

Legitimacy of non-custodial sanctions and measures – a European perspective

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I. NCSM in Europe

Three generations of non-custodial sanctions:

1) 19th century - 1980:

- 19th century: short term imprisonment
 - « European » penal systems: prison, fines, suspended sentences; retribution, deterrence
- 1950-1970: 'resocialisation'
 - Probation: autonomous (ex. Sweden, Malta, Luxembourg, Great Britain) v condition of suspended sentence (ex. Belgium); treatment + deterrence
 - CSO ('70): retribution, resocialisation, deterrence

1) First generation: application

- Anglosaxon and Scandinavian countries: vast application
 - Treatment: disproportionality, « Nothing works »
- Western Europe: limited application (« favour »)
 - Perverse effects: length, net widening, thinning mesh
- Southern Europe: dictatorships Spain, Greece, Portugal
 - Introduction probation: Italy 1975, Portugal 1983, Spain 1995
- Eastern Europe: communist prison = treatment
 - Recent introduction in most CEE countries

2) Second generation Intermediate sanctions

- 1980s: selection and bifurcation
 - Penal inflation (NI, Spain, E&W, Belgium, France)
 - Prison overcrowding: inhuman and degrading treatment (CPT, ECHR)
- Between probation and prison: credibility, control; high risk populations
 - Effectiveness?
 - Recidivism / Technical revocations !
 - Net widening !/ Financial gains?
 - Europe: electronic monitoring!

3) Third generation Restorative sanctions

- Harm, needs, restoration; victim, offender, community
 - Mediation
 - Community service: symbolic reparation, financial compensation
 - « Reintegrative shaming », « family group conferences »
- Victim satisfaction, responsibility offender, pacification community
- Future?
 - Position in CJS?
 - Public support: victim oriented

II. Legitimacy of NCSM

- Legitimacy : multidimensional concept, used differently by different professionals.
- Beetham, *The Legitimation of Power*, 1991
 - Constitutional lawyers:
 - Legal validity? Not sufficient: is law itself justifiable?
 - Moral and political philosophers:
 - Moral justifiability? Universalising claim!
 - Social scientist:
 - Empirical consequences? Particular social context!
 - Weber (1968: 213): “belief in legitimacy” by relevant social actors

Beetham (1991)

- “Definition Weber = disaster”! Mere description
 - No objective reference or moral content
- Misrepresents the relationship between beliefs and legitimacy
 - “a given power relationship is not legitimate because people believe in its legitimacy, but because it can *be justified in terms of their beliefs*” (p.11)
- Takes no account of those aspects of legitimacy that have little to do with beliefs at all
 - Legality = important component of legitimacy
 - Actions demonstrating consent by subordinates = confer legitimacy

Beetham (1991)

Hence different levels of legitimacy:

- Legal/constitutional validity of the acquisition and exercise of power
- Justifiability of the rules governing a power relationship in terms of the beliefs and values current in a given society
- Evidence of consent derived from actions by subordinates expressive of it

1) Legal/constitutional legitimacy of punishment

- Punishment : one of the most coercive forms of the exercise of state power.
- Democratic constitutional state : requires legitimation.
- Legal theoretical requirements of legitimacy of punishment (C/NC) in democratic constitutional states: human rights, rule of law and democracy.

Human rights

- Traditional:
 - HR = bulwark = limit to punishment
- Europe: van Zyl Smit & Snacken (2009):
 - ECtHR, CPT, Rec : HR of offenders: torture, IDT, prisoners' rights; death penalty, life without parole
 - Imprisonment & human dignity (“inherent humiliation”): last resort
 - Sentencing: Rec, CPT versus ECtHR
- HR of victims?
 - US, UK: zero sum policy
 - Council of Europe, EU: “procedural justice”, care and assistance, not impact model
 - ECtHR: criminal law for serious breaches; parole & art.2

Rule of law - democracy

- Rule of law: rational and impersonal laws as guarantee against arbitrary and emotional decisions
 - Garland (1990: 30): ‘the essence of punishment is irrational, unthinking emotion’
 - Offenders/prisoners not excluded from rule of law
- Democracy:
 - Will of majority - ‘tyranny of majority’
 - General interest (minorities) - accountability
 - ‘Constitutional’ versus ‘populist’ democracy
 - Europe: HR and rule of law not dependent of will majority:
 - EU Charter Fundamental Rights: art. II-2 death penalty
 - ECtHR prisoners’ rights: legal not necessarily = legitimate

Constitutional legitimacy NCSM

- HR: choose least interference; Snacken (2006, 2009):
 - Art.5 ECHR: right to liberty
 - Proportionality: necessity
 - Harms of imprisonment (offender, family, society)
 - ECtHR art. 8-11: strict proportionality
 - *Bouchet v France* (20 March 2001)
 - NCSM: level of interference in HR, imprisonment last resort, burden of proof prosecutor.
- Rule of law >< expressive justice
- Democracy: general interest; reductionist policy; accountability: empirical legitimacy?

2) Empirical (social scientist) legitimacy

- “Justifiable in terms of values and beliefs in current society”; context = Europe
- Who?
 - Probation agencies (CEP; CoE 2010 Probation Rules)
 - Judges, prosecutors (penal culture)
 - Offenders (compliance)
 - Victims (acceptance)
 - **Politicians**
 - **Public**

Politicians & public in Europe

Politicians on NCSM:

- Rec (92) 16 on the European rules on CSM
- R (99) 22 concerning prison overcrowding & prison population inflation
- Rec(2000)22 on improving the implementation of the European rules on CSM
- Rec(2003)22 concerning conditional release
- CM/Rec (2010) 01 on the Council of Europe Probation Rules
- FD 2008/947/JHA of 27 November 2008 on supervision of probation measures and alternative sanctions
- FD 2009/829/JHA of 23 October 2009 on supervision measures as alternative to provisional detention

Values and beliefs NCSM?

Council of Europe 2010 Probation Rules:

1° Human dignity and human rights

2° Social inclusion

3° Community safety

1° Human Dignity & Human Rights

Politicians:

- European Convention Human Rights: art. 3; art. 5
- EU Charter Fundamental rights:
 - Art. 1: 'Human dignity is inviolable. It must be respected and protected.'
 - Art. 4: Prohibition of torture, inhuman or degrading treatment or punishment
- National Constitutions:
 - Belgium: art. 23: R to live a dignified life; economic, social, cultural rights: employment, housing, social security, health care, social and legal aid, cultural and social development
 - Link with: social integration, social inclusion, proportionality

1° Human Dignity & Human Rights

“Public opinion” in EU: Standard Eurobarometer 74
(autumn 2010): 3 most important personal values (list):

- Human rights: 47%
- Peace: 44%
- Respect human life: 41%
- Democracy: 29%
- Individual freedom: 23%
- Rule of law: 22%
- Equality: 19%
- Solidarity: 15%
- Tolerance: 15%
- Respect other cultures: 8%
- Religion: 6%

1° Human Dignity & Human rights

- Standard Eurobarometer 74 : 3 values which best represent EU (list):
 - Democracy: 38%
 - Human rights: 38%
 - Peace: 35%
 - Rule of law: 25%
 - Solidarity: 20%
 - Respect other cultures: 18%
 - Tolerance: 11%
 - Religion: 3%

2° Social inclusion

- CoE Probation Rules (2010):
 - **Definition:** Probation relates to the implementation in the community of sanctions and measures, defined by law and imposed on an offender. It includes a range of activities and interventions, which involve supervision, guidance and assistance aiming at the social inclusion of an offender, as well as at contributing to community safety.
 - **Basic principle 1.** Probation agencies shall aim to reduce reoffending by establishing positive relationships with offenders in order to supervise (including control where necessary), guide and assist them and to promote their successful social inclusion. Probation thus contributes to community safety and the fair administration of justice.

2° Social inclusion

- A fundamental HR in Europe? Politicians
 - Human dignity
 - Socio-economic rights
 - European Social Charter (1961, 1996), European Committee for Social Rights
 - EU Charter Fundamental R: Chapter IV: Solidarity
 - Social rights: social security benefits and protective social services
 - European Commission 2008 ‘Renewed Social Agenda’: ‘welfare, solidarity, social cohesion and social inclusion = intrinsic part of the European identity’
 - European Parliament + Council: 2010 =‘European Year for Combating Poverty and Social Exclusion’; Belgian Presidency (end 2010) : “still much work to be done”

2° Social inclusion

- Public: Eurobarometer 74 (Autumn 2010):
main concerns:
 - 1-3: Economy:
 - Rising prices (38%)
 - Economic situation (25%)
 - Unemployment (20%)
 - 9: Crime: 7%
 - 12: Immigration: 4%

“Public opinion” in Europe

- Unemployment = first social factor explaining poverty
- Poverty & social exclusion (Special survey 321, October 2009)
 - Who is at risk of poverty?
 - Causes of poverty?
 - Solutions?

“Public opinion”: Poverty & social exclusion

- Who is at risk of poverty:
 - Unemployed: 56% (UK: 38%)
 - Elderly: 41% (UK: 47%)
 - Low level education: 31% (37%)
- Causes of poverty:
 - Injustice: 47% (UK: 33%)
 - Laziness: 16% (UK: 26%)
- Solutions for poverty:
 - Action by Government: 89% (UK: 85%)
 - Reduce income inequality: 88% (UK: 82%)
 - Redistribution of wealth by Gov: 82% (UK: 74%)
 - Higher taxes by well off: 75% (UK: 65%)
 - No point, poverty will always exist: 35% (UK: 43%)

“Public opinion”: Poverty & social exclusion

- Solving social and economic problems? More ‘social’ than ‘liberal’ approach:
 - More health care, education, social spending, even if this means raising taxes: 63% (UK: 77%)
 - Minimal wages, even if less jobs: 62% (UK: 72%)
 - Free education, even if less quality: 60% (UK: 69%)
 - More responsibility Government: 55% - self: 34% (UK: 40-51%)
 - National Gov to provide jobs for unemployed: 54% (UK: 57%)
 - Still ‘social democratic values’?

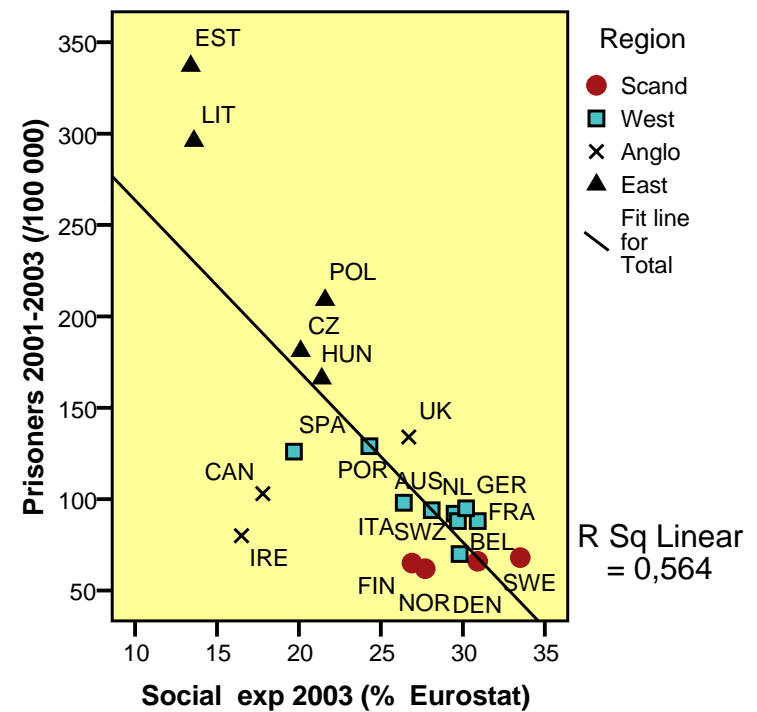
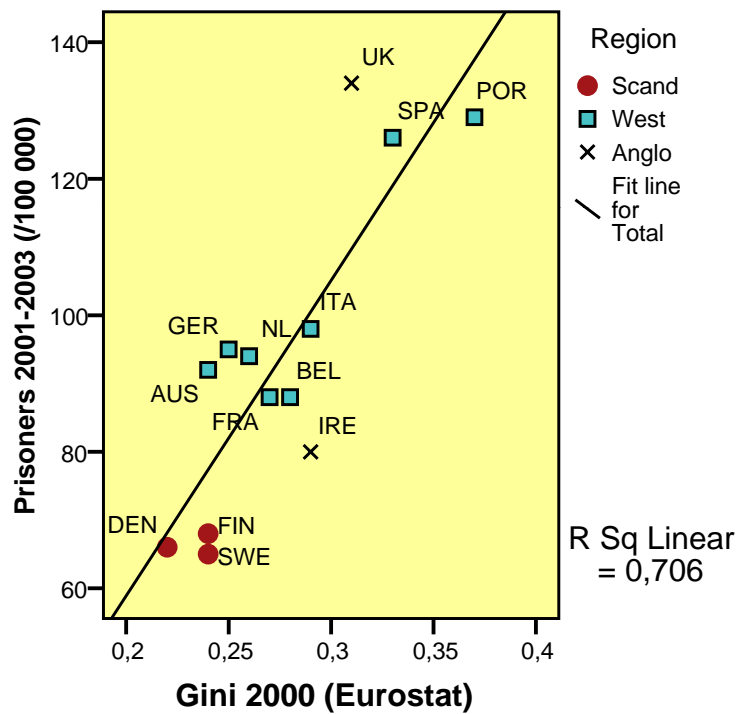
Public opinion”: Poverty & social exclusion

- Eurobarometer 71 (September 2009): EU poorly
 - EU fighting unemployment: 3.9/10
 - EU protecting social rights: 4.8/10
 - EU ensuring economic growth: 4.6/10
- European Values Study (1999; 2008):
 - Solidarity, social inclusion, poverty: “European value”
 - Welfare chauvinism (immigrants)
- Offenders, immigrants?
 - Common value: constitutional democracy - policy issue

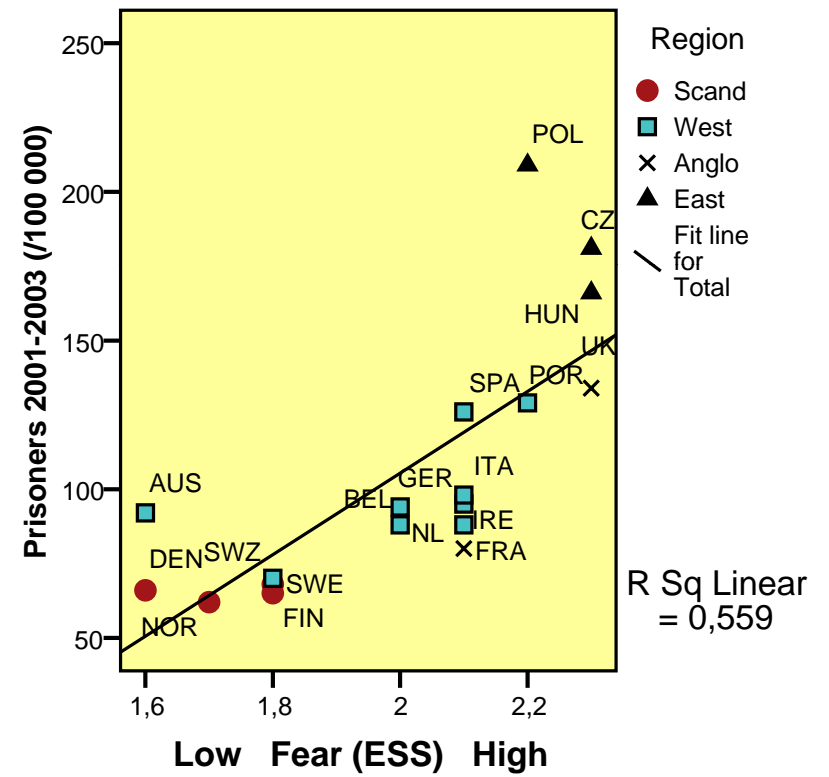
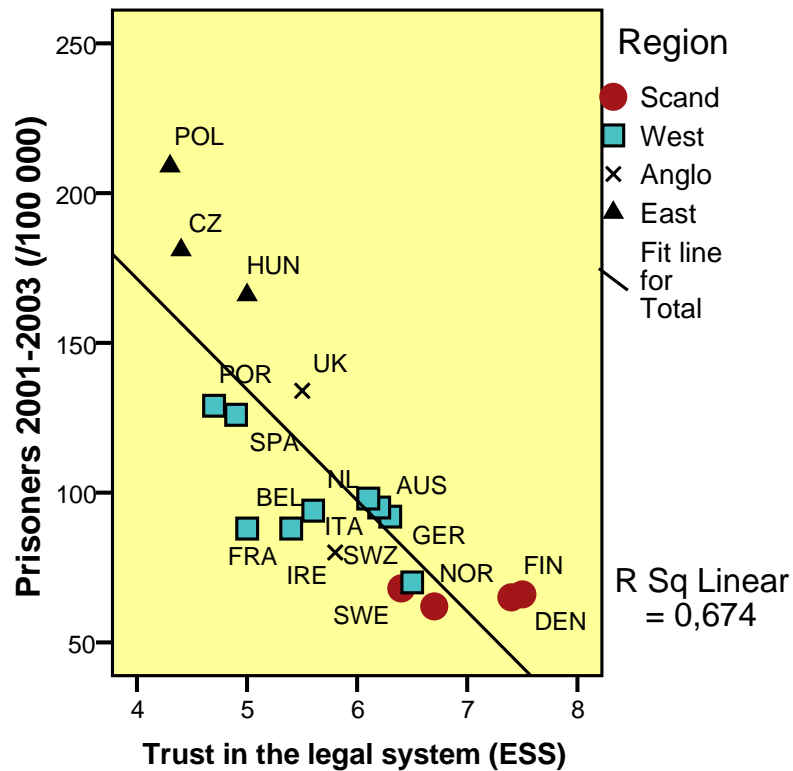
3) Community safety

- Imprisonment versus NCSM:
 - Incapacitation versus recidivism after prison
 - Desistance:
 - Human & social capital, positive relationships, generativity, decreased pressure of deviant peer groups
 - Imprisonment contrary to all these factors - NCSM
 - Rational arguments versus irrational punishment?
 - Lappi-Seppälä (2011): Scandinavian countries lowest prison population, highest welfare investments, highest political & judicial legitimacy >< UK & CEE

Social inequality/expenditures



Trust, fear and legitimacy



Conclusion

- Values embedded in NCSM and society
- Levels of punitiveness NCSM?
- Constitutional democracy - political leadership - concerns of the public – welfare & economy - political legitimacy national and European politics
- Research on community safety, recidivism, desistance
- Communication : SASO