

# TECHNIQUES IN ENHANCING COMMUNITY-BASED ALTERNATIVES TO INCARCERATION — A EUROPEAN PERSPECTIVE

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The techniques in enhancing community-based alternatives to incarceration are often divided into “front door policies” and “back door policies”. Another way would be to distinguish measures to be applied (1) before, (2) during and (3) after the court proceedings. This presentation follows the latter logic, however, with some reservations: Firstly, measures which have similar names may be placed in *different phases in different jurisdictions* (for example community service). Secondly, many of the newly developed community sanctions fail to follow the logic of these three phases, because they can be applied *either before, during or after the trial* (for example restitution).

## I. PRE-TRIAL PHASE

### A. Prosecutorial Discretion

#### 1. The Changing Role of the Prosecutor

The role and powers of prosecutor vary in different jurisdictions. In some countries the prosecutor is given a wide discretion over the consequences of an offence; in other jurisdictions his/her main task is to bring the offenders before the court. The trend in many European countries leads to the widening of the prosecutorial powers, giving the prosecutor in many respects a position similar to that of the judge.

*The types of prosecutorial decisions.* - The prosecutor’s traditional role as an agency providing alternatives to custody has been to act as a “filter” in diverting the cases out of the formal flow of criminal justice by means of *non-prosecution*. This is the case when the prosecution service decides to waive the case and not to proceed further with it (even if there was enough evidence to press charges against the defendant). The offence can also be *dealt with outside formal court procedures*. For example, the offence can be diverted to a settlement or a reconciliation between the victim and the offender, without the further involvement of the criminal justice system. Thirdly, the prosecutor may have the power to impose a *minor type of formal sanction*, such as a caution, an oral or a written admonition, a small fine and sometimes a compensation order (for example transaction in the Netherlands, see below). The fourth group of measures consist of other types of sanctions, such as supplementary conditions attached to non-prosecution, (agreement based) social training courses (for the juveniles) and sometimes even community service.

The following concentrates on non-prosecution as a means to divert cases from the court proceeding. Other measures are dealt with separately in chapter II below.

*Legality versus opportunity principle.* - Two separate principles provide the legal basis for diversionary policies: the legality principle and the opportunity (expediency) principle.

According to the *legality principle*, prosecution must take place in all cases in which sufficient evidence exists of the guilt of the suspect (and in which no legal hindrances prohibit prosecution). The *principle of opportunity* grants the prosecution service discretion over the prosecutorial decision, even when proof exists as to the occurrence of the criminal offence and the identity of the offender.

Even if the distinction is clear in principle, in practice the differences may remain smaller. In almost all countries, following the principle of legality, there are separate rules allowing exceptions, usually regulated in specific legislative grounds of non-prosecution. Two countries – the Netherlands and Finland – may serve as examples here.

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2. Prosecutorial Discretion under the Principle on Expediency (The Netherlands)

*The scope of non-prosecution.* - Netherlands is among the countries where prosecutors have traditionally had substantial powers to divert cases from the criminal justice system. The expediency principle, expressed in the Code of Criminal Procedure Section 167 subsection 2 of the Dutch Code of Criminal Procedure reads: “the public prosecutor shall decide to prosecute when prosecution seems to be necessary on the basis of the result of the investigations. Proceedings can be dropped on grounds of public interest”.

Non-prosecution may be unconditional or conditional. In the latter case (which has no foundation in the law) the prosecutor may impose conditions similar to those attached to a suspended sentence (*Tak* 2002 p.16 and below). Normally, however, the decision on non-prosecution is not accompanied by such conditions.

In the early 1980s, approximately 28% of all crimes were dealt with by non-prosecution. The general tightening of penal policy was reflected also in prosecutorial practice, and in 1997 only 5% of criminal cases received unconditional non-prosecution. However, a part of the previous cases of unconditional non-prosecution were replaced by conditional non-prosecution and a specific arrangement, called transaction (*Tak* 2002 p.18-19).

*Transaction.* - Transaction is a form of diversion in which the offender voluntarily pays a sum of money to the Treasury, or fulfils one or more (financial) conditions laid down by the prosecution service (*Tak* 2002 p.19 ff). The opportunity to settle criminal cases by way of a transaction has a long tradition in the Dutch criminal justice system. Earlier this opportunity to settle a case financially was reserved for misdemeanours in principle punishable only with a fine. In 1983 the scope of transactions was extended to crimes which carry a statutory prison sentence of less than six years. The conditions set by the prosecutor only concern the sum of money to be paid (see closer *Tak* 2002 p.20).

The acceptance of the prosecutor' s offer to settle a case is, as a rule, beneficial for the offender: he avoids a public trial, the transaction is not registered in the criminal record, and he/she no longer has to worry about the sentence. Transactions save the prosecution service and the offender time, energy and expenses, and protect the offender against stigmatisation. On the other hand, by accepting the transaction he gives up the right to be sentenced by an independent court with all legal guarantees.

The almost unlimited power given to the prosecution service to settle criminal cases by a transaction has also been criticised. According to the critics, the system increases opportunities for plea bargaining, it undermines the legal protection of the accused, favours certain social groups, and entrusts the prosecution service with powers which should remain reserved for the judiciary (see *Tak* 2002 p.20-21).

Despite the criticism, the introduction of the broadened transaction has been a great success. More than 35% of all crimes prosecuted by the prosecution service are now settled out of court by a transaction. The lack of uniformity in the practice has, however, caused some problems. The Board of prosecutor-generals has also issued guidelines for the common crimes. Despite this, there are considerable variations in the frequency of the application of transaction and the level of transaction sums (mainly because the guidelines offer such a broad latitude). Since 1993, the police may also offer transactions for certain categories of crimes (such as shoplifting or drunk driving, see *Tak* 2002 p.21)).

3. Prosecutorial Discretion under the Principle of Legality (Finland)

*The basic rules on prosecution.* - In Finland, violations against criminal law are divided in two categories as far as the right to prosecute is concerned. In *complainant offences* the prosecutor has the power to prosecute the offender only on the request of the complainant. However, the majority of offences are subject to public prosecution (non-complainant offences). In this group the prosecutor is obliged to bring the offender to justice (raise a charge) as soon as there are “probable reasons” to suspect that he or she is guilty of an offence.

The rigid requirements of the principle of legality are being softened through the provisions of non-prosecution. Traditionally, the scope of non-prosecution has been quite narrow, as compared to earlier

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Dutch figures. In the beginning of the 1980s, only about 2% of criminal cases led to non-prosecution. However, in 1991 the scope of non-prosecution was extended through a law reform which tripled the number of offences diverted from the court proceedings due to non-prosecution.

*General conditions for non-prosecution.* - The conditions for non-prosecution are strictly defined in the law. Major grounds for a waiver are the *petty nature of the offence* and the *young age* of the offender. The prosecutor can waive the prosecution (1) when a penalty no more severe than a fine is to be expected for the offence, when, assessed as a whole, considering the offence's harmfulness or the culpability of the offender, the offence is to be deemed petty; and (2) for an offence committed by a person under 18 years of age, when a penalty no more severe than a fine or a maximum six months imprisonment is to be expected for the offence, and the offence is deemed to be the result of thoughtlessness or imprudence rather than heedlessness at the prohibitions and commands of law.

Non-prosecution may also be based on *reasons of equity or criminal policy expediency*. According to the law, "unless an important public or private interest requires otherwise, the public prosecutor can waive the prosecution when trial and punishment are to be deemed unreasonable or pointless, considering the reconciliation between the offender and the complainant, or other action taken by the offender to prevent or remove the effects of his offence, his personal circumstances, other consequences of the offence to him, actions by the social security and health authorities, or other circumstances."

This section covers non-prosecution on the basis of reconciliation and mediation (as well as other reparative actions taken by the offender). Victim-offender-mediation was specifically added in the law in 1995. Since then it has quickly gained more and more importance as a grounds of non-prosecution.

*Non-prosecution on the basis of mediation.* - In complainant offences restitution will often put an end to the matter even before it gets into the court. In non-complainant offences the prosecutor can drop the charge, if prosecution would seem either unreasonable or pointless due to a reconciliation and non-prosecution does not violate "an important public or private interest." The latter condition excludes more serious offences from non-prosecution. If non-prosecuting would endanger the victim's right to get his/her damages compensated, this option would - in general - be out of the question.

There are no formal conditions as regards the form, content or fulfilment of the mediation agreement. Mediation may well serve as a reason for non-prosecution, even if the process is still unfinished. Neither does the law require that the offender has succeeded in his efforts of reconciliation: An honest and serious attempt by the offender will suffice. In practice, of course, completed and successful mediation has more weight in the decision.

Also in these cases, non-prosecution is always discretionary. Unlike in some other countries, mediation does not automatically divert the case from the criminal justice system. This may narrow the diversionary effect of mediation. On the other hand, it also prevents mediation from becoming restricted to trivial cases (the ones in which the prosecutors would be willing to drop the charges, if the case was mediated). Mediation as such will be dealt in more detail below (chapter II..H).

## **B. Pre-Trial Detention**

### **1. Means for Reducing the use of Pre-Trial Detention**

Among the key measures in the "front end" of the system is pre-trial (or remand) imprisonment. In many countries a large proportion (or even the majority) of those held in prison are on remand. The share of non-convicted prisoners as a proportion of the total prison population tends to be relatively high in many Asian countries (*Kitada 2001*).

Too often suspects are detained in prison almost automatically once they are arrested. Still, pre-trial imprisonment is often unnecessary. Legislative arrangements are needed:

1. to ensure that there are *appropriate restrictions on the circumstances in which pre-trial imprisonment can be used*,

2. to ensure that when a person is held in pre-trial imprisonment *the period is as short as possible*, and
3. to provide *other means* to fulfil the functions of pre-trial detention.

1. Pre-trial detention should not be an automatic option. Its use should be limited to cases *where offences are particularly serious* or where for some other reason *it is clearly contrary to the public interest to allow the suspect to remain in the community*. The simplest way of restricting the use of pre-trial detention would, thus, be to raise the minimum punishment stipulated and to loosen the other criteria and pre-conditions of pre-trial detention. Since pre-trial detention is generally tied to the seriousness of the charge, one way of reducing its use would be to restrict “over-charging” (charging for a more serious offence than the case at hand would justify).

2. The length of the pre-trial period should be kept as short as possible. The law should contain solid guarantees that the case is tried in due time. In a case where the process takes a longer time, the preconditions of pre-trial detention should be examined within short intervals by the court (and preferably not by the police). The overall use of pre-trial detention might also be decreased by stipulating a maximum period of detention after which the suspect must be released unless convicted.

In many countries, the investigation procedures are long and even when a decision has been taken to prosecute there are delays in arranging the court hearing because of a backlog of cases. Legislation can be introduced to shorten investigation procedures and can also be used to tackle the factors that create the backlog of cases. Since pre-trial detention is used also in order to ascertain the identity of the suspect, the length of the detention can be reduced by increasing administrative efficiency in the identification of suspects (i.e. through the use of mandatory identification documents or the computerisation of fingerprints and other identifying characteristics).

3. One of the basic functions of pre-trial detention is to *prevent the suspect from absconding, interfering with the investigation of the offence or continuing to commit offences*. This aim may also be served by *other means*, such as restrictions on movement, supervision, the payment of bail, and release on recognizance.

*Restriction of movement.* In this case the suspect is required to stay within a certain area or within certain premises, most commonly his or her home. (“Home arrest”). Another, a less restrictive form, would be to forbid the suspect from travelling from certain locations (MK). Observance of the conditions is generally enforced through constant monitoring by the local police. Such monitoring can also be carried out electronically.

*Supervision.* A less restrictive measure requires that the suspect awaiting trial submits to supervision primarily in order to ascertain that he or she is not going to disappear. The suspect may be required to report to the police or another agency (or even private citizens) at fixed intervals, or a representative of such an agency will make random checks on whether or not the suspect has adhered to the conditions.

*The payment of bail.* “Bail” is usually understood as the posting of property or money as a surety that a person released from custody will appear in court at the appointed time. Bail is in common use in most countries throughout the world. It is not used in the Scandinavian countries, but the use of bail has been reported in Asia in countries like Indonesia, Korea, Philippines and Thailand (Joutsen 1990), and the practice in the USA is well known. Bail’s primary drawback is that it can be discriminatory, since the poorer suspects cannot afford bail and often do not succeed in having a bondsman post the bail for them.

*Release on recognizance.* The most common measure used to avoid pre-trial detention is simply the release on recognizance, whereby the suspect agrees to appear before the court when the case comes to trial. Such simple release may be used even in more serious cases, when the suspect is an established member of the community.

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2. Pre-Trial Detention in Finland

In Finland the use of pre-trial detention consists of three steps:

1. A policeman may *apprehend* a person for whom an arrest or remand warrant has been issued, or if the conditions for an arrest (see below) are present and the measure does not bear delay. Such a measure must be reported to an authority with powers of arrest, who shall decide within 24 hours whether the suspect shall be released or arrested (Section 2 of the Coercive Means Act).

2. An authority with powers of arrest (generally the chief police officer) may *arrest* a person who is suspected with probable cause of having committed an offence under three sets of conditions.

I. If the *maximum sentence for the offence in question is imprisonment for at least one year and in addition* it is probable that the suspect shall

- (1) seek to escape or evade justice,
- (2) seek to tamper with the evidence or influence witnesses or other parties or
- (3) continue his or her criminal activity.

II. Furthermore, the suspect may be arrested even if the above conditions are not fulfilled, provided that

- (a) the *minimum sentence is imprisonment for two years or more*,<sup>1</sup>
- (b) the suspect refuses to identify himself or herself, or
- (c) the suspect is not domiciled in Finland and it is probable that he or she shall seek to evade justice by leaving Finland,

III. Even if there is no probable cause, a person may be arrested if the other conditions noted above are fulfilled and the arrest of the suspect for further investigations is deemed very important. However, no one may be arrested if this would be unreasonable in view of the nature of the case or of the age or other personal circumstances of the suspect (Section 3 of the Coercive Means Act). In all cases, the arrested person may not be held in custody for longer than is necessary.

3. If a person is suspected on probable grounds of having committed an offence, he or she may be remanded in custody. The conditions are the same as above (=arrest). However, this time the decision has to be made by the court (not the police).

The request for remand must be *presented to the court without delay, and in any case by noon on the third day* from the date of apprehension. The court must deal with the matter within four days of the apprehension. The four-day limit may be exceeded only on the request of the suspect.

When the suspect is put on remand, the court must confirm the day of the hearing. *The hearing should in principle take place within two weeks time*. If longer preparations are needed (which is often the case for example in large-scale drug offences and economic crime), the court must ensure fortnightly that the conditions for pre-trial detention are still present.

## II. NEW COMMUNITY SANCTIONS - POSSIBILITIES AND PITFALLS

In those countries where the range of community sanctions is limited to a number of "classical" sanctions, such as fines, suspension of imprisonment and probation, the first step is to *ensure that the law provides for an adequate range of community sanctions*.

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<sup>1</sup> Only a limited number of offences carry a minimum sentence of two years or more. Examples include, treason, certain offences against humanity, sabotage of air traffic, skyjacking, certain forms of arson, murder, manslaughter, aggravated counterfeiting, and aggravated rape and aggravated sexual offences against a child.

## A. The List of Possible Alternatives

### 1. Introduction

1. Some decades ago the selection of sanctions in the European penal codes looked quite similar: The core of any system consisted of imprisonment, fines, and suspended (or conditional) sentence – either with or without supervision (probation). Today the picture looks quite different. During the twenty to thirty years most European countries have amended their penal system by introducing a number of new community sanctions.

2. An important stimulus for this change has been the adoption by the Council of Europe Committee of Ministers of Resolution R(76)10 on some alternative penal measures to imprisonment in 1976. Since that decision almost all European countries have incorporated into their sanction system some form of new community measure. As many as 20 new kinds of alternatives under different labels have been counted (*Kalmthouth* 2000). In 1990, another important step was taken, as the United Nations General Assembly accepted the “United Nations Standard Minimum Rules for Non-custodial Measures” (“The Tokyo Rules”, resolution 45/110 of 14 December 1990, see in brief *Stern* 2002).

3. Today, the mere listing of all available alternatives used in different European jurisdictions would be a very burdensome (if not impossible) task. The Swedish law knows more than 20 different alternatives and their combinations. A recent listing of the French system provided as many as 47 different sentencing options!

4. The mere number of alternatives is not a guarantee of the new sanctions’ effective role as means to reduce the use of custody. Some alternatives may lack all practical relevance. In addition, too complicated a sentencing system endangers consistency in sentencing and leads to unwarranted disparities in sentencing. Too complicated a sentencing system is also incomprehensible to the public, which may weaken the general preventive effect of the criminal law.

Evidently, a well-planned and effectively implemented system of only a few non-custodial alternatives is a better arrangement than a system with a great variety of alternatives which are only randomly used and which are – more or less – unknown to the public at large.

### 2. The Classification of Alternatives

There are several ways of classifying criminal sanctions. As *criminal punishments* they infringe different values and interests (otherwise protected by the law), such as freedom of movement, privacy and economic security. As *means of crime prevention* (and of reducing crime damages) they may use different methods such as incapacitation, supervision, treatment, work in the community and formal warnings as well as restitution, reparation and community integration. In the following table traditional and new alternatives are classified according to their aims and contents (of a slightly different classification, see also Penological Information. Bulletin 22/2000 p.93-94).

<b>Community Sanctions: Some Classifications</b>		
<b>Aim and contents: emphasis is on...</b>	<b>Traditional alternatives</b>	<b>New alternatives</b>
<b>Warning</b>	- Diversion, non-prosecution - Warning and admonitions	
<b>Economy</b>	- Fines - Confiscation	- Administrative penalties - “Unite fines”
<b>Supervision and support</b>	- Probation - Conditional imprisonment - Suspended sentence	- Intensive probation

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<b>Community Sanctions: Some Classifications</b>		
<b>Restrictions of liberty in the community</b>		<ul style="list-style-type: none"> <li>- House arrest/electronic monitoring</li> <li>- Other restrictions of movement</li> </ul>
<b>Community-ties and integration (+ work)</b>	<ul style="list-style-type: none"> <li>- Public work</li> </ul>	<ul style="list-style-type: none"> <li>- Community service order</li> </ul>
<b>Social work/social training</b>	<ul style="list-style-type: none"> <li>- Probation</li> <li>- Juvenile corrections</li> </ul>	<ul style="list-style-type: none"> <li>- Social training courses</li> <li>- Juvenile corrections</li> </ul>
<b>Treatment (psychological/psychiatric/medical)</b>	<ul style="list-style-type: none"> <li>- Treatment orders</li> </ul>	<ul style="list-style-type: none"> <li>- Contract treatment</li> </ul>
<b>Restitution/compensation</b>	<ul style="list-style-type: none"> <li>- Criminal damages</li> </ul>	<ul style="list-style-type: none"> <li>- Compensation orders</li> </ul>
<b>Restitution/mediation/community involvement</b>	<ul style="list-style-type: none"> <li>- Different forms of informal out-of-court settlements</li> </ul>	<ul style="list-style-type: none"> <li>- Victim-offender mediation</li> <li>- Community mediation</li> <li>- Family group conferences</li> <li>- "Healing circles"</li> </ul>

3. Formal Sanctions

*Penal warnings.* - Mere warnings are customarily used where the offence is not grave and especially where the offender is of previously good character. They are called by a variety of names, including admonition, absolute discharge, conditional discharge, reprimand, warning and "final warning" (in the UK).

*An example: In the UK a new system of reprimands and final warnings has been implemented nationally from 1 June 2000. Reprimands can be given to first time offenders for minor offences. Further offending results in either a final warning or a charge. The final warning triggers referral to a local youth offending team which will assess the young person and, unless they consider it inappropriate, prepare a rehabilitation programme designed to tackle the reasons for the young person's offending behaviour and to prevent any future offending. This assessment will usually involve contacting the victim to assess whether victim/offender mediation or some form of reparation to the victim or community is appropriate (see <http://www.homeoffice.gov.uk/rds/caution1.html>).*

Conditional or suspended sentence with no supervision or control (below), may also be classified as a kind of warning. In some countries admonitions may also be public; for example, it may be published in a local newspaper, and – what is even worse – on the Internet (which comes very close to the ancient forms of shaming penalties, abandoned from the European Codes during the 19th century).

*Fines.* - Fines are the most commonly used monetary penalty. Fines are economical in terms of both money and labour, and practical in terms of management and administration. They are also humane, as they inflict a minimum of social harm.

The major problem with fines is that the same amount of money means different things to the rich and the poor in terms of the relative size of loss. This can be overcome through the use of the *day-fine* – a system developed by a Swedish criminalist, but first adopted in Finland in 1921. According to this, the severity of the offence determines the number of day-fines, while the income of the offender determines the size of each individual day-fine. Thus, the absolute amount of a fine for the same offence is heavier for the more affluent offender than for the poor – but the relative meaning of fine remains the same for each offender.<sup>2</sup>

<sup>2</sup> To take the common example of shoplifting: if both an unemployed person and a person with a monthly income of several thousand dollars are sentenced for the same shoplifting offence, the judge may set the number of day-fines at 20. The unemployed person would pay a fine of 20 day-fines of 5 dollars each (100 dollars in total), while the employed offender would pay 20 day-fines of 50 dollars each (1000 dollars).

Fines can create problems also in cases where they are not paid. They may even increase the use of custodial sanctions, if they are converted into imprisonment. This can be moderated by limitations on the conversion of unpaid fines into imprisonment, by granting reprieves of payments or the possibility of paying in instalments, by allowing the court discretion over whether or not conversion shall take place and by using other than custodial conversion penalties (such as community service).<sup>3</sup>

Finland reduced the number of imprisoned fine-defaulters in the late 60s. More recently, Germany has been successful in using community service as a default penalty. Sweden has been able to cut down the use of default imprisonment almost totally, despite the very widespread use of the day-fine.

#### 4. Focus on Supervision (and Support)

*Probation and suspended (conditional) imprisonment with supervision.* - Suspended sentence means that the offender is convicted, but exempted from serving a sentence (which may or may not be specified) under certain conditions and directions, most commonly on the condition that he or she does not commit a new offence during the probationary period. Supervision may also be ordered as an independent sanction under the title "probation". In all cases the offender must, generally, remain in contact with a probation officer, notify the probation officer of any change in address, and provide essential information on, e.g., employment, earnings and lifestyle. The supervision can range from intensive through moderate to minimum, and the conditions may relate, for example, to residence, work, education, treatment and the use of alcohol or drugs.

In Finland suspended sentence with supervision have been used successfully instead of imprisonment for juveniles.

*Suspended imprisonment without supervision.* - Some systems recognize the possibility of suspending a sentence of imprisonment without any supervision. The offender is thus not subjected to any control during the term of the sentence. However, if the offender commits a new offence during this term, the court may order that the conditional sentence be enforced.<sup>4</sup>

In Finland, a suspended sentence (conditional imprisonment) without supervision is quite a common punishment in most middle rank offences. A majority (60%) of all prison sentences are suspended. It is a clear presumption that all shorter prison sentences (less than one year) are suspended for first time offenders.

*House arrest and electronic monitoring.* - The common feature in these cases is that they all include some restrictions on liberty, but these restrictions are carried out in the community (not in institutions). In *house arrest*, the offender is required to stay at home for a certain period. The extent of the confinement may be limited to night-time, or to nights and other free time. It may also be full-time confinement for twenty-four hours a day. The conditions of home arrest may include full or partial abstinence from alcohol, or counselling or treatment for substance abuse. The offenders are generally subject to strict and random surveillance, either face-to-face or electronic monitoring.

Electronic monitoring and surveillance has been used successfully in Sweden and the UK. This option seems to enjoy a growing popularity among politicians – presumably due to its high profile as a means to protect the public. At the moment, the Commission of the European Union is planning a recommendation for all member states to include electronic monitoring as a part of their criminal justice system.

<sup>3</sup> E.g. in Australia, the Federal Republic of Germany, Italy, Norway, Portugal and Switzerland, non-payment can lead to community service.

<sup>4</sup> Among the Asian and Pacific countries responding to the U.N. Third Survey, this sanction was noted for Fiji, Hong Kong, Korea (both as a suspended sentence and as suspended execution of sentence), Papua New Guinea, Sri Lanka and Thailand. In Fiji, should the court find cause to consider enforcing the suspended sentence, it has the discretion to order that the suspended sentence shall take effect with the original term unaltered, substitute a lower term, or to extend the operational term by at most three years from the date of the new decision.



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5. Focus on Maintaining Community Ties and Community Integration: Community Service

In its present form community service was first introduced in England and Wales in 1975. The sanction involves the performance, during leisure-time and within a given period, of a certain number of hours of unpaid work for the good of the community. In most systems, there are specific provisions regarding the conditions under which a community service order can be made; these include, for example, the type of offence and the consent of the offender. Community service has spread to a number of countries. The current use of community service varies enormously. In the United Kingdom alone, almost 40 000 community service orders are imposed each year. The corresponding figure in the Netherlands is 16 000, in France 24 000, in Finland 4 000, in Sweden 3000, in Switzerland 2000, in Denmark 200, and in Portugal almost none. The frequency index per 100 prison sentences is highest in the Netherlands (59), England and Wales (51) and Finland (40, see Council of Europe, Penological Information Bulletin 22 December 2000 p.104-105 and Bulletin 23 & 24 2002).

6. Focus on Social Work and Social Training

Different forms of social work and social training courses have been an essential part of the juvenile justice systems. More recently similar programmes have entered into the adult criminal justice system as a part of the probation order. Programmes run by, for example, the UK probation service include courses like "Thinkfirst" (22 group sessions + 6 individual follow-up sessions; application of problem solving, self-management and social skills), "Reasoning and rehabilitation" (36 group sessions; target areas include problem solving, social skills, self-control, negotiation skills, assertiveness, critical reasoning) and "Enhanced Thinking Skills" (20 two-hour sessions focused on cognitive skills). In addition there are a number of programmes selectively focused on specific types of offence (such as "Aggression replacement Training", programmes for sex offenders, drunk drivers and substance abusers (see McGuire 2001 and Bottoms et al 2001).

7. Focus on Treatment

During the period of welfare treatment ideology (especially in the 50s and the 60s), several countries adopted treatment orders as a part of their criminal justice systems. In the late 60s and 70s criticism against coercive treatment decreased the popularity of these sanctions. However, in the course of the 90s, treatment has, again, undergone a gradual renaissance. Old, compulsory treatment orders have been replaced by different type of contract-based treatment programmes. Now treatment is based on *consent and co-operation*. This is an important principal change – even though the consent is often given in a situation where the offender's choice is between treatment and a prison sentence.

New rehabilitative measures are used especially in specific offender categories, where medical or psychiatric experts suggest that there is a connection between the offence and, for example, drug addiction or a drinking problem. Among the target groups are drunk drivers, drug addicts, those guilty of repeated domestic violence and sex offenders.

8. Focus on Restitution and Community Participation: Restorative Justice

*Compensation and restitution.* - All legal systems have arrangements to repair the victims' injuries and losses. However, relatively few define these compensation orders as independent sanctions. Often compensation can be mentioned as one of several conditions of a conditional sentence. Generally, however, compensation or restitution is a civil matter, even though in many jurisdictions it is often imposed by a criminal court.<sup>5</sup>

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power calls for greater use of compensatory payments as sanctions. Restitution of the loss to the victim is deemed an appropriate aim of criminal justice, and it is in the interests of society as a whole.

*Victim-offender mediation or community mediation.* - One of the major transformations in the European Criminal Justice systems from the 70s onwards, has been the growth of the restorative justice movement and the increased interest in informal conflict resolution schemes, such as victim-offender mediation. This change has global dimensions, well known to Asian and African countries,

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<sup>5</sup> See Matti Joutsen 1987, pp. 235-240; see also pp. 192-196 and 231-235.

which have, in fact, much longer traditions in informal conflict resolution. In Australia and New Zealand mediation has been applied in specific family and group conferences.

In Europe, Austria, Norway, Belgium and Finland have been the pioneers – especially in practical application and legislative planning. Reconciliation is generally considered an option only during the preliminary stages of the criminal process, for example during the police investigation or as a measure implemented outside of the state-based criminal justice system.

#### 9. Other Sanctions

*Confiscation.* - Confiscation of personal property is used to some extent as an independent sanction, and its use appears to be expanding. This trend has been encouraged in part by the 1988 United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances. Generally, however, confiscation of the property derived from or used in the offence is considered a penal measure to be applied in addition to the sanction, and not as an independent penal sanction.

*Loss of licence or rights.* - *Suspension of driving or other licence* is used in some countries as a sanction in criminal law; however, in most, it is an ancillary criminal sanction or an administrative measure. *Deprivation of certain rights and/or removal of professional status*, such as the right to perform certain functions or hold certain positions or public offices, the right to vote, and the right to act as an expert or witness in court, may be used mainly as an ancillary sanction. Furthermore, some forms of withdrawal of rights (such as dismissal from office) are reserved for certain special offender groups, such as civil servants.

#### 10. Changing the Contents: Co-operation, Consent and Commitment to Community

1. New alternatives differ essentially from traditional penalties on one central point: They usually require the offender's consent, cooperation and sometimes even a specific contract. These sanctions treat the offender, not merely as a passive object of compulsory measures, but also as an active and autonomous person, capable of making his/her own choices.

2. The second important aspect is the *commitment to the society*. Community service, social training courses and victim-oriented sanctions need society's involvement; after all, that is why they are called 'community sanctions' or 'community-based sanctions'.<sup>6</sup> As stressed by *Kalmthouth*: "The intrinsic value of sanctions must be more than the simple fact that the offender can stay in the community during its enforcement. The real value and meaning of community-based sanctions or measures must be sought in the fact that they contribute to the reintegration of offenders into society by stimulating and improving the offenders' sense of responsibility and their social skills by confronting them with the consequences of their offending behaviour and by asking them to perform re-socialising activities" (*Kalmthouth* 2000 p.123).

3. Community-based sanctions and measures can only be applied within a community-orientated infrastructure geared to the specific requirements of these sanctions. Their implementation is to a large extent dependent on the existence of an organisation like the probation service. This service organises (and also prepares, enforces, supervises and controls) the community-based sanctions in close cooperation with private, semipublic and public organisations or institutions. The reason community sanctions have not gained a firm footing in, for example, Spain and Portugal must be mainly concerned with the lack of a well-functioning implementation system.

4. The role of the new alternatives is not confined to the sentencing level. They have a special impact on the pre-trial and post-trial phase. This changes the power relations in the criminal justice system. In many countries (for example Austria, Belgium, Germany, the Netherlands) the public prosecution service – or sometimes even the police – now have sentencing powers that formerly belonged exclusively to the courts. Financial settlement, compensation, mediation and restitution, conditional pre-trial release, community service and training courses can be applied as part of out-of-

<sup>6</sup> According to Recommendation No. R (92) 16, community sanctions and measures (CSMs) are to be understood as sanctions and measures which maintain the offender in the community and involve some restriction on his/her liberty through the imposition of conditions and/or obligations, and which are implemented by bodies designated in law for that purpose.

court settlements to reduce pressure on overcrowded prisons and the overburdened judicial apparatus. (Kalmthouth 2000). A wide variety of sanctions and measures also apply after the completion of any sentence. Decisions on electronic monitoring, assignment to the probation service and community service may be taken – not by the trial judge – but by the prison authorities or a specialised sentencing judge after the trial (Italy, France, Portugal, Spain and Sweden).

### **B. Limitations and Possible Pitfalls**

Of all the alternatives developed in the western European countries, community service has clearly been the most successful. It has been adopted in almost all European countries (see the Penological Bulletin 2000). However, there are significant differences among different legal systems. Community service has proved to be a success especially in Finland, England, France and the Netherlands, but not in countries like Italy, Poland, Portugal, Spain and Switzerland (Kalmthouth 2000 p.124-125).

Despite the fact that almost all European countries have amended their sanction systems, true success stories are still hard to find. This is true especially if we consider the “original plan” of using these measures *as an alternative to incarceration*. In order to enhance the use of community-based sanctions one has to be aware of these possible shortcomings and their causes. New alternatives can fail in two different ways:

1. *Unpopularity*. - Firstly, new alternatives may turn out to be unpopular and they may remain unused.

2. *Net-widening*. - New alternatives may turn out to be a success in implementation, but are not used instead of imprisonment, but rather in order to replace other non-custodial sanctions. For example, community service seems to substitute prison sentences only in roughly 50% to 60% of cases. In other cases, they are used as substitutes for other community sentences (Kalmthouth 2000 p.127). Here too, the difference to the Finnish figures is clear. Follow-up research showed that community service had replaced imprisonment in more than 90% of all cases.

3. *Counter-productive effects*. - From the point of view of the original aim, new alternatives may also have counter-productive effects: Sometimes they may even *increase the use of custodial measures*. Some judges may simply regard community sanctions as too soft an option, and in order to ensure that there is “sharp-short-shock” effect, use pre-trial detention as a form of sanction. Non-compliance with the requirements of community sanctions may lead to the use of imprisonment as a back-up sanction. As far as community sanctions have really replaced imprisonment, this may not be such a big problem. But if community sanctions have been used to replace other community sanctions, the use of custodial back-up sanctions may lead to genuine increase of prison sentences.

4. *Social discrimination*. - Finally, there is the risk that community sanctions are used only for “normal decent offenders” who lead a more or less stable life, while those suffering from for example drug or alcohol problems are locked in prison. The Council of Europe Rule 20 forbids the discrimination in the imposition and implementation of community sanctions on grounds of race, colour, ethnic origin, nationality, gender, language, religion, political or other opinion, economic, social or other status or physical or mental condition. However, in reality important categories of offenders – especially persons suffering from drug or alcohol problems, unskilled workers, ethnic minorities and persons with prior convictions - are often highly under-represented (Kalmthouth 2000 p.131).

All in all, care must be taken in order to make sure that the new alternatives...

- are used and implemented *in the first place*
- - are used *instead of imprisonment*
- - are *not used in a way that increases* the use of imprisonment
- - are *not used in a way that leads to social discrimination*.

### C. Overcoming the Difficulties: General Pre-Conditions for Policy Success

#### 1. Clearly Defined Aims, Content and Implementation Criteria

The essential issue is to ensure that the new alternatives will be used instead of imprisonment, and not in lieu of some other – more lenient – sanction. In some cases, the failures in replacing custodial sanctions with new alternatives are explained by the *lack of clear provisions* in law on both the conditions for imposition of community sanctions and the methods of their implementation. What, therefore, is needed, is legislation clearly outlining the procedures and conditions for their imposition and implementation, together with a coherent and systematic view of the interrelations of the existing sentencing alternatives.

*Aims and content.* - The legislation should specify the aim and nature (purpose and content) of the sanction; that is, whether the focus is on the punitive dimension, rehabilitation or restitutive elements, and if on all of these, which ones come first (*Kalmthouth 2000 p.126*).

*Position and relation to other sanctions.* - Especially in those cases where the emphasis is on the “punitive dimension” (and the principle of proportionality), the courts should be given *clear guidance as to how the new custodial sanctions fit in with the present sentencing system*. The court should be able to assign the new alternative’s appropriate place in the scale of punishment. For example, is 40 hours of community service the equivalent of one month’s of imprisonment? Is it more or less severe than a suspended sentence of a certain length? This would help judges in determining the proper place of the measure in the scale of penal values.

This requirement is usually neglected in systems which allow multiple combinations. If, for example, community service can be combined with any other alternative (with fines, suspended sentence and even as supplementary sentence for imprisonment), confusion on its proper place and relation with other penalties is unavoidable.

*Application criteria.* - When a new alternative to custodial sanction is introduced, it is of vital importance to give clear guidance to the courts on the criteria for its application. The form in which this guidance can be given will vary from one jurisdiction to the next, and it will depend largely on the role of legislator, on the superior courts and on other agencies capable of formulating guidelines in sentencing in each jurisdiction.

#### 2. Credibility and Consistency in its Enforcement

1. *Organising the work.* - Community service and other community sanctions are (as a part of their punitive dimension) meant to operate as “fines on people’s time”. Thus, they require the offender to perform the work during their leisure time. Still, in many countries, the work has been arranged on a full-time basis (8 hours a day). This clearly jeopardises the original concept of a community sanction being a “fine on time” devised in order to oblige the offender to perform his or her tasks over a relatively long period of time in a community-orientated environment. Another consequence is that the community sanction loses its formative and re-integrative character, because the way it is carried out does not give the offender the required time to make a real commitment to the community (*Kalmthouth 2000 p.128*).

2. *Successful implementation requires intensive supervision and support.* - There is an obvious relationship between the failure rate and the quality and intensity of supervision: the less control and supervision, the higher the dropout rate. In many countries, in spite of Rule 24 of the European Rules, strict and uniform rules with respect to breach criteria and procedures are lacking. This may require that the roles and tasks of the involved agencies are sorted out: In many countries the probation officers are still notoriously reluctant to take breach actions because they consider a failure to complete the imposed sanction as a breakdown of the therapeutic relationship or as the consequence of the offender's chaotic lifestyle. In several countries, probation officers still consider the supervision of a penal sanction difficult to bring into line with their professional principles. These kind of issues have to be dealt with openly.

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3. *Consistent responses to violations.* - There should be clear and consistent practice in the cases where the conditions of the sentence are violated. This is also a question of equality. Different and sloppy practices create mistrust and resistance on the part of public prosecutors, the judiciary and the public.

4. *Social inquiry reports and consent.* - The use of community sanctions is sometimes prevented due to the fact that no social inquiry reports have been prepared and there has been no contact with a probation officer or counsellor. In some systems the chances of receiving an alternative sanction instead of a short prison sentence are in these cases very small.

In only in a few countries (the Czech Republic, Denmark, Finland, Sweden, and the United Kingdom) must the probation service draw up a pre-sentence report on the suitability of the offender for a community sanction. This report includes also his or her consent to such a sanction. Unfortunately, in many countries, asking the offender's consent is only a formal ritual maintained in order to preclude the presumed violation of forced or compulsory labour regulations. However, the experiences in Finland clearly indicate, that *an explicit and well-informed consent is a highly motivating factor for the offender.* By giving his/her consent to the work, the offender has also committed to the performance in a manner that gives hope for good success rates.

### 3. Resources and Infrastructure

The success of a community sanction depends heavily on the availability of resources for their implementation. Probation requires a suitable infrastructure for the arrangement of supervision, and community service requires not only a suitable organisation but also designated places of work. In addition, the general economic and political circumstances in a country may have a role in determining the extent to which community sanctions are used in general.

One important reason why community sanctions have so far only partly fulfilled their purpose is the lack of a well equipped financial and institutional infrastructure. Here, Portugal provides an example. As probation and community service were introduced, it proved difficult to set up a wholly new probation service. This led to an overburdening of the probation services which, in turn, decreased court confidence in these services.

These risks have been noted in the European Community Sanctions and Measures (Rules 38 and 42, see also the rules 39 and 40). Still, most European countries have not provided adequate means from public funds to create the necessary infrastructure for the implementation of community sanctions. In cases where sufficient means have been provided they have, as a rule, been taken away from other activities of probation services rather than additional means. In other words, the implementation of a new community sanction will generally be assigned to an existing service, on the assumption that this service has already developed the necessary infrastructure.<sup>7</sup>

The point is well summarized by *Joutsen* (1990): "The most efficient route to increase the credibility of community sanctions 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 sanctions. Particular attention should also be paid to the training of the practitioners responsible for the implementation of the sanctions and for the coordination between criminal justice agencies and other agencies involved in the implementation of these sanctions in the community."

## **D. Community Service in Finland**

*Basic features.* - Community service was introduced into the Finnish penal system in 1992 on an experimental basis in four judicial districts. In 1995 the system was extended to cover the entire country, and community service became a permanent part of the Finnish system of sanctions.

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<sup>7</sup> As *Kalmthouth* notes: "This shows that politicians' belief in the viability of community sanctions is not very high – at least, not as high as their belief in the viability of the prison system, into which they are willing to pour budgetary allocations measured in hundreds of millions each year in order to expand the capacity" (ibid p.127).

Community service is imposed instead of unconditional imprisonment. The duration of community service may vary between 20 and 200 hours.<sup>8</sup> The prerequisites for sentencing the offender to community service are (a) that the convicted person consents to it, (b) that the sentence imposed on the offender does not exceed eight months, and (c) that the offender is deemed capable of carrying out the community service order. Also (d) prior convictions may in some case prevent the use of this option. The offender's ability to carry out the work is evaluated on the basis of a specific *suitability report*. *This report may be requested by any one of the parties, the prosecutor or the court. The suitability report is prepared by the Probation Service.*

*Avoiding net-widening: the two step procedure.* - In order to ensure that community service will really be used in lieu of unconditional sentences of imprisonment, a *two-step procedure* was adopted. First the court is supposed to make its sentencing decision by applying the normal principles and criteria of sentencing, without even thinking about the possibility of community service. *If the result is unconditional imprisonment (and certain requirements are fulfilled), then the court may commute the sentence into community service.* In principle community service may, therefore, be used only in cases where the accused would otherwise receive an unconditional sentence of imprisonment. In commuting imprisonment into community service, one day in prison equals one hour of community service. Thus, two months of custodial sentence should be commuted into roughly 60 hours of community service. If the conditions of the community service order are violated, the court normally imposes a new unconditional sentence of imprisonment.

*The number of hours of community service.* - The court should always determine the number of hours (20 to 200 hours) of community service to be served. The length of the service depends in practice on the original sentence of imprisonment. The practice that one day in prison equals one hour of community work is not this favourable to those who are performing community service, since prisoners are released from prison on parole after having served one half (for first time prisoners) or two thirds (repeat offenders) of the sentence.

The rate of conversion has sometimes been criticised for not reflecting the actual differences in severity between imprisonment and community service. It is difficult to assess the exact relation between the scales of severity of different sanctions, since there are no fixed and unambiguous criteria that would be needed for this. In addition, some attention should be paid in the assessment to the fact that the performance of community service lasts twice as long as the sentence of imprisonment for a first time prisoner. This means, in other words, that the offender undergoes a longer period without any free weekends – and without alcohol, which is often difficult for persons undergoing a sentence. Secondly, attention should be paid in the assessment to factors other than those directly related to the pure comparison of the relative severity of sanctions. Had exact comparability between sanctions been the sole basis, there would have been no need to adopt community service in the first place. In the assessment, some weight should also be given to the fact that community service as a sanction is more constructive and also, from the point of view of possible recidivism, less detrimental (see below).

*Contents.* -Community service consists of a certain amount of regular, unpaid work carried out under supervision. The sentence is usually performed in segments of three or four hours, ordinarily on two days each week. The intention is that this service would be performed over a period that roughly conforms to the corresponding sentence of imprisonment without release on parole. Only work for a non-profit organisation is allowed.

The Probation Service approves a service plan for the performance of a community service order. The plan is prepared in cooperation with the entity with whom the place of work has been arranged. The person who is to perform the work should be allowed an opportunity to be heard in the drafting of the service plan.

<sup>8</sup> The maximum for hours of community service varies in different countries: 200 (Finland), 240 (Belgium, Denmark, Ireland, Luxembourg, Sweden, United Kingdom), 300 (Scotland, Norway, Switzerland), 380 (Portugal), 384 (Spain), 400 (Czech Republic), 480 (Italy, the Netherlands, Poland).

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The performance of a community service order is supervised quite closely. On the other hand, the supervision is specifically focused on ensuring the proper performance of the work. Unlike the other Nordic countries, in Finland community service does not contain any extra supervision aimed, for example, at controlling the offender's other behaviour in general. The supervision is strictly confined to his or her working obligations. Consequently, in Finland supervision is not an independent component of a community service order.

*Violation of the conditions.* - Minor violations are dealt with by reprimands, whereas more serious violations are reported to the public prosecutor, who may take the case to court. If the court finds that the conditions of the community service order have been seriously violated, it should convert the remaining portion of the community service order into unconditional imprisonment. The hours that have already been worked should be credited in full to the offender. In this calculation, the length of the imprisonment should be determined by applying the general conversion scale.

*Community service in practice.* - Annually some 3500 - 4000 community service orders are imposed by the courts. This is around 35-40% of the sentences of imprisonment which could have been converted (sentences of imprisonment of at most eight months). Over one half of the community service orders are imposed for drunk driving.

The proportion of orders interrupted has varied between 11-15% (of those sentences started each year). Annually some 250 000 - 300 000 hours of community service are performed, which corresponds to some 400-500 prisoners (15% of the prison population) in the overall prison population (assuming that in the absence of community service a corresponding unconditional sentence of imprisonment would indeed have been imposed). A typical community service order is for 70 to 90 hours.

According to a study prepared at the Prison Administration Department of the Ministry of Justice, a slight, albeit systematic, difference in recidivism was noted between those sentenced to community service and those sentenced to imprisonment. Of those sentenced to imprisonment, 55% were again entered into the criminal register for a new sentence during the following three years. During the same period, 52% of those receiving a community service order re-offended. Over a five-year follow-up period, recidivism among those sentenced to imprisonment had increased to 67%, and recidivism among those sentenced to a community service order had increased to 61%. In the study, an attempt was made to ensure that both groups were comparable (*Muiluuvuori* 2001).

*Suitability and equality.* - Only those who are deemed capable to comply with the community service order, may receive this benefit. This "suitability" is assessed on the bases of a suitability report, prepared by the Probation Service. The situation can, in practice, be particularly problematic if the person in question has problems with intoxicant abuse, and this constitutes a risk to the fulfilment of the community service order. In such a situation we are dangerously close to intoxicant abuse which requires institutional treatment, automatically leading to a prison sentence. Indeed, using suitability as a factor in deciding on the sanction raises the danger of social discrimination (more generally regarding these risks, see *Kalmthouth* 2001). An attempt has been made to reduce this risk by combining the enforcement of the sanction with a set of social support measures. This obviously is not enough. For those offenders who are unable to cope with the community service order, other types of arrangements are needed. One solution is a form of "Contract Treatment" (Drug Court), developed especially in the US and more recently in Sweden.

### **E. Treatment on Contract**

#### **1. The Swedish System**

The Swedish law contains a specific sanction, titled "contract treatment" suited for those who suffer from drug or alcoholic addiction. The treatment lasts between 6 months to 2 years. Part of the treatment takes place in a institution. Participation in the treatment is always voluntary. Before passing the sentence, the offender is asked, whether he/she is willing to undergo the treatment period.

The relation between other sanctions and contract treatment is arranged in two ways: Contract treatment can be used as a normal sub-condition to probation, or it may be used as the very reason for

not imposing a prison sentence. In the latter case (a “genuine” contract treatment), this sanction is used more clearly as an alternative to imprisonment. In this case the court also declares the length of the original prison sentence which would have been passed had the offender not been accepted to take part in the treatment programme.

In Sweden some 1100-1200 contract treatment orders are given each year compared to 15000 prison sentences and 3000 community service orders imposed annually.

## 2. The Finnish Reform Plans

According to recent reform plans, a similar type of sanction shall also be included in the Finnish sanction system in 2003/2004. These plans have been inspired partly by the Swedish solutions. However, the main impetus has come from the Finnish experiences in Community service. It clearly seems that there is a need for a separate sanction targeted for those offenders who are suffering from alcohol and/or drug addiction and who are not able to cope with the requirements of community service.

The Finnish version follows the legislative solutions adopted in the Finnish community service act. Thus, this new sanction is planned to replace only a prison sentence using the same “two-step procedure” successfully employed in connection with community service: First the offender must be sentenced to an unconditional prison sentence (max. 8 months). After that the court has to consider, whether the sentence may be commuted to treatment. The main condition would be that the offender’s criminality is heavily affected by his/her addiction (= the crime is a “cause” of the alcohol/drug addiction) and that the offender consents to the treatment. In practice this penalty would be used in those cases where the offender is suffering from such addiction problems that they endanger his ability to cope with the requirements of community service.

The duration of the treatment is 6 months to 2 years. A part of the treatment would be delivered in institutional settings, another part in an open environment. If the offender refuses the treatment or quits the programme or otherwise breaches the conditions, the sentence may be commuted back to imprisonment.

## **F. House Arrest and Electronic Monitoring**

### 1. General Observations

In *electronic monitoring*, a “passive” or “active” tag is attached to the person under supervision. The passive tag responds to a signal, generally transmitted by telephone, thus informing the caller (the supervisor or a computer) that the person in question has not left the designated area. The active tag sends a continuous signal to a nearby telephone; should the person leave the designated area, the signal will stop, alerting the supervisor to a violation of the order.<sup>9</sup>

The special benefits of home probation are, first of all, that it restricts the risk of future offences by direct supervision. Without violating the conditions of probation, he or she cannot commit offences other than against him/herself (or against those living in the same building). As other community sanctions, home probation allows the offender to maintain family ties and continue to work or study. It also is less costly than prison, regardless of whether or not electronic monitoring is used.

However, there are some social and ethical counter-arguments. Electronic monitoring is accused of involving an invasion on the offender's privacy at home. This has been countered with reference to the fact that in prison the offender would have considerably less privacy. On the other hand, “house arrest” expands the control over, not only the offender, but also over his/her family. For some, the use of new technology (and the practically limitless opportunities it involves), resembles too much the horror images of the “surveillance society”, described in the *Brave New World* by Huxley.

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<sup>9</sup> This system was first used in Palm Beach County, Florida, in December 1984. As early as in 1990, some 40 states in the United States were using this option. In 1998 over 100 000 offenders were subjected to electronic monitoring in the US. No reliable data is available on the effects on recidivism (*Tonry* 1999 p.12-13).



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In Europe, electronic monitoring has been in a wider use in the UK and in Sweden. In the UK this option has been used mainly as a condition attached to parole. In Sweden electronic monitoring is a substitute penalty for imprisonment.

2. Electronic Monitoring in Sweden

*Description of the system.* An experiment with intensive supervision by electronic monitoring (ISEM) was carried out in Sweden from 1994 to 1998. In 1999, ISEM became permanently available as a form of sentence implementation that can be used as an alternative to short prison terms.<sup>10</sup> An individual who has been sentenced in a court of law to a short period of imprisonment may apply to the correctional authorities requesting that his or her sentence be served under ISEM rather than in prison. The number of days to be served under ISEM is the same as would have been served in prison.

ISEM involves the convicted person remaining at home except for the time allowed by the probation service for employment, training, health care, participation in corrective-influence programmes, commuting to and from these activities, shopping for necessities and other similar tasks. The probation service usually also allows the convicted person an hour outdoors on days when he or she has no other activities to take part in outside the home. A detailed schedule is drawn up by the probation service, and monitoring is carried out principally by means of an electronic tagging device.

If the person leaves or arrives at home at times that do not correspond to the schedule, an alarm is triggered at the probation service office, and the individual concerned will immediately be contacted in order to establish the reason for the discrepancy. Checks are also made in the form of unannounced visits to the person's home several times a week. Most of these visits include a breath test to determine whether the person is observing the ban on alcohol consumption. Drug use is checked for by means of urine and/or blood tests administered both at the beginning of the implementation period and subsequently when necessary.

In addition, the convicted person must visit the probation service at least once a week and take part in the corrective-influence programme they provide. Supervision at the person's place of work is performed by a contact person (a manager, co-worker, teacher, or the like) employed by the probation service, who informs the board if the convict is absent from work or has in any other way violated the rules prescribed. There are no electronic checks to determine when the person is present at his/her place of work. Abuses of ISEM are met with a swift and palpable response, which usually entails removal from the programme and a transferral to a prison for the remainder of the sentence.

*Practical experiences.* - The results of a specific evaluation study (BRÅ 1999:4) show that 75 per cent of the target group applied for ISEM and that about 85 per cent of the applicants were allowed to participate. Of these, roughly 95 per cent completed the programme, whilst the remaining 5 per cent quit the programme and served the remainder of their sentences in prison.

About 40 to 45 per cent of all sentences that specified a maximum of three months in prison were implemented using ISEM and about 60 per cent of all sentences for those in the ISEM target group. About 50 per cent of those who underwent ISEM had been sentenced for drunk driving. In 1997, some 3,800 convicts, their families (65 per cent lived with a spouse) and their employers (70 per cent were employed) were spared the negative consequences of a prison sentence. The cost of ISEM to the correctional authorities was significantly lower than the corresponding cost of incarceration.

The most common reason for not granting ISEM was that the convict did not cooperate in the investigation carried out by the probation service. Those who served their sentences under ISEM had a somewhat more favourable social background and current social situation, even with respect to criminality, than the group who of their own volition or on the basis of the probation service's assessment did not serve their sentences under ISEM. One consequence of this may be an increase in the concentration of habitual criminals in prisons (similar effect can also be found in Finland after the expansion of Community Service).

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<sup>10</sup> The following is based on a report published by the Swedish National Council for Crime Prevention (Brå-Rapport 1999:4).

With respect to the time spent in the home by the convicted person, the level of supervision was high. On the whole, the technology worked well, although continued technological development is important. The probation service made an average of three visits a week to the convicted person's home. Twenty-five per cent of these visits, whose main purpose was to check up on the individual concerned, were carried out by external personnel engaged for the purpose by the probation service. On these occasions a breath test was usually conducted to establish that the convicted person was adhering to the ban on alcohol.

About 6 per cent of the convicted offenders were forced to quit ISEM, usually as a result of violations of the ban on drugs or alcohol, or because they had otherwise broken the rules. Of those who underwent ISEM during the geographically limited portion of the trial period (1994-1995), 26 per cent relapsed into crime within three years compared with 28 per cent of a corresponding group who served their sentences in prison. A cautious interpretation might be that ISEM does not generally affect the convicted person's tendency to re-offend. However, certain results indicate that ISEM may have a somewhat restraining effect on the tendency to relapse into drunk driving.

Generally speaking, convicts and their families were positively disposed towards ISEM. Over 90 per cent of the convicted individuals reported that they would prefer ISEM to prison if sentenced to the same penalty again and a little over 80 per cent of their spouses would also prefer ISEM in such circumstances. Although both the convicted individuals and their spouses felt that some of the demands imposed by ISEM caused stress and threatened their personal integrity, they did not do so to the extent that prison would have been perceived as an attractive alternative. The majority of the convicted offenders and their spouses saw ISEM as a more lenient alternative to prison.

The experience of the contact persons was also positive on the whole. More than three-quarters said they were prepared to work as a contact person again.

As a corrective measure, ISEM is considerably cheaper than prison. The cost to the correction authorities for ISEM is lower than the cost of keeping convicts institutionalised (from 500 to 850 SEK less per day). Furthermore, ISEM yields substantial economic gains for society as well as for the individual, since the convicted person can usually continue working at his ordinary place of work, thereby avoiding the loss of income.

## **G. Juvenile Criminal Justice**

There are enormous variations within the European Juvenile Criminal Justice systems. The age limit for criminal responsibility alone varies between 10 to 18 years. Still, all systems seem to share the same goal, of restricting the use of custodial sentences in the youngest age groups. The vulnerability of juveniles to the damages of custodial sentences is widely recognised. These detrimental effects include psychological and health problems, disruption of family links, impaired education and a lack of re-integration into society. This also holds true in regard to pre-trial detention, which, however, has too often been used as a kind of substitute penalty for young offenders in order to reach the "short sharp shock" effect.

The other common feature among the Scandinavian countries is that the main responsibility among authorities for the socialisation of young persons belongs to the social welfare authorities and not to the criminal law authorities. The criterion for all child welfare measures is the best interests of the child. Interventions in the event of offences are also predicated on the fact that the child is endangering his or her future.

But also, in those cases, where the use of criminal justice is unavoidable, the aims and contents of the penalties differ from the adult criminal justice system.

*Experiment in juvenile penalty in Finland.* - In Finland a new community sanction for those between the ages of 15 and 17 years (juvenile penalty) was introduced on an experimental basis in 1994. It has a twofold content: (a) supervision for a period of three months to one year, and (b) a community service-type of work order or other similar activity for a period of 10 to 60 hours. On the penalty scale this new sanction is located on the level of conditional sentence.

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One of the goals of the juvenile punishment is to create an *additional step in the "ladder" of sanctions* and in this way slow the process that would ultimately lead to an unconditional sentence of imprisonment. In addition, the enforcement of the sanction has clear *social goals*. An effort was made to incorporate elements in juvenile punishment which would seek to promote the ability of the young person to function in society and to promote his or her sense of responsibility. Juvenile punishment is, in a way, a compromise between the neoclassicist and the social and rehabilitative perspective.

*The contents.* - Juvenile punishment consists of two elements, youth service and supervision. Youth service consists of regular unpaid work carried out under supervision as well as tasks that promote social adjustment and that are carried out under supervision. Youth service orders' duration ranges from a minimum of ten hours to a maximum of sixty hours. Supervision is always a component of juvenile punishment. The period of supervision ranges from four months to one year. The purpose of supervision is to support and guide the person sentenced to the juvenile punishment. A part of the supervision can also be carried out in connection with group activity.

The Probation Service is responsible for the enforcement of the punishment. The Service also prepares the enforcement plan which is a key document in the enforcement of the punishment. This is done in cooperation with the social welfare board of the young offender's place of residence and with the supervisor. In practice the enforcement of the juvenile punishment is based on work programmes developed by the Probation Service and the social welfare authorities. One of the purposes of the programme used in the meetings is to increase the young offender's understanding of why he or she commits offences, why committing offences is wrong, what the impact of offences is on the victims and on the offender himself or herself, and how the young person could act differently in situations where he or she is tempted to commit an offence. Also the youth service programmes have similar orientations.

*Sentencing offenders to juvenile punishment.* - There are explicit rules to guide the sentencing judge: A person who was 15 years but not yet 18 years old at the time of the offence can be sentenced to juvenile punishment. The first requirement for the application of juvenile punishment is that "in view of the seriousness of the offence and the circumstances connected with the act a fine is to be deemed an insufficient punishment, and there are no weighty reasons that require the imposition of an unconditional sentence of imprisonment." (Juvenile Punishment Act, section 3(1)). This provision locates juvenile punishment, in the ladder of sanctions, on the level of conditional imprisonment (and thus between fine and unconditional imprisonment). The question of whether or not the offence calls for a sanction that is located at this level is solved primarily in the light of the seriousness of the offence, in other words through application of the ordinary grounds for sentencing and for the imposition of conditional imprisonment.

It is, however, not enough to locate the sanction at the same level as conditional imprisonment. We still have to make a choice between conditional imprisonment and juvenile punishment. Here, one should bear in mind the amendment made to the Act in 1998, according to which the sanction should be applied if "the use of juvenile punishment is to be deemed justified in order to prevent new offences and to promote the social adjustment of the young offender". The Act places before the judge a difficult task. In practice, the most reliable basis for the assessment of the risk of recidivism has proved to be earlier offences. Indeed, the primary focus of the sanction is young individuals who have committed prior offences.

*Violation of the conditions.* - If the person sentenced to juvenile punishment violates the enforcement plans or orders given on its basis, the Probation Service should give him or her a written reprimand. In the case of a more serious violation (for example not serving the punishment or interrupting the punishment), a report is prepared for the prosecutor on the matter. In the more serious cases the prosecutor takes the matter to court, and in the less serious cases the matter is returned to the Probation Service which continues the enforcement of the punishment. The court decides on the sanction for a serious violation of the conditions of juvenile punishment. The court may extend the period of supervision or convert the juvenile punishment into another sentence, which is to correspond to the portion of the juvenile punishment that has not yet been served. The type of sanction in question would usually be a conditional sentence of imprisonment that is supplemented with an unconditional fine.

In the drafting process, there were considerable reservations regarding the conversion of juvenile punishment into unconditional imprisonment. Since the point of departure was that one condition for the imposition of juvenile punishment was that there were no weighty reasons for sentencing the young offender to unconditional imprisonment, there was deemed to be a contradiction in converting juvenile punishment into unconditional imprisonment simply because of a violation of the conditions. It should also be noted that, in the more serious cases, the young offender would in any case be sentenced to unconditional imprisonment for any new offences.

## H. Mediation and Extra-Judicial Settlements

Mediation schemes are now available in almost all European countries (for a full account, see Victim-Offender Mediation in Europe, 2000). The following observations are aimed only at providing two brief Scandinavian examples.

### 1. Mediation in Norway

In Scandinavia, mediation has the longest tradition in Norway. The Norwegian mediation schemes were started in 1981, and in 1991 the practice was “legalized” by passing “The law on mediation in Conflict-counsels”.<sup>11</sup> A transfer for mediation is an independent criminal sanction which has been acknowledged in the code of criminal proceedings (See the Norwegian Code of Criminal Proceedings 67 and 71a §).

In Norway, mediation serves as an alternative to the criminal justice system in the sense that a successful mediation automatically leads to non-prosecution. Mediation is not restricted to criminal matters, although the proportion of civil matters is almost nil. The system covers the whole country. In each community there has to be a conflict counsel as well as a communal mediator. Conflict counsels are financed by the state. The communal mediator is elected for a period of four years by the communal board.

The *basic conditions* for mediation are *voluntariness* and a *principal agreement of the object of mediation*. A further requirement for mediation in criminal cases is that the offence is not of a serious nature. Mediation is possible mainly in cases which would alternatively be dealt with by either child welfare actions, non-prosecution, fine, or a short conditional sentence.

The *initiative* for mediation may come from either the police or the prosecutor. If the offender is under 18, his/her parents must be heard. If the parties agree, the mediator writes down their contract. The role of the mediator is to mediate, not to present a ready made solution. However, the mediator has to see that the contract is balanced and fair. The mediations are oral, but the contract will be on paper. A signed contract will be sent to the prosecutor who after that makes a decision on possible non-prosecution.

### 2. Mediation in Finland

*Introduction.* - The first mediation experiment was started in Finland in 1983. Today, all towns with a population of over 25,000 and most of those with over 10,000 offer mediation services. Over 75 per cent of Finns live in a municipality that has an agency for mediation. Annually some 5000 cases are referred to mediation (see *Iivari* 2000).

In Finland mediation does not constitute a part of the criminal justice system but cooperates with the system as far as the referral of cases and their further processing is concerned. There is no legislation on the organisation of mediation. However, the criminal code has recently been revised so that it now mentions an agreement or settlement between the offender and the victim as a possible grounds for waiving of charges by the prosecutor, or the waiving of punishment by the court. In 2002 a plan was published to extend mediation to cover the whole country.

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<sup>11</sup> See *Paus* 2000. The aim of the establishment of the system of “conflict-counsels” was (1) to create an alternative to the traditional criminal process in minor offences, (2) to intensify the work with juvenile delinquents, (3) to reduce the workload of the police, (4) to speed up the time used in processing cases, and (5) to reduce crime.

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Mediation is based on volunteer work. Also participation in mediation is always voluntary for all the parties. The municipal social welfare authorities usually assist in coordinating the mediation services, but mediators are not considered public officials. The persons who function as mediators are unpaid volunteers who have taken a training course of approximately 30 hours in preparation for the task. The training includes some basics of criminal and tort law.

*Mediation process.* - The mediation process is not tied with the criminal process. Thus, it can start at any time between the commission of the offence and the execution of the sentence, and be initiated by any one of the possible parties. The *victim* or the *offender* may contact the mediation service right after the offence. However, the case is normally first reported to the police. After that the *police* may either send the case to mediation or may advise the parties to contact the mediation office. A third possibility is that the *prosecutor*, after receiving the files, sends the case to mediation. Three-quarters of all cases are referred to mediation either by the prosecutor (44%) or by the police (30%); the remainder of the cases are initiated by the offender (9%), social authorities (7%), the victim (5%) or other (6%).

During the session the *mediator's principal role* is only to mediate. He/She should act on a neutral basis and not try to lead the parties into one direction or another. The aim is to provide an opportunity for the parties for a better understanding of each other's points of view and for an agreement. However, the role of the mediator is also dependent of the situation. If the parties are unequal in terms of negotiating resources, and if the outcome appears to be unfair to either of the them, the mediator should intervene and, for example, inform the parties about the court practice as well as the legal rights of each party.

Once the process has started it normally leads to a *written contract*. The contract contains the subject (what sort of offence), the content of the settlement (how the offender has consented to repair the damages), place and date of the restitution as well as the consequences for a breach of the contract.

What happens after a successful mediation depends largely on what category the offence belongs to and how serious the offence is (see above I.A). In complainant offences a successful mediation automatically means that also the prosecutor drops the case. In non-complainant offences, it is under the discretion of the prosecutor whether he/she will drop the charge on the basis of the mediation. If the prosecutor takes the case into the court, mediation may still affect the sentencing decision of the court. It can totally withdraw all sanctions if the requirements of Penal Code 5:3 come to be considered, or it can mitigate the sanction.

*Practical experiences* - A rough estimation of the total number of cases in all mediation schemes gives the result of about 5000 referrals each year. 80% of the cases consist in Finland either of minor property offences, or minor forms of assault and battery.

Agreement is reached in about 50-60% of the referrals. An average of 90% of the contracts will be fulfilled. The majority of the contracts contained monetary compensation. On the other hand, money is not the sole issue, since in one-fifth of the cases the victim made no financial claims. Then the agreement contained mainly immaterial compensation e.g. an apology, a promise not to repeat the offence, or an undertaking to return the stolen property.

Mediation clearly provides a workable channel of restitution. In addition to material compensation, mediation may serve as a means for repairing some of the emotional and psychological damage caused by the crime. Contact between the offender and the victims has been able to temper the fears and aggressions the crime has aroused in the victim. Those victims that have been interviewed have also - in general - been quite satisfied with the mediation process. The popularity of mediation work among the municipal authorities as well as the willingness of the community members to do unpaid work has clearly been a positive surprise.

Only tentative results on recidivism rates are available. A comparison between different groups of offenders (with similar background and similar offences) revealed that recidivism was lower among those who have participated in mediation (compared to those who had gone through the normal criminal justice process).<sup>12</sup>

### III. THE SENTENCING PHASE: FRAGMENTARY NOTIONS

#### A. Restricting the Use of Imprisonment

##### 1. Depenalisation

1. The simplest way of avoiding the use of imprisonment would be just to construct legal barriers against it. One should always carefully consider whether imprisonment should be included as an legislative option in the first place. And when laws are changed, one should consider if *imprisonment for certain offences could be abolished*. Social, cultural and economical changes in society are often reflected in changed attitudes towards certain behaviour, as well as the value of liberty. A review of criminal law may show that existing penal provisions were drafted at a time when certain offences were deemed particularly reprehensible. However, in the light of the present attitudes, a community sanction may well be more appropriate.

In Finland, theft offences provided an example of this. In a rural society, i.e. when the country was still predominantly rural, and property was highly valued, theft was made punishable by harsh sentences of imprisonment which, in practice, exceeded those given for crimes of violence. Following e.g. the significant increase in the standard of living, theft was no longer considered to be as serious an offence. Accordingly, the law was amended several times to lower the sentence for theft. No doubt similar changes have occurred – and are occurring – in the quickly developing Asian countries.

2. The risk of custodial sanctions, even for the less serious offences, is always present in the form of a back-up sanction, which enters in the picture if the offender does not comply with the requirements imposed by less severe sanctions. Therefore, the possibility of *decriminalisation and other sanctions outside the criminal law* must also be kept in mind. Historically, “offences” like vagrancy and public drunkenness provide good examples. Although these offences were rarely imprisonable offences by themselves, the “offenders” were usually fined, but unable to pay the fines. Such non-payment often led to imprisonment. The dramatically falling number of fine-defaulters in Finland during the late 1960s provides an example of the possibilities to reduce the use of custodial measures by decriminalisation.

##### 2. Legal Presumptions Against Imprisonment

1. Another statutory measure would be to impose *statutory requirement of justification for the use of imprisonment*. Such a measure would compel the court to justify why none of the available community sanctions are appropriate in the case at hand. The Swedish law states clearly that the court must first consider all other sentencing options, and only if these do not come into consideration, the court may impose a custodial sentence. This policy is also accepted in the Finnish sentencing law.<sup>13</sup>

2. Even stronger restrictions against the use of imprisonment may be imposed when the accused is a young offender (see the Council of Europe Recommendation on Sentencing). Both the Swedish and the Finnish laws allow the use of imprisonment for young offenders only if extraordinary reasons call for this sanction. In both countries this means that less than 100 juveniles under the age of 18 (at the time of the commission of the offence) are sentenced to unconditional imprisonment annually.

#### B. Expanding the Scope of Traditional Alternatives

Also the restrictions on the use of community sanctions could be relaxed. These restrictions generally refer to (1) the type of offence, (2) the length of the sentence, (3) the criminal history of the offender, and (4) other attributes of the offender.

1. For example, the maximum length of imprisonment that can be replaced by a community sanction could be raised. For example in Finland in 1976, the maximum length of conditional

<sup>12</sup> A recent Australian study found that the proportion of juveniles who re-offended (i.e. were subsequently charged and brought before the Children's Court) was about 28 per cent lower for those who had participated in a mediation scheme (called Youth Justice Conference) compared to those who had originally been dealt with by a Children's Court (see [http://www.lawlink.nsw.gov.au/bocsar1.nsf/files/CJB69.pdf/\\$file/CJB69.pdf](http://www.lawlink.nsw.gov.au/bocsar1.nsf/files/CJB69.pdf/$file/CJB69.pdf)).

<sup>13</sup> Similar provisions are to be found in the Australian criminal code, which requires that “a court must not pass a sentence of imprisonment on a person unless the court, having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case.” See in detail *Joutsen* 1990.

imprisonment was raised from one year to two years. Also existing absolute prohibitions against the use of community sanctions in case of recidivism could be replaced by statutory provisions allowing the court to exercise discretion. This type of amendment was carried out in Finland in 2000.

2. The scope of community sanctions may be expanded also by *allowing new combinations of such sanctions*, or by allowing for the possibility of inserting additional requirements or conditions in e.g. probation orders. This type of reform was carried out in Finland in 2000 by allowing the possibility of combining short community service orders (20-90 hours) and long conditional prison sentences (1-2 years).

3. In general, *increasing the credibility* of community sanctions serves as one central method in narrowing the scope of custodial sanctions. One example of how an “old” sanction can be made more credible concerns the fine, the most common sanction in nearly all, if not all, jurisdictions. If steps are taken to ensure that the collection of fines is made more effective, judges would consider it to have a stronger “bite”, and its use could be expanded. At the same time, the risk of imprisonment for non-payment of fines would be reduced.

4. Some jurisdictions aim at restricting the *use of imprisonment below a certain length*. The rationality of this policy is much dependent on the general length of sentences,<sup>14</sup> as well as with the guarantees against the possibility that short sentences will not be replaced by longer sentences.

### C. Amendments to Recidivism Rules

In most countries a substantial part (usually the majority) of prisoners are recidivists (a person who has previous convictions). It is, therefore, evident that the size (and composition) of the prison population heavily depends on the way the law treats persons with prior convictions. In the US, the three strikes laws provide an acute (bad) example of the impact of recidivism rules in prison rates.

The mechanical aggravation of penalties for recidivists has a long tradition in European criminal codes - and, as with so many other traditions in the field of criminal justice, there are good reasons to take a critical look at this practice. One of the achievements of the criminal legislation during the 20th century has been a kind of “devaluation” of this aggravation by replacing old casuistic rules with more flexible models of regulation.

In Finland, this took place with the sentencing reform in 1976. One of the main aims of this reform was to restrict the significance of a prior criminal record in sentencing by replacing old mechanical provisions with a regulation which allowed aggravation only when recidivism implies increased culpability. According to chapter 6 section 2(4) of the Criminal Code, the previous criminality of the offender may increase the penalty “if the relation between the offences on the basis of their similarity or for another reason shows that the offender is *apparently heedless* of the prohibitions and commands of the law”. Casual or occasional repetition should, thus, not increase punishments. In order to find out whether the accused has shown “apparent heedlessness”, the judge must compare the new crime with the previous ones as well as look at the lapse of time between crimes, at the amount of premeditation, and at the motivational connection between these crimes. The mere number of previous convictions is not the only criteria to be taken into account.

### D. Restricting the Use of Predictive Sentencing

Another bad example from the US sentencing system is predictive sentencing which means that sentences are based on unsure assessments of the offender’s dangerousness and future behaviour.

The Finnish sentencing provisions generally rule out predictive sentencing on the basis of dangerousness. However, there is one exception in the law. Provisions on preventive detention require an assessment of dangerousness. This system is reserved for those violent offenders who have previously been sentenced for a serious violent offence and who are deemed to present a particular

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<sup>14</sup> A statutory prohibition against short imprisonment sentences would, however, meet with difficulties in countries where almost all sentences of imprisonment are quite short. For example in Finland, the median sentence of imprisonment is about 3 months.

danger to the life or health of another. The scope of application is quite restricted. Some 20-30 persons are kept at any one time in preventive detention. In principle, preventive detention for dangerous recidivists means indeterminate sentence, since the offender may be retained in prison even after he has served his or her original sentence if he/she still is manifestly deemed to present a particular danger to the life or health of another. During the last 20-30 years, however, no one has been kept in custody for longer than the term of their original sentence.

Even in its limited use preventive detention contradicts the prevailing sentencing ideology and the principle of proportionality. According to a recent proposal, the entire system of preventive detention could be abolished. The dangerousness of the offender could be taken into account through normal rules of release on parole.

#### IV. PAROLE AND EARLY RELEASE

##### A. The Benefits of Parole and Early Release

1. Finally, prison population size can be reduced by increasing the use of early release procedures - parole and conditional release. Unfortunately, many countries have become more restrictive in granting early release. The most extreme forms of this trend are political and populist programmes directed against the use of parole (like "truth in Sentencing") and proposals for "real-time" sentencing. However, there are a number of advantages from the point of view of the public - from the point of view of the potential victims - in increasing the use of parole.

2. The most obvious benefit must be the assistance that parole (and the accompanying supervision and support) can give to the *reintegration of the offender into the community*. The possibility of parole also *encourages good behaviour in prison*. In addition, early release *reflects our everyday moral judgements*, which often require a swift response immediately after the offence has occurred (and the offender has been detected), but which tend to become more lenient in the course of time.. Time is "the Great Healer" – also when it comes to feelings of resentment and retribution. And, of course, parole is a means to reduce the number of prisoners, without undermining the general preventive effect of the criminal justice system.

3. *Parole* is used in almost all countries around the world.<sup>15</sup> Under most parole systems, the prisoner may be released under supervision after having served a specific portion of the original sentence, as well as an absolute minimum (for example in England and Wales after having served one third of the sentence, but at least six months). Close to parole comes, in some countries, *remission of sentence*. This is a more mechanical release from prison once the prisoner fulfills certain criteria, most commonly that the prisoner has not been subjected to disciplinary measures and has otherwise been of good behaviour. The assumption is, therefore, that remission shall be granted unless there are special reasons to the contrary.<sup>16</sup> In the following, all arrangements of early release are considered under the term "parole".

##### B. Key Points in Parole Policy

The effect of parole on the prison population size is largely determined by the solutions adopted in the following four points:

<sup>15</sup> In the Asian and Pacific countries responding to the Third UN Survey, its use was reported in China, Fiji, Hong Kong, Indonesia, Japan, Korea, Papua New Guinea, the Philippines, Sri Lanka and Thailand (*Joutsen* 1990). Matti *Joutsen* reports also country-specific variants of parole including pre-release treatment (Indonesia) and extramural punishment (Fiji). This latter measure extends to prisoners serving at most one year, or to other prisoners within a year of the earliest release date. Such prisoners may be released subject to a compulsory supervision order, and they are to undertake public work for no less than thirty hours each week. Under the pre-release employment scheme in Hong Kong, a prisoner with less than six months to serve of a sentence of two years or more may be placed under supervision for the remainder of the sentence, and be required to (1) reside in a hostel provided for this purpose, and (2) remain employed. In Thailand, under certain conditions a prisoner may be transferred to a penal settlement, where he receives eight acres of land. He may have his family stay with him, and may stay for life. The land may be transferred to his heirs as part of his estate (see *Joutsen* 1990).

<sup>16</sup> According to *Joutsen*, remission of sentence is used in, for example, Fiji, India, Indonesia, the Philippines, Sri Lanka and Thailand (*Joutsen* 1990).



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1. Basic policy: parole as a rule, or parole as a prerogative. - Countries may have a different basic policy: Some countries grant parole only for a small group of (well-behaving, not dangerous) prisoners after a case-by-case consideration, some countries use it as a standard form of release, reserved for (practically) all offenders. The policy adopted in this point is reflected in the way the material conditions for parole are stipulated in the law (and applied in practice).

2. The formal conditions. - Every system stipulates also formal conditions for parole. A part of these conditions refer to how much (what proportion) of the original sentence has to be served before the prisoner is eligible for parole (usually after 1/3, 1/2, 2/3 or 3/4 of the sentence being served). The second form of requirement defines the minimum (absolute) time to be served, before parole is possible. Some European systems still retain relatively high minimum times (for example 6 months in the UK and Wales), while others have practically abandoned the requirement for a specific minimum time (in Finland this time is 14 days). The shortening of this minimum time may be defended on the grounds of equality: To the extent that prisoners must serve an absolute minimum before becoming eligible, it also erodes (in an unequal way) the difference between the amounts of time spent in custody under sentences of different lengths.

In addition, these two formal preconditions may vary in different prisoner groups (according to the age, prior convictions, the type of offence and the length of the sentence). In most systems, first offenders and young persons are released earlier (for example after 1/3 or 1/2), and recidivist later. In some systems, the right to parole is restricted or denied for certain categories of offenders (for example drug offences). In certain countries, also the length of the original sentence has an effect. For example, those serving a longer sentence may have the right to parole only after 3/4 of the sentence has been served, while those under shorter sentences may be released after having served only half of their sentence (for example England and Wales). There seems to be very little logic behind these practices. In fact, taking into account the background arguments for the parole system as a whole, one could even demand that those serving a longer sentence should be released under less restrictive formal conditions. Such practices are, thus, mainly explainable by public demands and political arguments.

3. *Parole revocations.* - Also the way parole violations are dealt with may have a substantial impact on the incarceration rates. Some systems hold the threshold low, and are prepared to revoke parole even on the basis of minor infractions. In other systems, the revocation of a parole order may be possible only when the released prisoner has committed a more serious offence. Policy differences in these matters may have visible effects on the prisoner rates. For example, in California two-thirds of those entering the prison each year (admittals) are parole revocations. In some other countries, the number of prisoner admissions due to "pure parole violations" may be practically non-existent.

4. *Conditions for a re-release.* - Another, often overlooked, detail deals with the issue, *at what point a person whose parole has already been revoked (at least once) may be eligible again for a new parole?* The main point to be decided here is how much of the "rest of the original sentence" this person must serve, before being eligible for a new parole. Some countries use formal fractions (such as 1/3-3/4), while others have fixed minimum times (for example 1 month in Finland). Different kinds of combinations are possible too.

A common feature of all these systems is that this part of legislation is very technical and very difficult to grasp. Another feature is that the solutions adopted may have a great impact on incarceration times, since those whose parole has been revoked may often have very long sentences to serve. Thirdly, rigid regulation (especially if based on formal fractions of the original sentence) can easily lead to unjust and unfair results, especially when the threshold of parole revocation is low. In the worst cases this can mean that trivial violations – such as the use of alcohol or omitting the supervision orders – may be followed by years of incarceration.

5. Comparisons between the European criminal justice systems on these four points reveal great differences. Consequently, the role of parole as a means to control prison rates, varies among the European countries. All in all, parole is the most efficient tool in reducing the size of the prison population, once (a) it is applied to all prisoners as a standard solution, (b) the revocation of parole may

take place only after more serious violations, and (c) re-release for parole is not tied too closely to the length of the original sentence. The Finnish system meets all the three requirements.

### **C. Release from Prison in Finland**

1. Practically all offenders (99% of prisoners) sentenced to a determinate sentence of imprisonment are *released on parole*. The decision is made by the Board of Directors of the prison in question (in accordance with instructions issued by the Ministry of Justice). In general, *recidivists* are always released after they have served two-thirds of their sentence, and *first time prisoners* are released after they have served one-half of their sentence. Those placed in *juvenile prison* are released after they have served one-third of their sentence. In all cases, a further condition is that the prisoner has served at least fourteen days.

An offender who is serving a sentence of life imprisonment may be released only if pardoned by the President of the Republic. Those held in preventive detention (at the moment some 20 prisoners, see above) as dangerous recidivists are in practice released on parole once the entire sentence originally imposed by the court has been served.

2. Release may be *postponed* beyond these minimum periods in general by one month or, at times, by even more if the grounds for discretion noted in the law are deemed to exist. In practice, release on parole is postponed only for two reasons: either the offender has committed a new offence within a very short time of his or her two previous releases, or he or she has violated the conditions of the furloughs granted during his or her sentence. Postponement of release on the grounds of the type of offence and a prognosis of dangerousness is very rare. All in all, parole is postponed in about 6% of all cases. Earlier release may be possible for various reasons related to aftercare (education, employment, housing) or general social reasons (illness, family-related reasons). In practice, few offenders are released on parole earlier than usual.

3. The *period of parole* is the remaining sentence, but at least three months and at most three years. About one-third of those released on parole are placed under supervision. The supervisor may be the Probation and After-Care Association, a private individual or the police. In principle, the supervision involves both control and support.

4. The court decides on *revocation* of parole if the offender commits an offence during the period of his or her parole and on the grounds of a behavioural infraction. In practice, all parole revocations are based on new offences, and only offences that would normally lead to a prison sentence may serve as a reason to revoke the parole order.

Once the parole has been revoked, the prisoner may be released on a new parole, once he/she has served the normal fractions of the "new sentence" plus one month of the old sentence.

### **D. The Enforcement of Prison Sentences**

1. The use of community alternatives may also be enhanced during the enforcement of the prison sentence. In "intermittent custody" the offender may spend the daytimes outside the institute but returns to the prison for the night-time. For some prisoner groups, the prison administration may grant permissions to study or work outside the prison.

2. The prison-structure can also be developed into more "open direction". *The use of "open" prisons* is one important means to this end. This system is widely used for example in the Scandinavian countries. In Finland some 25% of prisoners are placed in open facilities. In Sweden the number is still higher. Open prison units may also include work colonies, which have been established for certain work projects (for example the restoration of many cultural-historically valuable sites and other important building and repair work). Inmates participating in work or other activities and who are considered to suit freer circumstances and are not likely to leave the institution without permission, are placed in open institutions. In open institutions inmates always use their own clothes. In Finland all open institutions are intoxicant-free, in which an inmate is required to make a commitment not to use intoxicants. In open institutions prisoners are paid wages for their work of which they pay taxes and their keep.

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3. Perhaps the most widespread form of "opening" the prisons is the system of prison leaves (or prison furloughs). These furloughs have become a routine in the Scandinavian countries. In Denmark around 50,000 leaves are granted annually, in Sweden 40,000, in Norway 15,000 and in Finland 11,000 (the absolute number of prisoners in these countries varies between 2,500-5,500). In Germany, the numbers are even higher; more than 500,000 prison leaves (including day leaves) with a prisoner rate about 50,000.

**E. Amnesties**

If the above measures are ineffective in bringing the prison population size down, or cannot be applied (because they have not been legislated for or because they would not be acceptable in a particular country), then consideration can be given to the use of amnesties for less serious offenders who are approaching the end of their sentences. Amnesties are essentially a measure of short-term value, but if high prison population levels and overcrowding cannot be effectively combated in any other way, amnesties can play a useful role.

In Finland, amnesty was used in 1967 in connection with the 50th anniversary of our independence day. A substantial number of prisoners sentenced mainly for property offences and drunk driving, got their sentence reduced by one-sixth. As the experience showed, a majority of those released returned to prison within a relatively short time, thus confirming that amnesties provide only temporary relief.