

# European Probation Rules: What they are, why they matter

**Rob Canton**

*Professor of Community and Criminal Justice, De Montfort University, Leicester<sup>1</sup>*

The Council of Europe has adopted European Probation Rules. These set out basic principles and draw out their implications for the organisation, policies and practices of probation. This paper discusses the origins and rationale of the Rules, the process of their development and their potential significance. Their value is found to lie in their insistence on an ethical foundation for this important component of penal practice, not least in constraining other influences on criminal justice - the 'new punitiveness', unduly instrumental understandings of penalty and preventive justice - that dominate contemporary policy in many countries.

On 20<sup>th</sup> January 2010, the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec (2010)1 to the member states on the Council of Europe Probation Rules. This paper considers the origins and significance of these Rules, the way in which they were developed and approved and their implications for probation policy and practice. Grounded in the European Convention for the Protection of Human Rights and Fundamental Freedoms, an ethical commitment shared by the 47 member states of the Council, the Rules are intended

to guide probation work across the continent. Three particular influences on penal policy will be identified and it will be argued that the Rules are valuable and timely as an ethical constraint on these developments. While the rights of offenders subject to community sanctions and measures are not as vulnerable as of those held in prisons, it remains essential that probation agencies across Europe test their current policies and practices, as well as any innovations, against the ethical principles that the Rules represent.

## **THE COUNCIL OF EUROPE AND THE IDEA OF RULES**

The standing and importance of the Council of Europe are not well understood in some countries. In England and Wales, Euro-sceptical responses to its work sometimes confuse it, perhaps mischievously, with the European Union. But the Council of Europe is distinct, its origins and purpose quite different from those of the EU. If the EU originally aspired to develop a 'common market' across Europe with principally economic objectives, the Council, Europe's oldest political association,

was a response to the horrors of the Second World War and represented a collective commitment to guard against any repetition.

Winston Churchill affirmed the vision: “Our constant aim must be to build and fortify the strength of the United Nations organisation. Under and within that world concept we must recreate the European family in a regional structure called - it may be - the United States of Europe and the first practical step will be to form a Council of Europe ... The salvation of the common people of every race and every land from war and servitude must be established on solid foundations, ...”<sup>2</sup> (Churchill 1946). In 1950, the Council adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms, leading to the establishment of the European Court of Human Rights, and it is the Convention that represents the most solid Churchillian foundation. On the basis of the Convention, the Council sets standards, inspects and facilitates international cooperation to protect and enhance human rights. Many of the disputes about rights are at their sharpest in penal affairs because it is in the practices of criminal justice and punishment that the state most manifestly deploys coercion, force and deprivation of liberties.

The Articles and Protocols of the Convention are necessarily framed in a very general way. For example, Article 3 (Prohibition of torture) states “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” But while in the abstract this is a principle which would command near unanimous support, its precise implications are altogether less clear. Imprisonment, most obviously, involves any number of hardships, pains, humiliations and privations and the point at which these amount to a violation of Article 3 is not self-evident.

Through the case law of the European Court, standards are progressively clarified, but this is inevitably a gradual process, which depends upon litigation and Court rulings. The Court – which has a backlog of cases in excess of 100,000 (Guardian 2009) - can only adjudicate on applications received, most commonly associated with violations, infringements, oppressions and loss of liberties. If the determination of precisely what some rights amount to in practice depends upon the Court, the wait could be a long one.

Liberties, moreover, are only one dimension of rights (Gearty 2006; Canton 2009a). While some rights in the Convention are liberties – rights that forbid states from certain courses of action – other rights are better understood as claims, not just requiring states to forbear but imposing positive obligations to act (Mowbray 2004). The Convention should therefore inspire and act as a stimulus to policy and practice. As Mowbray writes “Changing ethical standards, regarding, inter alia., judicial punishments and torture, and technological progresses ... have resulted in not only the evolution of societies, but also the creation of new types of problems for the Court to resolve.” (Mowbray 2005: 79) Taking seriously the idea of the Convention as a ‘living instrument’, however, requires more than the resolutions of the Court.

It is here that the work of the Council can be invaluable. The Council of Europe promulgates Rules which, once adopted by the Committee of Ministers (the Council’s decision-making body) as Recommendations, carry considerable authority. Essentially the Rules point to the possibility of a relatively detailed and specific working out of the liberties – and often the rights claims – required by the Convention.

In the area of criminal justice, Rules have been developed which form part of the increasingly influential corpus of international regulation of punishment (Coyle and van Zyl Smit 2000). Probably the best known and most influential of these Recommendations is the European Prison Rules (Council of Europe 2006). These are intended to guide the policies and practices of imprisonment in all the member states. They have been cited in the judgements of the European Court of Human Rights. For example, in *Dickson v. the United Kingdom* (European Court of Human Rights 2007), the Court was invited to rule on the applicant’s claim that his right to respect for private and family life (Article 8) had been violated. In ruling in *Dickson*’s favour, the Court cited the emphasis on rehabilitation and resettlement in the Prison Rules.<sup>3</sup> The substance of this case is beyond the scope of the present paper: it is the process to which attention is drawn here. In trying to determine which of a prisoner’s rights were necessarily forfeit and which should be retained and protected, the Court recognised that

this matter had been considered in detail and with care by the Council of Europe and saw the Rules as a legitimate source of authority.

In this way, Rules can respond to the potential limitation in the form of the rights in the Convention, their remoteness and abstraction. The Rules draw out what it will mean in practice to respect the rights of offenders, victims, criminal justice staff and the community – and how to resolve conflicts of rights in a principled way. Rights may then become the beginning and the focus of policy.

## THE EUROPEAN PROBATION RULES

Like the Prison Rules, the Probation Rules were developed by one of the committees of the Council of Europe, the Council for Penological Co-operation (PC-CP), within the Directorate General of Human Rights and Legal Affairs. This committee is made up of individuals from several different countries, usually people with extensive experience of penal affairs. Their experience – for example, of the practical challenges of managing a prison or a probation agency – not only gives authority to their opinions, but also ensures that hard, specific questions are properly addressed. Some of the rights of offenders are deliberately and necessarily taken away or limited by the sentence of the court, but PC-CP works out in detail how, within these parameters, rights may be protected and enhanced. The Rules that emerge are thus both realistic and principled.

To develop the Probation Rules, the PC-CP appointed to work with them two experts, who undertook much of the drafting of the Rules that were then thoroughly debated in committee and as necessary revised. The experts worked closely with the Secretary General of CEP (the European Probation Forum), Leo Tigges. Formally an observer on the PC-CP, Leo Tigges contributed not only his wide knowledge of European probation but also used his extensive networks among European probation agencies to consult on ideas and proposals as the Rules developed. This contribution was invaluable in making sure that the Rules are relevant to those who will be responsible for their implementation. Once the Rules were completed to the satisfaction of the PC-CP, the draft was

submitted to the European Committee on Crime Problems (CDPC). All member states are represented on this committee and they take the opportunity to consult within their own countries on the text of the draft. The CDPC has the authority to refer back and to amend the draft, although the PC-CP may want to defend its original position. Once the CDPC has approved the text, it is submitted to the Committee of Ministers for approval and formal adoption.

The Rules are divided into eight parts:

- Part I: Scope, application, definitions and basic principles
- Part II: Organisation and staff
- Part III: Accountability and relations with other agencies
- Parts IV-VI: Probation work (the several tasks and responsibilities of the probation agency), the processes of supervision, work with victims of crime
- Part VII: Complaint procedures, inspection and monitoring
- Part VIII: Research, evaluation, work with the media and the public

A Glossary is appended to the main text. The Rules are also accompanied by a Commentary to explain their rationale and implications.

It can readily be imagined that the process of negotiating the content of these Rules was both fascinating and challenging. The Committee spent a great deal of time on definitions and scope. Even the term *probation* resists any simple definition, for example. There was debate too about the extent to which these Rules should attempt to prescribe the practices of independent organisations - NGOs or private companies. In England, the concept of *contestability* (Goode 2007) is opening up the possibility that tasks that have in the past been undertaken by the public sector may be taken up by others. In many countries, agencies are involved in partnerships with independent and sometimes commercial organisations. Is it within the purview of the Council to prescribe their practice to independent organisations? At the same time, can a state abdicate its responsibilities here by assigning tasks to others? Some countries too have no

designated probation agency, but there are other public sector organisations that undertake tasks which would be seen elsewhere as ‘probation work’ and which ought to be guided by these Rules.

A central challenge is to construct a set of Rules that can be ‘owned’ by the member states, with their different traditions and legal and organisational frameworks. The intention is to guide practice, but, unless the Rules are bland or vacuous, this is highly likely to mean that some national practices are called into question. This is one manifestation of a wider problem of international regulation: national traditions must be respected, but at the same time some practices may need to change to conform to the ethical standards of the international community. A parallel problem arises with policy transfer: while transfer must take respectful account of local ways of doing things, states often seek the inspiration and guidance of other countries precisely because of dissatisfaction with aspects of their own penal practices and a wish to change (Canton 2009b).

In many countries, the whole question of crime and punishment has become highly politicised (see below). The extent to which the Rules should emphasise *punishment* and *control* or, on the other hand, *help through positive relationships* was contentious. It is possible too that those countries where such questions are less politically vexed would resist a characterisation of probation practice that was driven by the perceived political imperatives of other countries.

Many of the established probation agencies of northern and western Europe would feel confident that their policies and practices conform with these Rules. So they should. But there are other parts of the continent where probation is taking its first tentative steps. Some countries are uncertain how their emerging probation agencies should practise and what organisational structure is required to ensure probation’s legitimacy and success. It is hoped that the Rules and Commentary will be a resource to these countries.

At the same time, no country should be complacent about the ethical standards of their practice in penal affairs. The second half of the paper, then, will discuss three particular and related themes in the

discourse and practices of punishment that are discernable in a number of countries. It will be argued that, singly and still more in combination, they pose a threat to human rights which calls for a strong ethical statement in response.

### THREE THEMES IN PENAL POLICY

#### *Punitivism*

The first of these themes is *punitivism*. Several scholars have drawn attention to a ‘new punitiveness’ in penal policy in many countries and have debated its origins and significance (for example, Pratt *et al.* 2005; although for a different view, Matthews 2005). Rates of imprisonment – one plausible barometer of punitiveness - have been increasing in almost all European countries, even as levels of crime have been stable or decreasing. While Christie (2000) shows that levels of imprisonment are never simply determined by levels of crime, if crime rates were to increase, then, without changes in sentencing policy and practice, the prison population would increase as well.

Economic recession may well bring this about, leading not only to increases in some kinds of crime, but also aggravating a general *lebensangst* for which punitive responses can become a focus. Taylor wondered whether levels of fear and anxiety about crime expressed in surveys “are ‘really’ about crime and the chances of criminal victimisation, or whether the fears expressed about crime are actually a convenient and socially-approved kind of metaphor through which survey respondents can articulate ... a much more complex sense of restlessness and anxiety” (Taylor 1998: 23). Crime commonly functions as a proxy for social anxieties and the fears evoked lead to exclusionary and punitive reactions.

In passing, it is worth wondering if the recession may have other and countervailing effects. Last year, *The Wall Street Journal* (2009) reported a decision by a federal judicial panel ordering “... California to reduce its prison population by more than 40,000 inmates from a total of about 160,000 over the next two years, to relieve overcrowding and improve medical care for inmates.” This episode prompts two immediate questions: first, might Europe be as directly responsive to its Convention as the US is

to its Constitution? And secondly might economic constraint achieve reductions in prison population where criminological reason and evidence have proved impotent?

However that may be, punitive excess must be opposed. As Garland shows (1990), penal practices are not only shaped by cultural sensibilities, but reciprocally influence them. Wrong in itself, a zeal for punishment leads to a level of social exclusion that produces more crime. Illiberal and callous attitudes begin to affect other aspects of our social interactions, not only changing the tone of crime control strategies, but through the *contagions of punishment*, generating intolerance, mistrust and a corrosion of community. As H G Wells noted in his pamphlet on human rights, these attitudes, once conjured, cannot be confined to their original targets but infect our dealings with others, especially those whom we choose to see as different from ourselves. He deplors “this exaggerated outlawing of the fellow citizen whom we see fit to suspect ... and also of the stranger within our gates” (1940: 51) This is in no way to deny that punishment is a proper response to crimes, but it is to insist that it must be determined and administered ethically.

### *Instrumentalism*

The second theme to guard against is an unduly *instrumental* understanding of criminal justice, the idea that there is something(s) that a criminal justice system is ‘for’ and to which purposes it is reducible. This is conceptually distinct from *managerialism* (Bottoms 1995), but is its natural ally. As punishment has become more politicised, governments in some countries have felt it necessary to convince the electorate that their policies will be more effective than their opponents’ in reducing crime (for the experience of England and Wales, see Downes and Morgan 2007). But in order to try to bring this about, they have had to order the governance of criminal justice through tight managerial arrangements and mechanisms of accountability.

Within probation discourse, the dominance of *what works* can suppress other vital characteristics of criminal justice. Instrumentalism values outcomes over processes and elevates ends over means. But the manner in which a sentence is carried out is critical

and should be congruent with its objectives (Duff 2001; Rex 2005). The values that the state articulates in and through its practices of punishment are (should be) *our* values. And, if punishment is to have integrity, there must be congruence between these values and the manner in which they are affirmed.

It is not true that anything is acceptable so long as it ‘works’. For that matter, some of the objectives that are set for criminal justice – for example, reduced reoffending and public protection – are largely beyond its reach in any case.

David Faulkner wisely insists that

*“Criminal justice is not only about pursuing, convicting and punishing offenders: it is also about the exercise of the state’s powers of interference, intrusion, control and ultimately of coercion, and correspondingly the limits which should be placed upon those powers.” (Faulkner 2006:349)*

But this is not something that the state itself readily grasps and indeed is at risk of overlooking altogether in its enthusiasm to establish its credentials in law and order. *Of course* probation should set objectives and strive to achieve them, but it is not reducible to these objectives and its value rests as much in what it represents and stands for – principally the values of social inclusion and a belief in the possibility of personal change – as in its contingent achievements.

### *Preventive justice*

The third theme is the rise of *preventive justice*. Several scholars have drawn attention to and debated the significance of a shift in some countries from the traditional criminal justice projects of the just punishment and rehabilitation of offenders towards an emphasis on crime prevention (for example, Garland 2001). This same trajectory has led to modifications and compromises to the safeguards of due process (see for example Ashworth and Zedner 2008 and references there cited). In the penal system, this has led to a range of

preventive sanctions and measures that are less a response to what an individual has done than a pre-emptive intervention in anticipation of what it is believed that they might do.

In practice the distinction is not always easy to draw: pre-emptive interventions in the penal system are taken mostly against those with a (typically significant) previous record of offending, so that what is *retributive* (due punishment for wrongs done) and what *pre-emptive* is not always distinguished. But plainly these developments raise hard questions about *proportionality*. Proportion used to relate to an appropriate fit between the crime and the sanction, but this is now significantly complicated by the emphasis on prevention: proportionality may be exceeded to prevent crimes.

In England and Wales, a sign of this is to be found in the Criminal Justice Act 1991 which, when prescribing the length of custodial sentences, stated that this should (normally) be “commensurate with the seriousness of the offence ... “(s. 2 (2) (a)) but allowed that this could be exceeded “where the offence is a violent or sexual offence, for such longer term ... as in the opinion of the court is necessary to protect the public from serious harm from the offender.” (s.2 (2) (b)). More recently, the *indeterminate sentence for public protection* (Criminal Justice Act 2003, s. 225) has had an enormous impact on the prison population of England and Wales. The title of the sentence proclaims its purpose and the Court of Appeal has clarified that “Although punitive in its effect, with far-reaching consequences for the offender on whom it is imposed, it [the IPP] does not represent punishment for past offending. The decision is directed not to the past, but to the future.” (Quoted Rose 2007). As Rose (2007) explains, preventive sentences have a long (and undistinguished) history, but the contemporary emphasis on crime prevention creates a political context in which they are likely to proliferate. Faith in the accuracy of actuarial instruments of risk assessment further claims to legitimise such interventions.

All of this has considerable implications for probation. In England and Wales, probation has claimed public protection as one of its purposes and

the assessment and management of risk have come to define probation’s work: the tiering in the Offender Management Model (NOMS 2006) is essentially a gradation of risk and assignment to a tier is the principal determinant of the nature and degree of probation intervention. Risk and crime prevention priorities have been influential in other countries too and have altered the character of probation (Menger and Hermanns 2009). It is not here argued that prevention should not inform probation practice, but it is, as before, to insist on a principled regulation in a complex ethical area.

Punitivism and public protection have a more immediate impact, perhaps, on imprisonment than on probation. Yet most policies that impact on prison have profound implications for probation as well. In some countries, the prison and probation services are part of a single agency and in most countries probation staff work with prisoners during their period of detention and in resettlement after their release. Probation-administered sanctions are often presented as *alternatives to custody*, so conceptions of probation change to adapt to different understandings of the character and purpose of prison. For example, in the attempt to establish community sanctions as ‘credible alternatives to custody’ probation agencies in some countries (and certainly in England and Wales) has tried to bring it about that community sanctions are and are seen to be *punitive*.

It has been argued here that each of these themes marginalises rights and can come to see them as obstacles to achieving the ‘purposes of criminal justice’. But as Garland puts it

“... the pursuit of values such as justice, tolerance, decency, humanity and civility should be part of any penal institution’s self-consciousness - an intrinsic and constitutive aspect of its role - rather than a diversion from its ‘real’ goals or an inhibition on its capacity to be ‘effective’.” (Garland 1990: 292)

This is among the compelling reasons why the values of probation need a robust reaffirmation.

## PROBATION VALUES

In England and Wales, until the mid-1990s, the values of probation were taken to be the same as the values of social work. In an influential paper in 1995, Mike Nellis encouraged probation to look beyond 'social work values' and argued for a broader *community justice* ethic grounded on anti-custodialism, restorative justice and community safety. At around the same time, the government was rejecting social work as an adequate characterisation of probation practice. Unlike Nellis, however, the government had no strong ethical vision to put in the place of social work and the values of the profession were largely displaced by a set of organisational and instrumental objectives (Lancaster 2003). It is not that ethical arguments disappeared, but that, at least within the formal policy pronouncements, they were suppressed by an emphasis on objectives - specifically the aim of reducing offending - which was taken to have self-evident ethical justification.

Comparable trends were apparent in other European countries. A definitive survey of European probation practice (van Kalmthout and Derks 2000) found a tendency in 'almost all countries' away from social work concepts and values and towards an alignment with the goals of other criminal justice agencies - notably, risk management, public protection and punishment. But to assess the ethical considerations it is necessary to know much more about *how* these objectives are to be pursued and what is to be probation's distinctive contribution.

The value of the Probation Rules is that they aspire to represent and prescribe probation on the basis of the Convention. They begin, as it were, with *what is right* rather than *what works*. Rather than being seen as obstacles frustrating punitive or reductive purposes, rights become the foundation and inspiration of policy and practice.

There are many reasons why an ethical statement of probation should be adopted internationally. As Coyle and van Zyl Smit observe "... an international dimension allows one to recognise abuses that might otherwise go unnoticed" (2000: 262). Again, some key human rights concepts are inherently

comparative. For example, how is it to be determined whether a sanction is *proportionate* without reference to the practices of other countries? How is it to be decided if imprisonment is indeed being used as a *last resort* (as the European Prison Rules require) except by comparison? Finally, when criminal justice is so intensely politicised in many countries, the accountability of states to an international community is an indispensable check on immoderate policy.

## PROBATIONERS' RIGHTS

The position of those subject to community sanctions and measures is no doubt more secure than that of prisoners. The total dependence and vulnerability of serving prisoners makes their rights especially precarious and in need of vigilant defence. Yet what Durnescu (2010) has aptly called the *pains of probation* are significant and real and a reminder that probation too involves hardships and constraints that need ethical guidance and conformity to human rights standards.

At the same time, the long-term policy to make community punishment 'credible' - with increased constraints on liberty, a demanding content in the penal sanction, increases in control and harsh enforcement - could imperil the rights of offenders under probation supervision.

Three areas for particular vigilance (Canton 2009a) are:

1. Data protection, personal privacy and disclosure - how are decisions to be taken when there are competing claims about the need to disclose personal information about offenders who are believed to pose a risk (and therefore threatening the rights of potential victims) and, on the other hand, the rights of such former offenders to privacy and safety from harassment?
2. Mechanisms of electronic surveillance - both tagging and tracking - have considerable invasive potential (Independent 2008), not only for offenders and their families, but for potential offenders as well (and therefore for all of us - for who of us may safely be assumed not to be a potential offender?) Many new technologies

have unintended consequences and this implies periodic assessment and revision of the realities of implementation to ensure a principled assessment of their use.

3. Enforcement – increasing numbers of people are in prison not because of the offences they have committed or even on the basis of the risks they are believed to pose, but because of their failure to comply with the requirements of supervision (Maruna 2004). This is especially the case for those released early on licence, but is increasingly a concern for community supervisees as well. In its quest for ‘credibility’, probation agencies are likely to want to show that enforcement is rigorous; at the same time, more demands in community sanctions increase the prospect of non-compliance (Canton and Eadie 2005).

As with imprisonment, the curtailment of rights involved in the implementation of community sanctions and measures should be parsimonious, with as many rights retained as is consistent with the implementation of the court’s order. The infringement of rights should not be disproportionate to the offence and interventions that impact on these rights should be justified in terms of their furtherance of a legitimate penal aim.

## CONCLUSIONS

The prospects for the adequate implementation of the Rules are uncertain. They are likely to encounter many of the problems identified by Bishop and Schneider (2001) in their reflections on the European Rules on Community Sanctions and Measures. In particular, in countries with nascent probation agencies, there is a risk of the vicious circle described by Bishop and Schneider: low credibility of probation-administered sanctions means they are infrequently used; this poor take-up leads to inadequate resources, resulting in indifferent implementation - which further undermines the sanctions’ credibility and the standing of the Probation Service.

The Rules also represent a form of policy transfer and will encounter challenges associated with that project (Canton 2009b). While the Rules do not originate in the policies or practices of any one country, they are likely to command more confidence and understanding in some places than in others. Their implementation will be mediated by a set of complex and interacting variables – legal frameworks and traditions, politics, economics, culture. Where the Rules challenge practice, they may sometimes lead to change, but it may also happen that the Rules will be disregarded.

Yet while all those associated with their composition hope that the Rules will serve as a stimulus to the enhancement of probation through their proposals for sound organisation and good practice, there is a sense in which it is the idea of framing and adopting such Rules that is of more lasting importance. The Rules represent a commitment to guiding the development of probation within the spirit and letter of the Convention. At their best, they might become the inspiration and origin of probation work in Europe; at the least, they may serve as an ethical constraint upon the potential excesses of punitivism, preventive justice and unduly instrumental conceptions of the work and value of probation.

## NOTES

<sup>1</sup> Rob Canton is Professor in Community and Criminal Justice at DeMontfort University, Leicester. He has been involved in the development of probation practice in several countries, especially in eastern Europe. He was one of the two experts appointed by the Council of Europe to work with the PC-CP to develop the European Probation Rules.

<sup>2</sup> Since at least one Europhobic British political party tried to misappropriate Churchill’s legacy in their own political interests in the run-up to the general election of May 2010, it is worth underlining the use of the expression “United States of Europe”. This is a term that hardly any British politician would (dare to) use nowadays, but expresses Churchill’s commitment to that wider political vision.

<sup>3</sup> I owe this example, and many wise insights in this area, to Professor Dirk van Zyl Smit.

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