

# Consent and co-operation in community supervision – Denmark and Norway

European Journal of Probation  
2014, Vol. 6(3) 242–259

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DOI: 10.1177/2066220314549524

ejp.sagepub.com



**Berit Johnsen**

Correctional Service of Norway Staff Academy, Norway

**Anette Storgaard**

Aarhus University, Denmark

## Abstract

Neither Danish nor Norwegian legislation has explicit references to European Rules on Community Sanctions and Measures (ERCSM), No. 31 or European Probation Rules (EPR), No. 6, on consent and co-operation. Attention is drawn to similarities and differences between Denmark and Norway in relation to legal regulations and practices concerning consent and co-operation. The analyses focus upon community supervision by the Probation Service and include the main forms of community sanctions in both countries. It is found that in spite of legal differences between the countries, their practices have a lot in common. The scope of discretionary power that is entrusted to the Probation Service regarding judgement of the offender's suitability for community sanctions is debated; and the relationship between the rules on consent and co-operation in the ERCSM and EPR and the European Convention on Human Rights on the presumption of innocence and the prohibition of forced labour is questioned.

## Keywords

Consent, co-operation, community supervision, community sanction

The article begins with a brief introduction, followed by a description of the scope and the task of the Probation Services in Denmark and Norway. Immediately after follows a brief overview of how the cross-national legal framework is understood in relation to

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## Corresponding author:

Berit Johnsen, Department of Research, the Correctional Service of Norway Staff Academy, Box 6138 Etterstad, 0602 Oslo, Norway.  
Email: berit.johnsen@krus.no

national legal rules. In order to illustrate similarities and differences in community supervision a number of community sanctions and supervision tasks that are *either* essential in both countries *or* special for one country in relation to consent and co-operation are highlighted. Here, the legal regulations of community supervision and how they relate to consent and co-operation is considered. Differences and similarities in legislation and practice on consent and co-operation are discussed before we conclude.

## Introduction

Offender involvement with regard to consent and co-operation is an indicator of the degree to which a state observes the European Rules on Community Sanctions and Measures (ERCSM) and the European Probation Rules (EPR), but it might also be considered as an indicator of humanity in penal policy and practice. The extent of offender involvement is nevertheless restricted by what punishment is supposed to comprise and what purpose the punishment is supposed to serve. In Norway, punishment is defined as to inflict an evil (or pain) that is supposed to be experienced as an evil (or pain) (Rt. 1977 p. 1207 – High Court sentence; Ot.prp. nr. 90 (2003–2004) – proposition of a new criminal code for the Parliament;<sup>1</sup> Andenaes, 2004; Christie, 1981). While the evil/pain in imprisonment is deprivation of liberty, the pain in non-custodial sentences is the limitation of liberty. According to Ot.prp. nr. 90 (2003–2004) the official purpose of punishment in Norway, which legitimises the infliction of pain by the state authority, is prevention. The purpose has a double meaning: To prevent unwanted behaviour, and to prevent social disturbances in the wake of unwanted behaviour. The *Execution of Sentences Act in Norway, May 18<sup>th</sup> 2001* (ESA-N) section 2 states that the punishment shall be executed in a manner that takes the purpose of the punishment into consideration.

In Denmark, punishment as an abstract phenomenon is understood as pain inflicted on the offender by state authority. Regarding ‘mentally sane’ offenders, there is no codified general purpose of the punishment. Mentally insane offenders are normally not sentenced to a punishment but often sentenced to treatment and this treatment is expected to ‘serve the purpose’ of preventing new crime (the Criminal Law<sup>2</sup> section 68). The most general legal framework for punishment is laid down in the Criminal Law section 1 that states that the only possibility for the state to legally impose a punishment (inflict pain) is within the limits of the law (Nielsen, 2013: 20).<sup>3</sup> Apart from legality the focus of the Danish Criminal Law is on proportionality between crime and punishment as a first criterion, and the personal situation of the offender as the secondary criterion (section 80). Likewise, the *Execution of Sentences Act in Denmark, May 31th 2000* (ESA-D) does not define a purpose of punishment. However, it is emphasized that the sentence is not allowed to include other limitations than those mentioned in the law or those that are direct consequences of the sentence (section 4). It is underlined in the White Paper, which was published before the law was passed (Report nr 1181: 33), that a purpose of the ESA-D as such is to regulate the execution of sentences.

An indispensable principle in the Prison Services in Denmark and Norway is: ‘Going to prison *as* punishment, not *for* punishment’. The principle has the same validity in relation to the Probation Services: ‘Going to probation *as* punishment, not *for* punishment’.

**Table 1.** Clients in the Probation Services in Denmark and Norway in 2012 per day (average).

	Denmark <sup>a</sup>	Norway <sup>b</sup>
Community service	2304	
Community sentence		1431
Conditional release with supervision	1675	394
Conditional sentence with supervision	2212	6
Supervision of 'mentally disturbed' persons	2596	
Supervision with treatment of alcohol problems	481	518
Supervision with electronic monitoring	288	134
Others	78 <sup>c</sup>	72 <sup>d</sup>

<sup>a</sup>Clients counted once a month.

<sup>b</sup>Clients counted each day.

<sup>c</sup>Offenders conditionally sentenced to treatment, mainly alcohol treatment, sex offender treatment and waiver of prosecution.

<sup>d</sup>Mainly supervision of offenders released from preventive detention in prison. Persons participating in the drug court programme are also counted in this category owing to the small number (23 persons in 2013).

Source: Statistics Norwegian Correctional Service, 2013).

(Source: Kristoffersen, 2013: 25, 28).

This means that the evil or pain is inflicted by the passing of the sentence, and that the sentenced offender in both countries maintains all rights from before he was sentenced except for the deprivation or limitation of freedom included in the sentence. As an example, the official presentation of the values of the Prison and Probation Service in Denmark is described as 'the Art of balancing the strict and the soft approach' ([www.kriminalforsorgen.dk](http://www.kriminalforsorgen.dk)) to the client, that is, to secure order and safety and to control that rules and conditions are kept *and* to encourage the client to aim at a lawful life after the sentence.

## The scope of clients and tasks in probation

In 2012 there were 11,693 entries to the Danish Probation Service, compared with 6223 entries of sentenced offenders to Danish prisons. In the same year there were 5356 entries to the Norwegian Probation Service and 7332 entries of sentenced offenders to Norwegian prisons (Kristoffersen, 2013: 15, 18).<sup>4</sup> Table 1 above gives an overview of the community sanctions supervised by the Probation Service and the average<sup>5</sup> number of clients within the different sanctions in Denmark and Norway in 2012.

Table 1 shows some significant differences between Denmark and Norway. Denmark has Community Service (Samfundstjeneste), which mainly consists of unpaid work in a non-profit service or organization for a number of hours defined in the sentence (between 40 and 300). Norway has a generic Community Sentence (Samfunnsstraff), which might include unpaid work but most probably is directed at other conditions and needs of the offender, such as training of skills. The Community Sentence in Norway is the most common community sanction as community service is in Denmark.<sup>6</sup> However, in total the Probation Service in Denmark has significantly more clients than the Norwegian Service. Contrary to Denmark, the Probation Service in Norway is not in any way involved with supervision of 'mentally disturbed' persons who

have committed crimes. This task is diverted to the Health Services. Likewise, the opportunity to include a term of supervision in a conditional sentence has not been possible since 2002, although there are still some people who remain subject to conditional supervision. Table 1 also shows that the average number of people with supervision with treatment of alcohol problems is almost the same in both countries. In both Denmark and Norway, this sentence can be imposed for driving under the influence of intoxicants, but the majority of convictions would be for drink-driving (Kristoffersen, 2013: 14, 18). In Norway, this sanction requires participants to undertake the Driving Under the Influence (DUI) programme.

It is also important to add that there are persons on conditional sentences in Norway with terms that do not involve any supervision by the Probation Service. These persons are not included in Table 1. Nor are persons under supervision with electronic monitoring who are actually serving an unconditional prison sentence outside the prison.

Below follows a short overview of the legal framework and the most relevant legal sources in each country. After that, we turn to a presentation of selected community-based sanctions involving supervision by the Probation Service. Broadly equivalent sanctions from each country are considered alongside each other to allow for comparison. Denmark's conditional sentence with supervision and Norway's conditional sentence with a requirement to undertake a DUI-programme or a drug court programme (DC-programme) are broadly comparable. Further, the two community sanctions involving (or possibly involving) a duty to work are considered, as are the modes of conditional release with supervision in both countries. Conditional release is, strictly speaking, not a community sanction as it is not imposed by the court, but in our countries it is *both* seen as execution of punishment without deprivation of liberty (but with limitation of liberty) *and* as a job for the probations service that requires resources.

## The legal framework – brief introduction

The European Convention on Human Rights (ECHR) was incorporated into national law in Denmark and Norway in 1992 and 1999 respectively. Thereby, the Convention achieved the same status in the countries as other laws decided in the parliament. The Convention defines a number of rules that address criminal law, criminal procedure and the execution of punishment: for example, Article 3; the prohibition of torture and degrading treatment or punishment; Article 4; the prohibition of slavery or forced or compulsory labour, except for work which is 'required to be done in the ordinary course of detention ... or during conditional release from such detention'; and Article 6; the presumption of innocence.

The status of the ECHR in the national legal systems is often named 'hard law', indicating a higher status than other instruments decided in the Council of Europe that are not incorporated as national law. They include a large number of so-called 'soft law rules', such as the two of highest relevance here – ERCSM and EPR. The soft law rules do not have the same legally binding force as national (and incorporated) law. There is, however, a certain moral obligation, just as important principles of international law *may*

assign these sources a role in national administration of justice. These are: (1) the principle of interpretation, meaning that national law as far as possible must be interpreted in accordance with the soft law rule and (2) the principle of presumption, meaning that the Parliament is not presumed to act contrary to the rules.<sup>7</sup> That the countries are not in general reckless to soft law rules is, for example, illustrated in the fact that the preparatory report for ESA-D explicitly refers to the European Prison Rules (Engbo, 2005: 39–42), that are also adopted by the Council of Europe and that the European Prison Rules were central in the latest revision of ESA-N (Storvik, 2011: 24).

In Denmark, as well as Norway, the Execution of Sentences Acts regulate both Prisons and Probation Services, which constitute the Correctional Services in both countries. The present acts have been in effect since 2001,<sup>8</sup> however, references to the ERCSM or the EPR are not found in either in the preparatory reports for the Execution of Sentences Acts, or in the acts themselves.

Until 2001, the regulation of the correctional system was not codified in Denmark. Even though there was such codification in Norway, both countries had, and still have, a tradition of numerous legal instruments on lower hierarchical levels. Some of the lower level instruments are binding for citizens (inmates or other sentenced persons included) and authorities (such as Prisons and Probations Services).<sup>9</sup> Other instruments mainly comprise internal instructions for staff in the prison and probation systems<sup>10</sup> (Engbo, 2005: 60). In the day-to-day administration and execution of sentences these lower legal sources are essential.

Bearing in mind that soft law instruments are of some moral importance and expected to influence practice, it is worthwhile examining if the national laws and other legal sources (even if they do not refer explicitly to consent and co-operation according to EPR, no. 6 (consent and cooperation) and ERCSM no. 31 (co-operation)) include the principles in any relevant manner. In Denmark, the ESA-D section 31 affirms the prison's obligation to compose a plan for inmates for the time in prison and the time after release. The act specifies explicitly that the plan is to be composed in *co-operation* with the inmate. The plan follows the inmate when s/he leaves the prison on parole, and it becomes the obligation of the Probation Service to continuously update the plan. Likewise, the Probation Service is obliged to compose a plan for the execution of conditional sentences (ESA-D section 95). However, it might happen that the inmate, parolee or conditionally sentenced person does not want to co-operate in the compositions of the plan. In these cases, a plan describing aims considered to be relevant is to be composed by a staff member (Internal guideline (Vejledning), no. 9399/2013). In Norway, the requirement of co-operation with the offender in sentence planning is made in the Instructions and Guidelines to the ESA-N. The text in the act (ESA-N) refers to co-operation and consent regarding collection of personal information. Even if the Correctional Services has the right to collect certain information from other authorities, efforts should be made to achieve the consent and co-operation of the sentenced person (ESA-N section 7a). Most likely, this refers to the respect of the protection of personal privacy, which is a central principle in Norwegian legislation (cf. the Act of Preserving Personal Information). The General Civil Penal Code (hereafter referred to as the Norwegian Criminal Law) demands consent from the defendant when sentencing persons to community sanctions.

## Conditional sentences – supervision and terms of participation in programmes

### Denmark

According to the Danish Criminal Law, the ordinary penalties are imprisonment and fine (section 31). In practice, imprisonment is imposed as both an unconditional and conditional sentence whereas a fine is always unconditional. In the Danish Criminal Law section 56 it is stated that if the court holds that the sentence does not need to be executed immediately, the execution might be postponed on terms (i.e. on certain conditions), or the length may be stipulated and then the execution be postponed subject to conditions.

In a conditional prison sentence the term of 'no violation of the law' during the full period of probation is always set (the Danish Criminal Law section 56.3). The ordinary maximum of probation is three years (section 56.4). In the Danish Criminal Law section 57 there is a non-exhaustive list of other terms; for example, supervision by the Probation Service, where to live, who to see, treatment for addiction to drugs or alcohol, psychiatric treatment, follow instructions from probation officer regarding personal finances and compensation payment to victims. The terms may be stipulated for different periods from the day of the sentence. But apart from the term of 'no violation of the law', the terms are normally stipulated for a shorter time than the probation.

According to the Danish Criminal Law section 57 the terms are expected to be 'suitable' but the wording does not say for what the terms should be suitable. An official report on conditions in relation to conditional sentences (Report no. 519 of 1969) states explicitly that the terms should solely aim at offering a better chance for the client to lead a life without crime and that the terms cannot have a purely penal direction. The compliance with the terms is overseen by a probation officer, who at the same time is supposed to support the supervisee in his day-to-day life. This combination of tasks for the supervisor is as mentioned above described as a basic value for the Prison and Probation Service, namely 'the art of balancing a strict and a soft approach' ([www.kriminalforsorgen.dk](http://www.kriminalforsorgen.dk)).

Supervision in itself comprises of meetings between the supervisor, who is a probation officer, and supervisee, and nothing else. The first meeting must take place no later than 14 days after the decision of a conditional sentence in court. Also, in the first two months of the supervision period, meetings must take place at least every 14 days. After that time, a meeting every month will be sufficient according to the rules (Tilsynsbekendtgørelsen §§ 32.2 and 4.2). Meetings normally take place at the probation office. At the meeting the compliance with other conditions is monitored, and any difficulties that the supervisee is experiencing can be explored. The supervisor may give advice on where to apply for a job, and so forth, but the Probation Service does not have money, jobs, places for living, and so on, at their disposal.

The supervisor is in possession of relatively wide discretionary powers in situations of non-compliance. If the offender repeatedly violates the conditions and if they do not comply with the instructions given by the supervisor, s/he might be brought back to court. In court they may receive a warning from the judge, the conditions may be changed, the probation time may be prolonged, and the sentence may be determined and even ultimately executed or executed if it was already determined (Danish Criminal Law section 60). If the client has committed new crimes during the probation period and is

charged by the police during the probation period, a new sentence will be imposed including the former as well as the new crime (one ‘collective’ sentence). At exceptional occasions a new sentence just for the new offence may be imposed (Danish Criminal Law section 61.2). If the offences are different and there are different limitations for how long the sentence can be, the ‘collective’ sentence for the different offences must, as a rule, stay within the limitations of the sentence for the most serious crime (Danish Criminal Law section 88.1).

### Norway

In Norway, the court may decide that determination or execution of the penalty shall be deferred for a period of probation. In practice, this refers to custodial sentences (the Norwegian Criminal Law section 52). As in Denmark, the conditional prison sentences presupposes no violation of the law during the probation period. Before the court imposes a conditional sentence with terms, the offender will be given the opportunity to express his views about the terms. In Norway, the Probation Service only administers conditional sentences that involve participation in a DUI-programme or DC-programme (the Norwegian Criminal Law section 53 no. 3e). Other conditions, such as terms of treatment or prohibitions regarding contact and/or geographical exclusions, are overseen by the Health Service and the police respectively.

The DUI-programme commenced in 2008. The aim of the programme is to motivate persons that have been convicted for driving a motor vehicle under the influence of alcohol or other intoxicant or anaesthetic substances (the Road Traffic Act section 31 cf. 22), and who have a problem with any of these substances, to resist driving under influence again (Guidelines DUI-programme section 2). The DC-programme began in 2006 and is a trial arrangement in the towns of Bergen and Oslo. The aim of this programme is to prevent further offending, encourage the rehabilitation of the offender, and to strengthen and co-ordinate the offers of help and treatment for persons with drug problems (Instructions DC-programme section 1).

The Norwegian Criminal Law requires consent from the defendant in order to pass a sentence with this condition. In a pre-trial phase, defendants shall be informed of what the programmes imply and sign a declaration of consent (Drug Court Report, 2004; Instructions DC-programme section 4; Guidelines DUI-programme section 4). Information is provided in the course of preparing the social inquiry report, which is mandatory in order to pass sentences to these programmes. The social inquiry reports to the DUI-programme are prepared by the Probation Service, while drug court teams prepare social inquiry reports for the DC-programme. The drug court team consist of representatives from the Correctional Service, the Health Service, the Social Service and the Educational Service. Consent to participate in the DC-programme also involves consenting to information sharing across the different agencies. For the DUI-programme the defendant is required to confirm consent in court.

In relation to legal protection, there has been a debate about the meaningfulness of consent when the alternative is imprisonment. These precise issues were raised in hearings prior to the enactment of the relevant legislation (Ot.prp. nr. 81 (2004–2005, Innst. O. nr. 120 (2004–2005)). There has also been a debate about the nature of *informed*

consent and how much the defendant actually understands of the information. These debates have especially concerned the DC-programme (Drug Court Report, 2004; Johnsen and Svendsen, 2007). The abolition of the professional secrecy in the DC-programme is also problematic. In the hearing (Ot.prp. nr. 81 (2004–2005)), the Data Protection Authority had several comments and objections; for example, that the authority in law of exchanging information must be clearly stated because of the great imbalance of power between the team-members and the offender.

Social inquiry reports for the DUI-programme and the DC-programme are supposed to include a judgement of the defendant's suitability to complete such sentences. In 2013, about 40% of the candidates for the DC-programme and about 25% of the candidates for the DUI-programme were judged as unsuitable (Statistics Norwegian Correctional Service, 2013: 21, 22). To be found 'suitable' for the DUI-programme, a person has to be charged for driving a motor vehicle under the influence of alcohol or other intoxicant or anaesthetic substances (the Road Traffic Act section 31 cf. 22). Besides, the person has to have a problem with driving motor vehicles and the use of these substances in combination (Guidelines DUI-programme section 1). Normally, it is an assumption that the defendant has admitted a problem with alcohol or drugs. Repeatedly driving under the influence of alcohol or other drugs may be an indication of a problem with alcohol or drugs in the legal sense (Ot.prp. nr. 31 (2006–2007)). Suitability for the DC-programme means to have a drug problem and to have committed drug related crimes (Instructions DC-programme section 2). There are restrictions for persons that are charged for violence (Ot.prp. nr. 81 (2004–2005)). For both drug-court teams (Oslo and Bergen), the defendant's motivation and the teams' belief in the person's ability to carry out the programme have been central factors in the judgement (Johnsen and Svendsen, 2007). 'Not-suitable' may also mean that there is no adequate treatment or help available for the defendant (Statistics Norwegian Correctional Service, 2013).

The DC-programme and sentence plan is supposed to be individually composed in consultation with the offender (Instructions DC-programme section 7). The intentions of the plan are to clarify the expectations for the offender and therefore to provide predictability during the execution of the sentence. According to the Instructions (section 8) of the DUI-programme, there is a demand for a plan of the execution, but, in reality, the programme is pre-set and this is what constitutes the plan.

The DUI-programme lasts for 10 months, while the DC-programme could last for the whole probation period, normally set for two years. Not giving consent would most likely lead to an unconditional sentence that could be considerable shorter than the community sanction. For example, a person convicted of a drink-driving offence may be sentenced to 30 days imprisonment or to a DUI-programme.

Participants on the DUI-programme and the DC-programme may withdraw their consent at any time. If they do, the court is supposed to reverse the punishment to imprisonment. The court is, however, free to decide the most appropriate punishment, depending on the time served in the programmes. According to the statistics in 2013, one of five persons sentenced to the DUI-programme did not complete the sentence (Statistics Norwegian Correctional Service, 2013). However, the statistics do not show how many that do not complete because they withdrew their consent.

## **Community service and community sentence**

### **Denmark**

Denmark introduced Community Service Orders (CSO) as a regional experiment in two geographical areas in the early 1980s. In 1992, the CSO was implemented nationwide in the Danish Criminal Law (chapter 8, section 62–67). A CSO is a conditional sentence (see above) with the main condition of carrying out unpaid work for 30 to 300 hours. The maximum number of hours was increased from 240 to 300 in 2012 (L 159/2012). According to the preparatory remarks of this bill, the increase was owing to an expectation of replacing unconditional sentences between 18 and 24 months with CSOs in the future.<sup>11</sup> In addition to the CSO, the court may inflict the ‘ordinary’ conditions, which are exemplified in The Danish Criminal Law sections 57 and 63.4, such as avoid misuse of alcohol, stay in a certain institution for a period, and so forth.

Before imposing a CSO, the Probation Service is obliged to compose a social inquiry report considering a person’s suitability for such a sanction. The court decides the number of hours and the maximum time for carrying out the work hours. The Probation Service finds appropriate work and schedules the work hours. Other duties of the offender, such as job, family-related tasks, and so on, must be respected in the planning of a CSO. Further, the Probation Service carries out ‘ordinary’ supervision during the probation time. In many – but not all – sentences the length of probation (the time where the old crime may be taken into account in the sentence if new crime comes on top of it) is equivalent to the length for the CSO to be carried out (often one year). The CSO should not involve working with people in vulnerable situations – for example, single elderly people in their homes – and the order is not supposed to replace ordinarily paid labour.

Until 1992, a declaration of consent by the charged person was demanded in the court. This was considered necessary because of a possible conflict with Article 4 of the European Convention on Human Rights that deals with compulsory labour. However, this demand was not repeated when CSO was implemented in the criminal code. The question was considered by the expert committee on criminal matters (Straffelovrådet) in 1990 in report no. 1211, where it is stated (p. 62) that it is reasonable to assume that in cases where a CSO is replacing an unconditional sentence, it can be used without consent from the offender without conflicting with Article 4. There was some disagreement amongst the expert committee in this regard. A majority of five members of the committee concluded (p. 67) that a clarification in court as to whether the charged person accepts the condition of CSO is sufficient, whereas a minority of two members preferred to uphold the formal claim for written consent.

The current practice is that before the case goes to court, the Probation Service has a meeting with the client (the charged) and gives them the opportunity to sign a document on CSO. The document states the information and duties for the person in case s/he is sentenced to CSO. The document is used nationwide by the Probation Service and is undergoing a revision. Neither the new nor the former document includes a written acceptance of a CSO. In both cases, the charged only signs that s/he is informed about CSO and has received a letter with the rules on CSO.<sup>12</sup>

The fact that the defendant is required to sign a letter of consent for a CSO, and will be deemed unsuitable if he does not do so, is problematic because at this stage s/he still has the right to plead not guilty in court. This issue should be considered in the light of the presumption of innocence and the prohibition of self-incrimination (Article 6). Failure to consent to a CSO may ultimately result in a sentence of unconditional imprisonment. At the moment it is not possible to tell if the 'Danish solution' with letters of 'something close to consent' is a token attempt to meet Article 4 in the European Conventions on Human Rights (prohibition of forced labour) or as an attempt to avoid conflict with Article 6 (prohibition of self-incrimination). Article 4 is silent about the stage at which consent must be given. One possible way to address these issues may be for information about the requirements of a CSO to be provided at an early stage and consent to be sought after a determination of guilt.

## Norway

The Community Sentence in Norway took effect in 2002. It is specified as a penalty in the Norwegian Criminal Law (section 15), and is an alternative punishment to prison where the prison sentence would not extend to more than one year. To avoid any social differences in sentencing people to a community sentence, there is no requirement to assess a person's suitability to carry out such a sentence. Even where a social inquiry report is prepared it does not address the question of suitability for this sentence. The criminal law requires consent from the defendant for the court to pass this sentence, and the law requires that the defendant shall be made acquainted with what the sentence implies. The reason for this is that the offender him/herself should judge whether s/he is capable of carrying out such a punishment, which is in accordance with the principle of taking responsibility for one's criminality (Ot. prp. nr 5 (2000–2001). A person sentenced to a community sentence may withdraw the consent at any time. By withdrawal of consent, or violation of the set terms that leads to new court proceedings, the court may by judgement decide that the alternative sentence of imprisonment shall wholly or partly be executed (Norwegian Criminal Law section 28b)

When the court passes a community sentence it must specify the number of hours (30–420 hours), and the period of time these hours should be provided within, corresponding to the alternative prison sentence (Norwegian Criminal Law section 28a). The court may also set other conditions, such as banning the person from having contact with specific people and/or complying with the provisions set out by the Probation Service regarding place of residence, work, training and treatment.

According to the ESA-N Instructions section 5.2 the Probation Service, with some exceptions owing to staff shortage and external collaborators, has to respect other duties of work or education so the offender can carry out these tasks without being absent or otherwise neglecting these duties. It is the Probation Service that decides the overall composition of the sentence (for example the type of work undertaken). The Probation Service in Norway therefore, has a high degree of discretion in deciding the contents of the sentence. This is described as the most striking aspect of the 'Norwegian variant' (Ploeg, 2008: 778). The content could be community service, programmes or other arrangements suitable to prevent further offending such as conversations of a more

therapeutic character, treatment, mediation board, and so forth (ESA-N Guidelines 4.1). If it is not a condition set by the court, any requirement of participation in a programme or treatment is voluntary and requires consent. However, in initiation meetings with probation the offender may be obliged to receive information about programmes (ESA-N Instructions section 5-2) and s/he shall be informed about the decisions set by the court, and have an opportunity to express their views on these (Storvik, 2011).

Based on individual information an obligatory plan for the fulfilment of the sentence is composed of realistic and suitable activities that aim to prevent further offending (ESA-N section 53; Storvik, 2011). The plan should be composed in collaboration with the offender (ESA-N Instructions section 5-2). The plan might be revised in co-operation with the offender, for example if some of the activities turn out to be inappropriate. According to the ESA-N Guidelines chapter 4.1 the plan is a resolution, and if the offender disagrees with its composition, s/he may appeal to the regional level in the Correctional Service (ESA-N section 7 letter e). For the purposes of preparing this article we consulted with juridical counsellors at the Regional offices in the Correctional Service in Norway who are unaware of any such appeals since the establishment of the Community Sentence in 2002. However, it should be noted that not appealing the plans does not necessarily mean co-operation, but it might function as an indicator that severe disagreements do not occur. According to the ESA-N section 53 the Probation Service is required to change the plan if it is considered to be necessary for safety and security reasons. This could be that the offender does not show up to appointments, and therefore the supervision would be more intensive for a while. The plan may also be changed without consent if there are staff shortages.

## **Conditional release with supervision**

### *Denmark*

The Danish Criminal Law, section 38 states that a prisoner must be considered for release<sup>13</sup> on conditions (parole) when s/he has served two-thirds of their sentence, with a minimum two months in prison.<sup>14</sup> The general conditions for early release include that 'it is not judged as inadvisable' with regard to the situation of the prisoner and that s/he has secured appropriate housing and support. The claim of conditional release 'not being inadvisable' means that conditional release after two-thirds of the sentence is expected to be the main rule. Report no. 1099 of 1987 by the expert committee on criminal matters plays a central role in the interpretation of 'not inadvisable'. According to the report, 'not inadvisable' is supposed to be understood in a way that only a minority of the prisoners are not released after two-thirds. It is also argued, for example, that behaviour in the prison, even having tried to escape, must not be considered in the decision about early release. There has been no formal decision on becoming more restrictive but nevertheless the rate of prisoners, who had parole rejected has been increasing from 5–10% in the 1980s to between one-quarter and one-third more recently.

Further, a number of individual conditions may be added in a decision on parole. The legal description of such conditions is the same as for conditional sentence, for example supervision, drug treatment and so on (Danish Criminal Law sections 39.2 and 57). Contrary

to the conditional sentence, the Danish Criminal Law states that the prisoner must declare their willingness to comply with the conditions (section 38.5) in order to achieve parole.

Since 1965, it has been stated in the Danish Criminal Law section 38 that apart from a certain minimum time in prison (now: two months) a minimum of 30 days had to be remaining as not served<sup>15</sup> in order for a conditional release to be decided. This was seen as a rule of fairness as the probation time may include restrictive conditions for a period of normally two years. This rule has been erased since July 2013 and there is no minimum claim for sentence to remain. There are a few other legal possibilities for even earlier release down to after half time. These are used very rarely (Danish Criminal Law section 38.2 and 40a)

## Norway

In Norway, the prisoner has to apply for release on parole. The release on parole shall be planned in good time before the date for the actual release. The planning is supposed to be done in co-operation with the prisoner and the Probation Service (ESA-N Guidelines 3.45.1). Of special focus is the provision of a place to live, work or education. As in Denmark, a prisoner cannot be released before two-thirds of the sentence has been served, and the prisoner must have served more than two months of the sentence in prison. If the time left of the sentence is less than 14 days, the prisoner is most likely not to be released on parole. Lately, there has been an increased restrictive practice on release on parole in Norway. This is owing to changes in the political debate on crime and punishment and hence more restrictive legislation (for example in the ESA-N) and policy on this matter (Storvik, 2011).

According to ESA-N section 43, a premise in order to be released on parole is that the offender does not commit new crimes during the probation period. If a tighter follow-up scheme is considered necessary the obligation to appear before the Probation Service without being influenced by drugs and alcohol might be set for a period of time (ESA-N section 43) This period is normally three months (ESA-N regulation section 3-42), and the control mostly implies a conversation with a probation officer. Other conditions may be set as well, as agreement to stay at a particular place, treatment, education, work or prohibition to contact certain people. All conditions for parole are stated in a 'parole-document' that the prisoner has to sign before release. According to the ESA-N Guidelines (3.45.3), the Probation Service is obliged to construct a plan in co-operation with the offender. If the supervision is carried out by a person not employed by the Probation Service, this person should also be involved in the construction of the plan. All conditions for parole are to be settled in the plan. Concerning the condition 'obliged to appear' the probation officer or the person that is authorized is supposed to have close co-operation with the offender during the period of control.

## Discussion – consent and co-operation, similarities and differences

In Norway, the criminal law demands that offenders have an opportunity to express their view about the terms set by the court when passing a conditional sentence. It is reasonable to believe that this kind of 'involvement' of the defendant varies from case to case.

However, the court will take the defendant's view into consideration – especially when the term might be treatment – when passing a sentence aimed at preventing further offending. In Denmark, where the terms of a conditional sentence are supposed to be 'suitable' in terms of addressing the needs of the defendant, it is reasonable to believe that the defendant will be involved in the identification and definition of these needs in order for the court to take the personal situation of the offender into consideration when passing the sentence.

When a Norwegian court passes a conditional sentence with a requirement for participation in a DUI-programme or a DC-programme, the law requires informed consent from the defendant. Here the court adjusts to the principle of voluntariness for participation in programmes in the Correctional Service. Also, when sentencing a person to a community sentence the law requires that the defendant gives consent. This is not the case in Denmark. However, in both countries the sentence will be influenced by a de facto consent. In Denmark, the chances of being defined as unsuitable for CSO is close to 100% if s/he refuses to sign.<sup>16</sup> If deemed unsuitable for a CSO, the most probable sanction is unconditional imprisonment. The same applies in Norway for sentences involving engagement with the DUI-programme or the DC-programme. Here, if the offender does not consent, the most likely sanction is a prison sentence. In this comparison, therefore, the legal claim for consent does not make a big difference in reality.

In both Denmark and Norway, the Probation Services make judgements about a person's suitability in order to submit to some community sanctions: CSOs in Denmark and conditional sentences involving participation in the DUI-programme or DC-programme in Norway. The existence of such judgements as guidance for the court is understandable, as the court wants to be as sure as possible if the defendant 'fits' or is in the target group for the sentence and is able to accomplish the sentence. At the same time, the judgement of suitability might be seen as distrust in the defendant's own ability to judge whether s/he may accomplish the sentence, or that s/he has understood what the terms actually mean. From a Foucaultian point of view (Foucault, 1991a; 1991b), the judgement is an estimation of the person's ability to discipline him/herself within the framework the sentence set, and their ability to co-operate within this framework. Even if a social inquiry report only has a consultative function for the court, the drug court team and the Probation Service are in a position of a considerable exercise of power in such a judgement. Exactly for these reasons, there is no judgement of suitability other than the defendant him/herself in the Norwegian community sentence.

A plan for the fulfilment of the sentence is obligatory for all offenders subject to community sanctions administered by the Probation Services in Denmark and Norway. Legislation in both countries requires co-operation with the offender in the composition of these plans. However, in Denmark a plan is composed even if the offender does not want to co-operate. This is not mentioned in the Norwegian legislation, even though the plan is compulsory. The consent given before being sentenced to community sanctions administered by the Probation Service in Norway, however, seems to imply a 'voluntariness' and an assumption of a co-operative attitude of the offender. There are, however, several factors in the legislation that prepare the ground for co-operation: The demands to take into consideration other duties of the offender (for example employment), the high degree of flexibility in tailoring an execution of a

sentence in such a way that it responds well to the needs of the offender, and the admission to appeal in Norway. In both countries, however, the offenders' involvement take place within a rigid legislative framework of the execution of sentences. In Norway, the offenders also know that not following the plan will lead to a breach procedure that could send them to prison.

There have been debates concerning consent to community sentences in both Denmark and Norway, but these have been somewhat different. In Norway, the debate has concerned the reality of meaningfully consenting to a conditional sentence requiring participation in a programme, when the alternative is imprisonment. However, sometimes the sentence to imprisonment might be so short for some persons compared with the time in the programme, that they actually might prefer imprisonment. There has also been a discussion about the abolition of the professional secrecy in the DC-programme. Because of the great imbalance of power between the team-members and the offender, this issue ought to be taken into consideration if the trial arrangement becomes a nationwide and permanent arrangement.

In Denmark, the debate concerns whether consent implies indirect confession and if this is inconsistent with Article 6 in the European Conventions on Human Rights on the presumption of innocence and the prohibition of self-incrimination. The debate also concerns Article 4 on prohibition of forced labour. This is, in general, a principle and important debate also in relation to ERCSM, No. 31 and EPR, No. 6 (see below).

## **Concluding considerations and remarks**

Neither the Danish nor the Norwegian national laws or other legal sources refer explicitly to EPR, no. 6 and ERCSM no. 31 on consent and co-operation. One might say that EPR and ERCSM should have been more visible in the countries' legislation. Even so, the moral guidelines that EPR, no. 6 and ERCSM no. 31 express, is found to an extent in the legislation and in practice in Denmark and Norway. In Norway, consent is more expressed in the legislation, but in practice we see that the two countries are quite similar on the matters of consent and co-operation. In relation to the more superior principles in both countries concerning the aims and purposes of punishment and how it is imposed, we will claim that the humanity in penal policy and practice in accordance to EPR, no. 6 and ERCSM no. 31 is quite ensured in the two countries.

However, there are two final considerations that might be the subject for future work. First, in the ERCSM, No. 31 it is argued that community sanctions are more likely to achieve their aims if the execution is based on co-operation but Article 4 of the European Human Rights Convention is not explicitly mentioned. Does that mean that the ERCSM ignores the prohibition of compulsory work outside prisons? Or is it presupposed – as among the majority of the expert committee in Denmark – that in all cases community sanctions are really an alternative to unconditional imprisonment (in which cases compulsory work is included and therefore legitimized)? And secondly, in the EPR, No. 6 presupposes consent but does not mention the risk of conflict with the presumption of innocence. This is, however, mentioned in No. 7, but very briefly. Is it always realistic in a pre-court inquiry-situation to create a situation where a charged person is able to overview the consequences of accepting the terms of a sentence before they are even found

guilty? If the person pleads not guilty would they not see the consent to a specific punishment as a risk of being taken for an indirect confession?

### **Declaration of Conflicting Interest**

The authors declare that there is no conflict of interest.

### **Funding**

This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

### **Notes**

1. The new criminal code (*the General Civil Penal Code, May 20<sup>th</sup> 2005*) has been approved by the Parliament, but not in effect yet.
2. The Criminal Law has been in force since 1933 and was passed 1930, Law no. 126 of 15 April 1930. Latest consolidated Act no. 1028 of 22 August 2013.
3. The principle of legality is also stated in The Constitution of Norway section 96.
4. The size of the populations in Denmark and Norway are relatively equal, as Denmark has 5.5 million and Norway has 5.1 million inhabitants.
5. The average means the average number of clients each day all year round.
6. The number of 'mentally disturbed' clients is higher than the number of any of the other groups in Denmark. But this is not a typical group of clients for the Probation Service. The main supervision alongside with mental treatment is carried out by the Health Service. These clients are only registered in the Probation Service owing to formalities.
7. It may be debated, though, if these principles, which are of international law origin, are in force in this context (Engbo, 2005: 39–42).
8. In Denmark, this was the first codification ever on execution of sentences. In Norway, the execution of sentences in prison had been regulated by law since 1857, and had the latest revision in 1958 (Storvik, 2011: 19).
9. Governmental orders (Bekendtgørelser/Forskrifter).
10. Departmental notices (Cirkulaerer/Rundskriv).
11. It is too early to tell if the change will expand the use of CSO. To date, there have been very few sentences (around 10 in total) with over 240 hours. After the change in the law, the Department of Prison and Probation formed a task force in order to expand the use of CSO, too. It shall be interesting to follow its development.
12. In the former version, the wording indicated consent ('before you say...') but in the bottom of the page does not stand: 'I accept CSO' but only 'I have received a copy of this letter'. The new version is titled 'Consent as regards getting through CSO', but the signature is kept hypothetical: 'The undersigned confirms that they have been informed about the rules concerning CSO and to have received a copy of this letter'. Either way, the two documents are close to being a letter of consent but in both cases the signature formally only confirms that the person has been informed about what CSO involves. An experienced probation officer informed us orally that if the person does not sign this document s/he is seen as not suitable for CSO, and the most probable outcome is consequently an unsuspended sentence. We were also informed that among probation officers the document is called 'a letter of consent' and she feels pretty sure that the clients are of the opinion that they with their signature consent to be sentenced to CSO. This assumption is, among other things, based on the fact that clients regularly refuse to sign because they plan to plead not guilty in court and find the signature

- equivalent to an indirect confession. These issues seem never to have been explored in either law or literature.
13. The law says that the consideration must be made by the Ministry of Justice. The power is delegated to the Department of Prison and Probation and in many cases to the prison.
  14. Conditional release after two-thirds of the time has been included in the law since 1930. The amount of time that should be served before release was originally nine months. This has been adjusted downwards a couple of times.
  15. That is, sentences of less than three months had to be served in full.
  16. See above; this is referring to personal information from an experienced probation worker.

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## Author biographies

Berit Johnsen is Associate Professor and Head of the Research Department at the Correctional Service of Norway Staff Academy. She has been involved in a range of research projects concerning both prison and probation. Her current research interest are preventive detention, education and the

professionalization of prison officers, quality of prison life and the establishment and functioning of prison units with extra high security level. [Email: berit.johnsen@krus.no]

**Anette Storgaard** is an Associate Professor in Criminal Law and Criminology at the Department of Law, University of Aarhus, Denmark. Her main research topics are alternatives to imprisonment, imprisonment and alternative conflict resolution. Apart from teaching Law students at the university in Aarhus and regularly other universities, she runs a diploma study in criminology for practitioners like probation officers, police officers, prison staff and others. [Email: as@law.au.dk]