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# CSM at the Council of Europe: soft law or hard law?

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# Previous international initiatives in the field of CSM



- “Groningen” rules: Standards Minimum Rules for the Implementation of Non-Custodial Measures involving the restriction of Liberty;
- Tokyo Rules (as they came to be called after their place of birth), was adopted by the United Nations’ General Assembly by consensus in December 1990;
- European Rules on Community Sanctions and Measures (1992)

# The European Framework: Council of Europe



- **Conventions:** European Convention on the supervision of conditionally sentenced or conditionally released offenders (1964); Convention on the transfer of sentenced persons (1963)
- **Resolutions and Recommendations:** *inter alia* CM/Rec (2014) 4 on electronic monitoring; CM/Rec (2014) 3 concerning dangerous offenders; Rec (2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

# European Rules on Community Sanctions and Measures.



- Community Sanctions, in the definition of the Council of Europe, comprise all sanctions and measures before, instead or after the trial when they have a penal content or penal value.
- Address the national legislators, the judiciary and other implementing authorities in the widest sense – professional associations and international NGOs, and, most of all probation services.

# The penological framework for community sanctions.



- I. Protecting fundamental rights of the prisoners. The scope of the ECHR;
- II. Facilitating reintegration;
- III. Imprisonment as a means of last resort;
- IV. Developing a comprehensive approach towards criminality;
- V. Protecting victim's rights and society.

# Tenets of reductionist policy at the Council of Europe



## **Recommendation R (99) 22 on Prison Overcrowding and Prison Population Inflation**

- 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;
- The extension of the prison estate should rather be an exceptional measure, as it is generally unlikely to offer a lasting solution to the problem of overcrowding. Countries whose prison capacity may be sufficient in overall terms but poorly adapted to local needs should try to achieve a more rational distribution of prison capacity;

# Tenets of reductionist policy at the Council of Europe



## **Recommendation R (99) 22 on Prison Overcrowding and Prison Population Inflation**

- Provision should be made for an appropriate array of community sanctions and measures, possibly graded in terms of relative severity;
- Member states should consider the possibility of decriminalising certain types of offence or reclassifying them so that they do not attract penalties entailing the deprivation of liberty;
- A detailed analysis of the main contributing factors should be carried out matters as the types of offence which carry long prison sentences, priorities in crime control public attitudes and concerns and existing sentencing practices.

# Pre-trial detention and remand custody: requirements.



## **Rec (2006) 13 on the use of remand in custody**

- There is reasonable suspicion that he or she committed an offence;
- there are substantial reasons for believing that, if released, he or she would either (i) abscond, or (ii) commit a serious offence, or (iii) interfere with the course of justice; or (iv) pose a serious threat to public order;
- there is no possibility of using alternative measures to address the concerns mentioned



# Early release from prison

## The Recommendation N (2003) 22 on Conditional Release



- **First**, conditional release should be made available to all prisoners, including life-sentence prisoners.
- **Second**, prisoners should be allowed to predict under which conditions they will become eligible after having served a minimum period after which an evaluation is made if the requirements are met (this is so-called discretionary release system"); or the fixed term (mandatory release system).
- **Third**, prisoners admitted to early release should be in principle be placed under supervision and receive help by probation services. Specific supervision implying treatment must be put in place for specific categories of offenders.

# Content and limits of community sanctions in CeO



**R (92) 16 on the European rules on community sanctions and measures**

## **Absolute limits**

- No community sanction or measure restricting the civil and political rights of an offender shall be created or imposed if it is contrary to the norms accepted by the international community concerning human rights and fundamental freedoms' (Rule 21)
- The nature of all community sanctions...shall be in line with any internationally guaranteed human rights of the offender' (Rule 22)

# Content and limits of community sanctions in CeO



## **Principle of legality**

- “The definition, adoption and application of community sanctions and measures shall be laid down in law” (Rule 3)
- “No community sanction or measure shall be of indeterminate duration” (Rule 5)

# Content and limits of community sanctions in CeO



## **Principle of proportionality**

“The measure shall be in proportion to the seriousness of the offence for which an offender has been sentenced or of which a person is accused and take into account his personal circumstances”. (Rule 6)

# Content and limits of community sanctions in CeO



## **Principle of consent**

“A community sanction or measure shall only be imposed when it is known ... whether the offender is prepared to co-operate and comply with them” (Rule 31)

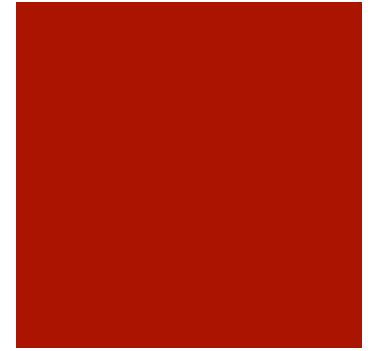
# Striking a balance between public security and rights of the offender



## **CM/Rec (2014) 3 concerning dangerous offenders**

- Strike the right balance between the protection of public safety and the rights of offenders.
- Secure preventive detention is only justified when it is established as the least restrictive measure needed.
- The risk assessment can be commissioned by the Judicial Authorities to experts, but use can be made of pre-sentence reports about the personal circumstances of the offender

# Indirect effects of CoE soft law in the field of CSM



- Legal basis of their adoption is based on the European Convention;
- Unanimous adoption by Committee of Ministers
- References made in the European court of Human Rights:
  - a) article 2 of the ECHR – negative effects (Mastromatte v. Italy; Maiorano and Others v. Italy; Choreftakis and Choreftaki v. Greece);
  - b) Article 3 of the ECHR – positive effects (Vinter v. U.K.; Torreggiani v. Italy).