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**Rapid Evidence  
Assessment  
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Churches and  
Irish Inter-Church  
Meeting  
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# **Fines or prison – key issues in public policy**

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## 1. Approach.

The evolution of the policy issues within the environment of the question of fines versus prison leaves us with a choice that is no longer a binary one. Increasingly, over the last thirty years, we are seeing a global application and use of community sanctions and measures (CSM) as an alternative. With this increased use of CSM, we are also benefitting from ongoing research into all facets of the different types of CSM application and operation. This allows researchers to gain an insight into the success or otherwise of various CSM measures in different jurisdictions and, naturally, this research can feed into the policy development elsewhere.

We met with our research sponsors, the Irish Council of Churches to get their view, perspective and importantly, their broader overview of the issues. It was clear from our engagement with them that they were interested in a broader interrogation of the topics of prison, prisoners and the communities that are currently over-represented in the penal system, not just in Ireland, but throughout the globe. In addition to this, they also informed of how an examination of these issues could reflect a vision of a more humane society which could include a greater focus on education while incarcerated; examples of possible best in class in prison policy; and the issues around rehabilitation. They were also very aware of the international dimension to these issues and what might be learnt from what had worked in other countries.

In our discussion with the sponsoring organisation, we challenged them on the binary nature of the policy question which appeared to present prison or fines as binary sentencing options. We pointed to a number of alternative options in penal policy, including diversion, community sanctions and outright decriminalisation, which would avoid such a stark juxtaposition. They agreed that these were realistic alternatives and what was being sought was a set of guiding principles that would make the penal system more humane towards offender, whether prison or fines were involved or not.

In our subsequent discussions and analysing available research, the Group were not convinced that answering the binary question of Fines or prison would, in our view, lead to a useful study to be applied to general penal reform. With regard to punitive options, it was apparent to us that fiscal fines are ineffective and almost by definition unfair, and prison broadly understood to be harmful and ineffective, so we turned our focus to the unmentioned third punitive option that of community sanctions and measures.

We then reviewed twenty-two pieces of relevant CSM research from a variety of individual jurisdictions and regions worldwide. These research papers were distilled down to five individual pieces which we subjected to a more detailed consideration and critique and from where we derived our conclusions and recommendations.

## **2. Introduction.**

Fines or prison? Answering the binary query of fines or prison as a punitive measure for an individual who has breached the law would not, in our view, lead to useful study to be applied to general penal reform.

Lucia Zedner (Zedner, 2004) argued against the effectiveness of fines as a punitive device in her 2004 book *Criminal Justice*, stating that fines generally provide no opportunity for the rehabilitation of the offender, indeed a fine is the only sanction for which offenders can (and routinely do) rely on friends and family to bear the burden of punishment their behalf. Moreover, the same sum of money obviously will not have the same impact on all those who are fined. Individuals are likely to be affected in very different ways, depending on their personal wealth, that of their family and their overall ability to pay. The fine amount also is generally a reflection of the seriousness of the crime, and rarely, if ever, the offender's ability to pay. It is therefore an unfair penalty affecting those with fewer means disproportionately. A crime punishable by a fine is only a crime for those without the means to pay.

With that said, the harmful effects of penal custody have been well understood in the sociology of prisons since the 1940s and right up to today (Clemmer, 1940; Grappendaal, 1990; Healy, 2009). In his 2001 paper (Donnelly, 2001), Donnelly argues that custodial sentencing is neither a deterrent nor a rehabilitation, citing evidence of the limited value of incarceration through the high rate of recidivism among ex-prisoners from England and Wales in a 1995 study that demonstrated within two years 77% of young males were re-convicted, with 52% returned to prison (Kershaw, 1999). Byrne and Tusinski Miofsky (Byrne and Tusinski Miofsky, 2009) state in their 2009 paper the available evidence on deterrence suggests that while incarceration may reduce crime to a point, once the incarceration rate hits a certain level, crime rates actually increase - likely because parents are absent from their children, future earning potentials of ex-prisoners via legitimate means upon release are reduced and for communities in which a large proportion of adults are incarcerated a general mistrust of the justice system may be engendered, serving to increase crime rates over all.

And so, with regard to punitive options, it being apparent that fiscal fines are ineffective and almost by definition unfair, and prison broadly understood to be harmful and ineffective we turned our focus to the unmentioned third punitive option that of community sanctions and measures (CSM).

The 1985 Whitaker Committee about the situation in Ireland stated that '*imprisonment is a severe personal punishment for the offender. It is of limited protective, deterrent, or corrective value ... It should be employed only as a last resort*' (Whitaker, 1985). The Irish Penal Reform Trust (IPRT), a non-governmental organisation campaigning for the rights of people in prison and the progressive reform of Irish penal policy, have had a longstanding position that imprisonment as a last resort should be the underlying principle of penal policy in Ireland. This is to reduce imprisonment, respect the rights of everyone in the penal system, and reform the penal system based on evidence-led

policies. Despite the prominent advocacy of IPRT in this area, in recent years (2017 – 2021) we have seen a practical move away from the sentiment of imprisonment as a last resort, as people were continually sentenced to short terms of imprisonment rather than being diverted to alternative sanctions in the community (IPRT, 2021).

In the Republic of Ireland, committals to prison exceed CSM by a rate of more than two to one (Probation Service, 2014; Irish Prison Service, 2014). Importantly, a significant proportion of committals to prisons in the Republic of Ireland are as a result of non-payment of a court ordered fine (DoJE, 2014).

In developing our rapid evidence assessment, we elected to focus on prison as a last resort and were led by a clear emphasis within the literature on the use of community-based sanctions and measures (CSM).

The four predominant areas of focus established are:

- I. CSM - Overview
- II. The impact of CSM and widening of the penal net.
- III. CSM: Stand-alone or alternative punishment.
- IV. Judicial and professional discretion.

Each of these four areas will be discussed in detail in Section 4 below.

### 3. Overview of Key Research Documents.

Title	Short Citation	Citations	Topic	Country	Method/analyses	Key points
The ethics of community-based sanctions	Von Hirsch, 1990	78	Proportionality of CSM	General	Philosophical enquiry	Like imprisonment, CSM involve deprivations; CSM should be designed around and justified by the intrusiveness of these deprivations, rather than comparison to imprisonment. Intrusiveness must not undermine the dignity of offenders as members of the moral community, though some ancillary deprivations may need to go beyond on a strictly limited basis this in order to enforce the primary sanction. The CSM that affects third parties least should generally be imposed when use of CSM is justified.

<p>Changes in European instruments as a reflection of a shift in legal philosophies relating to community sanctions and measures</p>	<p>Yang, 2019</p>	<p>4</p>	<p>Convergence of CSM in Europe via impact of international instruments</p>	<p>Council of Europe; European Union</p>	<p>Comparative qualitative analysis</p>	<p>CoE recommendations focus on reducing the use of imprisonment, while the EU decisions concern mutual recognition for this purpose. The CoE’s emphasis has changed from the cost effectiveness of less imprisonment to effective supervision and control of offenders via both formal and substantive compliance.</p> <p>Human rights have been undermined by uncertainty over the punitiveness of CSM, but more recent CoE recommendations emphasise human dignity more greatly and exclude indefinite use of CSM. The proportionality principle has also been extended to factors beyond the seriousness of the offence and culpability of the offender, including the risk of reoffending and offender’s needs.</p> <p>To some extent, this has restrained increases in their punitiveness, but CSM are now established as tools for both rehabilitation and public protection in Europe and appear to exist in parallel to imprisonment.</p>
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<p>Women and community sentences</p>	<p>Malloch and McGill, 2011</p>	<p>79</p>	<p>Supervision of women as alternative to imprisonment</p>	<p>Scotland</p>	<p>Semi-structured interviews with members of chosen cohorts</p>	<p>The UK and Scottish governments recognise that the structural circumstances behind offending by women make imprisonment an inappropriate disposal.</p> <p>However, policies continue to emphasise punishment, rather than addressing these factors. CSM are gendered and it may be difficult for women to comply due to personal difficulties and they may be up tariffed by default instead.</p> <p>Women expect CSM to provide support but can be labelled 'troublesome' by social workers because of past abuse or trauma. Interventions should support achievement of self-efficacy and control by women over their lives, but this is still defined by the relationship between the social worker and offender, rather than policy.</p>
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Title	Short Citation	Citations	Topic	Country	Method/analysis	Key points
Have community sanctions and measures widened the net of the European criminal justice systems?	Aebi, Delgrande and Marguet, 2015	126	Are CSM an alternative sanction or an additional sanction?	29 European countries	Cross-sectional and longitudinal quantitative analysis	<p>The number of inmates and of persons serving CSM have both risen relative to population across Europe. This occurred despite falling overall crime rates and cannot be explained by increases in non-lethal violence and drug offences alone.</p> <p>CSM, therefore, are being used to widen the net of criminal justice systems in many European countries and are an instrument of an increasingly punitive approach to crime.</p>

<p>Prison sentences: last resort or the default sanction?</p>	<p>de Castro Rodrigues, Sacau, Quintas de Oliveira and Abrunhos a Gonçalves, 2019</p>	<p>10</p>	<p>Judges' perceptions of prison sentences as a last resort</p>	<p>Portugal</p>	<p>Questionnaire and interview on attitudes towards sentencing and penal ideologies</p>	<p>Penal sanctions should be considered from the perspective of the judge's penal ideologies and their purpose in sentencing. But the aims of judges are based on courtroom experiences more than laws or theories of punishment. Portuguese judges are aware of the problems with imprisonment but rate it highly for deterrence, incapacitation, and retribution purposes; they do not consider it suitable for achieving rehabilitation, but many also show a disbelief in the re-socialisation of offenders.</p> <p>Despite referring to prison as a 'last resort' solution, judges show a marked preference for this sanction. This may be because the alternatives are seen as inadequate but inverting the focus to identify affirmatively when these alternatives should apply by default may not be enough to address this. The attitudes of judges must be identified, and research-based training provided to engender change.</p>
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Title	Short Citation	Citations	Topic	Country	Method/analyses	Key points
Crime, criminology and criminal justice in the Nordic countries	Lappi-Seppälä and Tonry, 2011	82	Is there a Nordic penal model?	Denmark, Finland, Sweden, and Norway	Comparative qualitative analysis	Crime policy has become harsher in the Nordic countries but through widespread use of CSM they have limited increases in imprisonment. While aspects of a ‘Nordic line’ on penal matters exist, these overshadow national differences. The Nordic welfare model may be the common thread.

<p>Community sanctions as substitutes to imprisonment in the Nordic countries</p>	<p>Lappi-Seppälä, 2019</p>	<p>4</p>	<p>Use of CSM in Nordic countries</p>	<p>Denmark, Finland, Sweden, Norway</p>	<p>Comparative qualitative and quantitative analysis</p>	<p>Suspended sentences, community service and electronic monitoring have become the main CSM in the Nordic countries. CSM have had a clear replacement effect. There is no Nordic model of electronic monitoring, but it has led to systematic decreases in re-offending rates.</p> <p>Despite their effectiveness, expansion of CSM must still overcome public beliefs that they are too lenient. The simultaneous increase in recorded criminality generally since 1960 also suggests that crime rates rise and fall independently of these sentencing policies. CSM may be limited in deterring crime.</p>
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<p>From pre-entry to re-entry: An examination of the effectiveness of institutional and community-based sanctions</p>	<p>Byrne and Tusinski Miofsky, 2009</p>	<p>2</p>	<p>Review of what works prison sentences, prison alternatives or pre-entry strategies, and re-entry initiatives.</p>	<p>USA</p>	<p>Review article</p>	<p>Expansion and improvement of research base required before evidence-based reviews are used as the basis for policy and practice; parole and probation are not as effective as 30 years ago. We don't know why as there is uncertainty around the impact of individual offender-based change strategies means we must consider how individual change may be related to community change.</p> <p>Given the available evidence on deterrence, Incarceration does reduce crime, but only up to a point. Once the incarceration rate hits a certain level, crime rates actually increase - potentially because parents not with children, reduced earning potential and engendering a mistrust of the justice system, for example, we need to rethink current sentencing schemes.</p> <p>We are much better at controlling offenders than we are at changing their behaviour. This leads to a broader question: why do we criminalize certain behaviours, drug use, in the first place?</p>
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Title	Short Citation	Citations	Topic	Country	Method/analyses	Key points
Implementation of community sanctions and measures across Europe at the beginning of the twenty-first century: An empirical analysis focusing on supervision and community service	Jehle and Palmowski 2017	1	Evaluation of the implementation of CSM at three stages, prosecution, sentencing and probation. Across Europe, to get a broad European perspective. Examining the integration of CSM into the criminal justice system; as well as data availability and comparability.	Europe	Quantitative analysis	Study in how to collect data regarding CSM to have an apples-to-apples comparison. Good definitions on different types of CSM and different stages of implementation, but very little discussion about what was effective and/or ineffective.

Title	Short Citation	Citations	Topic	Country	Method/analysis	Key points
Probation matters	Healy, 2009	13	Case for broader use of CSM (referring specifically to the 2001 O'Donnell article below)	Ireland	Philosophical enquiry - with data to back up arguments	This article examines the case for expanding the use of community sanctions and measures in the criminal justice system. It explores why this has not occurred and makes a number of recommendations for the future.

Title	Short Citation	Citations	Topic	Country	Method/analysis	Key points
Prison matters	O'Donnell , 2001	4	Case against prison	Ireland	Philosophical enquiry - with data to back up arguments	<p>Case against prison and building more prison capacity in response to overcrowding issues, etc. Prison should be a last resort.</p> <p>If you build more prison capacity, you will subsequently have more prisoners. Examines the effects of high-profile violent crimes (Veronica Guerin, Ireland, and James Bulger, UK) on public opinion, policy and subsequently prison populations. Point raised that prison sentences are short in Ireland.</p>



Title	Short Citation	Citations	Topic	Country	Method/analyses	Key points
Examining the use of community service orders as alternatives to short prison sentences in Ireland	O'Hara and Rogan, 2015	8	Comparing populations who received a CSM vs short prison sentence	Ireland	Comparative analysis	Study (examining judicial discretion) compared the populations receiving community service orders vs short term prison sentences. Very little difference in the two populations - further example of a preference for custodial sentences.
Examining the effects of community-based sanctions on offender recidivism	Steiner, Makarios, Travis and Meade, 2011	3	Effect of CBS sanction on recidivism offenders who committed a violation of the conditions of their release during the first year after their release from prison in Ohio.	Ohio	Quantitative analysis	Parole violators who received community-based sanctions and were sanctioned with certainty, as well as more swiftly and severely, were less likely to recidivate. Some discussion as to why this is the case.

<p>Belgian sentencing as bifurcated practice?</p>	<p>Scheirs, Beyens, and Snacken, 2016</p>	<p>8</p>	<p>Belgian judges have a great amount of autonomy in sentencing, leading to disparities</p>	<p>Belgium</p>	<p>Interviews with Belgian Judges</p>	<p>Focussed on Belgium. Judges have no sentencing guidelines, lots of autonomy, don't like to refer to social reports, etc. They attempt to make sentencing meaningful and pre-empt early release.</p> <p>Prosecutors have additional power in sentencing, use more CSM, with judges opting for custodial sentences. The perceived non-implementation of short prison sentences has created a bifurcation practice and policy in which sentencing judges impose longer prison sentences to be sure that the convicted person will serve at least what the judge considers the deserved prison sentence.</p> <p>Early release measures to tackle overcrowding thus became mechanisms of penal inflation as a result of adaptive sentencing.</p>
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Title	Short Citation	Citations	Topic	Country	Method/analyses	Key points
Community Sanctions and Measures	Carr, 2015		Comparative analysis of the use of CSM in the Jurisdictions of Northern Ireland and the Republic of Ireland	Northern Ireland Republic of Ireland	Comparative analysis of the use of CSM in the Jurisdictions of Northern Ireland and the Republic of Ireland	Use of CSM increasing in both Jurisdictions as per wider European trends. However, in Northern Ireland the number of people under CSM is roughly equivalent to those in prison, while in the Republic the figure for the latter exceeds the former by 2:1 owing to a number of social and historical factors in both jurisdictions.

Title	Short Citation	Citations	Topic	Country	Method/analysis	Key points
Offender perceptions of graduated sanctions	Wodahl, Ogle, Kadleck and Gerow, 2009	31	How offenders view certain types of graduated sanction.	United States	Questionnaire with members of chosen cohort	<p>Graduated sanctions are increasing being used as an alternative to offenders who might violate the conditions of their CSM.</p> <p>Offender perceptions of graduated sanctions are influenced by individual characteristics such as gender, age, and education level.</p> <p>Offenders do not view jail as being more punishing than community-based sanctions and they view treatment-oriented sanctions as being more punitive than other graduated sanctions.</p>

Title	Short Citation	Citations	Topic	Country	Method/analysis	Key points
Community sanctions in youth justice compared to other youth crime responses: A meta-analysis.	Koops-Geuze and Weerman, 2021	0	Examining the levels of recidivism in youth justice depending on whether community service or behavioural intervention programmes were used as a community sanction.	United States, Netherlands, Australia, Hawaii.	Comparative qualitative and quantitative analysis	<p>Recidivism in youth justice is lower when community sanctions (work, learning, therapeutic interventions, and supervision) are used instead of custodial sanctions.</p> <p>There were no lower rates of recidivism for offenders for community sanctions as compared with dismissals which include no sanction and release to the community practices.</p>

Title	Short Citation	Citations	Topic	Country	Method/analyses	Key points
Sentencing and penal policy: Ending prison as the default	Tata, 2019	1	Hidden penal function of CSM	Scotland	Qualitative analysis	<p>Presumptions against prison do not work because prison remains an option when alternatives fail.</p> <p>Prison is seen as a fail-safe and a means of delivering social services in complex cases.</p> <p>Policies should set out separately where prison is specifically required and where CSM are specifically required, rather than through mutual reference.</p>

Title	Short Citation	Citations	Topic	Country	Method/analysis	Key points
Are the community sanctions and measures the key for reducing the prison overcrowding ?	Tomiță, Darjan and Predescu, 2017	0	The effect of improving CMS services on reducing the prison population	Romania, Belgium, Croatia, Germany, Hungary, Serbia, Italy, and Greece	Comparative quantitative analysis. Prison population and persons serving CSM, 2010-2015	<p>CSM services have the potential to be more diverse and pervasive.</p> <p>From a social point of view, there is a tendency to increase the number of CSM service recipients and consequently, to reduce the prison population.</p> <p>But the assumption that improving CSM services means reducing the prison population is invalid.</p> <p>However, they claim that efficient CSM services may be a way to reduce the harm done to society by crime.</p>

Title	Short Citation	Citations	Topic	Country	Method/analysis	Key points
Differences in national sentencing systems and the differences they make	Tonry, 2016	10	Comparison of jurisprudence in developed countries	Europe, North America, and Australia. English-speaking countries and non-English-speaking countries	Comparative qualitative analysis	<p>Judicial practice in Northern Europe is based on compatibility, and there is much doubt about the effectiveness of deterrence of CSM. Nonetheless, in Southern Europe, jurisprudence is proportionate and supports the idea of facilitating the reintegration of the offender into society.</p> <p>Judicial practice in English-speaking countries places more emphasis on crime prevention and conviction. And the difference between the United States and other English-speaking countries is the impact of partisan policies on the decisions of judges and prosecutors.</p> <p>In terms of human rights, human dignity and equality, Western European continental systems, despite their diversity, are considerably more admirable than English-speaking countries, especially those of the United States.</p>



Title	Short Citation	Citations	Topic	Country	Method/analyses	Key points
No news is good news	Weigend, 2016	10	Investigating changes in the system of sentencing in Germany	Germany	Quantitative analysis of reports received by the German police and court cases	<p>Legislation and efforts in Germany have not led to a significant amount of CSM replacing traditional punishments. This is because the implementation of these alternatives requires a judicial bureaucracy.</p> <p>From an administrative point of view, the positive impact of social services is eliminated by the need to hire and train staff to monitor offenders and support them in performing their substitute duties.</p>

Title	Short Citation	Citations	Topic	Country	Method/analysis	Key points
Punishment, legitimacy and taste: The role and limits of mainstream and social media in constructing attitudes towards community sanctions	Happer, McGuinness, McNeill and Tiripelli, 2019	6	The impact of the media on legitimizing CSM in public opinion	England	Questionnaire and interview on immersing 27 participants in a multi-media environment	<p>It has long been believed that those who have studied punishment, including historians, legal researchers, and social scientists, tend to incarcerate because of human, social, and financial costs.</p> <p>Thus, community sanctions that replace traditional punishment have always been a struggle for legitimacy. The usefulness and cost-effectiveness of these sanctions has always been debated.</p> <p>The tone of the media in this regard is increasingly negative, which has had a profound effect on public perception and public confidence in community sanctions and its effectiveness.</p> <p>Community sanctions suffers from fundamental cognitive and emotional barriers to public legitimacy, and the legitimacy or illegitimacy of these sanctions is crucial to the development of the penal system.</p>

## 4. Discussion of the key points of Community Sanctions and Measures.

Section 4 sets out discuss the key points in relation to community sanctions and measures which have emerged through the review of the literature. These are, as follows:

- An overview of Community Sanctions and Measures.
- The impact of Community Sanctions and Measures and widening of the penal net.
- Community Sanctions and Measures: Stand-alone or alternative punishment.
- Judicial and professional discretion.

### 4.1. An overview of Community Sanctions and Measures.

Key points:

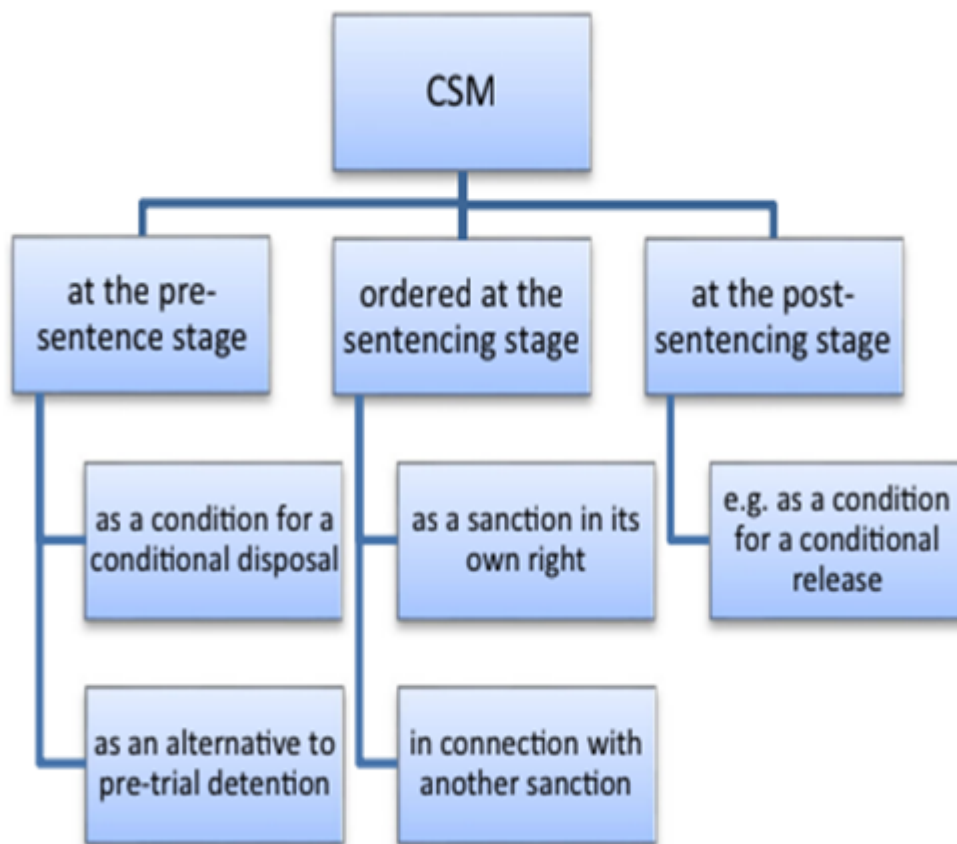
- CSM have existed since the 19<sup>th</sup> century, gained popularity in England and Wales in the 1970s and spread throughout Europe by the 1990s.
- CSM are not limited to just sentencing practice and can have functions at several stages of judicial proceedings.
- CSM can have diverse objectives.
- CSM have had limited scholarly attention or public discourse.

A definition for CSM is given by recommendations of the Council of Europe (CoE) 2010 recommendation 'Probation Rules' appendix II defines CSM as; '*Sanctions and measures which maintain offenders in the community and involve some restrictions on their liberty through the imposition of conditions and/or obligations. The term designates any sanction imposed by a judicial or administrative authority, and any measure taken before or instead of a decision on a sanction, as well as ways of enforcing a sentence of imprisonment outside a prison establishment* (Council of Europe, 2010).

The idea of non-fiscal and non-custodial punitive action is not new. Probation dates to the 19<sup>th</sup> century and has become standard practice in multiple criminal justice systems across the world (Van Kalmthout and Durnescu 2008). The implementation of community service in the jurisdictions of England and Wales in the 1970s is regarded as the origin of the trend towards CSM (Canton, 2011) which was not established in areas of central and eastern Europe until the 1990s (Van Kalmthout and Durnescu 2008). The work of international organisations in Europe, particularly the Council of Europe, has led to a convergence in the use of CSM across the continent. Many types of CSM are in use across Europe, such as supervision, victim–offender mediation, restitution, ambulant therapeutic treatment, and community service (Jehle and Palmowski, 2018).

CSM is not limited to mere sentencing practice: it can perform a function at several other stages of proceedings: at the pre-sentence stage, CSM can serve as an alternative to pre-trial detention; at the sentencing level, CSM can be ordered by the court in tandem with some other form of sanction (for example, a condition for a suspended prison sentence) or as a sanction in its own right; and, finally, CSM can be imposed following sentencing as a condition for a conditional release, in addition to the point in judicial proceedings at which CSM are applied.

**Fig 1.** Community sanctions and measures (CSM) at different stages of the criminal



justice

process in Europe (Palmowski, 2018).

CSM can also be diverse in terms of their objectives. Some like electronic tagging are aimed at security while others, like community service are focussed on the rehabilitation of the offender (Jehle and Palmowski, 2018). Robinson et al (Robinson

et al, 2013) note four distinct - although not necessarily mutually exclusive - strategies for CSM:

1. Managerial: refers to the emphasis placed upon the management of individuals in the most cost-effective manner, with no wider ambition to reform the individual.
2. Punitive: these include the recasting of CSM as 'punishment in the community' aligned with public messaging about the 'toughness' of such sanctions; this has been associated with more intense supervisory requirements and increased penalties for non-compliance.
3. Rehabilitative: emphasis on risk assessment as a means to target resources and the recasting of 'need' as criminogenic need (i.e., interventions should only be targeted at factors relating to risk of re-offending). We can see that this revived rehabilitation model intersects with the managerialism.
4. Reparative: sentences, such as community service, involving unpaid work in the community may be regarded as reparative; other forms of reparation include restorative justice approaches.

Carr (Carr.,2015) in his comparative analysis of the roles of CSM in the neighbouring jurisdictions of the Republic of Ireland and Northern Ireland notes that CSM usage is rising exponentially internationally and yet, despite this rise in application, CSM has received relatively limited scholarly attention or public discourse. Carr reasons that this 'Cinderella effect' may be due to the difference in visual impact between what are, by definition, spatially disperse CSM and the powerful imagery associated with incarceration.

## **4.2. The impact of Community Sanctions and Measures and widening of the penal net.**

### Key Points:

- CSM were introduced as a measure to reduce prison populations and are associated with clemency over punishment.
- CSM are diverse, with differences in the point of proceedings in which they are applied and the overall objective of the CSM.
- Increase in the number of people serving community sanctions across the continent, parallel increase in the number of inmates serving custodial sentences.
- More widespread use of CSM must go hand in hand with law reform if CSM are to avoid becoming a net-widening tool in an increasingly punitive criminal justice system.

Approaches to the implementation of CSM have differed widely across the criminal justice systems of Europe. Indeed, the types of applicable sanctions are as heterogeneous as their fields of application, but, that said, as a general trend in most European countries, more people are subject to CSM than imprisonment by their criminal justice systems.

As Yang demonstrates (Yang, 2019), CSM were initially proposed as alternatives to prison in order to reduce prison overcrowding and suffered from a lack of public trust due to their association with clemency instead of punishment. The perception of impunity, however, has steadily been eroded by a broadening of the scope of the offenders eligible for CSM and by an increasing focus on control methods as part of supervision. Through a number of Council of Europe Recommendations, effectiveness, as measured by compliance, has become the core goal of CSM, but managerial approaches to justice can lead to an over-emphasis on formal compliance with the specific legal requirements of CSM for their duration, rather than attitudinal change. While the public has become more convinced of the punitive character of CSM due to the more intrusive dimension of CSM like electronic tagging, the lingering perception that those subject to CSM were the recipients of mercy slowed the progress of human rights discourse around CSM. However, successive Council of Europe Recommendations have sought to limit the scope and duration of CSM in line with established international norms. These have emphasised privacy, dignity, family relationships and links to the community (Yang, 2019).

Despite these developments, the use of CSM as an alternative to prison remains far from a panacea for criminal justice systems in Europe. There has been a long-term increase in the number of people serving community sanctions across the continent, but this has coincided with a continuous increase in the number of inmates serving custodial sentences in most of these countries. As Aebi, Delgrande and Marguet

demonstrate (Aebi, Delgrande and Marguet, 2015), this suggests that the use of CSM has contributed a widening of the net of European criminal justice systems, as they can be used a form of penalisation, rather than an alternative to penalisation. Three countries – Finland, Norway, and Switzerland – were found to have both the lowest rates of persons serving CSM and the lowest prison populations rates. While this could suggest that moderate use of CSM corresponds to lower prison rates, these three countries are also found to prioritise socialisation of offenders in the community, as opposed to the control that CSM allow criminal justice systems to exert over offenders.

The experience of the Nordic countries, where the use of CSM is mature, albeit subject to national fluctuation, is cautionary about the limits of their impact (Lappi-Seppälä, 2019). While it is clear that CSM are being used effectively as an alternative to prison, their role in deterring crime appears to be limited, as evidenced by the general increase in crime rates through the Nordic countries while the use of CSM also increased. This suggests that crime rates respond to distinct changes in the law, while the rate of imprisonment responds separately to changes in sentencing policy. Perhaps in response to this, crime policy in the Nordic countries has become harsher in recent decades and more offenders are being managed through the criminal justice system than before (Lappi-Seppälä and Tonry, 2011). This means that the more widespread use of CSM must go hand in hand with reform to the very law that criminalises certain forms of offending behaviours if CSM are to avoid becoming a net-widening tool in an increasingly punitive criminal justice system. Across the Atlantic in the United States of America, Byrne and Tusinski Miofsky (Byrne and Tusinski Miofsky, 2009) are aligned with this point, stating that it is easier to control the offender than to change the behaviour that led to the punitive action against them in the first place, which leads to the broader question of why we criminalize certain behaviours—drug use in particular—in the first place.

Carr (Carr, 2015) compares the use of CSM in both Northern Ireland and the Republic of Ireland. In both jurisdictions there has been a rise in the use of community sanctions aligned with broader European and global trends as discussed above. However, the rate of use of CSM, compared to the numbers imprisoned differs across the two jurisdictions. In Northern Ireland the rate of use of imprisonment compared to CSM is broadly equivalent, while in the Republic of Ireland committals to prison exceed CSM by a rate of more than two to one (Probation Service, 2014; Irish Prison Service, 2014). Importantly a significant proportion of committals to prisons in the Republic of Ireland are as a result of non-payment of a court ordered fine (DoJE, 2014). Authors report an increase in the population under CSM in Northern Ireland, however, this has not been matched by a reduction in the use of imprisonment. In tandem with the increase in numbers of people under some form of community supervision, the prison population in Northern Ireland has also grown.

The pace of legislative change in the Republic of Ireland to afford the increased usage of CSM has been comparatively slow, likely due to a number of factors including low

crime rates for much of the twentieth century, the roles of wider institutions in Irish Society of social control, along with poorly developed governance and administrative infrastructures. These factors explain a lack of progress in the Republic of Ireland in many interrelated areas including, prison, youth justice and wider social policy.

As is clear from the case of Scotland (Malloch and McGill, 2011), there is also a significant gender dimension in how CSM are applied. Because women are more likely than men to breach CSM for non-compliance issues, as opposed to committing a new offence, there is evidence that judges may make use of custodial penalties by default in cases where it appears that a female offender is unlikely to comply with a CSM. This leads to 'up tariffing' of female offenders and shows that CSM may not be applied by judges on their merits, but rather based on implementation issues, which may not be the fault of the offender.

### **4.3. Community Sanctions and Measures: Stand-alone or alternative punishment.**

Key Points:

- CSM should be conceived of, evaluated, and applied on their own merits not alternatives to imprisonment as some kind of foundational, catch-all disposal.
- When CSM alternatives to prison do not appear credible, prison remains a fail-safe option for judges.
- CSM applied to offenders on the conditional release of prison reduces the rate of recidivism when applied swiftly, with certainty and severity.

As Aebi, Delgrande and Marguet note (Aebi, Delgrande and Marguet, 2015), the potential for CSM to result in a net-widening effect in criminal justice systems was identified in the late 1970s. Before the expansion in the use of CSM in Europe and North America began in earnest in the 1990s, scholars were already pointing to the need to conceive of CSM independently of imprisonment to avoid unnecessary intrusions on the rights of offenders on the dubious basis that CSM are, by default, more humane than imprisonment.

The penal ethicist Von Hirsch (Von Hirsch, 1990) suggests that, as a starting point, reformers could consider the seriousness of crimes and seek to grade them according to this. They could then consider the seriousness of the available punishments and seek to match these to appropriate crimes. It is likely to emerge that some will be suitable only for punishment by imprisonment, while, inversely, some may be identified as being suitable for a CSM only with no possibility of imprisonment. What is required, then, is that CSM are conceived of, evaluated, and applied on their own merits, rather than as alternatives to imprisonment as some kind of foundational, catch-all disposal.

Tata (Tata, 2019) points to the continued difficulty in applying CSM for this reason in Scotland, where, since 2011, there has been a legislative presumption against prison



sentences of three months or less, a measure that is held to be socially progressive. Rather than presenting real alternatives to prison, Tata argues, this presumption in fact further entrenches the use of prison on the very basis that it is framed as a last resort. When CSM alternatives to prison do not appear credible, prison remains a fail-safe option for judges. However, resorting to prison in these cases masks the root cause of these stark decisions of last resort: the under-resourced and stretched nature of non-penal social services that contribute to the rehabilitation of offenders by addressing physical, psychological, addiction, homelessness, and personal needs. This leads to a self-perpetuating cycle where resources that could be directed towards these complementary services are instead fed into the prison system. This, Tata concludes, leaves governments off the hook on its failure to address these more widespread social problems by providing community-based welfare services. He echoes Von Hirsch in proposing that imprisonment should be used only when specifically warranted by the seriousness of the crime and that rehabilitation and self-improvement should be expressly excluded as a ground for recommending or imposing a custodial sentence.

The 2011 paper ‘Examining the effects of community-based sanctions on offender recidivism (Steiner, Makarios, Travis and Meade, 2011), as its title suggests, examines recidivism among offenders conditionally released from prison who have received a CSM. Authors approached from the perspective of social control, hypothesising that through normative regulation or punishment for noncompliance or indirectly controlling offender behaviour by increasing compliance with release conditions designed to foster prosocial adjustment they could reduce recidivism. This study found, in this context CSM applied swiftly, with certainty and severity, reduced the odds of recidivism and time to recidivism.

Carr (Carr, 2015) notes that in Northern Ireland CSM available to the court are prescribed in the legislation and include ‘Community Service Orders’ and Combination Orders which combine probation supervision and community service. In recent years, the numbers of Community Service Orders have declined in Northern Ireland, while sanctions that combine custody and community supervision have come increasingly to the fore, with the driver of this change being an increased focus on risk management and public protection.

## 4.4. Judicial and professional discretion.

### Key Points

- Judicial and professional opinion and sentiment can outweigh evidence led policy.
- Judges often respond to certain crimes with certain penalties based on philosophies cultivated from their courtroom experience, rather than theories of criminology or jurisprudence.
- In Belgium, Judges and correctional practitioners in various ways manipulate the nature and type of sentencing delivered to pre-empt, circumvent, or overrule decisions that may be made at a later date.
- In Ireland, the slow pace of legislative reform has led judges to create their own CSM not afforded in legislation.
- Comparative analysis of those convicted in Ireland receiving a CSM with those who received short term prison sentences showed little significant differences in the two populations, whereas factors including the distance of the court to the nearest prison affected outcomes.

The case of Portugal, a country of a civil law tradition, where judges are given strong guidance by penal and procedural codes, highlights the challenges posed by judicial discretion in the application of CSM. There, the law provides for two types of mandatory penalty: prison or fines. In cases where prison may be applied, this may be substituted for certain CSM as an alternative. While non-custodial sentences are to be preferred in certain circumstances, judges have considerable discretion in making an initial decision on the type and severity of the initial sentence, which may or may not then be suitable for substitution. Judges, it is observed, are predisposed to respond to certain crimes with certain penalties based on penal philosophies but these may be based on courtroom experience, rather than the reasons outlined in laws or theories of criminology or jurisprudence. In their study of the attitudes of Portuguese judges, de Castro Rodrigues, Sacau, Quintas de Oliveira and Abrunhosa Gonçalves (de Castro Rodrigues, Sacau, Quintas de Oliveira and Abrunhosa Gonçalves, 2019), observe a disconnect between judges' descriptions of their personal penal philosophies and their purposes in sentencing offenders. The study identified a high degree of scepticism by judges over the efficacy of the penalties on offer, except in relation to imprisonment, despite a lack of empirical data to support their beliefs. Echoing Tata (Tata, 2019), the authors suggest that imprisonment becomes the only penalty that does not need to prove itself to judges. This and the difficulty that judges faced in identifying the point at which offenders should be put in prison point to the need for an evidence-based approach to sentencing practice. More research is required to understand the purpose behind the sentences issued by judges and to understand their attitudes towards CSM with a view to providing programmes of training that makes them aware of the processes at work in these decisions and empowers them to resist them where necessary.

Scheirs, Beyens and Snacken's (Scheirs, Beyens and Snacken 2016) study of the attitudes and actions of Belgian judges operating in a system in flux demonstrates how influential the attitudes and opinions of the judiciary can have a vast impact on sentencing practices. As is most common in continental penal systems, Belgium has a modified inquisitorial legal system, involving a number of institutions and distributing important powers between the public prosecutor, the investigating judge, and the judges who adjudicate criminal charges and impose sentences. Belgian judges value their independence, have no guidelines or sentencing starting points to assist in decision making and are relatively free to determine sentences. Most believe in the desirability of individualized sentencing and resent intrusions on their autonomy, many continue to hold traditional neo-classical views about the purposes of sentencing, in which the aims are primarily deterrent and retributive. Belgian policy makers and correctional officials, to contain or reduce the impacts of several decades of rising imprisonment rates and recognising the destructive effects of imprisonment have, enacted legislation, and developed administrative devices aimed at avoiding incarceration, diverting cases from the courts, and establishing CSM such as work penalties, electronic monitoring, and probation.

This change in the penal landscape has enabled correctional practitioners in various ways to convert prison sentences handed down by judges into dispositions of CSM. This in turn, has led judges to adjust the sentences they impose to anticipate and circumvent decisions other officials may make at a later stage that the judges believe would undermine what they wish to accomplish in individual cases.

Severe prison overcrowding has led to a common practice of not implementing sentences less than six months and to almost systematic early release or conversion to some form of CSM. This practice has led to dissatisfaction among the judiciary who feel offenders are avoiding their punishment, subsequently investigating judges feel free to keep offenders in custody before trial, seeing this as an advance payment upon a prison sentence that will likely be imposed but not likely to be fully realised. Another so-called compensatory measure seen among sentencing judges is to impose much longer sentences than would previously have been deemed "deserved", to ensure a minimum time spent in prison.

In a survey of judges, many were found to be frustrated and to feel undermined in their work. Most were seemingly unaware of the common practices of other autonomous actors with authority in the penal system (routinely confusing two different practices of early release), despite many admitting that circumventing or overcoming the actions of these other autonomous actors was a factor in their decision making. The Belgian experience, therefore can be characterized as a policy of bifurcation, with use of imprisonment as a last resort for most offenses and offenders and with wider application of noncustodial sanctions, while at the same time with use of more custodial sentences and restrictions on parole for specific offenses and offenders.

Carr (Carr, 2015) discusses how Irish judges, like their Belgian counterparts, also value their independence and operate in a dearth of sentencing guidelines. The three main forms of CSM available to the Irish Judiciary are: Community Service Orders, Probation Orders and 'Supervision during Deferment.' While community service orders and probation orders are legislated for under the criminal justice act 1983, 'Supervision During Deferment' is not a sentence in legislation but rather what has been described as 'judicial innovation' created by the Irish judiciary in the absence of the required legislation. The independent nature of the Irish judiciary, lack of sentencing guidelines and slow pace of legislative reform have all been put forward as a reason for this practice which in 2013 was issued more frequently than the legislated for 'probation orders). As the name suggests 'Supervision during Deferment' refers to supervision while the actual sentence is deferred. However, this is not meant to suggest that the Irish Judiciary are more progressive than European peers in the issuance of CSM over fines or custodial sentences, they are demonstrably not, with prisoners out numbering those involved in CSM by a margin of two to one. It has been claimed that members of the Irish judiciary do not consider the function of non-custodial sanctions equivalent to that of imprisonment, nor are they confident that adequate alternatives can achieve the deterrent effect of imprisonment (O'Hara, Rogan 2015). Ireland's overuse of imprisonment as punishment has been well documented (Healy and O'Donnell, 2005; IPRT, 2009; Walsh, 2005). While the proportion of the Irish population in prison is below the European median the prison committal rate is more than double the European median (Aebi and Delgrande, 2015), additionally, in Ireland the majority of people are sent to prison to carry out short sentences.

O'Hara and Rogan in their 2015 study (O'Hara, Rogan 2015) chose to exploit Ireland's highly discretionary sentencing system as an opportunity to study the behaviour of judges when comparatively free of imposed constraints. To complete a comparative analysis O'Hara and Rogan examined all administrative data pertaining to all cases sentenced to either a short-term prison sentence, or CSO between 2011 and 2012. Statistical analysis was used to determine whether demographic and offence variables differed between those who received a CSM and those who had received a short-term prison sentence. On average, those who received a short-term sentence over a CSM were older and had slightly more previous convictions than those who had received a CSM, although this difference was not significant.

A CSM of 27.6 Community Service hours was found on average to be equivalent to one month of imprisonment. This average differed noticeably depending on the offence category. The average equivalence was highest for dangerous and negligent acts (31 hours), public order offences (36.2 hours) and offences against government (34 hours) and lowest for sexual offences and robbery and related offences, both 13.3 hours. Alternative sentence attached to the recipients' CSM was longer than the custodial time received by the short-term prison group for the same offence types. Analysis of court characteristics was also conducted. The odds of receiving a CSM in

a rural court were 1.2 times higher than receiving a short prison sentence. Courts not located close to a prison were more likely to opt for CSM, as are courts located outside Dublin.

Carr (Carr, 2015) also reports significant variation in the use of CSM from county to county in the Republic of Ireland. The reasoning for this variation is not well understood, authors explain that some Judges are more inclined to use CSM and some are not, as to why this is the case perhaps it relates to a history of a relatively underdeveloped Probation Service provision, judicial confidence in CSM, or judicial punitiveness.

Alongside judicial discretion, there is also considerable scope for other forms of professional discretion by decision-makers within the broader criminal justice system: a 'criminal justice funnel', as one of the studies examined refers to it (de Castro Rodrigues, Sacau, Quintas de Oliveira and Abrunhosa Gonçalves, 2019). As Malloch and McGill (Malloch and McGill, 2011) observe, even when the support services that often accompany CSM have been designed with female offenders in mind, the greater (identified) needs of women and their lesser degree of criminality can lead to them being classified as 'troublesome' by service providers due to the resulting impact on the limited time and resources available to them. This can have profound impacts on an offender's relationship with her supervisor, which can, in turn, influence the offender's compliance with the terms of the CSM. Social workers themselves are often confronted with pervasive challenges in the lives of the offenders that go beyond the traditional focus of criminal justice responses to offending behaviour. While some can provide these supports to female offenders, sometimes based entirely on personal and professional discretion, there are systemic issues associated with skills, time availability and the criteria for measuring success that mean that this is not a uniform approach across the system. Thus, echoing the analysis of Yang (Yang, 2019), the role of social workers should be cast around achieving substantive compliance via attitudinal change, rather than formal compliance with the terms of the CSM imposed on the offender.

Punitive action is a very emotive topic, the judiciary and policy makers are only human and can be swayed by public opinion. O'Donnell (O'Donnell, 2001) explores this in his 'Prison matters' article. O'Donnell describes a ten-fold increase in additional prison capacity in Ireland over a four-year period during which time the overall level of crime fell. This anomaly is explained when it is considered that during this time while *overall* crime rates fell, there were two high profile violent murders in Ireland, those of journalist Veronica Guerin and Detective Garda Jerry McCabe. These high-profile violent crimes led to public outcry and demands for action. This was met with more law, more police, and more prison. This pattern is not a uniquely Irish phenomenon but evidenced in the UK and the US.

## 5. Critique of the most relevant CSM literature.

### 5.1. Have community sanctions and measures widened the net of the European criminal justice systems? (Aebi, Delgrande and Marguet, 2015)

This widely cited article examines the evolution of imprisonment and community sanctions in 29 countries across Europe from 1990 to 2010 to test whether community sanctions have been employed as alternatives to prison or additional sanctions that draw more people into the penal system, thus ‘widening the net’.

The term ‘net-widening’ first appeared in relation to community sanctions and diversion in 1979 and is now an established part of the scientific terminology and jargon. This may occur via front-end programmes designed to avoid sending offenders to prison or back-end programmes, such as early release, sometimes with diversion to a secondary correctional programme. The authors elect to focus exclusively on front-end net-widening, arguing that those subject to imprisonment can be inside the net already. While this is logically sustainable, the chosen scope ignores the well-established question of how post-release correctional programmes, via, for example, parole, can lead to continued penalisation of offenders due to non-compliance issues, which may be structural in nature.

The authors take both a longitudinal and a cross-sectional approach to prison population and CSM rates from the years 1990/91 to 2010 respectively. Their main hypothesis is that CSM are used as alternatives to imprisonment. This would be corroborated longitudinally if, in the countries studied, an increase in the use of CSM corresponded to a decrease in imprisonment. From a cross-sectional perspective, this would be corroborated if countries with high rates of offenders serving CSM also showed low prison population rates.

The study makes use of prison population data from the *Council of Europe Annual Penal Statistics: SPACE 1*. CSM data for 1990, 1992 and 1994 are also drawn from this source, while for 1997, 2001, 2007, 2009 and 2019, they are taken from the *Council of Europe Annual Penal Statistics on Persons Serving Non-Custodial Sanctions and Measures: SPACE II*. The definition of CSM used is drawn from the Council of Europe’s Recommendation (2010)<sup>1</sup>, which includes measures imposed before a sentence and through a sentence. The authors point to national differences in determining prison populations as a major obstacle in cross-national comparison, while data on CSM use is deeply influenced by geopolitical changes in Europe during this data range.

From the longitudinal perspective, the study finds that the number of persons serving CSM has constantly increased throughout Europe since 1990, such that, by 2010, 17 of the 29 countries had more probationers than inmates. Conversely, from 1991 to

2010, 17 out of 22 countries also increased their prison population, while this occurred in 23 of the 29 countries from 2000 to 2010. This reveals that both the use of CSM and the use of imprisonment generally increased from 1990 to 2010. This would seem to falsify the main hypothesis of the study. However, this would assume that crime rates remained constant during this time as well.

The link between crime rates and imprisonment rates is overblown, but there is said to be some relationship generally, whether direct or indirect. The overall crime rate in Western Europe has shown a downward trend since the mid-1990s, despite increases in drug-related and violent offences, due to lower rates of property offences. This is also the case in Central and Eastern Europe since the 2000s. This means that prison population rates and CSM rates increased even though the overall crime rate was falling. There is no evidence to suggest that custodial and non-custodial sanctions had any deterring effect that could explain the downward trend in crime.

From the cross-sectional perspective, the study shows that the 10 countries with the highest CSM population rates are also among the 10 countries with the highest prison population rates. This refutes the hypothesis that CSM are used as alternatives to imprisonment.

The statistical analyses are as strong as they can be in the circumstance. The *SPACE 1* and *2* reports represent the only source of comparable statistics that can provide empirical data on the evolution of CSM-use in Europe for 1990 to 2010. As already noted, these figures are influenced by geopolitical change across Europe, including the democratisation of various Central and Eastern European countries in the 1990s, and by the year in which European countries joined the Council of Europe, whose recommendations have harmonised the use of CSM amongst its Member States. The data available for certain forms of CSM, such as electronic monitoring, also varies substantially according to when and how it becomes available in each country. Similarly, the prison population rate for each country required a degree of construction by the authors due to differences in how juveniles, mentally ill offenders and those held in police stations are accounted for in each country. The conclusions of the study must be interpreted with a degree of caution, therefore.

The approach taken in using both longitudinal and cross-sectional analysis allows the others to test their hypothesis from two perspectives: in relation to how prison population rates and CSM rates evolve in comparison to one another over time and in relation to whether the rate of one would impact on the other at a particular point in time. The conclusions of both analyses coincide and confirm the robustness of the study.

In summary, both longitudinal and cross-sectional analyses reveal that, instead of being alternatives to imprisonment, CSM have contributed to a widening of the net of European criminal justice systems. This provides statistical evidence that CSM are an instrument in an increasingly punitive approach to crime control in Europe.

## **5.2. Women and community sentences (Malloch and McIvor, 2011)**

This study examines the impact of community sentences on women in Scotland, where the Criminal Justice and Licensing (Scotland) Act 2010 introduced a presumption against short prison sentences in favour of appropriate CSM. In Scotland, like most western jurisdictions, there has been a sharp increase in the number of women imprisoned, despite little evidence that more women are offending or that women's offending is becoming more serious. UK Government policy has recognised that the often-challenging lives experienced by many women in the criminal justice system make CSM a more appropriate disposal than prison; despite this, these initiatives are predominantly located within the criminal justice system and, therefore, continue to emphasise a penal role. The article argues that the approach in the 2010 Act will only be effective in diverting women from imprisonment if its provisions are gender appropriate.

The core argument of the article is that crime and punishment, whether imprisonment or via CSM, are fundamentally gendered. Women commit fewer offences than men proportionately in Scotland but are also proportionately more likely than men to be placed on probation orders. While women are more likely to complete probation and other CSM than men in general, in cases where breach proceedings are pursued by the authorities, women they are more likely than men to have CSM revoked for non-compliance; men, in contrast, are more likely than women to have CSM revoked as a result of a further offence. The pursuit by the authorities of non-compliance breaches by women belies the difficulties that many experience in their lives, which often make compliance with CSM challenging. This means that women are often up-tariffed by judges due to their perceptions of the viability of alternative disposals, such as CSM.

The authors examine the experiences of women across a range of CSM disposals to highlight the ways in which compliance can be hampered by the challenges in their lives. They conduct semi-structured interviews with 27 female probationers whose supervision has ended or is about to end. They also carry out semi-structured interviews with 34 experienced social workers to explore their views on the effectiveness of different approaches to the supervision of women who offend.

Social workers indicate in the interviews that women are more likely than men to present a range of problems to the probation authorities and are regarded as more complex cases. Women expect that the supervisory relationship will provide support, but this can lead to them being labelled troublesome by social workers. The women interviewed are acutely aware of their difficulties and are reluctant to be called 'offenders' because their issues are behind their offending. These issues often reveal patterns of trauma and abuse, while relationships are described as pathways into and out of criminal activity. This means that supervisory relationships should focus primarily on women's welfare, rather than offending behaviour, and should be accepting and non-judgemental. A right to be viewed as a competent individual that is



worthy of respect and the need to achieve control over their lives are highlighted as particularly important.

Women in Scotland are more likely than men to be breached on technical violations of CSM than men but generally pointed to satisfaction with the level and quality of contact with social workers. However, some found their CSM difficult to comply with due to the inconvenience of the location, transport costs or difficulties in arranging reliable childcare, even with the support of the authorities.

The study employs a strong qualitative methodology in arriving at its conclusions and the authors took precautions to address uneven power dynamics in research by allowing the interviewees to select the location of the interview and using only female interviewers. The article does not propose any detailed solutions to the problems it identifies but highlights the importance of addressing issues that are not normally the focus of the criminal justice system in order for women to exit it. It also underlines that offending behaviour by women is often driven by structural issues that the criminal justice system is unable to prevent in the first place.

Despite the increased use of CSM as disposals for offending by women, it is clear that women remain subject to assumptions and expectation which underpin their overall experience of the criminal justice system, including penalisation itself. As highlighted in the case of Portugal (de Castro Rodrigues, Sacau, Quintas de Oliveira and Abrunhosa Gonçalves, 2019), a useful avenue of inquiry would be to examine more closely how these ideological constructs influence sentencing decisions. Despite the considerable enthusiasm around CSM-use in Scotland then, they can by no means be regarded as a panacea for the penal system without an equal emphasis on addressing structural issues like chronic poverty.

### **5.3. Community Sanctions and Measures (Carr 2015)**

This study compares the application of Community Sanctions and Measures in the Jurisdictions of Northern Ireland and the Republic of Ireland, the differing trajectories of the two jurisdictions in respect of the evolution and use of community sanctions are explored, as are some of the factors that explain areas of divergence and commonality.

Authors begin by noting that internationally the numbers of people subject to forms of CSM has expanded exponentially and yet CSM has been subject to limited scholarly attention or public discourse. Reasoning that this may be because the lack of visibility of CSM compared to the more powerful iconography of prisons and prisoners or due to the focus directed towards imprisonment within the literature in light of the rise of 'mass incarceration' in the US, however, even in the US those subject to a CSM outnumber those in prison three to one.

CSM were initially grounded in penal welfare with an emphasis on the reform of the individual, however, the stated purposes of CSM have shifted with wider penal trends. Following the so-called ‘decline of the rehabilitative ideal’ and the rise in the use of imprisonment, community sanctions have been repositioned and reframed in response.

Both jurisdictions share a common antecedent legislation; the Probation of Offenders Act, 1907. This Act famously refers to the probation role as one of ‘advising, assisting and befriending’. Evidence of the slow rate of legislative reform in this field in the Republic of Ireland, this statute continues to provide the core legislative basis for probation there while although poorly resourced, probation in Northern Ireland for much of the last century followed legislation introduced in England and Wales.

Both jurisdictions have seen a rise in the use of CSM. However, the rate of use of CSM compared to the numbers imprisoned differs. In Northern Ireland the rate of use of imprisonment compared to CSM is roughly equivalent while in the Republic of Ireland committals to prison exceed community sentences imposed by a rate of more than two to one with a significant proportion of committals to prisons in the Republic of Ireland are as a result of non-payment of a court ordered fine.

In Northern Ireland the Troubles really influenced the evolution of legislation with many agencies becoming embroiled. While probation and CSM in Northern Ireland followed some trends evident in England and Wales, it did not do so to the same degree predominantly due to the impact and legacy of political conflict on all aspects of the criminal justice system.

Following the Good Friday Agreement, the feasibility of combining prisons and probation into a unitary offender management service, like the model adopted in England and Wales was considered. This approach was not taken in Northern Ireland, predominantly due to issues with the way prisons had become so closely entwined with the Troubles. In the post-conflict period, Northern Irish prisons have been required to significantly downsize and move from a highly securitized model towards more ‘normalised’ operations. However, this process has been painstaking, and the challenges involved are still evident in the present day.

Authors report an increase in the population under CSM in Northern Ireland, however, this has not been matched by a reduction in the use of imprisonment. In tandem with the increase in numbers of people under some form of community supervision, the prison population in Northern Ireland has also grown. The pace of legislative change in the Republic of Ireland to afford the increased usage of CSM has been comparatively slow, likely due to a number of factors including low crime rates for much of the twentieth century, the roles of wider institutions in Irish Society of social control, along with poorly developed governance and administrative infrastructures. These factors explain a lack of progress in the Republic of Ireland in many interrelated areas including, prison, youth justice and wider social policy.

The major CSM allowed for within the Republic of Ireland are: Community Service Orders, Probation Orders and ‘Supervision during Deferment.’ While Community Service orders and Probation orders are legislated for under the Criminal Justice (Community Service) Act, 1983 (as amended). ‘Supervision During Deferment’, however, is not in fact a sentence in legislation, while it results in CSM while a custodial sentence is deferred, it has been characterised as a ‘judicial innovation’ created by the Irish Judiciary, who are understood to be comparatively autonomous and independent in character likely due to the slow progress with regard to policy in this area. Authors note that in 2013 ‘Supervision during deferment was issued more frequently than the legislated for ‘Probation orders.’ In the Republic of Ireland, CSM and specifically community service has been used as a ‘back-door’ for early release.

In the Republic of Ireland, the use of imprisonment as a sanction far outstrips the use of CSM, additionally, there is significant variation in the use of CSM from county to county. The reasoning for this variation is not well understood, authors explain that some Judges are more inclined to use CSM and some are not. As to why this is the case perhaps it relates to a history of a relatively underdeveloped Probation Service provision, judicial confidence in CSM, or judicial punitiveness.

#### **5.4. Prison Matters (O’Donnell, 2001)**

O’Donnell begins by forwarding Thomas Mathieson’s case for a moratorium on prison building asserting this position on three grounds, firstly prisons are ineffective in terms of prevention, deterrence, or rehabilitation, as evidenced by multiple studies demonstrating high levels of recidivism of ex-prisoners. Secondly prisons are expansionist in nature once built remain in operation (Mountjoy prison was built in the 1850s) and additional capacity will inevitably be filled – speaking to US prisons currently being built speculatively in the knowledge that they will be filled and become profitable. O’Donnell’s third point is that prisons are extremely expensive, and when viewed in purely economic terms do not deliver good value when compared with alternatives.

The paper is thought provoking and entertaining to read, quoting an infamous white paper published by the British government in 1990 which stated prisons are ‘*an expensive way of making bad people worse*’ and referencing Mathieson’s belief that the existence of prisons legitimates the use of coercion and degradation to resolve human conflict.

O’Donnell then referred to recommendations from the Council of Europe to combat prison overcrowding by exercising restraint in the use of custody;

- Deprivation of liberty should be a measure of last resort.
- Expanding prison estates should also be an exceptional measure, as it is generally unlikely

to offer a lasting solution.

- Provisions should be made for an array of CSM; graded in severity and used widely.
- Coherent strategy against overcrowding examining priorities in crime control, public

attitudes, and existing sentencing practices.

O'Donnell then explores how public attitudes and Government priorities impact prison capacity, describing a ten-fold increase in additional prison capacity in Ireland over a four-year period during which time the overall level of crime fell. This anomaly is explained when it is considered that during this time while overall crime rates fell, there were two high profile violent murders, those of Veronica Guerin and Detective Garda Jerry McCabe, which led to public demands for action, translating to more law, more police, and more prison. This pattern is not a uniquely Irish phenomenon but evidenced in the UK and the US. O'Donnell quotes Professor of Criminology at the London school of economics who stated that high profile horrific crimes become '*occasions for orgies of punitiveness and anguished Jeremiads about moral decline*'.

Prison issues are neglected and poorly understood. O'Donnell examines pockets of severe overcrowding in Irish prisons and discusses issues with the quality of medical care provided especially given the prevalence of hepatitis B, C and HIV among prisoners, this issue of drug use and the fact that there can be little doubt that for many prisoners heroin is a way of life and also death, citing the multiple calls from medical personnel for the routine provision of needles, bleach, methadone and intensive education programmes to tackle inmate drug use. In addition to the risk of serious disease, there is also a significant risk of inmate death by suicide not to mention a myriad of other psychiatric issues which are not appropriately managed.

O'Donnell concludes the paper with a discussion on the current state of prisons in Ireland within an international context. The Irish incarceration rate was three times that of England and Wales, four times that of Norway and seven times that of Sweden. Finland has four times the recorded crime as Ireland, but a smaller prison population. In Ireland, crime rates continue to fall while more prison spaces come on stream.

The average Irish prison sentence is short, 1 of every three sentences is less than three months and the vast majority are less than 6 months in length – given that there is a high flow of individuals through the system in a given year but comparatively less 'stock' in prison on any given day. Both the 'flow' and 'stock' of prisons are valid measures of prison populations, Ireland is presently on the lower end of international comparisons for 'stock' but the higher end for 'flow.' Part of the reason for this, is the practice of incarceration for the non-payment of fines. In Ireland in 1973 17% of prison committals were for the non-payment of a fine, while by 1994 this had risen to 34%.

This practice of incarcerating payment defaulters has major issues, notwithstanding the fact that these prisoners are guilty of a crime deemed by a court of law not to warrant a custodial sentence, this undoubtedly disproportionately affects those with less means to pay, exacerbates overcrowding and moreover is on balance more expensive given the loss from the non-collection of the fine and the cost of incarceration.

## 6. Conclusions and recommendations.

Fines or prison? As already noted, answering this binary question would not, in our view, lead to useful study to be applied to general penal reform. Regarding punitive options, it was apparent that fiscal fines are ineffective and almost by definition unfair, and prison broadly understood to be harmful and ineffective, so we turned our focus to the unmentioned third punitive option that of community sanctions and measures (CSM).

CSM are defined by the Council of Europe as *‘Sanctions and measures which maintain offenders in the community and involve some restrictions on their liberty through the imposition of conditions and/or obligations. The term designates any sanction imposed by a judicial or administrative authority, and any measure taken before or instead of a decision on a sanction, as well as ways of enforcing a sentence of imprisonment outside a prison establishment (Council of Europe, 2010).*

Despite the relatively modern definition, CSM are not new and have been around since the 19th century, gaining popularity in England and Wales in the 1970s which spread across Europe, becoming commonplace by the 1990s. Ireland’s overuse of imprisonment as punishment has been well documented (Healy and O’Donnell, 2005; IPRT, 2009; Walsh, 2005). While the proportion of the Irish population in prison is below the European median. The prison committal rate is more than double the European median (Aebi and Delgrande, 2015) in Ireland prisoners outnumber those involved in CSM by a margin of two to one.

However, across Europe where the practice is commonplace CSM-use has had a net-widening effect in most criminal justice systems and does not represent an alternative to prison. CSM should instead be conceived of as stand-alone punishments that are graded according to their severity and imposed according to their own merits. Conversely, imprisonment should be reserved for a limited number of crimes whose severity require isolation and deprivation of liberty and should be imposed according to its own merits.

Rehabilitation and self-improvement should be specifically ruled out in statute and sentencing guidelines as grounds for imprisonment. These goals should instead be associated with appropriate CSM that are conceived of in line with the above.

CSM should not be designed for their punitive character or the control they exert but rather what they seek to achieve from the perspective of resocialisation of offenders. They should emphasise human rights, dignity, privacy, family relationships and ties to the community of offenders.

The more widespread use of CSM should be accompanied by reform of the laws that lead to criminalisation of petty offenders in the first place.

The role of social workers after a CSM is imposed is critical to the success or failure of CSM as punishments. The organisation of social workers' work should prioritise achieving substantive, long-term compliance through attitudinal change, rather than formal, short-term compliance with the terms of the CSM before it elapses. This may require a re-focussing of interventions traditionally associated with the criminal justice system to address structural problems in the lives of offenders.

Female offenders require distinct management when subject to CSM in order to take into account the nature of their offending and the difficulties that often motivate this behaviour. The success of CSM imposed on female offenders should not be measured by formal compliance. Sentencing policy should take into account the personal circumstances of the offender and how its rehabilitative aims can best be achieved.

Individual Judges and the judiciary as a whole can have disproportionate influence on the practical application of penal policy, overriding policy reform as reported in the Belgian case, or using 'judicial innovation' to create their own CSM as seen with 'Supervision during Deferment' created by the Irish judiciary in an effort to compensate for slow legislative progress in this area. Further research should be conducted on the attitudes of judges towards certain sentencing options and how these are informed by penal ideologies.

In the long term, this should inform training programmes delivered to judges.

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