

Offender Supervision in Europe

COST Action IS1106



Decision-Making and Offender Supervision in Europe

Miranda Boone, University of Utrecht, the Netherlands
Martine Herzog-Evans, University of Rheims, France

Presentation of the group

The briefing summarises the learning from the first year's activities in Working Group 1 of the COST Action about Offender Supervision in Europe (COST IS1106: www.offendersupervision.eu).

During the first year of our Working Group (WG) we reviewed the empirical literature on decision-making related to offender supervision. This task proved rather difficult for a number of reasons. Firstly, it took quite some time for us to define exactly what the scope of our work should be. After much debate it was decided that we would address granting and breaching of supervision. But since we wanted to examine every phase of decision-making, we included the process preceding these decisions and focused mainly on papers which studied (at least partially) the decision-making process itself.

Our group was lucky to comprise of sixteen experts who represented thirteen countries and fourteen jurisdictions: Belgium; France; Germany; Greece; Hungary; Ireland; Lithuania; Spain; Sweden; Switzerland; The Netherlands; and the United Kingdom (in the latter case with reports from both England and Wales and Scotland). We started by surveying these experts and by asking them to briefly present the penal, judicial and supervision systems in their jurisdictions, to select empirical literature and to critically describe its methodology and findings. Miranda Boone and Martine Herzog-Evans, the two group leaders, read most of the selected literature and structured the main findings presented below.

Object of study

Once this was done it was decided to divide our analysis into three sections: pre-trial, sentencing and release. Again, there was much debate over this way of dividing the task. That said, differences were such in the fourteen jurisdictions that it proved sensible to try to keep it simple (so as to be easily understood) than to try to be legally exact. However, we had a difficult time with the issue of breach, which we eventually decided to deal with in the release section of our report, but which raises issues in all three phases of the penal and supervision process. For our report, we decided to systematically

present the legal context of the jurisdictions and then to present the literature review.

General results

Unsurprisingly, we found that beyond apparent superficial similarities (e.g. all legal systems had diversion from trial or prosecution procedures, community service/unpaid work or some form of parole), very important differences existed in the various European legal systems. The traditional dichotomy between continental written law systems and common law systems proved very pertinent. Adversarial versus inquisitorial systems – where prosecutors have an important role that can extend beyond the sentencing phase – was clearly another relevant line of demarcation.

The review of the literature revealed that empirical studies, in particular pertaining to the pre-trial and release phase, were scarce. We did find a number of small scale qualitative studies, but typically these did not focus on the decision-making process involved in deciding upon granting community sentences or release measures or deciding on breach cases. In general, this literature, when it existed, came mostly from the U.K, Holland, Belgium and, increasingly Spain, with the exception of a burgeoning but still anecdotal French research literature. For the most part, other jurisdictions answered that it was essentially legal scholars who had so far been interested in decision-making. Lastly, very little, if anything, is known about the manner in which decisions are made and how these decisions relate to supervision outcomes. In conclusion, there is still very little that we know about the decision-making process and consequently, there are a lot fascinating avenues for future research.

Pre-trial

From the legal viewpoint, we discovered two main mechanisms in the fourteen studied jurisdictions by which offenders could await their trial in the community: on the one hand, in civil law systems, preventive custody can be suspended conditionally; on the other hand, in common law countries, release from pre-trial detention – with or without conditions – is organised. Some jurisdictions have intermediary systems. For instance, Hungary can postpone accusation itself and Scotland and France have a system of sentence postponement (or deferment). French law has a three tiers system where supervision in the community is the norm, electronic monitoring (hereafter EM) can replace it if supervision alone does not provide enough guarantees and pre-trial detention is the very last resort and only applies if supervision or EM are not enough to prevent flight and to safeguard both the investigation and public and victims' safety. A variety of systems can coexist in one jurisdiction. It is to be noted that EM is increasingly available in Europe as a pre-sentence measure. Following the aforementioned different European legal traditions, there also is a great diversity of competence rules at this stage in the penal process. Mainly in inquisitorial jurisdictions, an investigating judge or the prosecutor makes the decisions, whereas, in adversarial systems, competence tends to lie with lower courts.

Empirical studies reveal that decision-makers tend to consider the following criteria: defendant nationality, residence status, community ties, seriousness of the offence, previous convictions and bail history (completion, compliance), organisational or technical obstacles (e.g. with EM), the availability of a probation report or other information about the defendant, his or her behaviour during the interrogation or hearing and lastly, court's culture, values and goals.

Since only a few studies were available it is however impossible to affirm that these criteria are similarly influential in the decision-making processes of all jurisdictions. There are also important questions which remain unsolved. For instance, we do not know whether the number of available alternatives to pre-trial custody impact on their use. Too little is also known on the importance of risk assessment tools or other forms of assessment at this stage.

Sentencing

Again, from the legal viewpoint, a clear dichotomy is apparent: there are, on the one hand, jurisdictions where alternative sentences are autonomous sentences and, on the other hand, jurisdictions where they replace imprisonment, which is not pronounced or can be suspended. In some jurisdictions, there can be a mix of both. For instance in France and Belgium, alternative sentences can either replace a potential imprisonment sentence or be linked to a suspended sentence. In other jurisdictions, bifurcation procedures exist that allow for the suspension of the penal process and for mediation to take place in its stead (Hungary, France) or for an alternative sentence or even a release measure to replace a pronounced custodial sentence (France).

Unsurprisingly, in all the reviewed jurisdictions, it is first and foremost a court of law which sentences offenders. It is generally seen as being an essential guarantee in terms of fairness and due process even if actual fairness will depend on a number of factors. Only in the Netherlands can the prosecutor impose a sentencing order, with the exception of a prison sentence, of course, since this belongs to the ultimate authority of the courts. In some cases, for instance with speedy trials or bifurcation procedures, due process principles may only be partially observed.

Sentencing is a human (Hogarth, 1971) and social (Beyens, 2000) process open to bias, culture, influence and context. Though limited, the empirical literature tells us a little about the factors that impact on decision-making. Broadly speaking decision-makers are influenced by three categories of criteria. Firstly, offender related criteria such as gender, ethnicity or nationality, residence status, community ties and social and economic circumstances, the seriousness of the offence, and previous convictions; secondly, decision-maker criteria and in particular his or her ideology, ethics, goals and emotions. Decision-makers can also be influenced by what they think goes on in the implementation phase and by the penal policy atmosphere and context. Thirdly, research has also pointed towards the availability and quality of pre-sentence reports – and these are neither systematic nor detailed enough in some jurisdictions.

Gaps in the literature are, again, numerous. For instance, as was mentioned previously, empirical studies pertaining to pre-sentence reports would need to be replicated in more jurisdictions in order for general conclusions to be drawn.

Whether fair trial has or has not been observed is likely to have a strong influence on decision-makers but little is actually known on this subject. We do not know how influential and under what conditions attorneys are influential in sentencing courts. We do not know whether and how decision-makers can be influenced by their peers and by other partners such as the prison services, the prosecutors' office, community agencies and leaders, the media, and so on. It would also be essential to have a European body of research on cognitive decision-making factors. Findings from the USA may not be transferrable to the European context, in particular in written law jurisdictions: in the US legal context a crucial issue is whether courts will set aside written rules for ethical or other reasons. Studies have tried to determine what are the main factors for such decisions. In written law systems the law must be abided by in every case.

(Early) release

As Padfield *et al.* (2010) have shown, there are two main systems in Europe that can also coexist within a single country for different decisions. These systems are, on the one hand, mandatory/automatic release systems whereby at a certain point in time offenders have a right to be released early; on the other hand, discretionary release systems where the value and merit of the case is decided by a person, board, commission or court. Both systems are represented in Europe; in a lot of cases, the two systems coexist. The choice between these systems is the result of tensions: firstly, the need for quality and individualisation in order to better tailor the measure to the offender's circumstances and needs and thus to better protect the community; secondly, in times of prison overcrowding, the need to free up prison spaces. The choice is also probably the result of the number of release measures available. An increasing number of European countries opt for mandatory supervision or even detention following a fully served prison term for sexual and violent offenders.

Another dichotomy (Padfield *et al.*, 2010) is found in Europe between jurisdictions where a court makes the decision and jurisdictions where an executive body does. Again some jurisdictions will mix both systems depending on the length of the sentence or the type of release measure. There is thus no strong consensus in Europe, and this reflects different legal traditions along with the balance of powers amongst the agencies involved.

A third non systemic dichotomy is nonetheless apparent: in some jurisdictions parole and sometimes EM are the only available early release measures. In other jurisdictions, there is a (much) larger choice.

Fair trial and the issue of the applicability of the principles of legality and of the presumption of innocence in breach cases are crucial and have so far only been addressed by legal doctrine.

Unfortunately there is no literature showing that either one of the aforementioned systems has better outcomes in terms of reoffending, compliance and public spending. Some studies, however, show that offenders perceive problem-solving courts as being fairer than ordinary courts or decision-makers. Empirical literature also does point towards similar decision-making factors as the ones listed above for the sentencing phase. There are however other specific factors. Decision-makers will for instance take into account: prisoner's behaviour; whether the person was subjected to pre-trial detention; whether he complied with a pre-trial supervision; or whether he complied with a previous community sentence or measure. When there is a choice between several release measures decision-makers will also consider each one of their specificities, in order to better tailor post-release supervision to offenders' needs. How much this impacts on their decision is alas under-studied.

Conclusion

As a result of our review, a long list of gaps in the literature was identified. No European literature has studied the factors that influence appellate courts decisions, be it during the sentencing or release phase. There is very little research on the decision-making processes of other agencies (e.g. third sector, private sector, prison staff...) involved in early release and post release. We need to know more about the impact of practitioners' goals, ethics and professional culture. We also know very little about the influence which these agencies and practitioners have on each other's decisions (e.g. the prison service which increasingly needs early release to help them deal with overcrowding). If US literature has addressed the influence of victims' impact statements or input in the process leading to early release, so far European literature has not empirically established that it had any influence on decision-makers. This question is essential as victims are gradually invited to express their opinion in an increasing number of jurisdictions.

A more detailed account of the findings of this and the other Working Groups will be provided in our forthcoming book: **Offender Supervision in Europe**, edited by Fergus McNeill and Kristel Beyens, which is due to be published by Palgrave in December 2013.

For more information about the Action, check out our website:
www.offendersupervision.eu

If you are interested in joining or working with the Working Group on Decision-Making and Supervision contact: M.M.Boone@uu.nl or martineevans@ymail.com