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EUROPEAN INITIATIVES FOR HARMONISATION AND MINIMUM STANDARDS IN THE FIELD OF COMMUNITY SANCTIONS AND MEASURES[1]

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Abstract

The article addresses the question how far European initiatives on Community Sanctions and Measures as well as the attitude towards them and their implementation by the Member States reflect "the punitive turn" or rather show a tendency to "resist punitiveness" in European penal policies. After presenting the Council of Europe's European Rules on Community Sanctions and Measures (ER CSM) of 1992 its provision regarding the co-operation and consent of the offender is considered in more detail. The change of penal climate in the Member States and its reflection by the update of the ER CSM in 2000 is described then, using the example of sanctions of indeterminate duration and Electronic Monitoring. Finally, the European Union's Framework Decision on the supervision of probation measures and alternative sanctions (adopted 2008) and possible obstacles with regard to its implementation are introduced briefly.

Keywords:
Co-operation - Consent - Harmonization - Human rights - Minimum standards - Penal policy

Introduction

The current discourse on changing penal policies in Europe usually addresses the question whether and to what extent they have become harsher and what risk and protective factors for such punitive tendencies can be identified. One of the protective factors commonly identified is the "confidence in expert and professional views on policy options"; the corresponding risk

[1] The article is the revised and amended version of a presentation at the 9th conference of the European Society of Criminology (9-12 September, 2009) in Ljubljana, Slovenia. It is based on older research conducted until 2002 on international (UN and European) human rights standards in the field of non-custodial sanctions and measures (Morgenstern 2002). This research involved a theoretical analysis of these instruments – so the problems discussed were principally normative - but also looked at the practical implementation of standards in the member states, highlighting good or bad practices. In the last seven years, however, in particular with regard to the Eastern European countries, significant change in legislation and practice can be expected. An update therefore seems necessary and opens up the possibility to assess differences over time. For this update and the broader questions of criminal policy that were outlined above, I draw on other comparative research (Dünkel/Lappi-Säppälä/Morgenstern/van Zyl Smit 2009) that has been conducted by the Department of Criminology in Greifswald with regard to possible explanations for the different development of prisoner rates in different countries (involving many eastern European states). For this study expert surveys in the form of country reports were used that included a chapter discussing the impact of alternative sanctions.

factor being the influence of public opinion and focus groups (Tonry 2007). The problems of contrasting "punitive" and "tolerant" policies in comparative criminological research without considering the "cultural meanings of punitiveness and tolerance" (Nelken 2009, p. 304) in the respective penal cultures, however, were recently pointed out by Nelken who also highlights that examining the "prisoner rate" alone is not sufficient to explain the policies prevailing in a criminal justice system.

Tentatively summarizing this discourse it can be said that European penal policies currently are somewhere between the "punitive turn" and "resisting punitiveness", with some countries more on the punitive side and some others resisting better. Moreover, in most countries the development is not linear and, at least in continental Europe, we can often speak of bifurcation in criminal policy (e. g. Snacken 2007 with regard to Belgium, Dünkel/Morgenstern 2009 with regard to Germany). This bifurcation involves diversion and mild (often pecuniary) sanctions for smaller crimes and a concentration of harsher sentences and a strict risk-based approach for serious violent or sex offenders involving long prison terms or strict supervision within the community, sometimes for unlimited periods of time. In some contexts and to varying extents, it is argued that this holds true not only for serious but also for marginalized offenders such as homeless persons, drug addicts or illegal immigrants (e. g. Boone 2007 with regard to the Netherlands, Nelken 2009 with regard to Italy).

Other scholars have argued that even if harsher punishments can be found in many places, an opposite tendency also exists within Europe that tries to recognizes the "full legal citizenship" of prisoners and that "a principled human rights based approach to prison law and policy has become a part of wider European cultural heritage ..." (van Zyl Smit/Snacken 2009, p. 344).

This article picks up the latter point and addresses the question how European initiatives with regard to harmonisation and minimum standards for community sanctions and measures fit into the discourse. Do they reflect increasingly punitive penal policies? Or can they help resist punitive attitudes of governments or (presumed) punitive attitudes by the public? To be able to answer, the Council of Europe`s European Rules on Community Sanctions or Measures (ER CSM) of 1992 and a more recent initiative of the European Union, the Framework Decision on the transnational enforcement of non-custodial sanctions that involve supervision (adopted in December 2008), will be introduced and some problems with regard to their implementation and impact will be discussed.

European instruments – between human rights standards and harmonisation: history, scope and objectives

a) The European Rules on Community Sanctions and Measures (ER CSM) of 1992[2]

Against the background of rising prisoner numbers and severe overcrowding, and the attempt to make non-custodial sanctions "more credible" (usually meaning: harsher), international bodies as well as non-governmental organizations in the middle of the 1980s started to draft comprehensive instruments to combat prison population inflation and/or to safeguard the rights of those undergoing non-custodial sanctions. The first standard minimum rules were drafted by experts of the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI). The work of drafting and redrafting was influenced by a set of rules formulated by the International Penal and Penitentiary Foundation

[2] All recommendations are available for download: http://www.coe.int/t/cm/adoptedTexts_en.asp#P47_2021.

(IPPF).[3] The final version, the Tokyo Rules (as they came to be called after their place of birth), was adopted by the United Nations´ General Assembly by consensus in December 1990.

The development of the Tokyo Rules was described as a "careful process of international consensus building" (van Zyl Smit 1993, p. 314). The same later became true for the development of European Standards which were prepared by many governmental and independent experts, non-governmental organizations[4] and by the secretariat of the Council of Europe. They were adopted in 1992 by the Council of Europe´s Committee of Ministers as the European Rules on Community Sanctions and Measures (Recommendation No. R (92) 16). They are thus the first in a set of recommendations in that field, followed e. g. in 2003 by an instrument dealing with conditional release/parole, which builds closely on earlier recommendations, and particularly by the recommendation concerning prison overcrowding and prison population inflation of 1999, which endorses the use of community sanctions and measures.[5] The process still continues – at the moment a further recommendation on probation ("The European Probation Rules") is being drafted that deals with the proper functioning of probation agencies in Europe, which should contribute to the social inclusion of offenders, the safety of the community and a fair justice process.[6]

The principal aims of the European Rules on Community Sanctions and Measures are to safeguard the rights of the offender and to supply guidelines for good practice – so basically they promote the approach that only *what is just is working well*.[7] As a Recommendation they are legally not binding for the 47 member states of the Council of Europe. A certain authority might be deduced from the fact that they were adopted unanimously by the governments representatives – which is, admittedly, an easier task to achieve for mere recommendations than for binding instruments such as conventions.

They are to a great extent the "non-custodial" equivalent of the European Prison Rules. Unlike them, however, they are not well-known, they have no "back-up" from other, binding instruments and control mechanisms such as the Committee for the Prevention of torture (CPT), and even if they are based on the European Convention of Human Rights in the same way as the Prison Rules, almost no jurisdiction by the European Court of Human Rights can be found with regard to the application and enforcement of community sanctions and measures. This means that the Court has no occasion to draw on the ER CSM as it does on the European Prison Rules more and more frequently, which clearly is a disadvantage and impedes their implementation and distribution. This is regrettable because the ER CSM can be considered as a highly principled approach towards the human rights based use of community sanctions and represent what human rights lawyers, regardless of the actual legal nature, call "evolving standards of decency" in the respective field (Van Zyl Smit 2006).

[3] The Standards Minimum Rules for the Implementation of Non-Custodial Measures involving the restriction of Liberty (the Groningen Rules), Groningen 1988.
[4] Such as the European Conference on Probation and Aftercare, CEP.
[5] Rec. R (2003) 22 concerning conditional release and Rec. R (99) 22 concerning prison overcrowding and prison population inflation.
[6] I thank Rob Canton (as one of the experts of the Council of Europe's Penological Council responsible for the draft) for the information. The draft is available under the document number PC-CP 2008/09/Rev 6 on the website http://www.coe.int/prisons.
[7] To pick up the title of an article from the first edition of this journal (Mc Neill 2009).

Community Sanctions, in the definition of the Council of Europe,[8] comprise all sanctions and measures before, instead or after the trial when they have a penal content or penal value: it therefore also applies to diversion, compensation, reparation or even mediation as long as those concepts are backed by any type of control by law enforcement agencies (in the widest sense). Mere fines or warnings do not fall under those rules. Target groups of the Recommendation are the national legislators, the judiciary and the implementing authorities in the widest sense – special importance in my view is attributed to the professional associations and international NGOs, in particular the CEP, that become key players in preparing European collaboration between national probation services. Finally, these recommendations are important for researchers because they represent a point of reference for comparative criminological and criminal justice research.

According to the preamble of the ER CSM the application of community sanctions has to balance the need to protect society and the needs of the offender having regard to his social adjustment.[9] The victims' interests are only incorporated indirectly in this preamble in the form that CSM must be implemented in a way that allows for "reparation for the harm caused to victims". It can thus be said that the ER draw mainly on the concept of rehabilitation of the offender, all enforcement activities should gear towards it.. To find out how far this is still reflected in the current penal policy in Member States it is helpful to look at the country reports in the valuable and voluminous book "Probation in Europe" (Van Kalmthout/Durnescu 2008) at the section "Mission Statements" of the respective country reports of probation services. Such a review leaves the impression that the priorities offenders rights, victims' needs and public protection are frequently held in tension and that they are differently set out in different jurisdictions and probation services. That said, in several of the (admittedly short) mission statements the offender in person does not even appear.[10]

The ER CSM are structured in three main parts and consist of 90 rules in 11 chapters, preceded by a preamble. The three parts are entitled "General Principles", "Human and Financial Resources" and "Management Aspects of Sanctions and Measures". A glossary follows the text and is an integral part of the instrument, it might also help European researchers to find a common linguistic usage. A commentary ("Explanatory Memorandum"), written by the experts who drafted the text of the recommendation, exists as well.

In the first part, the European Rules stipulate the need for legal safeguards for every sanction or measure that has a penal content, stressing that the idea of alternative or community sanctions being soft options or even privileges for the offender in comparison with a custodial

[8] "The term "community sanctions and measures" refers to sanctions and measures which maintain offenders in the community and involve some restrictions of their liberty through the imposition of conditions and/or obligations which are implemented by bodies designated in law for that purpose." (Glossary, No. 1)

[9] "The present Rules are intended: a. to establish a set of standards ... to provide a just and effective application of community sanctions and measures. This application must aspire to maintain a necessary and desirable balance between, on the one hand, the need to protect society both in the sense of the maintenance of legal order as well as the application of norms providing for reparation for the harm caused to victims, and, on the other hand, the essential recognition of the needs of the offender having regard to his social adjustment; ... " (Preamble).

[10] See also Van Kalmthout/Durnescu 2008, p. 12. One example for a quite snappy mission statement is the Austrian report ("Our assistance creates safety and security", p. 50); others (e. g. the Estonian (p. 300), the Dutch (p. 682), or the Scottish (p. 910) reports clearly focus on risk assessment and effective prevention by means of "offender management". On the other hand the Bulgarian (p. 112) mission statement does explicitly speak of the "rehabilitation of offenders" and Portuguese of "social reintegration of (young) offenders" (p. 838), the Danish mission statement is characterized as "the art of balancing care and punishment" for the offender (p. 234). It has to be noted, however, that not all Probation Services have one single and short mission statement, but the authors use a rather lengthy and comprehensive description of all tasks instead.

sentence is wrong. They call for clear and explicit legal provisions on the introduction, definition and application of community sanctions and measures[11] (that means sentencing and enforcement, especially regarding conditions and obligations and consequences of non-compliance[12]). One of the fundamental principles is the concept of proportionality[13] (proportionate to the offence, not the perceived risk!) in a sense of a minimum intervention that takes into account the offenders personal circumstances. To clarify this concept of proportionality and its consequences for CSM, comparative research would be of interest and importance because obviously the question "proportionate to what?" is answered in many different ways.

To safeguard the offender's rights and thus to implement the legal citizenship of the offender, the ER CSM contain detailed provisions on complaints procedures as well as the requirement of the offender's informed consent to measures before or instead of a formal proceeding or trial. Furthermore, they stress that the co-operation of the offender is crucial for the success of the measure. They also stress the right to privacy of the offender and his family, which is of utmost importance, on the one hand with regard to the use and dissemination of personal data and on the other hand with regard to visits and other personal contact. The second and third part deal with the qualification, duties and rights of the personnel and the necessary involvement of the community and volunteers – which in fact qualify the community sanctions as part of a social inclusion strategy. They further set good practice guidelines based on those general principles, e. g. with regard to keeping files, co-operation amongst enforcement agencies, the need for individualised programmes, the nature of community service or probation conditions, the operation of the sanction and consequences of non-compliance etc. The last rules relate to the need for national and international research and evaluation of the use of community sanctions and measures.

To give just one example for how the Rules are formulated, how much room for the interpretation they leave and how problematic it may be to implement them in the Member States, Rule 31 will be discussed in more detail: "A community sanction or measure shall only be imposed when it is known what conditions or obligations might be appropriate and whether the offender is prepared to co-operate and comply with them."[14]

In implementing ER 31, the least that is required is a thorough examination of whether the offender is willing to co-operate or not. Though his or her consent is not an absolute condition to apply the measure, co-operation is deemed to be crucial for the success of the measure. Neither the text nor the commentary,[15] however, answer the question what the consequence of a final refusal to co-operate is (in most cases it will be imprisonment because a fine would be a milder penalty compared to the CSM foreseen). Rule 31 nevertheless is important because it respects the autonomy of the offender and values him or her as a person that might or might

[11] ER CSM 3, 4, 7, 9.
[12] ER 4.
[13] ER 6: "The nature and the duration of community sanctions and measures shall both be in proportion to the seriousness of the offence for which an offender has been sentenced or of which a person is accused and take into account his personal circumstances."
[14] It is accompanied by ER 34: "Since the implementation of a community sanction or measure shall be designed to secure the co-operation of the offender and to enable him to see the sanction as a just and reasonable reaction to the offence committed, the offender should participate, as far as possible, in decision-making on matters of implementation."
[15] The commentary to ER 31 points out that "…, community sanctions and measures require the co-operation of the offender if they are to achieve their aims. This has been widely recognized in relation to such sanctions as community service. If the offender is manifestly not prepared to co-operate and comply with appropriate conditions there would be little point in a court deciding on a CSM".

not make rational decisions. And, more practically, it should serve to reduce the number of unwilling clients from the CSM enforcement agencies (provided that there has been as serious attempt to reach their consent and co-operation).

ER 31 certainly deals with one of the core problems of enforcing CSM - its implementation is quite different in the Member States and has changed over time. The problem of consent and voluntary compliance is a complex one because its ethical and legal prerequisites are different for different stages and sanctions within the system of CSM. For legal reasons - the presumption of innocence as part of the fair-trial-principle, Art. 6 (2) European Convention of Human Rights[16] - the consent of the offender is mandatory with regard to all measures before or instead of a criminal procedure. The question of how voluntary consent can be if the sword of Damocles is hanging over the offender's head cannot be discussed here – at least he or she has two options (or better: can choose between two evils, this becomes quite clear when one option is pre-trial detention).

Beyond that one point, there seems to be no consensus with regard to the necessity of consent. This can be demonstrated by the example of community service or unpaid work as one of the most popular CSM throughout Europe. Most European countries do require the consent of the offender; exceptions are, e. g., Russia, Moldova, the Czech Republic, England and Wales and Hungary (Morgenstern 2002, p. 239). This is partly due to national (constitutional) requirements or a certain understanding of Art. 4 (3) ECHR – mostly this article is interpreted in a way that, at least if community service is a sanction in its own right (and not a substitute for prison), its imposition without consent would infringe the prohibition of forced labour.[17] Apart from this complex[18] legal problem it is interesting why and how States have decided about the necessity of consent regarding community service:

- England and Wales has to be regarded as the European precursor for community service orders within the penal system. In the beginnings, consent was considered necessary (Sect. 14 (2) (b) Powers of Criminal Courts Act of 1973). Here, not constitutional requirements or the European Convention of Human Rights were the basis (because the latter had not been transformed into English law at that point of time). In fact it was deemed indispensable, as e. g. the National Standards of the Supervision of Offenders in the Community for the Probation Service of 1992 show, because without informed consent the sanction would – it was argued - have little chance of success.[19] This approach has changed since the introduction of the Crime Sentences Act 1997 (Sect. 38 (2)), the consent of the offender to the sentence of community service is no longer necessary. This is reflected by the National Standards again, the version of 2000 does not deal with the question of co-operation anymore and stresses instead that work placements should "occupy offenders fully and be physically, emotionally or mentally demanding" (Home Office 2000, D 3). With the introduction of the new Community Order by the Criminal Justice Act 2003, and the creation of a unified National Offender Management Service (NOMS), community

[16] To specify Art. 6 (2) ECHR, ER 35 states that "The consent of an accused person should be obtained before the imposition of any community measure to be applied before trial or instead or a decision on a sanction."

[17] Moldova, e. g., ratified the ECHR with the reservation that despite of Art. 4 (3) ECHR, the imposition of a (traditional form of) community service as a penal sanction would be continued without consent of the offender. This demonstrates an understanding that Art. 4 (3) and involuntary community service are incompatible.

[18] In fact it is an unsolved legal problem, Morgenstern 2002 p. 236 pp. with further examples from different jurisdictions.

[19] Home Office/Department of Health/Welsh Office 1992, p. 68 f. The tasks of the Probation Service in that regard are also described in Ward/Ward 1993, p. 24 pp.

service orders as such disappeared and so did questions of consent (Cavadino/Dignan 2007 in the fourth edition of "The Penal System" do not touch on that question whereas they did in the second; Cavadino/Dignan 1997, p. 218). Nevertheless, the NOMS Management Model published for the first time in 2005 recognizes the importance of treating the offender as "active collaborator" (National Offender Management Service 2006, p. 39). This return to at least some elements of voluntarism seems to be motivated rather by efficiency-orientated than by ethical arguments.

- To give a second example for (possible) changes with regard to the requirement of consent: In Hungary community service has only slowly gained popularity amongst the judges (currently it has a share of about 7% of all sanctions imposed). Up to now, no consent of the offender was necessary and the judges tended to impose it on those apparently unwilling to work, as a means of education. It is not surprising that this practice met with harsh criticism by scholars (Nagy 2009); judicial selection of the wrong types of offenders may have been responsible for the lack of acceptance and success of that sanction. As a consequence, current reform plans foresee the requirement of consent of the offender.

- Thirdly, the new Penal Code of the Czech Republic which will come into force on 1 January 2010 will not change the current situation which does not require the offender's formal consent (for various legal reasons). The judge, however, has to interview the offender about his willingness to co-operate and to fulfil his or her working obligations. If the offender refuses to co-operate, the judge would nevertheless in theory be able to impose a community service order, but in practice nowadays rarely does so. The reason for this is that in the past community service orders (which represent a significant share - ca. 20% - of all sanctions imposed) have not often been successfully completed (Válková 2007). Also here it is recognized that the lack of consent in community service impedes its success, but scholars also used to see the lack of a requirement for consent as a sign of an antiquated, paternalistic penal system, that is not on a modern European level (Válková 1998).[20] Even if the legal problem concerning Art. 4 (3) ECHR now might not have been solved, the new practice implements ER 31.

Similar discussions and policy changes over time could be found with regard to medical and psychological treatment as a condition of a CSM: e.g. in Germany the legal discourse up to now was dominated by the approach that forced psychological therapy contravenes the rule of law. This discussion became lively again with regard to the reform of intensive supervision orders for released offenders (*Führungsaufsicht*, which is both possible for conditionally released prisoners and those who have served their sentence fully), because in particular psychiatrists and other specialized personal involved argued that sometimes the will to undergo therapy can only be developed in the first phase of such a treatment (Morgenstern 2006). Finally, the requirement of voluntariness was kept in the law in a compromising way: Forced therapy as a condition of the intensive supervision order is not possible, but a condition exists that obligates the client to present him- or herself to a specialized therapeutic establishment. The failure to follow this obligation is a punishable offence.

[20] For the information about the current developments I am very thankful to Helena Válková, University of Pilsen.

In an attempt to arrange and summarize my thoughts about contemporary consideration of the offender's consent/co-operation I again consulted the compilation of country reports about national Probation Services by van Kalmthout/Durnescu (2008). In their comparative overview, under the heading "principles and ethics of probation work", the editors speak[21] of common underlying principles in European Probation, such as (among many others)…"voluntarism": "it is up to the offender to decide whether he needs support and to request help". Looking closer at the country reports, however, this assessment can only be shared partly. Usually in the section that deals with the values of the Probation Service something can be found about the "respect for human rights" including, e. g. in the Czech Report, respect for the "dignity and autonomy" of offenders. But a further look in the section "Probation Clients Rights" of the country reports, where you would expect to find more consideration on that topic, does not elucidate how the generally recognized autonomy of the offender is respected in practice. In the English report it is said that[22] the offender has to be informed that he "should expect to have say in some of the parts of his supervision plan." This certainly does not meet fully the aim of Rule 31 but may represent a typical approach in the practice of many countries.

b) Update of the ER CSM in 2000[23]

After having tried to show some of the implementation problems of ER CSM up to the present, I now return to the development and transformation of the instrument itself. In 1997 it was decided that a committee of experts[24] should undertake a thorough review of the operation of the European Rules. It should be recollected in that context that at the end of the 1990s approaches in criminal policy in several countries were dominated by a "tough on crime" rhetoric, so human rights approaches and moderate voices often faced a hostile political reception. The outcome of the review was an evaluation report based on a questionnaire sent to all member States. Replies were received from 24 countries. The committee found out that there was a large degree of convergence between the legislative provisions on CSM and the European Rules but that major shortcomings and difficulties could be found in implementation. One of the particularly problematic points according to the experts was the fact that sufficient complaints procedures against the ways agencies actually enforced ECM existed almost nowhere – a judgement that is still shared ten years later by van Kalmthout/Durnescu (2008, p. 36). In addition to the report, a new Recommendation was formulated[25]. It was adopted at the end of 2000 and concentrated on promoting the dissemination of the ER CSM and their implementation.

Although fortunately in the new recommendation the European Rules were nearly completely confirmed, changing criminal policy in the Member States nevertheless could be observed in two details:

- The original Rules of 1992 contained the provision that no community sanction or measure shall be of indeterminate duration (Rule 5). In the version of 2000 this changed so that it is merely stated that this "ordinarily" shall not be the case. At least

[21] Van Kalmthout/Durnescu 2008, p. 14.
[22] Roger Mc Carva, England and Wales. In: van Kalmthout/Durnescu 2008, p. 281.
[23] Recommendation Rec (2000)22 adopted by the Committee of Ministers of the Council of Europe on 29 November 2000 and report.
[24] The Committee consisted of national experts from 15 countries (both east and western European countries). Elected chairman of this group was Sir Graham Smith from the UK. Additionally three scientific experts were involved, K.-K. Kunz from Switzerland, P. van der Laan from the Netherlands and N. Bishop from Sweden.
[25] Recommendation Rec (2000)22

four member states retained measures of offender control within the community for an indeterminate period (e. g. Norway and Germany with the above mentioned *Führungsaufsicht*, those measures follow as a rule a long prison sentence or committal to a psychiatric institution and include supervision and/or treatment). Although in this matter no basic new findings had emerged in the meantime that would justify the indeterminate prolongation of a sanction regardless of proportionality, the European Rules were adapted to the reality of criminal policy in the member States instead of an adaptation vice versa.

- The second example is Electronic Monitoring or Tagging: The original version of the ER CSM remain silent on that point and also the explanatory memorandum of the Rules in 1992 was very reluctant to support the use of electronic monitoring (it only considers the "dangers of new technologies" in general), as were most of the Member States at that time (Morgenstern 2002, p. 267 pp.) In the report preceding the new recommendation of 2000,[26] the growing use of these methods was recognized, but at the same time it was underlined that "house arrest and curfews with electronic monitoring without social assistance would amount to a breach of the ER CSM". The new recommendation in the end mentioned this form of punishment explicitly in its list of recommendable community sanctions and followed the practice in many of the Member states. In my view this change of attitude clearly corresponds to a changing *Zeitgeist* and European influences together with very active promotion strategies by the providers.[27]

  To illustrate that point: Estonia recently has introduced electronic monitoring as a back-door strategy; that is as a measure linked to conditional early release from prison. The country managed to reduce its prisoner rate considerably (from 351 in 2000 to 258 in 2008). This was explained, inter alia, with the increased use of parole/early release (Markina/Sootak 2009) which was made possible by a change in the Penal Code.[28] A closer look reveals, however, that not many parolees are under a EM scheme, many more are released in the normal parole system (Kruusement 2009). So the question remains, whether the introduction of Electronic Monitoring was necessary to reduce the prison population or whether it just helped as a political implementation strategy.

  Some political pressure from the European developments has also been felt in Germany. For a very long time it has been argued that in Germany – unlike, for example, in Scandinavia – no room is left for the use of EM: In Germany short unsuspended prison sentences (up to six months) are rare because the legislation only allows them in extraordinary cases. So most offenders that are the target group in other countries get suspended sentences or, more often, fines. The use of EM would clearly pose a serious risk of net-widening in Germany. So for many years most Federal States resisted and did not introduce Electronic Monitoring despite great efforts of the providers of the relevant technology. In one Federal State (Hessen) a pilot produced only mixed results in the evaluation (Mayer 2004), nevertheless EM is used there now on a regular basis (but with only very few clients). A second Federal State, Baden-

[26] Nr. 49 pp. with regard to ER 23 und 55.
[27] The last of the regular conferences on Electronic Monitoring by the CEP was co-sponsored by four providers who were present during the whole conference, their presentations are available at the website with all conference results (http://www.cepprobation.org/default.asp?page_id=116&news_item=191; last retrieved 18 September).
[28] I also thank Jaan Ginter from Tartu University, Estonia, for his assessment of the situation.

Württemberg, however, will introduce Electronic Monitoring soon, both in front door and back door schemes. One of the main arguments is "that we could not lose connection to the European development".[29]

c) The Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation

Very recently and for the first time, the European Union, as an increasingly powerful and eager player in the field of criminal justice, presented an initiative regarding CSM, namely the Framework Decision on Probation. Traditionally, the EU showed little interest in the criminal justice system and even less in its human rights related questions. If it became active in crime and criminal justice related fields in recent years, the engagement was usually associated with more effective law-enforcement instruments. This is on the one hand plausible because criminal justice currently is not in the scope of legislative powers of the Union, but, as part of the so-called third pillar, only a field of intensified mutual co-operation. Moreover, criminal justice and the penal culture are still seen as something entirely national and often jealously kept out of the reach of "Brussels".

Experts know that, in practice, this has changed, especially since 9/11 a lot of norms have been adopted to facilitate cross-border law enforcement within the European Union, the most prominent being the European Arrest Warrant. Those efforts are usually labelled as security-orientated, with particular shortcomings with regard to individual freedoms.[30] For some crimes, namely in the area of human trafficking, (other) organized crimes and drug crimes, the EU prescribes so-called mandatory minimums for the sentencing frame (more precisely for the maximum penalty), so in fact Member States could have been forced to foresee harsher sentences in their Penal Codes than they had before. The EU-Treaty itself, in Art. 31 I lit e, only obliges the Member States to "progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organized crime, terrorism and illicit drug trafficking", but these mandatory sentencing frames are one common form for harmonization. That said, their practical implications are, however, limited and more symbolic (Fletcher/Lööf/Gilmore, 2008, p. 203). The instruments of choice aimed at intensified collaboration and, in the future, harmonisation, are the Framework Decisions. They are based on the concept of mutual recognition of judgements in criminal matters. This mutual recognition is supposed to be based on mutual trust[31] in each other's jurisdictions and enforcement agencies; up to now this mutual trust (which should be based on mutual knowledge!) probably is rarely more than a fiction.

I agree with the widespread criticism against many of the above mentioned tendencies because they might lead to a levelling (and thus in some states lowering) of human rights and other standards. With regard to my subject here, however, I would like to stress that these are not the only impulses we find from the EU. In particular in the European Parliament there are

[29] A quote from one of the Government Officials responsible for the draft legislation, Ratzel 2009.

[30] Scepticism, if not open rejection, can be observed, for instance, in most papers included in Schünemann (ed.), 2006; this volume contains contributions by scholars from ten European countries. Critical remarks can also be found in a Polish-German colloquium; Joerden/Szwarc (eds.), 2007. For the Scandinavian countries, see (with further references) Lappi-Seppälä 2007. Critical monitoring and own initiatives also come e.g. from the European Criminal Bar Association, www.ecba.org.

[31] This is, e. g., stressed in the current guideline for EU policy in the criminal justice field, the Hague Programme of 2005 (The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, Official Journal 2005/C 53/01.

political groups and individual politicians who are prepared publicly to support the calls for improvements to conditions of imprisonment, for the humane treatment of offenders in the community and for various new instruments to ensure that this is done.[32] But also the Commission (usually on the initiative of some of the EU Member States' Governments) now sees the necessity to do something on the "human rights' side" of the coin.[33]

The Framework Decision on Probation[34] will enable Member States of the EU to enforce a foreign probation sanction or measure according to their national practice, provided that the enforcing state accepts the judgement (which "should be obligatory", recital 9 to the FD). The Framework Decision aims at "facilitating the social rehabilitation of sentenced persons, improving the protection of victims and the general public, and facilitating the application of suitable probation measures and alternative sanctions in case of offenders who do not live in the State of conviction."[35] The instrument itself only constitutes the overall framework the transfer of probation supervision will have to follow, but by December 2011, the Member States have to implement these specifications and transform them into a national act. A parallel instrument with regard to alternatives to pre-trial detention, enabling Member States to transfer the supervision of suspects or accused during the criminal investigation and proceedings, is also adopted (known as the European Supervision Order[36]).

These two Framework Decisions might be motivated mainly by the pragmatic approach to get rid of EU-foreigners in national prisons for whom an unsuspended prison sentence is not adequate but who nonetheless received such a penalty due to the fact that they were foreigners and therefore deemed not eligible for probation (with regard to non-compliance for various reasons – the risk of absconding, language problems etc.). But even if this is the main motivation, a functioning transfer procedure could implement several of the principles of the ER CSM and more general human rights principles with regard to non-discrimination of foreigners, fair trial etc. Another question that cannot be answered yet, is if and how the transfer will function in practice and whether the Member States will be able to transform the Framework Decision, one that is problematic in several regards, into good practice in conformity with the human rights framework. Reading the text of the FD, the procedure foreseen seems to be very bureaucratic and lengthy on one hand and quite vague on the other - what, e. g., are "suitable" probation measures that would fall within the scope of the FD? What if the conditions and obligations attached are not known by the then enforcing Probation Service? Or have a different intensity? To pick up the subject of my earlier considerations: Serious doubts arise as to whether the transfer of supervision will work if the explicit consent

[32] In a resolution in 2001, it called on Member States to stress the ultima ratio character of all forms of detention by restricting it as far as possible (Adopted on 15 January 2003: P5_TA(2003)0012). See also European Parliament recommendation to the Council on the rights of prisoners in the European Union (2003/2188 (INI)), OJ C 102 E, 28.4.2004, and Report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs.

[33] This can be seen, e. g., from the initiatives to avoid pre-trial detention for Non-nationals in other EU countries, which are also based on the Hague Programme (see: Council and Commission: Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, OJ C 198, 12.8.2005, and: Discussion Paper for the experts' meeting on minimum standards in pre-trial detention procedures on 6 June 2006 and 9 February 2009, European Commission, Directorate-General Justice, Freedom and Security, Unit E3: Criminal Justice; available at http://ec.europa.eu/justice_home, last retrieved 15 September 2009).

[34] More precisely: The Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation, Official Journal of the European Union 16.12.2008, L 226/102-122.

[35] FD Art. 1.

[36] "Council Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention". Council document 17002/08 COPEN 249, Brussels, 12 December 2008.

of the sentenced person will not be made a mandatory pre-requisite in national legislation. Also the incorporation of "an obligation to undergo therapeutic treatment of treatment for addiction", Art. 4 (1) lit k FD, as one of the transferable "probation measures and alternative sanctions" is clearly more than problematic in light of the discussions above.

Only modest first steps of practical European collaboration have been made so far that point in the right direction. For a few years now, two "European Contact Points" exist at the Polish-German and the Czech-German Border. Both small-scale projects are, inter alia, helping to organize and supervise community service in the respective home countries of the sentenced offenders (*Europäische Beratungsstelle für Straffälligen- und Opferhilfe, EBS*, funded, inter alia, by the Saxonian Ministry of Justice and the EU[37]). More of these smaller initiatives, which probably exist in other Member States too, are necessary and must be evaluated before ambitious complete packages are constructed.

Conclusion: A mixed picture

My initial question was how European initiatives with regard to harmonisation and minimum standards for community sanctions and measures fit into the discourse on punitiveness and, more general, penal policy in Europe. I therefore introduced two instruments, the Council of Europe's European Rules on Community Sanctions and Measures and the EU Framework Decision on Probation. Even having expressed some concern with regard to a punitive impact of these instruments (or more precisely: some less favourable interplay between national policies and the instruments, e. g. with regard to sanctions of indeterminate duration and electronic monitoring), and serious doubts about the practical functioning of the Framework Decision, from my point of view the Pan-European efforts taken together can have a moderating effect on Member States with regard to their policy on CSM. One reason for this may be that the initiatives are often drafted or otherwise influenced by veteran professionals, sometimes also researchers. This supports Tonry's (2007) point quoted above that the role of experts has to be seen as one of the protective factors against an irrational and punitive criminal policy. In Europe we also know that, in particular with regard to the Treaty of Lisbon, Europeanization in all of its forms will gain momentum. Mutual understanding based on knowledge together with intensified collaboration will therefore continue to be important. This knowledge-building, however, should not be merely understood in a technical and efficiency-orientated manner but must be based on a common human rights framework.

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[37] Only few information is publicly available yet about these projects, such as press releases and a information sheet of the EBS in Dresden (http://www.hammerhilfe.eu/ebs_konzept_dt_101008.pdf, last retrieved 15 September 2009).

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