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Community Sanctions and Measures

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Abstract

This chapter explores the use of community sanctions in the Republic of Ireland and in Northern Ireland. It locates this discussion within a wider international landscape, where the numbers of people subject to supervision in the community has risen markedly. It explores some of the reasons for this growth alongside the rationalities that are deployed to promote the use of community sanctions over time. 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. The chapter concludes by critically considering penal reductionism as a point of policy convergence in the two jurisdictions.

Introduction

This chapter explores the use of community sanctions in the Republic of Ireland and in Northern Ireland. The Council of Europe's (CoE) definition of Community Sanctions and Measures demarcates the field under study:

The term "community sanctions and measures" refers to sanctions and measures which maintain the offender in the community and involve some restriction of his liberty through the imposition of conditions and/or obligations, and which are implemented by bodies designated in law for that purpose. The term designates any sanction imposed by a court or a judge, 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 1992, Appendix para.1).

Included within the ambit of this definition are community sentences imposed by a court and post-custodial restrictions following release from prison (e.g. on licence). These are sometimes referred to as 'front-end' sentences and 'back-end' sentences respectively. Notably the definition above specifies that community sanctions and measures involve 'some restriction of liberty' through the imposition of conditions, which are overseen by a body designated in law.¹ In the Republic of Ireland this body is the Probation Service, in Northern Ireland it is the Probation Board of Northern Ireland (PBNI). Both organisations carry out similar functions, but their constitution

¹ It is worth mentioning that fines, the most common sanction imposed by the courts in both the Republic of Ireland and Northern Ireland, are not included in this definition, *unless* there is a supervisory or 'controlling activity' to secure their implementation. More generally, Mair (2004) among others has critiqued the lack of attention paid towards this form of sentence within penological scholarship.

and governance arrangements differ, as does the extent of their reach (evident in the differing proportions of people under forms of community supervision), and the legal frameworks in which they operate.

The chapter locates the Republic of Ireland and Northern Ireland within a wider international landscape, where the numbers of people subject to supervision in the community has risen markedly. It explores some of the reasons for this growth alongside the rationalities that are deployed to promote the use of community sanctions over time. 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. The chapter concludes by critically considering penal reductionism as a point of policy convergence in the two jurisdictions.

An expanding sphere

Internationally the numbers of people subject to forms of supervision in the community has expanded exponentially (McNeill and Beyens, 2013). Yet, despite the rise in their use, and in some cases the increasing strictures placed on people within the community, this sphere of penalty has been subject to relatively limited scholarly attention or public discourse. One reason for this oversight maybe the attention directed towards imprisonment in much of the criminological literature, particularly in light of the rise of ‘mass incarceration’ in the United States and prison expansionism elsewhere (Robinson et al, 2013; Clear and Frost, 2014; DeMichele, 2014). Yet if one takes the hyperactive incarceration rates of the US as one example, even there the numbers of people subject to community sanctions and measures is more than three

times the numbers imprisoned (Herberman and Bonczar, 2014; Carson, 2014).²

Similarly in many European countries the numbers subject to sanctions in the community far exceeds the numbers imprisoned (see McNeill and Beyens, 2013 for an overview).

Another reason for the neglect of community sanctions may be their lack of visibility particularly when compared with the powerful visual iconography and cultural purchase of the prison (Brown, 2009). In one sense this is understandable, community sanctions are by their nature more spatially diffuse. They are not bounded by a physical structure in the same manner as a prison and the spaces and places where supervision occurs are not usually made publically visible. Our understanding of what they entail is therefore harder to picture and their penal character appears more oblique (Robinson, 2015). Furthermore, the language or ‘branding’ (Maruna and King, 2004), of community sanctions often renders their purpose unintelligible to the wider public. All of these factors contribute to what Robinson (2015) characterises as their ‘Cinderella’ status.

Lack of visibility combines with mutability to further obscure this field. Reflecting broader socio-cultural and penal trends the rationale for the use of community sanctions has changed over time. In an analysis of what they describe as the ‘improbable persistence of probation’, Robinson *et al* (2013: 321) identify a number of shifts in the function and legitimisation of community sanctions and measures from the beginning of the twentieth century into the present. Initially grounded in penal-welfarism with an emphasis on the reform of the individual, the stated purposes of community sanctions have shifted in tandem with wider penal trends. The crisis in

² At the end of 2013, there were an estimated 4,751,400 adults under community supervision in the United States. This equates to 1 in 51 of all adults in the US. This compares with an estimated 1,574,700 people imprisoned in the same time period (Carson, 2014).

penalty from the 1970s onwards, most famously described by Garland (2001) in the *Culture of Control*, notes in particular the demise of rehabilitation in favour of more punitive approaches. Following the so-called ‘decline of the rehabilitative ideal’ (Allen, 1981), and the rise in the use of imprisonment, community sanctions have been repositioned and reframed in response.

Robinson *et al* (2013) note four distinct, (although not necessarily mutually exclusive), strategies of adaptation: managerial; punitive; rehabilitative; and, reparative. To take each of these in turn, the managerial adaptation refers to the increased emphasis placed on the categorisation and management of individuals in the most cost effective manner. The emphasis on *management* is instrumental and mutes any wider ambition of the transformation of the individual. Examples include the advent of ‘offender management’, perhaps best typified in the integration of prison and probation services in England and Wales under a National Offender Management Service (NOMS). Here as Worrall (2008:120) observes, the concept of ‘offender management’ serves to create: ‘...a narrative of ‘joined up’ penal thinking and cost-effective delivery...’ A narrative, which she argues is imaginary, invoking an illusion of social control – ‘both impossible to achieve but also undesirable’ (Worrall, 2008: 113).

Punitive adaptations include the recasting of community sanctions as ‘punishment in the community’. In addition to public messaging about the ‘toughness’ of such sanctions, this has been associated with more intense supervisory requirements and increased penalties for non-compliance. Given the expanded reach of post-custodial supervision, the conditions attached to licences and recall practices can have a significant influence on the prison population through the so-called ‘backdoor’ sentencing route (Padfield and Maruna, 2006; Padfield, 2012).

The rehabilitative potential of community sanctions was given a renewed focus by an emphasis on ‘evidence-based’ approaches from the late 1980s onwards. The ‘What Works?’ initiative, which has advanced particular methodologies and approaches premised on the ‘Risk-Need-Responsivity’ (RNR) model of offender rehabilitation has been particularly influential (Ward and Maruna, 2007). With its 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 adaptation.

Reparation, the last adaptation described by Robinson *et al* (2013), is most closely associated with interventions, which allow some form of repair for the harm caused by offending (McIvor, 2011). Sentences, such as community service, involving unpaid work in the community may be regarded as reparative (although for a discussion about how they can be recast as expressly punitive sanctions see McNeill, 2009). Other forms of reparation include restorative justice approaches, which have gained increasing currency in many countries in recent years (Morris, 2002; Wood, 2015).

Similarly in Northern Ireland and the Republic various legitimations have been deployed over time to support the use of community sanctions (Carr, 2015a; Healy, 2015). In both jurisdictions there has been a rise in the use of community sanctions linked to increased resourcing and an expanded legislative remit. However, the rate of use of community sanctions compared to the numbers imprisoned differs across the two jurisdictions. In Northern Ireland the rate of use of imprisonment compared to

community sanctions is broadly equivalent (Graham and Damkat, 2014).³ In the Republic of Ireland committals to prison exceed community sentences imposed by a rate of more than two to one (Probation Service, 2014; Irish Prison Service, 2014).⁴ 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). Understanding the variance in the use of community sanctions directs attention towards, social and cultural contexts, historical trends, sentencing practices, the purpose and character of these sanctions and their interrelationship with other forms of penalty - most notably the use of imprisonment.

Historical Context

Both Northern Ireland and the Republic share a common antecedent legislation in the form of the *Probation of Offenders Act, 1907*. Reflecting a welfarist (or perhaps paternalist) orientation, this Act famously refers to the probation role as one of 'advising, assisting and befriending'. Evidence of the inertia in criminal justice policy in the Republic of Ireland, this statute continues to provide the core legislative basis for probation there, despite a recent commitment towards legislative reform in the form of the *Criminal Justice (Community Sanctions) Bill, 2014*.

For much of the twentieth century legislation governing the administration of community sanctions in Northern Ireland followed legislation introduced in England and Wales. However, in relative terms probation in Northern Ireland was poorly resourced and concentrated in the main urban areas (Fulton and Carr, 2013). The

³ Sentencing statistics from 2013 show that 3769 prison sentences were issued by the courts compared to 2823 community orders (probation orders, community service orders and combination orders). Separate information is not provided in this dataset on sentences combining elements of community and custodial supervision (Graham and Damkat, 2014).

⁴ In 2013 there were 12,849 committals to prison under sentence compared to 5726 community sentences (Irish Prison Service 2014 and Probation Service 2014).

establishment of a trainee scheme linked to a social work qualification led to an increased emphasis on professionalization and an expansion of probation services in the 1970s. However, this coincided with the outbreak of the Troubles, which profoundly affected all aspects of Northern Irish society including the administration of criminal justice.

Many agencies within the criminal justice system became embroiled with the conflict, most notably the prisons and police, but the probation service adopted a stance of 'neutrality' (Carr and Maruna, 2012). Essentially this meant that the probation officers did not work with people whose offences were of a political nature (unless on a voluntary basis regarding welfare concerns). The reasons put forward for this stance, which was endorsed by the National Association of Probation Officers (NAPO), were both principled and pragmatic. It ultimately meant that probation continued work at a community level and probation officers were not viewed as 'legitimate targets' by paramilitary organisations (Carr and Maruna, 2012).

Legislation enacted in 1982 established the Probation Board for Northern Ireland (PBNI) as a non-departmental public body. This meant that direct governance of probation moved from a government department to a separate body overseen by a Board. Addressing deficits in legitimacy in state-administered criminal justice during the course of political conflict formed part of the rationale for the establishment of an independent board comprising of community representatives (Carr, 2015a). Today, however, this issue is arguably more symbolic than tangible. PBNI receives its entire funding from government and is required by legislation to 'give effect' to the directions of the Department of Justice; therefore the extent of independence or

community involvement in its operations is limited in scope.⁵ This realignment is evident in its budgetary allocation. When it was first established the PBNI allocated 20 per cent of its budget to community based organisations; by 2009 this proportion had declined to just 7 per cent (O'Mahony and Chapman, 2007; Carr, 2015a).

Throughout the 1990s and the 2000s a series of legislation was passed which further extended provisions for community sanctions and the role of the PBNI. The *Criminal Justice Order (Northern Ireland) 1996* updated the law in relation to the main community sentences – Probation Orders, Community Service Orders (CSOs) and Combination Orders – and set out the dual purpose of such orders (protecting the public and securing the rehabilitation of the offender). Following the Good Friday Agreement the Criminal Justice Review (2000) focused on the administration of justice in Northern Ireland and considered the feasibility of amalgamating prisons and probation into a unitary offender management service, akin to the model that was eventually adopted in England and Wales (Mair and Burke, 2012; Raynor, 2012). Ultimately the Review team did not recommend such an approach in Northern Ireland, largely because of the difficulties facing the prisons (Blair, 2000).

These difficulties followed from the manner in which the prisons had been so closely entwined in the conflict. The prisons were battlegrounds for many of the key events of the Troubles, including internment without trial and the death of ten men on hunger strike (Gormally *et al*, 1993). Prison staff were considered 'legitimate targets' by paramilitaries and twenty-nine prison officers were killed in the course of the

⁵ The relevant legislation specifies: 'The Department of Justice may, after consultation with the Board, give the Board directions of a general character as to the exercise and performance of its functions, and the Board shall give effect to any such directions.' [Probation Board (Northern Ireland) Order, 1982, Part: 6].

Troubles.⁶ In the post-conflict period the prisons were required to significantly downsize, prompted in part by a prisoner-release scheme (McEvoy, 2001). It was also necessary to move from a highly securitized model towards more ‘normalised’ operations. However, as the Owers’ Review of the Prison Service (2011) and subsequent inspection reports make clear (CJINI, 2013; 2014), this process has been painstaking and the challenges involved are still evident in the present day.

Further legislation throughout the 2000s consolidated probation’s public protection role and throughout this period the systems and processes developed by PBNI placed a strong emphasis on risk assessment. The *Criminal Justice Order (NI) 2008* introduced so-called ‘public protection’ sentences, in certain circumstances extending the periods of post-custodial supervision. The effects of this legislation on the work of PBNI is discussed further below. While probation in Northern Ireland followed some of the similar trends evident in England and Wales, including an increased focus on risk and public protection, it did not do so to the same degree. Some of the reasons for this divergence include the impact and legacy of political conflict on all aspects of the criminal justice system and the fact that historically such a strong emphasis had been placed on probation’s community-based role (O’Mahony and Chapman, 2009; Carr, 2015a).

In the Republic of Ireland the pace of legislative change has been much slower. As already noted, the main legislative instrument is more than a century old. Various analyses have put forward reasons for the torpor in criminal justice policy (Kilcommins *et al*, 2004; O’Sullivan and O’Donnell, 2012; Rogan, 2011). These include low crime rates for much of the twentieth century, the role of wider

⁶Since 1994, following the official ceasefires one prison officer has subsequently been killed. In 2012, David Black, a prison officer was murdered on his way to work: <http://www.theguardian.com/uk-news/2014/feb/05/charge-murder-prison-officer-northern-ireland-david-black>

institutions of social control, and poorly developed governance and administrative infrastructures. These analyses have variously been applied to prisons, youth justice and wider social policy, and in this respect the position of community sanctions while remarkable is not especially unique (Healy, 2015).

Evidence of the under-development of the Probation Service in the Republic of Ireland is provided in McNally's (2007) historical account, which notes that until the 1940s there were just four probation officers employed in the entire country, and until 1968 there was no full-time officer working outside of Dublin. By 1973, following some investment in the service, the numbers of probation officers employed across the country rose to 47 (Kilcommins *et al.*, 2004; McNally, 2007). In the latter part of the twentieth century, where community sanctions have garnered policy attention, it has largely been in the context of their potential to act as a penal reduction mechanism. Most notably the Whitaker Report (1985) recommended that prison should be used as a sentence of last resort and that community sanctions should be used to a greater degree.

The government's five-year plan for the *Management of Offenders* (1994) further recommended an expanded role for the Probation Service, again positioned as an alternative to custody in the context of an escalation in the prison population. In parallel, various reports have also decried the lack of investment in the service. For example the *Final Report of the Expert Group on the Probation and Welfare Service* (1999), the first substantial review of Probation in the history of the State, noted:

Mechanisms to maximise non-custodial sanctions for offenders are seriously underdeveloped and under-funded in the Irish context relative to custodial options. (Expert Group, 1999:5)

The most significant expansion in the role of the service to date came with the passage of the *Criminal Justice (Community Service) Act, 1983*, which introduced Community Service Orders (CSOs) (McCarthy, 2014). The Irish legislation was largely modelled on English legislation enacted in 1972 (similar legislation had been introduced in Northern Ireland in 1976). In 2011 amending legislation (the *Criminal Justice (Community Service) Amendment Act, 2011*) was enacted which required the court to consider the imposition of a CSO as an alternative to custody for sentences of 12 months or less. The legislation also allowed for the imposition of a CSO as an alternative to prison sentences exceeding this length, however, it is not a requirement that the courts make this consideration when imposing a longer sentence of imprisonment. The evident intention of the 2011 Act was to encourage a greater use of community service by the judiciary and consequently to reduce the resort to short prison sentences.

Legislation enacted in the 2000s (*Children Act, 2001; Sex Offenders' Act, 2000; Criminal Justice Act, 2006, Fines Act, 2010*) has further expanded probation's mandate. By 2007 the number of probation officers in the Republic had risen to 260 (O'Donovan, 2008). In tandem with this widening remit, there has been an increased emphasis placed on risk assessment and public protection, evident in the introduction of standardized risk assessment tools and a greater systemization of practice (Carr and Maguire, 2012; Fitzgibbon *et al*, 2010).

With divergent historical pathways, legislative frameworks and resources, community sanctions in the two jurisdictions in Ireland have developed in different ways. The following sections detail current trends in the use of community sanctions highlighting points of variance and commonality.

Trends in community sanctions and measures in Northern Ireland

On 31st March 2014 there were 1890 people detained in prison in Northern Ireland. On the same date there were approximately 3443 people under supervision in the community.⁷ One of the main roles of the Probation Board is the provision of reports to court with PBNI preparing almost 6,000 Pre-Sentence Reports (PSRs) per year (PBNI, 2014).⁸ PSRs are requested by the court following conviction but prior to sentencing. These reports provide background information on the defendant's social and personal circumstances, including education, employment and living arrangements. Linked to the advance of risk-oriented approaches, an assessment of the defendant's likelihood of re-offending and risk of causing serious harm is also included with the assessment of risk being informed by the use of risk assessment tools. In Northern Ireland, the ACE (Assessment, Case Management and Evaluation) assessment tool is used by probation officers to assess likelihood of re-offending within a specific time period. Further specialized risk assessment tools are used based on the offence (e.g. sexual or domestic violence) and where there are concerns regarding serious harm.

The community sanctions available to the court are prescribed in legislation. The *Criminal Justice (Northern Ireland) Order, 1996* outlines that the purpose of a Probation Order is to 'secure the rehabilitation of the offender' to ensure the protection of the public from harm by preventing the commission of further offences (Article 10, 1). A Probation Order involving supervision by a probation officer can be for a minimum duration of 6 months and a maximum of 3 years. Within this

⁷ This figure is derived from PBNI caseload data, which notes that on 31.03.14 there were 4,652 people subject to supervision. Of this number approximately three-quarters of people (74%) were supervised in the community, the remainder were in prison (PBNI, 2014).

⁸ A much smaller number of Short Pre-Sentence Reports are also prepared (880 in 2013). These reports are prepared within a shorter time frame and usually in relation to a specific sentence (e.g. assessment for suitability for a community service order) (PBNI, 2014).

legislation Community Service Orders (unpaid work in the community) are set out as alternatives to custody, to be considered when the offence is otherwise ‘punishable by imprisonment’. Combination Orders (combining probation supervision and community service) are also provided for within this legislation.

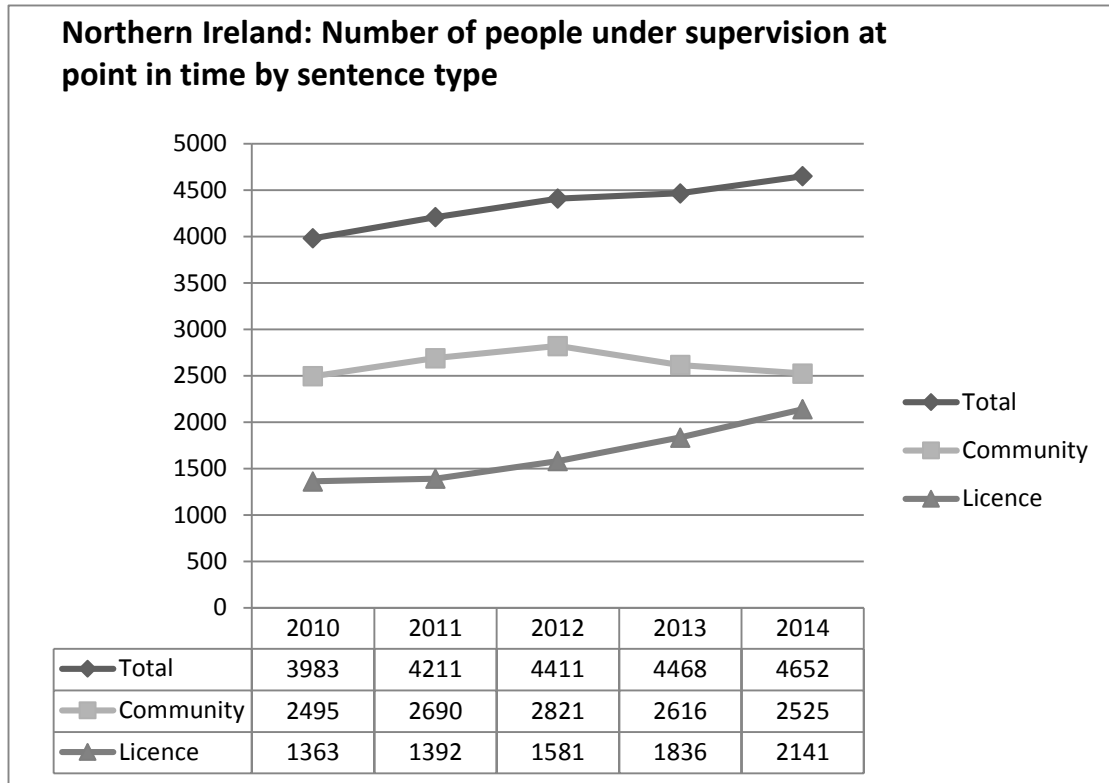
As Robinson *et al* (2013) note, different rationalities to legitimate the use of community sanctions are deployed to varying effects over time. As will be evident from the above, community sentences in Northern Ireland embody differing penal purposes including rehabilitation, public protection and reparation. First introduced in 1976, Community Service Orders are also framed as ‘alternatives to custody,’⁹ thereby ostensibly serving a penal reductionist function. It is notable that in recent years the numbers of Community Service Orders have declined in Northern Ireland, while other forms of sanctions, in particular those that meld elements of custody and community supervision have come increasingly to the fore. To a certain extent this has been driven by an increased focus on risk management and public protection (Carr, 2015a).

Table 1 shows the rise in the number of people supervised by PBNI in recent years. It illustrates that since 2010 the number of people supervised has risen by over 14 per cent. The number of people subject to supervision as a result of a community sentence has risen, as have the number of people supervised on licence. However, the number of people supervised on licence has grown at a faster rate, accounting for an increased proportion of PBNI caseload over time.¹⁰

⁹ Community Service Orders were initially introduced under *The Treatment of Offenders (Northern Ireland) Order 1976*. The Northern Ireland legislation was largely modeled on legislation introduced in England and Wales in 1972.

¹⁰ The data in this table is derived from PBNI caseload statistics (PBNI, 2014). It is based on the number of people under supervision on 31.03.14 by sentence type. The PBNI note that a person is

Table 1: Northern Ireland: Number of people under supervision by sentence type (2010-2014)



This trend illustrates an increased movement towards post-custodial supervision. This is driven in part by an increase in dual sentences such as Determinate Custodial Sentences (DCS), which combine an element of prison with post-custodial supervision. These sentences were introduced under the *Criminal Justice (Northern Ireland) Order, 2008* and their number rose by 32 per cent between 2013 and 2014 (from 1,130 to 1,497) (PBNI, 2014). The *Criminal Justice (Northern Ireland) Order, 2008* also introduced so-called ‘public protection’ sentences – Extended Custodial

counted once for each type of supervision to which they are subject. There may be some double counting because a person may be subject to more than one type of order at any one time.

Sentences (ECS) and Indeterminate Custodial Sentences (ICS).¹¹ This allows a court to impose prison sentences with longer periods of post-custodial supervision for specified offences of a violent and/or sexual nature. In the case of Indeterminate Custodial Sentences no release date is given, instead a tariff date is set at which point the prisoner *may* become eligible for consideration for release by the Parole Commissioners for Northern Ireland (PCNI, 2014). The numbers of Extended and Indeterminate custodial sentences have also risen in recent years (Graham and Damkat, 2014).

However, the rise in the population under supervision in the community 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. Between 2009 and 2013 the prison population rose by 28 per cent (DoJ, 2014). Some of the reasons for this expansion include increased sentence lengths and a rise in the number of people recalled to prison as a consequence of breach of their licence conditions (DoJ, 2014).¹²

Trends in community sanctions and measures in the Republic of Ireland

In the Republic of Ireland the Probation Service is a public sector agency of the Department of Justice and Equality. Formerly, the Probation and Welfare Service, the term ‘welfare’ was dropped from its title in 2006 in order to ‘provide greater clarity’ in regard to the service’s core business (Geiran, 2012:22). The *Probation of Offenders*

¹¹ This legislation was largely modeled on the Criminal Justice Act, 2003 in England and Wales. It also led to the establishment of the Parole Commissioners for Northern Ireland, replacing Life Sentence Review Commissioners. An Extended Custodial Sentence (ECS) can be imposed when a person has committed a specified violent or sexual offence and where the court believes that there is a likelihood of reoffending. The sentence involves time spent in custody (min. one year), followed by a period supervised in the community (extension period). Similar conditions apply for Indeterminate Custodial Sentences (ICS) however, the court must first determine that an ECS is not an appropriate sentence.

¹² By December 2013, people who had been recalled to prison accounted for 11% of the prison population (DoJ, 2014).

Act (1907) remains the main statutory framework for community sanctions in the Republic of Ireland, although legislative reform in the form of the *Criminal Justice (Community Sanctions) Bill (2014)* is promised. In 2013 the Probation Service supervised 15,984 people in the community (Probation Service, 2014).¹³ Similar to the PBNI, the preparation of Pre-Sentence Reports for the courts is a core function. In 2013 just over 5,000 requests for PSRs were received from courts across the country (Probation Service, 2014). Information on new orders supervised between 2011 and 2013 is outlined in **Table 2** below. From this we see that Community Service Orders, Probation Orders and ‘Supervision during Deferment’ constitute the majority of supervision in the community.

Table 2: Republic of Ireland new orders supervised by the Probation Service (2011-2013)

	2011	2012	2013
Probation Orders	2033	1742	1640
Supervision during deferment	1882	1695	1732
Community Service Order	2738	2569	2354
Fully Suspended Sentence with Supervision	570	599	753
Partially Suspended Sentence with Supervision	434	389	440
Post Release Supervision Orders	25	43	40
Other Orders	131	131	126
Life Sentence Supervision	70	73	76
Sex Offender Supervision	173	209	211

Note: Figures derived from Probation Service Annual Report (2013).

¹³ This number includes people released from prisons, including those involved in the Community Return Scheme and ‘repatriated offenders’ (Probation Service, 2014).

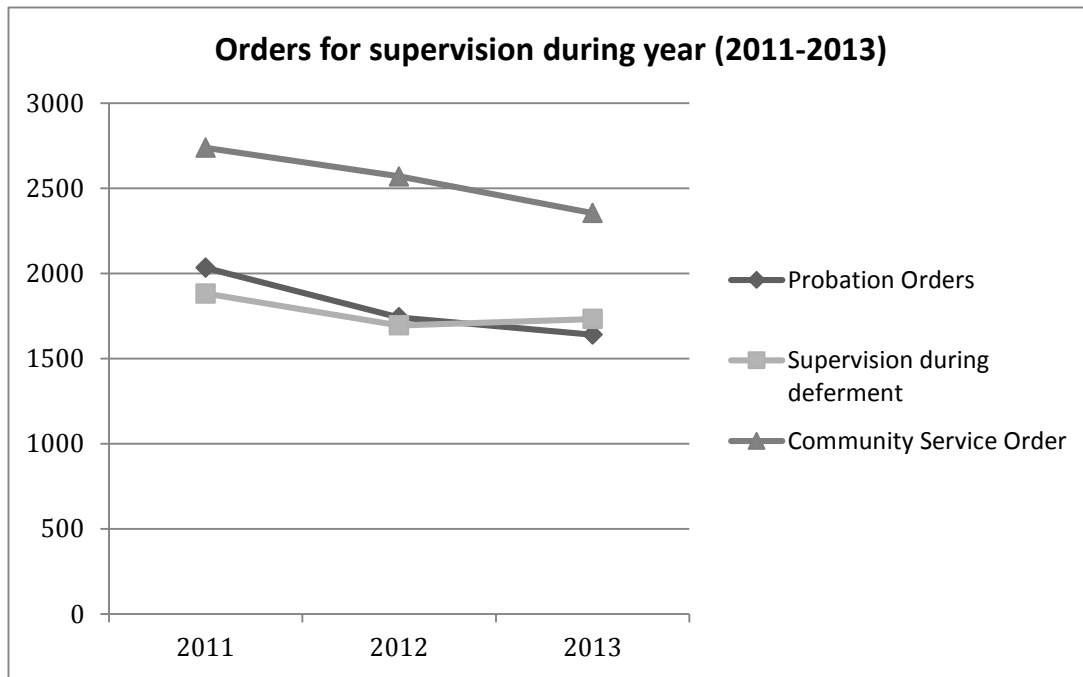
Probation Orders have a legislative basis under the *Probation of Offenders Act (1907)* and Community Service Orders are legislated for under the *Criminal Justice (Community Service) Act, 1983 (as amended)*. ‘Supervision During Deferment’, however, is not in fact a sentence in legislation,¹⁴ and, as the name suggests it is a supervision while the actual imposition of a sentence is deferred. It has been characterised as a particular form of ‘judicial innovation’ (Healy and O’Donnell, 2005). In other words it is a form of community supervision that has been created by the judiciary in the absence of legislation. The slow pace of legislative reform has been advanced as one explanation for this innovation; another may be the independent character of the Irish judiciary (Healy and O’Donnell, 2005; Maguire, 2010) and the lack of sentencing guidelines (see Maguire in this volume).¹⁵ Whatever its basis it remains popular and, as **Table 3** shows, in the last year for which figures are available (2013), it outstripped the numbers of Probation Orders issued in the same year.¹⁶

Table 3: Republic of Ireland Comparison of community sentences by type (2011-2013)

¹⁴ Limited provisions allowing a sentence of imprisonment to be deferred in conjunction with the issue of a fine were introduced in the *Criminal Justice Act, 2006*.

¹⁵ Healy and O’Donnell (2005) also cite the use of the ‘Poor Box’ by judges as another form of judicial innovation. Again without a statutory basis, a person can be required to pay money to the ‘poor box’, which is ultimately distributed to charitable causes. Courts use this measure in tandem with the provisions of Section 1 of the Probation of Offenders Act, allowing the person to be convicted but not to acquire a criminal record. Measures set out in the *Criminal Justice (Community Sanctions) Bill (2014)* propose to place the use of the ‘Poor Box’ on a statutory basis.

¹⁶ Previous analysis of the use of ‘supervision under adjournment’ reported in Healy and O’Donnell (2005) shows the popularity of this form of liminal sanction over time. It was utilised more often than Probation Orders in the years 1990-1999. In 1999, 1568 people were placed on ‘adjourned supervision’.



Following the recommendation of the *Thornton Hall Review Group*¹⁷(DoJ, 2011), Community Service has also been developed as a ‘back-door’ mechanism for prisoner release. Under the ‘Community Return Scheme’, a joint initiative of the Irish Prison Service and the Probation Service, prisoners are granted early release under the condition that they engage in unpaid work in the community. Since the establishment of the initiative in 2011 and up until December 2013, 761 released prisoners have participated in the scheme. The majority of people successfully completed the scheme and 11 per cent of participants were returned to prison for breaching the terms of their release (Irish Prison Service and Probation Service, 2014).

Proposed Legislative Reform

¹⁷ The Thornton Hall Project Review Group was established following a decision by a new government that plans to build a large-scale prison on the outskirts of Dublin were not affordable in the context of the economic crisis. Noting the poor conditions within prisons exacerbated by a rising prison population, the group recommended: “Further steps are required to reduce the prison population. We are of the view that there is scope within the prison system to introduce a form of structured “earned release” for suitable offenders so as to encourage active engagement by prisoners in rehabilitation and progression, prior to release into the community. This would involve prisoners being eligible for consideration for a programme of work in the community and thereby reduce some of the pressure on the system.” (DoJ, 2011:iii).

While yet to be enacted, the *Criminal Justice (Community Sanctions) Bill (2014)*, proposes to update and regularise practice in respect of community sanctions in the Republic of Ireland. Long awaited, it will overhaul legislation, which is now over a century old. It plans to address some areas of practice, which do not currently have a statutory basis, including the practice of ‘adjourned supervision’ and the use of the court ‘poor box’. It also proposes a system for the inspection of Probation Services by a designated person appointed by the Minister for Justice and Equality.

The Bill provides for ‘Discharge Orders’ and ‘Binding Over Orders’, where a court ‘may be satisfied of the guilt of the person’, but views it as inexpedient to impose any punishment. In these circumstances the court may impose a ‘Discharge Order’ or ‘Binding Over Order’ without proceeding to conviction. The latter entails a degree of conditionality, requiring a person to enter into a recognisance to comply with the order.¹⁸ The proposed orders replace the provisions set out under *Section 1 of the Probation of Offenders Act, 1907* which allow for discharge without a recorded conviction. The legislation also provides for the adjournment of criminal proceedings to facilitate restorative justice measures in relation to minor offences dealt with in the District Court. Here it is envisaged that restoration will take the form of financial reparation to the victim of the offence.¹⁹

The legislation also clarifies the circumstances in which Probation Assessment Reports should be requested by the courts, including: when the court is considering

¹⁸ The type of circumstances that a court may consider when making such an order are set out in the Heads of Bill and include: a) the character, circumstances, previous convictions, age, health or mental condition of the person; b) any previous similar sanctions; c) the trivial nature of the offence; d) any extenuating circumstances; e) the need to have due regard to the interests of the victim; f) that the person has accepted responsibility and expressed remorse (c.f. Head 9 re. Restorative Justice Criteria).

¹⁹ The Explanatory Notes under Head 9 specify: ‘It is intended that the provision will deal with cases such as minor assaults or minor criminal damage where the offender accepts responsibility for the wrong-doing, offers to make reparation, e.g. by paying for medical expenses or repairs to a vehicle, and, very importantly, the victim is willing to accept the reparation.’

the imposition of a supervised community sanction; a sentence of imprisonment (in specific circumstances) ²⁰; a suspended sentence subject to probation supervision; or making an order imposing post-release supervision under the *Sex Offenders Act, 2001*.

The intention is to ensure that assessment by the Probation Service is mandatory before the imposition of a sanction by the courts that requires probation supervision. The need for such a requirement is evidenced by the fact that in 2013, 11 per cent of referrals to the Probation Service were directly for orders made in the absence of an assessment report (Probation Service, 2014).

The introduction of ‘Deferred Supervision Orders’ will regularise the practice of adjourned supervision. This will allow the court to defer sentencing for up to six months during which period the person will be under the supervision of the Probation Service. Probation Orders, currently provided for under the *Probation of Offenders Act, 1907* will be replaced with Probation Supervision Orders (PSOs). This will reduce the maximum period for which a person can be placed under such an order, from 3 years to 2 years (for indictable offences). A ‘Reparation Fund’ replacing the court ‘Poor Box’ system will be put in place and allow for the imposition of Reparation Orders with specific financial limits.²¹

Comparing the use of community sanctions with imprisonment in the Republic of Ireland

Because of the way in which the data is presented it is difficult to make direct comparisons with the numbers of people imprisoned and those on community

²⁰i.e. where a person is aged 18-21 and has not previously been sentenced to imprisonment of 12 months or more.

²¹ Under the proposals adult cannot be required to make a payment exceeding €5,000 and a child cannot be required to make a payment exceeding €2,500 in reparation. This is in line with the *Law Reform Commission’s* (2005) recommendations to regularise the use of the Poor Box scheme.

sanctions in the Republic of Ireland on any one day.²² However, comparisons can be made with sentences under supervision in a given year. **Table 4** provides information on the numbers of community sanctions for selected years alongside the total committals to prison. From this we see that the use of imprisonment as a sanction far outstrips the use of community sanctions over time, and with the increased rates of committals to prison this differential has become even more marked.

Table 4 Community Sanctions and Prison Committals 1980-2013 (Selected Years)

Year	Probation Order	Supervision During Deferment of Penalty	Community service order	Other ²³	Total Committals to Prison ²⁴
1980	479	642	-	-	2,317
1984	1,326	583	-	-	3,284
1988	1,257	1,341	1,080	-	3,814
1992	1,039	1,062	1,745	-	4,756

²² The Irish Prison Service provides an average daily occupancy rate. In 2013 it was 4,158 (Irish Prison Service, 2014). A similar daily caseload rate for the Probation Service is not available.

²³ Following Healy's (2015) typology: 'The 'other' category includes suspended sentences (part/ full), post-release supervision orders, supervision of life sentence prisoners, young person's probation orders and supervision of sex offenders in the community. Caution is advised when interpreting trends in this category because the figures relate to different combinations of sanctions.'

²⁴ Note: This figure includes committals on remand and under sentence. Where committals under sentence is available (which is a more accurate comparator) this is included in brackets.

19 96	1,280	1,815	1,386	-	-
20 00	1,345	2,625	998	116	-
20 04	1,878	5,623	843	79	10,657
20 08	2,676	2,045	1,413	356	13,557 (8,043)
20 12	1,742	1,695	2,569	1,43 6	17,026 (12,991)
20 13	1,640	1,732	2,354	1,64 6	15,735 (12,489)

Note: This table is based on figures provided in Table 1 (Healy, 2015) with further data added for 2013. The source data is derived from Probation Service and Irish Prison Service Annual Reports (1980-2013).

Further information available in the Probation Service's Annual Report 2013, highlights significant regional variation in the use of community sanctions and measures across the Republic. The rate of referrals to the Probation Service varies significantly across counties.²⁵ In 2013 in Louth there were more than 250 referrals to

²⁵ Information presented in the Probation Service's Annual Report for 2013, is provided at county level rather than by Court District (Probation Service, 2014).

probation per 100,000 in the population compared to Kerry with a referral rate of less than 50 people per 100,000 . Similar disparities are evident in the use of Probation Orders and Community Service Orders. Relatively high rates of Probation Orders are imposed in Cavan (90 per 100,000) compared to Leitrim, where the rate is less than 10 per 100,000. The highest rates of Community Service Orders are imposed in Monaghan (almost 120 per 100,000), while in Kerry, Leitrim, Kildare and Kilkenny less than 20 CSOs per 100,000 are imposed (Probation Service, 2014).

The reason for such significant variation is not explained. However, given that caseload in the District Courts accounts for the bulk of sentences in the Republic of Ireland and in particular a significant proportion of the committals to prison (O'Malley, 2010; O'Nolan, 2013), one can surmise that community sanctions find favour with some judges more than others. Whether this relates to a history of a relatively underdeveloped Probation Service provision, judicial confidence in community sanctions, or judicial punitiveness are topics that are subject to debate (DoJE, 2014; Maguire, 2014).

Comparing the use of community sanctions in the Republic of Ireland and Northern Ireland

Because of recording differences it is difficult to make direct comparisons of the overall rate of use of community sanctions between Northern Ireland and the Republic of Ireland. However, when one takes into account the differences in population size (4.61 million in the Republic of Ireland compared to 1.84 million in Northern Ireland), the available data show a much higher use of community sanctions in Northern Ireland than in the Republic. **Table 5** below provides information on new referrals to the respective services over the course of one year. The use of pre-

sentence reports by the courts is evidently higher in Northern Ireland than in the Republic, as is the use of Probation Orders and Community Service Orders. Possible reasons for these differences include the stronger legislative basis underpinning probation and community sanctions in Northern Ireland when compared to the Republic of Ireland and the fact that historically Probation within the Republic of Ireland has been under-resourced. Supervision during deferment comprises a significant proportion of the population under supervision in the Republic while there is no equivalent in Northern Ireland. The uptake of post-custodial supervision is markedly higher in Northern Ireland, influenced by legislative changes in recent years.

Table 5 – Comparing the use of community sanctions across borders²⁶

2013/2014	Pre-Sentence Reports	Probation Orders	Community Service Orders	Supervision During Deferment	Post-Custodial Supervision
Northern Ireland ²⁷	5,877	1,260	1,456	N/A	972 ²⁸
Republic of Ireland ²⁹	5,027	1,640	2,354	1,732	767 ³⁰

²⁶ The figures provided in this table are the total numbers of reports and orders rather than a rate per population.

²⁷ (Data for year 01.04.13-31.03.14) Source: PBNI Annual Caseload Statistics Report 2013-14

²⁸ This figure includes the following sentences: Determinate Custodial Sentences; Juvenile Justice Centre Orders; Life Licences; Sex Offender Licences; GB Licence; Extended Custodial Sentences and Indeterminate Custodial Sentences.

²⁹ Data for 2013. Source: Probation Service Annual Report)

³⁰ This figure includes Post Release Supervision Orders; Part-Suspended Sentence Supervision Order; Life Sentence supervisees and Sex Offender supervisees. In the latter two categories (Life Sentence) and Sex Offender sentences, the figure presented in the annual report represents the total number of people supervised rather than all new orders issued that year.

Probation Across Borders

Notwithstanding the variance in both jurisdictions a number of joint initiatives between their respective probation services have been developed over recent years. These include the establishment of a Public Protection Advisory Group (PPAG) under the auspices of the North-South Intergovernmental Agreement on Cooperation on Criminal Justice Matters. This agreement provides for North/South cooperation in the area of criminal justice, including meetings between the Ministers for Justice in both jurisdictions and the establishment of priority areas for joint working.³¹ Identified priority areas of specific relevance in the area of community sanctions include: a focus on the production of fast track probation reports aimed at ‘speeding up justice’; best practice in offending behaviour programmes; and putting in place mechanisms for the transfer of prisoners and probation supervision between the two jurisdictions. The latter priority reflects a requirement to implement the 2008 Framework Decision (FD 2008/947/JHA) of the European Commission ‘on the application of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and probation sanctions.’³² Essentially this Framework Decision involves the transfer of supervision arrangements between different European states. This means that in practice, for example, a person from the Republic of Ireland who receives a community sanction in Spain could complete this sanction under the supervision of the Probation Service in Ireland if he so wished. All EU member states should have transposed this directive into law by the end of 2011. However, to date only a limited number of countries have done so and neither the Republic of Ireland

³¹ North/South Cooperation on Criminal Justice Matters Work Programme (2010-2011; 2011-2012 and 2013-2014). Available at:

http://www.justice.ie/en/JELR/Pages/Publications_Northern_Ireland?OpenDocument&start=1

³² Council Framework Decision 2008/947/JHA of 27 November 2008. Available at:

http://www.cepprobation.org/uploaded_files/Council_Framework_Decision_2008_947_JHA.pdf

(Accessed on: 24.01.15)

nor the United Kingdom have done so as yet (see Morgenstern and Larrauri, 2013 for an overview'; see also Ryan and Hamilton, this volume).

Van Zyl Smit *et al* (2015) note some of the inherent difficulties in the imposition of European norms across a continent with different legal traditions and differing penal philosophies. Similarly, Morgenstern and Larrauri (2013) highlight some of the complexity of practical implementation. Notwithstanding this and given many of the similarities between the structures of probation in Northern Ireland and the Republic an informal scheme has been in place since 2007 allowing transfer of orders across the border (McNally and Burke, 2012). Similar information exchange arrangements also exist for the preparation of court reports.

Published on an annual basis, the *Irish Probation Journal* is a joint-initiative of the PBNI and the Probation Service. The stated mission of the journal is to provide:

...a forum for sharing theory and practice, increasing co-operation and learning between the two jurisdictions and developing debate about work with offenders.

The journal includes contributions from practitioners and academics on topics relating to probation and the wider criminal justice system. In a review of research on offender supervision in both jurisdictions, Carr *et al* (2013) note the journal has provided a forum for the discussion and dissemination of probation work rendering it more visible.

Conclusion - Advancing Community Sanctions as Mechanisms for Penal Reduction

The divergent development of community sanctions between the Republic of Ireland and Northern Ireland provides an interesting comparative case study. Variations in the use of these sanctions in both jurisdictions over time reflect differential resourcing and legislative frameworks, but more fundamentally different modes of governance. As other chapters in this edition testify, the political context is inextricably linked to the character of penalty. This is equally the case for community sanctions and the legitimations that are deployed to give them effect (Robinson *et al*, 2013; McNeill and Dawson, 2014).

Healy (2015) observes that for most of its history the story of probation in the Republic of Ireland is one more of continuity than of change. In latter years, however, there has been increased attention paid to this field and a consequent expansion. In Northern Ireland the criminal justice system has faced more fundamental questions regarding its legitimacy. While the Probation Board forged a particularly distinctive path in this respect, in recent years it too has witnessed expansionism driven in part by the emphasis placed on public protection (Carr, 2015a). Despite the different relationships between the use of prison and community sanctions, in both jurisdictions the increased use of community sanctions are advocated as a means of penal reductionism.

The recent *Strategic Review of Penal Policy (DoJE, 2014)* places an emphasis on the need to reduce the use of imprisonment in the Republic of Ireland. Significantly, it identifies increasing the use of community sanctions as a means to achieve this and observes:

In order, however, to support a recommendation to reduce prisoner numbers, there must be appropriate non-custodial sanctions available to sentencing

judges. These sanctions must be cost effective, credible and command public confidence in managing both those who pose a general risk of re-offending and those presenting a real risk of harm and danger to the public. (DoJE, 2014: 44)

Similarly in Northern Ireland a consultation on community sentences conducted by the Department of Justice in 2011 noted the need to reduce the overuse of ineffective short prison sentences by encouraging a greater use of community sentences by the judiciary (DoJ, 2011). The arguments put forward to support this view were two-fold: community sentences are both less expensive and more effective in reducing re-offending. Cost and effectiveness, therefore, serve as legitimating discourses for community sanctions and measures, particularly when set against a prison service, which has demonstrably been failing in both respects.

However, lessons from other countries suggest that caution should be exercised in viewing community sanctions as *merely* a mechanism of penal reductionism. When community sanctions are positioned as ‘alternatives to prison’ prison is viewed as the ‘norm’ to which the ‘alternative’ should be provided. The result is that community sanctions are ‘toughened’ up to give them an associated punitive bite that may make them potentially more attractive to sentencers and to the public. The net result of this approach may not yield the reduction that is required, but result in precisely the opposite effect (Bottoms *et al*, 2004; Phelps, 2012).

Increasingly stringent community penalties see people being brought under the ambit of probation services where they may previously have been given a lesser sentence. An emphasis on enforcement of these ‘tougher sanctions’ results in greater numbers of people being sent to prison for failure to comply with the conditions of their orders.

Constituted in these terms, probation functions as a net-widening rather than a penal reduction mechanism. In an analysis of the differential relationship between probation and prison populations across the United States, Phelps (2012) characterises this as the ‘paradox of probation’.

Research on what may enhance both public and sentencer support for community sanctions shows that attention needs to be paid to the ways in which the purposes of justice can be served by such sentences (Maruna and King, 2008). This involves both evidence-based arguments (typically premised on rational considerations of what is most effective), and, critically, a wider consideration about what values and functions of justice community sentences should serve. An example of such evidence-based arguments is the recent data on recidivism published respectively by the Irish Prison Service (2013) and the Probation Service (2013), which shows lower levels of re-offending for those subject to community sanctions when compared with imprisonment. However, appeals to the wider purposes and values of community justice should also involve an increased focus on how community-based sanctions can provide greater opportunities for reparation and change. Some commentators have even argued that such ‘affective’ approaches should appeal to sentiments regarding redemption and a belief in forgiveness (Maruna and King, 2008).

Central also to leveraging support for community sentences is focussing on the potential for people to change. Given the complex and interrelated nature of issues faced by many who are processed through our criminal justice systems – including drug and alcohol addictions, mental health difficulties and homelessness – such processes of change are often likely to be complex and to take time. However, importantly, as the *Strategic Review of Penal Policy* notes, these challenges cannot be met solely by agencies within the criminal justice system.

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