

REDUCING PRISON POPULATION

ADVANCED TOOLS OF JUSTICE IN EUROPE



CUSTODY IS NOT THE ONLY ANSWER

ALTERNATIVES TO IMPRISONMENT IN EUROPE:
INCREASING UNDERSTANDING AND
PROMOTING IMPLEMENTATION

GUIDELINES



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“Reducing prison population: advanced tools of justice in Europe”

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FOREWORD

This Guidance, “Alternatives to imprisonment in Europe: increasing understanding and promoting implementation”, is the result of a 2-year work programme called, “Reducing Prison Population: advanced tools of justice in Europe” JUST/2013/JPEN/AG/4489.

This programme was launched in March 2014 and coordinated by the Italian “Community of Pope John XXIII” Association, and developed in 7 European countries (Italy, Bulgaria, France, Germany Latvia, Romania, Scotland: United Kingdom) with the financial support of the European Commission: Directorate General for Justice.

The programme’s overall aim was to improve knowledge and to exchange “innovative measures of practices alternative to imprisonment, both in pre and post trial phase”.

The aims of the Guidance are:

To increase knowledge and understanding in pre-trial and post-trial non-custodial measures within the criminal justice system;

To provide a knowledge and evidence-based platform for factual debate leading to objective conclusions to permit appropriate and acceptable action plans tailored to the needs of the criminal justice system within the Member State to be made.

Additional information about the work programme, “Reducing Prison Population: advanced tools of justice in Europe”, may be found at:

www.reducingprison.eu

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1.0 INTRODUCTION

1.1

Why has this guidance been developed?

The effects of offending no matter how, in reality, apparently inconsequential, have been theorised as an “acute form of social exclusion”¹. The loss of social capital, with its significant social and financial costs extend from the individual who committed the offence, to the victim, to the community and to society as a whole.

Across the world, prison populations have increased. In the last 15 years the estimated world prison population has increased by 25-30 per cent². In Europe, in 2012, the European median prison population rate was 125.6 detainees/100,000 population³; by 2013, the median prison population rate had risen to 133.5 detainees/100,000 population.

Statistics from Europe and across the world, suggest that there is a need to reconsider the place of imprisonment with respect to alternatives to detention, such as community sanctions, probation etc., since alternatives to imprisonment could pave the way for rehabilitation, rather than recidivism.

There are various ways to understand the term, rehabilitation. For instance, rehabilitation may be conceptualised as a means to enable the individual to modify their moral code and maintain their behaviour change; or rehabilitation may be theorised as the means to ensure that the individual’s behaviour is maintained, irrespective of any ethical position³, it may be thought of as the behaviour associated with adhering to State laws, finally within the law, rehabilitation is defined in terms of re-education and it is through this process that the individual gains the capacity to live in society, and to respect its laws.

Many criminal justice systems, in secular societies, adopt the latter interpretations. Their Constitutions, do not require their citizens to adhere to a specific moral code(s), and in doing so safeguard freedom of thought. This cultural pluralism, typical of democratic societies, has resulted in the view that it may not be possible to reach a consensus, regarding the characteristics and definition of a citizen’s ideal behaviour.

1 Schuller T., Crime and Life long learning, National Institute of Adult Continuing Education, 2009. Available at: www.learningandwork.org.uk/lifelonglearninginquiry/docs/ifll-crime.pdf?redirectedfrom=niace - Last access: 21/01/2016

2 Penal Reform International, Global Prison Trends 2015, Available at: www.penalreform.org/wp-content/uploads/2015/04/PRI-Prisons-global-trends-report-LR.pdf - Last access: 21/01/16

3 Dolcini E., “La rieducazione del condannato tra mito e realtà”, in V. Grevi (a cura di), Diritti dei detenuti e trattamento penitenziario, Zanichelli, Bologna, 1981.

If the concept and definition of rehabilitation presents ambiguities and problems, greater difficulties are experienced by those who wish to implement rehabilitation programmes as alternatives to imprisonment. It has been argued, however, that to abandon rehabilitation could result in unseen dangers, including the misapprehension that the only answer to offending is imprisonment together with its unwanted consequences of social exclusion and personal restriction. Baratta⁴ urges the need to oppose the de-socialising element of imprisonment by proposing the requirement to consider the realisation of re-socialisation not *through* imprisonment, but *despite* it; that is to oppose the de-socialising elements of prison routines and the prison environment, by investigating alternatives to imprisonment.

The wider use of alternatives to imprisonment reflects a fundamental change in the approach to criminality, people in prison, people with convictions and their place in society. The focus has changed from prison-based measures of punishment and isolation, to restorative justice, reintegration and social inclusion. Adopting this latter approach, together with appropriate and adequate support for offenders, has been shown to assist the most vulnerable members of society to develop a life without returning to criminal activity. Thus, the implementation of community sanctions and probationary measures, rather than imprisonment and isolation should offer long-term and better outcomes for the individual, the family, the community and society⁵.

This guidance seeks to provide the reader with a knowledge and evidence-based platform for factual debate leading to objective conclusions and to permit appropriate and acceptable action plans tailored to the needs of the criminal justice system within the Member State to be made. The material includes analysis of various aspects to alternatives to imprisonment; the strengths and weaknesses of alternatives to imprisonment and potential risks and promising elements of this approach to provide stakeholders with the necessary information to achieve this objective.

4 Baratta A., "Reintegrazione sociale. Ridefinizione del concetto ed elementi di operazionalizzazione", in Dei delitti e delle pene, n. 3, 1994, pp. 137-150.

5 United Nation Office on Drug and Crime, Custodial and non-custodial measures. Alternatives to Incarceration, Criminal Justice Assessment Toolkit, New York, 2006. Available at: www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Alternatives_Incarceration.pdf - Last access: 20/01/2016

1.2

Scope of this guidance

The guidance, “*Alternatives to imprisonment in Europe: increasing understanding and promoting implementation*”, has taken careful consideration of the current European Union and International legislation, the available evidence and expert opinion. The guidelines are based on information collected and analysed during the course of the project, based on an accurate analysis of the results of field research and reviewed by international experts in order to evaluate the transferability of various elements of alternatives to imprisonment across Member States⁶. The Guidelines provide:

1. A synopsis of current EU and International legislation;
2. A theoretical foundation for the concept of alternatives to imprisonment;
3. An insight on the current developmental status of alternatives to imprisonment in Europe;
4. The application, implementation and effectiveness of alternatives to imprisonment;
5. An extensive bibliography to inform further research on alternatives to imprisonment.

In conclusion, the presented material is the necessary information that needs to be taken into account when decisions are made and/or when planning interventions for those with convictions to prevent recidivism and to promote re-socialisation and social inclusion.

1.3

The aim of this guidance

The overall aim is to increase knowledge and understanding on pre-trial and post-trial non-custodial measures within criminal proceedings. The guidance provides a theoretical foundation for the concepts of alternatives to imprisonment, “return of the victim” and so forth. The guidance is not to provide reader with ready-made answers with regards to what non-custodial measures to apply and how this may be achieved; instead, this guidance aims at providing an evidence-base foundation to permit the reader to make objective decisions and action plans. The content of the action plans will be dependant on the readers professional background and the Member State where the alternatives to imprisonment will be developed, introduced, and implemented.

⁶ All the original materials from each partner country can be found in the link to project’s webpage, Reducing Prison Population - www.reducingprison.eu/en/documents_publications/

1.4

Who should use this guidance?

This guidance is aimed for use by a wide range of people working in the criminal justice sector and in particular decision and policy makers, judges, academics and researchers within national and European Union institutions and organisations.

1.5

How this guidance is presented

The guidance is presented in several sections. Section 2 examines the issue of reducing the prison population together with current and existing alternatives to imprisonment; Section 3 studies the effectiveness of alternatives to imprisonment and Section 4 presents general recommendations and indications for use.

1.6

Supporting tools

Tools to support this guidance include the summary findings from the 2-year work programme of research in seven Member States and the accompanying training package.

The training package consists of a detailed description of the evidence-based; focuses upon pre and post-trial phases; incorporates good and promising practices across Europe; and is available for all practitioners (such as police officers, prosecutors, judges, probation specialists, representatives from non-governmental organisations and individuals working in criminal justice and penal reform) together with policy makers. It may be used as an operational and/or reference tool.

If the guidelines are aimed at establishing the theoretical foundations for alternatives to imprisonment, the training package contributes to the theory with the evidence-based and practical examples of what has already been implemented and effective in Europe.

The guidelines and the training package are mutually complimentary and ensure an European level overview for every reader who is interested in alternatives to imprisonment.

Additional information about the work programme, "Reducing Prison Population: advanced tools of justice in Europe", and its findings may be found at:

www.reducingprison.eu

2
**Reducing prison population:
current existing alternatives to imprisonment**

2.1.

Alternatives to imprisonment: reducing the prison population

Alternatives to imprisonment are considered to be a means to decrease imprisonment and thus reduce the prison population. The literature on reducing imprisonment and preventing prison overcrowding refers to a number of possible approaches. These are generally referred to as “*front door strategies*”, “*back door strategies*” and “*reducing prison terms*”:

- **Front-door strategy**⁷: A front door strategy aims to limit the number of people sent to prison and corresponds to the Council of Europe Committee of Ministers statement that the “*deprivation of liberty should be regarded as a sanction or measure of last resort and should therefore be provided for only where the seriousness of the offence would make any other sanction or measure clearly inadequate*”⁸. Examples of this approach would include: decriminalising certain offences, intervening earlier to divert people away from the criminal justice system, changing prosecution policies, placing restrictions on sentencing powers, using community based alternatives to prison.
- **Back-door strategy**⁹: A back door strategy aims to reduce the prison population and associated overcrowding by reducing the length of time served in custody. Upon liberation, some ongoing monitoring and supervision may be provided in the community but people may also be released without continued requirements, when they can access voluntary support. Examples include Parole, Electronic Monitoring, House Arrest, semi-liberty, prison leave for educational reasons, half-way houses, voluntary resettlement programmes and other types of gradual transition back into society.
- **Reducing prison terms**¹⁰: The reducing prison terms strategy contributes to the reintegration of people in prison, prepares them for release and facilitates their social reintegration. This category of alternatives to imprisonment includes semi-liberty, prison leave for education, training, home leave etc., halfway houses and other re-entry programmes.

A solution to prison overcrowding therefore is a collaborative and multifaceted approach, involving alternatives to imprisonment and tailored measures to reduce the problem of prison overcrowding. An appropriate array of alternatives

7 Tony M. *Confronting Crime: Crime Control Policy Under New Labour*, Criminal Justice, Cambridge, 2003.

8 Recommendation No. R (99) 22 of the Committee of Ministers to Member States concerning prison overcrowding and prison population inflation.

9 Tony M, op.cit.

10 De Vos H., Gilbert E. Reducing Prison population: Overview of the legal and policy framework on alternatives to imprisonment at European level. 2014. Available at: www.reducingprison.eu/downloads/files/ReducingprisonpopulationEuropeanframework_FIN_101014.pdf - Last access: 21/01/2016

to imprisonment - such as community sanctions and measures - should be made available to those within the criminal justice system and in particular be made known to judges and prosecutors.

2.2.

Current European Union and International legislation

The Council of Europe's recommendation (Rec (99)22), concerning increasing prison population and prison overcrowding proposes that alternatives to imprisonment should adopt a multilayered approach¹¹. Multilayered approaches include the adoption of community sanctions and probation measures using, either and/or both front-door and back-door strategies. Other measures to reduce prison population and influence overcrowding include:

Excluding specific categories of detainees from imprisonment by:

- Encouraging the use of early interventions and pre-trial alternatives for pre-trial detainees;
- Providing a multidisciplinary and a multifaceted approach for people with mental health problems, learning disability and substance misuse;
- Providing appropriate and tailored interventions for people with mental health problems (including those hospitalised for psychiatric care), learning disability and for those with substance misuse.
- Decriminalisation of certain other types of offence;
- Increasing the capacity of prisons through an expansionist policy. This has been rejected by the Recommendation (Rec (99)22) of the Council of Europe.

The Council of Europe has issued several recommendations¹² with respect to community sanctions and measures, the Council of Europe Probation Rules (CM/Rec(2010)1) being the most recent one. In CM/Rec(2010)1, *Probation Rules are defined 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."*

11 Multilayered approach for reducing prison population derives from Council of Europe recommendation (Rec (99)22) where it is suggested to provide both appropriate array of community sanctions and measures and to ensure use of alternative modalities for the enforcement of prison sentences, such as "semi-liberty, open regimes, prison leave or extra-mural placements".

12 In particular: Rec(99)22E concerning prison overcrowding and prison population inflation, Rec(2000)22E on improving the implementation of the European rules on community sanctions and measures and CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures.

At both the European and International levels, the aim of the legislation is to set minimum standards, achieve common principles and identify the direction in which non-custodial measures should be advanced. The legislation, as such, is not prescriptive nor does it insist upon strict requirements for countries to implement alternatives to imprisonment. Listed below, there are a number of regulations at European Union level and at United Nations level which are important in this regard:

1. At the European level, policy focuses on reaching a consensus with regard to the designation and application of community sanctions and measures, rather than emphasizing implementation. The significant policy documents are:

- 1992: COE: European Rules on Community Sanctions and Measures;
- 2000: COE: Guidelines on “Improving the Implementation of the European Rules on Community Sanctions and Measures”;
- 2008: EU: Framework Decision on “Supervision of probation measures and alternative sanctions”: supervision of offenders sentenced in another EU State;
- 2009: EU: Framework Decision on the European Supervision Order: to grant the due course of justice; promote non-custodial measures for people who are not resident in EU States and improve protection of victims and society;
- 2010: Council of Europe Probation Rules;
- 2011: Green Paper on the “Application of the EU Criminal Justice Legislation in the Field of Detention”.

2. At the International level the most important document is the United Nations Minimum Rules for Non-Custodial Measures (Tokyo Rules, 1990). The alternatives to imprisonment mentioned by the Tokyo Rules are:

- Pre-trial: Verbal sanctions, conditional discharge, status penalties, economic sanctions and monetary penalties, confiscation or an expropriation order, restitution to the victim or a compensation order, suspended or deferred sentence, probation and judicial supervision, community service order, referral to an attendance centre, house arrest, any other mode of non-institutional treatment, or some combination of the measures listed above;
- Post-trial: Fully or partially suspended custodial sentences with or without probation, conditional pardon or conditional discharge (with probation), community service, electronic monitoring, home arrest, semi-liberty (including weekend imprisonment and imprisonment on separate days), treatment (outside prison), conditional release/parole with probation, furlough and halfway houses, work or education release, various other forms of parole, remission, pardon, mixed orders and others.

2.3.

Alternatives to imprisonment: aims and purposes: disadvantages and risks

2.3.1.

Aims and purposes

The aims and purposes of alternatives to imprisonment differed across the Member States that participated in the project. The reasons for the differences include¹³:

- Lack of consensus about the aims and purpose of alternatives to imprisonment, for example: punitive sanctions with a retributive aim may be preferred by the judiciary system while rehabilitation, re-socialisation and re-integration of the offender is often preferred by probation services and community organisations.
- Concerns around an incapacity of being able to reduce the use of imprisonment within Member State's penal policies;
- Concerns that these alternative measures have been imposed instead of punishment or as a form of suspended punishment and are not perceived as an actual punishment;
- Costs in terms of money (less costly) and social cost (relapse).

At European level, the aims and purpose of alternatives to imprisonment are considered as:

- The prevention of recidivism;
- Social rehabilitation and inclusion;
- Protection of community;
- Avoiding imprisonment and its negative effects;
- Reducing costs;
- Flexibility.

At an international level, the aims and purpose, according to the Tokyo Rules, the European Rules on community sanctions and measures (Rec (92)16) and the recommendation on improving their implementation (2000), are:

- Avoiding negative effects of imprisonment;
- Rationalising criminal justice policies;
- Taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender;

¹³ Authors' note: conclusions drawn from literature analysis and in-depth interviews to the country-experts. More information available at project's webpage: www.reducingprison.eu/en/documents_publications/

- Provide greater flexibility consistent with: the nature and gravity of the offence, the personality and background of the offender, and the protection of society;
- Avoiding unnecessary use of imprisonment;
- Avoiding institutionalisation in order to assist the offenders during their early reintegration into society;
- Reducing reoffending.

2.3.2.

Disadvantages and risks

Disadvantages of community sanctions include:

- Lack of clarity to what extent and under which conditions community sanctions assist in reducing prison overcrowding;
- Community sanctions may be used only to replace short prison sentences;
- The existence of non-custodial sentences does not necessarily imply that they are used by judges;
- The objective or aim of alternative sanctions is often unclear, resulting in a poorly developed ideological base;
- In most Member States, community sanctions may lack sufficient financial support and organisational infrastructure;
- Discrimination and stigmatisation when imposing alternatives to imprisonment.

The risks associated with the success of community sanctions depends on¹⁴:

- Judges who may be defensive and consider community sanctions as “softer” options. They may be inclined to impose pre-trial detentions over community sanctions even when the latter may be more appropriate;
- The fact that many of the community sanctions are imposed not as an alternative to imprisonment, but as an alternative to another community sanction or combined with a suspended sentence. In cases of poor adherence or noncompliance with the community sanction, a custodial sentence is often imposed thus increasing rather than decreasing the prison population.
- Net-widening effect, which arises when community sanctions are imposed in cases where no sanction would have been imposed.

¹⁴ Authors’ note: conclusions drawn from literature analysis and in-depth interviews to the country-experts. More information available at project’s webpage: www.reducingprison.eu/en/documents_publications/

2.4.

Current development of alternatives to imprisonment in Europe

While there is an expansion of alternatives to imprisonment in several Member States, it remains unclear whether this growth in interest is translated into an actual increase in the use of alternatives to imprisonment. Possible explanations for this concern include, that some alternatives to imprisonment are granted under the form of supervision and prison sentences, which does not avoid custodial measures. Indeed, alternatives like periodic detention, semi-detention, semi-liberty, weekend detention, work release and the (partly) suspended sentence, substitute a part of the custodial sentence and may be routinely, imposed. Except for community service, which is generally used across Member States, other community sanctions, which are the true alternatives to imprisonment, appear to be used on a limited scale.

It would seem, therefore, that the implementation of the policy document European Union Framework Decisions¹⁵ concerning offender supervision has in general not been adhered to¹⁶. On 14 June 2011 the Commission adopted a Green Paper on the application of the EU criminal justice legislation in the field of detention which aimed to consult Member States and concerned stakeholders on issues related to the pre and post-trial detention in the European Union. In this Green Paper, the European Commission wished to explore the extent to which detention issues impacted on mutual trust, and consequently on mutual recognition and judicial cooperation within the European Union. Only 81 replies to the consultation were received from national governments, practitioners, international organizations, NGOs, academics etc. These replies were summarised and published on the website of the European Commission¹⁷. From this comprehensive analysis it emerged that:

- The majority of Member States argued for an assessment of the implementation of Framework Decision 2008/247/JHA. The paper was seen as allowing the social reintegration of offenders;
- Pre-trial alternatives to detention were often selected over pre-trial custodial measures - a direct cause of prison overcrowding;
- Post-trial alternatives to imprisonment should be promoted;
- There was a precise requirement for a greater use of alternatives to imprisonment on the part of NGOs, International Organisations and Professional Associations.

¹⁵ Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention.

¹⁶ Morgenstern, C. & Larrauri, E., European Norms, Policy and Practice. In F.McNeill, K. Beyens (Eds.), *Offender Supervision in Europe*. New York: Palgrave Macmillan, 2013.

¹⁷ For further information please consult: ec.europa.eu/justice/newsroom/criminal/opinion/files/110510/summary_gpreplies_ms_ongs_en.pdf - Last access: 21/01/2016

Research from “Reducing Prison Population: advanced tools of justice in Europe” showed that the range and number of available alternatives to imprisonment at national level was dependent upon¹⁸:

- The legislative and judiciary system;
- The person within the criminal justice system who makes the decision;
- The appeal procedure and possibility of appealing;
- The political debate regarding alternative to imprisonment within the country;
- The national situation, such as, the role of civil society within the Member State, the State’s involvement in the implementation of alternatives to imprisonment and the synergy between State and non-governmental organisations (NGOs).

Member States should also consider in their deliberations the conclusions drawn from the current research that¹⁹:

- Alternatives to imprisonment should be a real alternative, not just a corresponding activity;
- There should be an integration of financial, logistic and technological dimensions to implement alternatives to imprisonment;
- Alternatives to imprisonment should be nested within a more general legislative framework that focuses on criminality and has the aim of incorporating alternatives to imprisonment, rather than isolating them;
- National crime policies should include early interventions such as the prevention of crime, effective law enforcement, public safety, the tailoring of sanctions and measures, and the social reintegration of people with convictions;
- There should be greater involvement of politicians and criminal justice professionals both at the national and local levels to ensure the implementation of alternatives to imprisonment;
- The approach to criminal justice should be developed within the broader context of social and health care policies, with due regard to both for offenders, their social reintegration, victims and their needs and rights.

18 Authors’ note: conclusions drawn from literature analysis and in-depth interviews to the country-experts. More information available at project’s webpage: www.reducingprison.eu/en/documents_publications/

19 Authors’ note: conclusions drawn from De Vos H., Gilbert E. Reducing Prison population: Overview of the legal and policy framework on alternatives to imprisonment at European level. 2014 Available at: www.reducingprison.eu/downloads/files/ReducingprisonpopulationEuropeanframework_FIN_101014.pdf - Last access: 21/01/2016

3
**Effectiveness of alternatives
to imprisonment**

3.1.

Effectiveness in protecting society

A commonly held belief is that the best way to protect society is by using harsh criminal penalties, and especially imprisonment. The existence of such belief was based upon:

1. Historical opinion

In the middle of the 18th century a custodial sentence was regarded as a progressive alternative to corporal punishment and the death penalty. This historic change was associated with early ideas of what constituted human rights towards the end of the 17th century and resulted in the subsequent changes in punishment. Gradually over time, the custodial sentence, while considered a severe form of punishment, was thought of as a more civilised form of punishment, since it partially replaced corporal punishment and the death penalty in many countries. Society readily adopted these changes since they permitted society to distance itself from the offenders, placing them in the hands of the court and to the prison for their allocated time. As corporal and capital punishments were replaced by the withdrawal of liberty, the purpose of custodial sentence was gradually replaced with the emphasis shifting from punishment to providing time for reflection and re-education.

With the passage of time, society recognised the more negative consequences of imprisonment - people in prison became institutionalised and were unable to relate to their families, communities and society. People with convictions, for example, on liberation did not have the basic life skills to manage their day-by-day living, this situation was reflected in being unable to connect with families and friends. This lack of social advantage affected their health and psychosocial wellbeing and exacerbated the tendency for recidivism. It should be mentioned that recidivism as a phenomenon of imprisonment does not imply negative consequences for society alone. The indiscriminate application of imprisonment not only fails in to protect society by reducing re-integration, but also increases social exclusion, with its unwanted effect, leading to increased costs to guarantee society's security.

Therefore, in addition to failing to protect individuals with convictions, their families and society at large, imprisonment also posed threats to the collective and financial fabric of society.

2. Preconceived and stereotypical

Pre-conceived notions for the need for imprisonment have been reported to be associated with the political need for outwardly easy, populist but reckless

solutions that are not based on evidence or experience. The research reported, however, here shows that this is not always the case. For instance, looking at the partner countries of this project, Scottish politicians stand out as supporters of ways to reduce prison populations. It is understandable that people want to be safe from any unlawful threats, but society ignores the long-term consequence of imprisonment as well as its role in the offence. Therefore, we assume that as a crime is a social phenomenon, it follows that crime must be related to societal changes and the type of crime affected by the society in which it occurs. Public opinion for security to achieve public safety, the type of crime committed and the criminal sanction varied within Member States, as shown by the field work conducted in this programme of work.

Despite the existence of many arguments against imprisonment, imprisonment still exists. Therefore, when considering the sanction of imprisonment the following should be taken into account:

- Sentencing is the final step of judicial involvement in the criminal justice system and, in many respects, it is the most important and the most difficult. Its importance lies in the obvious impact it has upon the offender, the victim, their families and the community. Its difficulty lies in the necessity of balancing many factors, including the human factors and the protection of society;
- The aims of punishment are considered as retribution, justice, deterrence, improvement and protection, and consequently, modern sentencing policy reflects a combination of all or several of these aims;
- The retributive element of sentencing is intended to punish the offender and demonstrate public aversion to the crime. The concept of justice as an aim of punishment means both that the punishment should be appropriate for the offence and that similar offences should receive similar punishments.
- An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the offender from further offences, but also, through early interventions to prevent people from breaking the law²⁰.
- Although the efficiency of alternative solutions to imprisonment might be greater (in terms of reducing level of reoffending and cost effectiveness²¹), the extensive use of imprisonment often leaves fewer financial resources for alternative measures. Therefore, it is necessary to improve financial support for their implementation. Courts should address the issue of the implementation of alternative solutions from pre-trial to post-trial with the loss of liberty being the last resort.

20 Lord Hailsham, Halsbury's Laws of England, 4th ed. London, Butterworths, 1976, p. 288. Available at: trove.nla.gov.au/work/6525116?selectedversion=NBD7575542 - Last access: 2/10/2015

21 See also United Nations "Handbook of basic principles and promising practices on Alternatives to Imprisonment" (2007) where it is indicated that vast majority of prisoners will return to the community, many without the skills to reintegrate into society in a law-abiding manner.

The main benefits of alternatives to imprisonment for society are²²:

- People who are rehabilitated pose a reduced hazard to society;
- Implementation of alternative sanctions allows people with convictions to maintain social and community contacts to allow individuals to keep family, work and social contacts, their home, their right to employment and education;
- Reduced risks of estrangement from family, relatives and friends, social isolation and exclusion;
- Increased the likelihood of people with convictions being financially and economically active members of society and receiving and providing support from family and being participate in raising their children;
- Increased opportunities for rehabilitation, improved self-esteem and self-efficacy are available through community sanction programmes;
- People who are granted alternative sanctions have greater opportunities to access health care and maintain their physical and psycho-social health. For instance, a imprisonment-related health problem and, more specifically prison overcrowding, is associated with the spread of communicable diseases²³;
- Most of the objectives of imprisonment can be met more effectively for the benefit of the offending individual and society;
- Society itself can draw conclusions from its experience about what is or is not effective and valid in criminal policy;
- Society gains a more flexible and effective set of instruments to combat crime within a changing environment;
- Public awareness about ways to achieve a safe society and to reduce the fear of crime can be encouraged to enable constructive and evidence-based actions.

It is important to improve the public and decision makers' awareness about alternatives to imprisonment. This may be achieved by:

1. Being transparency

- Providing access and increasing availability to websites where information on initiatives may be found;
- Improving access to download newsletters on the implemented activities, documents, annual reports and other relevant documents;

²² Authors' note: conclusions drawn from literature analysis and in-depth interviews to the country-experts, more information available at project's webpage - http://www.reducingprison.eu/en/documents___publications/

²³ See also World Health Organization "Prisons and Health", p. 45, 2014. Available at: www.euro.who.int/__data/assets/pdf_file/0005/249188/Prisons-and-Health.pdf - Last access: 21/01/2016

- Increased availability of impact evaluations, informative and academics publications in newspapers and other media.

2. Communication strategies:

- Development of communication networks to progress and maintain regular contact with judges, prosecutors and police officers;
- Maintaining direct contact with the public and decision-makers during formal networks and expert working groups;
- Lobbying activities through media networks, to promote research and project findings about the goals and effectiveness of alternatives to imprisonment, targeted to professionals, public, policy makers and civil servants.

3.2.

Effectiveness in punishment

When applying sanctions for a committed offence, a number of factors should be considered - since the application of a sanction can result in both positive (enabling) or negative (barriers) outcomes.

Positive changes that have occurred, have determined the need to integrate people with convictions into society and thus the need for alternative solutions to imprisonment²⁴. These changes are:

- Society's understanding the need and/or usefulness to reintergrate people with convictions into the community;
- The value change in legal philosophy and the shift in focus in penitentiary measures from punishment and isolation, to restorative justice and reintegration²⁵.
- An established integration system, which includes, institutions at State and municipal levels; specialists from law, health, social care practitioners etc., to provide inter-institutional and multidisciplinary approaches to enable people with convictions to re-enter society;
- Positive changes in policy, legislation and the development of supporting planning documents (guidelines, concepts, programmes, plans).

²⁴ See also United Nation Office on Drugs and Crime, Why promote prison reform? Available at: www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.html - Last access: 21/01/2016

²⁵ Ibidem.

The barriers to the integration of people with convictions into society include, that they²⁶:

- Experience substance misuse;
- Have had poor educational experiences;
- Experience of poverty and social exclusion
- Have impulsiveness and poor self-control;
- Lack support from family and partnership;
- Lack personal skills for positive leisure time.

In today's world, punishment, as such, is no longer the goal. Rather the move is towards prevention of crime. In order to achieve this preventive outcome it is essential to take two steps:

1. To prevent the criminal offence;
2. To impose sanctions upon the individual, which:
 - compensate the damage caused to the victim;
 - discourage committing new crimes during and after the enforcement of judgment.

It is important to stress that in order to make alternative sanctions to imprisonment more effective (i.e., community sanctions and measures), the penal process should be visible to the community.

Victims and society are entitled to expect that a crime results in punishment and that they will be protected from further offences. Imprisonment must always be a response to serious crimes. However, punishments without isolation from society are considered as effective as imprisonment since they allow people with convictions to remain in contact with the family and their place of residence - all of which promote socialisation and public safety. If society understands the nature of alternatives to imprisonment together with the benefits, society may concede that alternatives to imprisonment are effective solutions.

In order for an alternative to imprisonment to be effective, it must be applied in accordance with the seriousness of the offence, the damage suffered and the defendant's personality²⁷. Alternative sanctions must include a number of obligations on the part of offender. The offender must be aware of the content of the programme and of her responsibilities to adhere with the programme aims, its rules, its constraints and outcomes. The efficiency of alternative sanctions

²⁶ The Quaker Council for European Affairs, *The Social Reintegration of ex-prisoners in Council of Europe Member States*, 2011. Available at: cep-probation.org/wp-content/uploads/2015/03/rprt-reintegration-full-en-may-2011.pdf - Last access: 21/01/2016

²⁷ Authors' note: conclusions drawn from literature analysis and in-depth interviews to the country-experts, more information available at project's webpage: www.reducingprison.eu/en/documents_publications/

to imprisonment, begins from the ruling of the court as it decides between imprisonment and alternative sanctions.

There are several essential components which make alternative sanctions more effective. Each alternative sanction contains one or more elements of punitive nature, because each punishment should eliminate the reasons for which a person has committed a criminal offence. The fact that the preponderantly visible part of the sentence is the one related to compensation of damage or participation in rehabilitation programme, this does not mean that the sanction does not contain penalty elements. Imposing any kind of punishment leads to restricted personal freedoms and rights, specified in the law and by the court decision.

Even though the sanction's primary task is not to punish, it contains a clear message that criminal behaviour is unacceptable and punishable. Alternative sanctions may require a very detailed degree of tailoring to individual needs to assist individuals to behave in a responsible, law-abiding manner. Instead of focusing on punishment, the focus is now on self-reliance and taking responsibility for behaviour.

Alternatives to imprisonment can be full-time, but when progress is good, they can be reduced or suspended (similar to an early release from prison). This flexible approach motivates people to comply with the conditions imposed and promotes re-socialisation and re-integration into society.

3.3. Effectiveness in reducing offending

Efficiency of alternative sanctions in reducing the number of offences and recidivism is greater than the imposition of sanctions linked imprisonment and isolation from society²⁸. The reasons for are:

- First, alternative sanctions decrease the risks of institutionalisation, posed by social exclusion following imprisonment;
- Secondly, reduce the social costs of imprisonment and the potential negative impacts of imprisonment;
- Thirdly, provide opportunities to apply for a variety of educational and/or training programmes, employment which support individuals and enable

28 See also United Nations "Handbook of basic principles and promising practices on Alternatives to Imprisonment" (2007). Available at: www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf and Report prepared for Brå by Patrice Villettaz, Gwladys Gillieron and Martin Killias "The effects on re-offending of custodial versus non-custodial sanctions", 2014. Available at: www.bra.se/download/18.6cde4de61493868542d296/1421834737558/2014_The+effects+on+re-offending+of+custodial+versus+non-custodial+sanctions.pdf - Last access: 21/01/2016.-

their reintegration into society;

- Finally, alternatives to imprisonment, provide opportunities to make amends to the victim, the community and society through community service programmes.

When evaluating the effectiveness of alternatives to imprisonment, this should be done within context of the crime and the need to reduce recidivism. Therefore, each crime should be viewed as a conflict between society (including the victims) and the offender. All measures that contribute to the solution of the conflict will reduce recidivism.

Against this conceptual framework, two types of activities are considered essential for the reduction of recidivism:

1. Activities directed at preventing the reasons which lead to the crime being committed in the first place. Activities such as re-socialisation, employment, education, health restoration, compensation of the harm caused to the victim may be implemented;
2. Activities aimed at mitigating against the impact of the crime. These activities relate to the victims and society as a whole. They include, compensation for the victim, the restoration of the victim's health; and/or compensation for damages to the local community.

Restorative justice approaches allow all parties concerned to understand what has happened, learn from it and the reasons that may serve as the basis for the prevention of future crimes. Thus, the practice of restorative justice has a preventive effect, which allows not only to reparation, but also the prevention of relapse. Thus, crime affects all parties involved - the convicted person, the victim and society. By using restorative justice practices the injured party (victim) and the offender jointly decide on the necessary action to recover, lessen the harm, take responsibility for their actions and are able to appreciate the consequences of crime for society.

3.4. The rights and role of the victim

Victim's rights have increasingly been recognised in recent years in both policy and legislation, that have evolved steadily across the EU from the 1970s onwards. Early initiatives to bring victims' rights to the fore were led by the NGO sector and driven by a number of socio political movements that underlined the urgent need for Governments to provide services for and recognise the rights of victims of crime. Amongst these, the women's movement was the most notable²⁹.

The Council Framework Decision on the standing of victims in criminal

29 European Union Agency for Fundamental Rights, Victims of crime in the EU: the extent and nature of support for victims, 2014. Available at: fra.europa.eu/sites/default/files/fra-2015-victims-crime-eu-support_en_0.pdf - Last access: 15/01/2016

proceedings from 2001, established basic rights for victims of crime within the EU. The Member States were required to adapt their legislation in line with the recommendations of the Framework Decision by 2006. Implementation Reports published in 2004 and 2009, however, concluded that this EU legislation had not been effective in achieving minimum standards for victims across the EU. Therefore, new guidance 'establishing minimum standards on the rights, support and protection of victims of crime' was once more called for by the Framework Decisions issued in 2008 and 2009 and by The Directive of 25 October 2012 (Directive 2012/29/EU). The latest European regulation intend to guarantee information, support and adequate protection to the victims of crime and to provide an opportunity to participate actively in the penal process.

In particular, in Chapter 2, of the Directive (2012/29/EU), "Provision of information and support" foresaw the right to understand, to be understood and to obtain information from victims during all necessary interactions with a competent authority in the context of criminal proceedings; the right of victims for interpretation and translation support to enable the understanding of the language used in penal process and the victim's right to access specialised support services free of charge.

In Chapter 3, the victim's rights were enumerated. These included the victim's participation in criminal justice proceedings to be declined based on the specific right for protection; the right to take measures to safeguard the victim from secondary and repeat victimization from intimidation and from retaliation; the right to be heard; the victim's rights in the event of the decision not to prosecute; the right to legal aid; the right to reimbursement of expenses; the right to the return of their property; the right to decision on compensation from the offender in the course of the criminal proceedings and the rights of victims resident in another Member State.

One of the European Union objectives, as reiterate in the conclusion of Council the 26th and 27th June 2014³⁰, is the constructions of a trustworthy space of liberty, security and justice without internal borders and with full respect of people's fundamental rights and different judicial systems. The Council's objectives³¹ also highlight as an additional action to undertake the strengthening of victims' protection.

Both Tokyo Rules and European Rules prescribe the need for *"ensuring a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention"* through, for instance:

- Creating opportunities and attending fora in every phase of the criminal

30 For more information please consult: www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf - Last access: 21/01/2016

justice process (from pre-trial to post-sentence), where participation and communication between all stakeholders is possible;

- Applying restorative justice values and principles to all community sanctions;
- Give victims and offenders instruments to give satisfaction and wellness to the offended party; to promote re-dress and resolution including restorative justice practices (e.g. mediation, family-group conferencing³¹, victim-offender conferencing³², sentencing circle³³).
- Increasing restorative justice policy, not as an alternative but complementary to those of civil jurisdiction. This is essential in order to engage with the personal experience and to re-build the rift caused by the crime, so that conflict may be resolved between offender and victim. This paves the way for repair to the damage experienced by the victim and his community and the reintegration of the offender into society. It allows the restarting of a dialogue between victims, offenders and their community, in an informal setting, far from court's rooms, to discuss the situation and resolve the crime's consequences.
- The above policy documentation provides the evidence-base for the requirement for social change.

Social change is an essential factor and it is found in a new process, conceptualised by Garland as "return of the victim"³⁵. According to this theoretical position, the victim is the centre of attention within criminal policy. Prior to this, the victim's interests were included among those of the community which were perceived as not being in conflict with those of the offender. Everything has changed now. The victim's feelings are always evoked when supporting imprisonment. According to Garland, the prison's system has become "a zero-sum game". In essence, when the criminal wins, the victim is necessarily the loser; and when intervening in favour of the victim means being automatically inflexible to

31 Family-group conferencing, started in New Zealand, also includes the offender's family and the victim, but in addition professionals from agencies involved with the offender take part. It is a model used mainly for young people in trouble who are known to many agencies. I. Aertsen, R. Mackay, C. Pelikan, J. Willemsens, M. Wright, *Rebuilding community connections: mediation and restorative justice in Europe*, Council of Europe publishing, Strasbourg, 2004.

32 Victim-offender conferencing (also known as "community conferencing"), often used with juvenile offenders, usually involves a meeting between the victim, the offender and it is facilitated by a mediator (or sometimes two). The young person's extended family are invited, and often another person who has a good rapport with the offender, such as a sports teacher or club leader. The victim and a supporter, or others affected by the crime, are also invited to take part. Experience with adults is growing, and the supporters are more likely to include people from outside the family. I. Aertsen, R. Mackay, C. Pelikan, J. Willemsens, M. Wright, *op.cit.* Victim-offender conferencing (also known as "community conferencing"), often used with juvenile offenders, usually involves a meeting between the victim, the offender and it is facilitated by a mediator (or sometimes two). The young person's extended family are invited, and often another person who has a good rapport with the offender, such as a sports teacher or club leader. The victim and a supporter, or others affected by the crime, are also invited to take part. Experience with adults is growing, and the supporters are more likely to include people from outside the family. I. Aertsen, R. Mackay, C. Pelikan, J. Willemsens, M. Wright, *op.cit.*

33 Sentencing circles may include members of the community. The most significant difference from the other models is that the judge and the prosecutor are present. This method has been used in Canada, especially (but not only) by some judges working among the First Nation peoples. I. Aertsen, R. Mackay, C. Pelikan, J. Willemsens, M. Wright, *op.cit.*

the perpetrator of the crime. In Garland's opinion a new conceptualisation of the victim is now apparent together with new definitions of "the real victim", "the symbolic victim" and the institutions appointed to control criminality and dispense justice³⁴.

Garland's lexicon is concerned with victimisation and the collective value given to the concept of "victim". This is of relevance since the social processes involved are mentioned in several countries, but their use is mostly widespread in the United States and in the United Kingdom. This is an immediate consequence of their legal framework, in which public support for politics has clear, important and often significant impacts on the effectiveness of police operations. It is important to state the necessity to update the professional training and the continuing professional development (CPD) of judges, social workers and policemen, both by the point of view of methodology and by the subject area - which are easily identified by means of "detecting [their] real needs".

The need for training is reiterated in Directive 2012/29/EU, Chapter V, "Other provisions", which highlights the importance of training and CPD for both generalist and specialist practitioners (i.e. police officers and judicial staff) to a level appropriate to their contact with victims. The objective of training is increase awareness to: the offences; the individual's needs; to have the ability and capacity to handle those needs impartially, respectful and professionally. In this sense, there are several points which need to be emphasised:

1. To plan and ensure participation in CPD courses for judges, social workers, policemen and prison personnel informed by the evidence-base and international practices;
2. CPD courses should be tailored to the seniority, office and educational experiences of participants;
3. Scientific attention should focus on the methodology and the participative nature of educational interventions;
4. The introduction of methods (e.g. problem-based learning) to achieve the aims of the CPD programme using various flexible teaching schemes. The educational pattern may be modulated by employing e.g. a blended learning approach. Adopting such approaches allow the incorporation of different learning initiatives such as a report with a discussion for people attending meetings; short reports with debates; separate questions for small groups as provided by a convenor and short-life study groups.

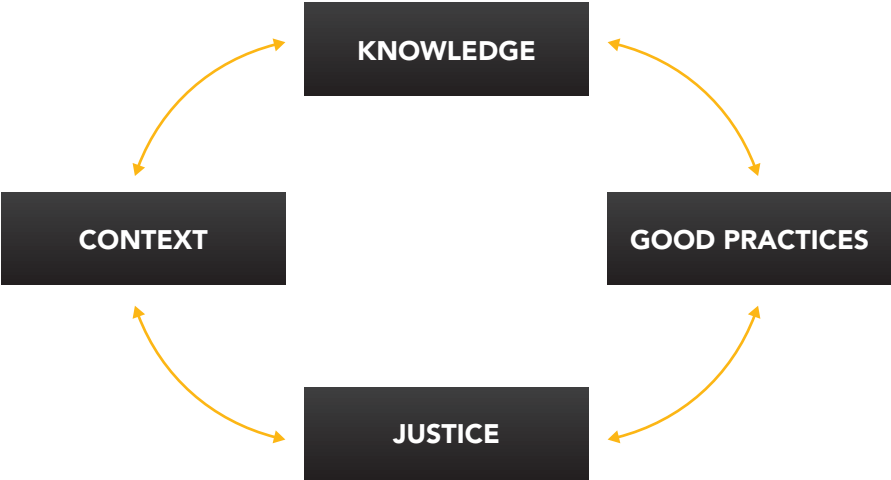
34 Garland D. The culture of control, Oxford University Press, Oxford (UK), 2001.



4
**General recommendations and
operative indications**

The design and the implementation of alternatives to imprisonment can be conceptualised as an interaction of four dimensions, as shown in the following Figure 1.

Fig. 1 Conceptualising alternatives to imprisonment: an interaction of knowledge, context, good practices and justice



The recommendations for are provided below:

1. Knowledge recommendations

It is recommended that all stakeholders and policy makers should be provided with information on different existing types of alternatives to sanctions, including their strengths and risks:

- Strength of alternatives to imprisonment: such as prevention of recidivism, social rehabilitation and inclusion, protection of community, avoiding the negative effects of imprisonment, reducing costs, improving the care of victim’s need, observance of human rights, avoiding institutionalisation;
- Risks of alternatives to imprisonment: such as the unclear relation to prison overcrowding, unclear aims, lack of financial support, possibility of discrimination or stigmatisation within the general public and society.

2. Context recommendations

In order to design effective alternatives to imprisonment, European Member States should develop their own strategy tailored to the needs of their society. It is recommended that the following elements should be considered:

- The legislative and judiciary system;
- The person within the criminal justice system who makes the decision;
- The appeal procedure and possibility of appealing;
- The political debate regarding alternative to imprisonment within the country;
- The national situation, such as, the role of civil society within the Member State, the State's involvement in the implementation of alternatives to imprisonment and the synergy between State and non-governmental organisations (NGOs).

3. Good practices recommendations

It is recommended that the following elements of good and promising practices should be considered when developing alternatives to prison:

- Alternatives to imprisonment should be a real alternative, not just a corresponding activity;
- There should be an integration of financial, logistic and technological dimensions to implement alternatives to imprisonment;
- Alternatives to imprisonment should be nested within a more general legislative framework that focuses on criminality and has the aim of incorporating alternatives to imprisonment, rather than isolating them;
- National crime policies should include early interventions such as the prevention of crime, effective law enforcement, public safety, the tailoring of sanctions and measures, and the social reintegration of people with convictions;
- There should be greater involvement of politicians and criminal justice professionals both at the national and local levels to ensure the implementation of alternatives to imprisonment;
- The approach to criminal justice should be developed within the broader context of social and health care policies, with due regard to both for offenders, their social reintegration, victims and their needs and rights.

4. Justice Recommendations

Application of imprisonment and associated penalties should bear in mind the following considerations:

- Sentencing is the final step of judicial involvement in the criminal justice system and, in many respects, it is the most important and the most difficult. Its importance lies in the obvious impact it has upon the offender, the victim, their families and the community. Its difficulty lies in the necessity of balancing many factors, including the human factors and the protection of society;
- The aims of punishment are considered as retribution, justice, deterrence, improvement and protection, and consequently, modern sentencing policy reflects a combination of all or several of these aims;
- Imprisonment and prisons do enable people to gain responsibility for their day-to-day living, but due to their increase dependency upon external routines and rules they are in danger of being institutionalised. Therefore, on liberation, they may be ill-equipped to cope in society without a sustained period of reintegration; and some, it is argued, actually seek to return to the institution because that is the life they know and have known;
- The efficiency of alternative solutions to imprisonment is considered to be greater, than extensive use of imprisonment. However, reliance upon imprisonment, often leaves less financial resources for community sanction programmes. Therefore, it is recommended that there must be improved financial support for alternative sanctions to imprisonment.
- Courts should address the issue of the implementation of alternative solutions to imprisonment from pre-trial to post-trial with the loss of liberty being the last resort.

APPENDIX 1

International (UN) and regional (EU) legislation on alternatives to imprisonment and sanctions

1. United Nations

- The United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules); (Resolution 45/110);
- The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules); (Resolution 2010/16);
- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules); (Resolution 40/33).

2. European Union

- The European Union Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions;
- The European Union Council Framework Decision 2009/829/JHA 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.
- The Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5);
- The European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS No. 51).

3. Recommendations of the European Council Committee of Ministers to Member States

- Recommendation Rec(92)16 on the European rules on community sanctions and measures;
- Recommendation Rec(92)17 concerning consistency in sentencing;
- Recommendation Rec(97)12 on staff concerned with the implementation of sanctions and measures;
- Recommendation Rec(99)22 concerning prison overcrowding and prison population inflation;
- Recommendation Rec(2000)22 on improving the implementation of the European rules on community sanctions and measures;
- Recommendation Rec(2003)22 on conditional release (parole);
- Recommendation Rec(2006)2 on the European Prison Rules;
- Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures;
- Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules;
- Recommendation CM/Rec(2012)5 on the European Code of Ethics for Prison Staff;
- Recommendation CM/Rec(2014)4 of the Committee of Ministers to member States on electronic monitoring.

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