice and strong institutions. It has been said many times that a strong legal system, including the criminal justice system, is a critical enabling factor in reaching the other Goals. When the rule of law is lacking, the Sustainable Development Goals that we are seeking are undermined. At the same time, equitable and predictable forms of justice are fundamental to building societies that have a strong foundation in the rule of law, and that facilitate growth and development.

All the Goals, however, are cross-cutting. We should see Goal 16, and the operation of the criminal justice system in the wide sense, in the broader context of the 2030 Agenda. This means in practice that we should take into consideration how the decisions that criminal justice practitioners make could have an impact on the different aspects of the life of the victim, the offender and the community – on physical and mental health, on education, on employment and economic survival, on the rural or urban environment, and so on. For example, when a police officer decides to arrest a suspect (instead of letting him or her go with a caution), this may affect the suspect's employment or education. If a judge decides to impose a sentence of imprisonment, this decision may remove the only provider from a family, thus leading to the break-up of the family, with a knock-down effect on the education and future development of the children.

This should not be understood as criticism of the decision to arrest, or of the imposition of the sentence of imprisonment. These decisions may be justified in themselves, and may even, under the circumstances in the case, be mandatory under the law. Imprisonment has a definite and important role in protecting victims and society, and in responding to offenders who have committed serious offences, and who continue to pose a great threat of harm.

However, it is important to realize that decisions in the criminal justice system do have consequences in different sectors of life and society, and that the decision-maker could and should consider whether the decisions could be made differently, in a way that promotes sustainable development more broadly, while still ensuring that the purposes of criminal justice are met. Moreover, judges and decision-makers often have discretion in making their decision, and in weighing whether or not to opt for a custodial or a community-based sentence.

When we look at who are in our prisons, we find that they tend to be members of vulnerable populations, such as racial and ethnic minorities, substance abusers and migrants. Because of our over-reliance on prison, in many communities a considerable number in particular of young men belonging to such vulnerable groups are in prison, or have been in prison and have to deal with the stigma of being ex-prisoners (a particular difficulty in seeking employment) and possibly also the deprivation of certain rights, such as the right to use public housing.

Having served time in prison deepens their problems and contributes to their marginalization. This in turn, breeds poverty (hampering progress on Goal 1 of the SDGs), which is one of the major root causes of crime and violence. Marginalization also often results in poor nutrition (Goal 2), ill health (Goal 3), illiteracy (Goal 4) and other challenges to sustainable development.

Because non-custodial sentences and measures do not restrict the liberty of offenders as much as imprisonment, they allow offenders to continue their responsibilities as a family member and a member of the community, and to continue their education (Goal 4) or employment (Goal 8) without interruption. Moreover, offenders can continue to utilize the various social welfare and health services (including substance abuse programmes) which are easier to provide in the community than in custodial environments (Goals 1 and 2).

Further reasons for the promotion of non-custodial sentences and measures are that they help to reduce inequality (Goal 10) and strengthen the inclusiveness, safety, resilience and sustainability of the community (Goal 11).

The strong interest throughout the world in replacing imprisonment with community-based sentences, noted at the outset of this paper, can be seen in various trends. The strength of these trends varies from one jurisdiction to the next:

- a diversification of community-based sentences through, for example, adoption of new community-based sentences, increased possibilities for adding conditions to existing community-based sentences, and increased possibilities for combining different community-based sentences;
- the diversification of community-based sentences has been paralleled in some countries by an extension of community-based sentences to a greater range of offences and offenders;
- a greater use of the classical community-based sentences such as the fine and probation;
- development of community-based sentences that include one or a combination of such components as work (as in community service), compensation/restitution, and treatment;
- a renewed interest in traditional indigenous measures (such as restorative justice processes), and on sentences that rely on traditional infrastructures.

Despite these developments, a gap remains between policy and practice regarding community-based sentences. This gap is reflected on several levels:

- On the statutory level, many states report that they do not have an appropriate range of community-based sentences, or that the legislation does not provide clear guidance on the purposes, imposition or implementation of these sentences;
- On the level of sentencing practice, the gap is reflected in the continuing predominance of imprisonment as the “norm”, as the main measuring stick in sentencing. Community-based sentences are either used far less than the law would allow, or they are used as alternatives for other community-based sentences;
- On the level of resources, the implementation of some community-based sentences remains hindered in many areas because of the absence of the necessary personnel, support structures and funds.

The gap can be diminished only through a change in attitudes. The legislator should be made aware of the need for legislation that supports the goals of community-based sentences. The judge and prosecutor (as well as the other practitioners involved) should be made aware of the need to seek the appropriate community-based sentences and to apply them whenever possible. Those who decide on resources should be made aware of the benefits to be derived through expanded use of community-based sentences, and the importance of well-staffed, well-trained and well-resourced community-based support services working in close cooperation with the criminal justice system. Where an offender does have a need for treatment, criminal justice practitioners should seek to ensure that he or she is referred to the proper agencies for help. Finally, the community should be made aware of the importance of the reintegration of the offender into the community for the benefit of the offender, the victim and the community as a whole.

Promoting a greater role for community-based sentences is part of sustainable development.

Appendix 1

Statistical data on the use of selected community-based sentences in Europe

The following three tables have been prepared on the basis of the Annual Penal Statistics of the Council of Europe (SPACE II). Each table contains data for 1999 (the first year for which this data is available), 2007, 2013 and 2017 for selected European countries.

There is a structural difference between 1999 on one hand and the other three years on the other: the data for 1999 refer to the number of community-based sentences given, while the data for 2007, 2013 and 2017 refer to the number of persons starting to serve such a sentence.

Please note that the number of persons starting to serve a sentence during a year – referred to in SPACE II as the “flow” – is a different indicator from the number of persons serving a sentence on a given day – referred to as the “stock”. Thus, these figures cannot be compared with the “stock” figures provided by the Global Community Corrections Initiative that are given in Table 1 in the preceding text.

These data should be used with caution. It can be seen that data is often missing. For example, in Table 2, only Denmark and Ireland have provided data for all four years.

A second observation is that there appear to be large differences in the data from year to year coming from some of the individual countries. For example, the data for the Netherlands in the Table 3 appears to show that almost 37,000 persons began to serve a community service order in 2007, and over 32,000 did so in 2017, but in 2013 this was the case with only 200 persons. Such huge swings can be the result of major changes in legislation or in the organization of community service in the country in question, but they can also be because the person(s) responding from these countries used different interpretations of community-based sentences from year to year, or that there was a simple error in filling out the questionnaire or in complying the resulting table.

Table 2. Annual number of probation orders ordered (1999), number of persons that have started to serve probation (2007, 2013 and 2017)⁶³

country	1999	2007	2013	2017
Austria	-	14,974	1,705	1,984
Denmark	1,702	1,289	1,822	1,290
England & Wales	58,368	-	43,134	42,520
Finland	1,297	-	-	575
France	62,111	-	69,642	67,385
Germany	-	-	94,300	80,111
Hungary	-	1,891	2,653	-
Ireland	1,500	163	732	615
Italy	-	2,779	6,171	8,691
The Netherlands	***	13,073	7,930	8,398
Norway	-	528	589	610
Poland	128,561	263,761	255,055	-
Portugal	-	1,595	8,739	9,387
Scotland	6,028	-	-	-
Spain	***	-	28,225	13,503
Sweden	5,258	-	***	***
Switzerland	2,096	175	396	563

Table 3. Annual number of community orders ordered (1999), annual number of persons who have started to serve community service (2007, 2013 and 2017)⁶⁴

country	1999	2007	2013	2017
Austria	***	3,187	4,249	3,784
Denmark	970	3,259	3,617	4,396
England & Wales	49,597	-	30,278	22,177
Finland	3,630	2,960	2,106	1,465
France	23,368	-	30,809	32,116
Germany	-	-	-	-
Hungary	-	5,178	13,537	-
Ireland	1,342	1,516	2,257	2,215
Italy	***	38	8,903	9,335
The Netherlands	17,290	36,928	200	32,306
Norway	-	2	2,228	1,980
Poland	-	103,406	-	-
Portugal	-	2,724	14,318	10,057
Scotland	6,200	-	7,800	9,888
Spain	-	-	151,354	84,073
Sweden	3,066	4,939	5,814	4,341
Switzerland	2,096	5,354	2,065	33,055

⁶³ (source: SPACE II; selected countries that have provided data for some years) (- = data not provided; *** = sentence does not exist / not applicable).

⁶⁴ Source: SPACE II; selected countries that have provided data for some years (- = data not provided; *** = sentence does not exist / not applicable).

Table 4. Annual number of electronic monitoring orders (1999), annual number of persons who have started to serve an electronic monitoring order (2007, 2013 and 2017)⁶⁵

country	1999	2007	2013	2017
Austria	***	***	724	891
Denmark	***	1,103	2,512	2,163
England & Wales	661	-	5,058	7,994
Finland	***	***	223	241
France	***	7,900	27,105	29,569
Germany	***	-	42	28
Hungary	-	***	***	-
Ireland	***	-	-	***
Italy	***	***	***	-
The Netherlands	47	916	***	***
Norway	***	0	1,889	3,265
Poland	***	***	16,927	-
Portugal	-	585	185	294
Scotland	206	-	1,500	2,900
Spain	0	2,904	2,344	2,343
Sweden	3,529	3,364	1,987	1,642
Switzerland	***	463	196	235

⁶⁵ Source: SPACE II; selected countries that have provided data for some years (- = data not provided; *** = sentence does not exist / not applicable).

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