Community punishments in Spain: A tale of two administrations

Chapter · January 2016

DOI: 10.4324/9781315768489-11

2 authors:

Ester Blay Gil
Universitat de Girona
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Elena Larrauri
University Pompeu Fabra
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COMMUNITY PUNISHMENTS IN SPAIN: A TALE OF TWO ADMINISTRATIONS.

Ester Blay and Elena Larrauri[1]

Abstract: Community Punishments has historically been an alien concept in Spain. With a rationale of proportionality and avoiding the harms of prison, rather than positive intervention in the community, the discussion is about *alternatives* to prison. Community punishments with some requirements and supervision were introduced in the 1995 Criminal code, albeit they have never developed, although increased attempts in Catalunya, into a full probation system. In addition to rehabilitation and proportionality, punitive and managerial narratives have been key in their development. The current landscape of punishments in the community cannot be fully comprehended without reference to prohibition orders, defended with a victim protection and incapacitation logics.

1. INTRODUCTION

'Community punishment' is not a concept used in Spanish policy, legal discourse or academic literature. Instead, 'alternatives to prison' or 'alternative punishments and measures'[2] are the current expressions used to refer to fines, suspended sentences with and without requirements and unpaid work. One reason why academics and practitioners keep referring to 'alternatives to prison' is probably the fact that the main rationale for defending community punishments is to avoid a prison sentence; the goal that is emphasized is not so much to achieve something positive (through supervision in the community) but to avoid something negative (imprisonment). A second reason that might explain the lack of attraction of the concept of 'community punishment' is probably that although judges when sentencing take into consideration the rehabilitation needs of offenders, their main thrust is to provide a proportionate penal response, which can often be more easily achieved through a fine. The final reason is perhaps that there is no 'probation system' (and no 'probation officers' as such) in Spain. Historically suspended sentences carried no requirements (except not to reoffend, which

[1] This research has been carried out under Research Projects DER2012-32150 "*Supervisión en la comunidad: intervención en la fase de ejecución de las sentencias. Especial énfasis en la violencia de género*" funded by the Ministerio de Economía y Competitividad (MINECO) and "*Penologia europea: La seva influència en el sistema de penes espanyol*", Generalitat de Catalunya, Agaur, SGR 2014-2016. We are grateful to Marta Martí for her help with the references and to Consuelo Murillo for her thoughts on the breach of community punishments.

[2] For example the Royal Decree that regulates them provides a list but no generic name; the Spanish Interior Minister speaks of 'Alternative Measures', and the Catalan Justice Department of 'Alternative Penal Measures'.

was supposed to be achieved by the threat of the prison sentence). Although 'supervision' and 'control' have been increasing (see Section 3 and 4) we may presume that in Spain both elements are still relatively rare; even in Catalonia, where supervision in the community is more developed, the terms *probation* or *community punishments* still tend not to appear as such.[3]

For the purposes of this chapter we understand 'community punishment' as referring to those sentences that do not consist of a deprivation of liberty, in a prison or mental health institution or detention centre, but do involve some level of supervision by an agent whose mission is to enforce the sentence imposed by a penal judge, by controlling and assisting the offender.

It is important from the outset to underline that there are two criminal justice administrations in Spain: whereas the criminal code and the judicial system is common to all Spanish territory, the implementation of sentences (both prison sentences and community punishments) is carried out by two administrations: the Catalan[4] and the Spanish ones.

It is also important to highlight some features of the Spanish jurisdiction that might have an impact on the way community punishments are imposed and enforced: a) in Spain *sentencing is narrowly determined by law*. This gives judges the impression that their discretion to resort to community punishments is very limited; b) for the vast majority of offences imposing *a prison sentence is an option* given by the lawmaker (i.e. the Parliament via the Criminal Code) which gives an indication that prison is an appropriate response in that case[5]. Actually the custody threshold (this is, when a custodial sentence is considered appropriate) is determined by law and it currently stands at 3 months;[6] c) when the sentence is up to two years judges may still avoid entrance into prison by *suspending sentences*, only if the person has no previous criminal record[7]; d) there is no *'sentencing hearing'* and no pre-sentence report; this means that the information about the offender available to the sentencing judge is limited and, to a certain extent, this might lead him to rely more on the seriousness of the offence and less on the individual information that would justify the use of a community punishment.

Until recently in Spain 'community punishments' were limited to suspended sentences[8]. The use of suspended sentences might be considered a 'history of success' in light of their

[3] There might be other reasons. The word community is not frequently used in common language.
[4] Catalonia being one of 17 Spanish autonomous regions, but the only one with powers to implement sentences.
[5] Only in 'misdemeanors' (*faltas*) does the criminal code generally avoid prison as an option.
[6] Only when a prison sentence of less than 3 months is imposed it is automatically suspended or transformed into a fine or an unpaid work order.
[7] For a comprehensive review of research on suspended sentence see Cid (2009).
[8] There are of course fines. However these carry no supervision. Therefore we focus on the suspended sentence which at least carries some requirements (i.e. not to reoffend) and therefore implies a 'control' element.

widespread use (Cid/Larrauri 2002) and their impact on decarceration. One could suspect that prison rates in Spain would be even higher if suspended sentences were not available to judges (Cid 2008; Díez Ripollés 2006). However, as in other European jurisdictions (Snacken/van Zyl Smit/Beyens 2014), suspended sentences have not usually been granted on the basis of an individual analysis of the case and have *not involved any supervision*. This might be due to the fact that the law establishes very strict requirements in order for judges to grant suspensions (prison sentences must be two years or less and the defendant must have no criminal record) and perhaps also reflects a form of judicial education and culture that emphasizes desert considerations over rehabilitation (in Beyens/Scheirs' (2010) terms, a 'neoclassic orientation'). Additionally, individual information on the offender is not available since generally, as we have mentioned, there are no pre-sentence reports available to the courts (Larrauri 2012; Larrauri/Zorrilla 2014).

The major change in this system (based on prison, suspended sentence, and fines[9]) came as a result of the new democratic 1995 Criminal Code (Cid/Larrauri 1997; 2005) which introduced a) the possibility for the judge to substitute prison sentences imposed on recidivist offenders for fines or home arrest; b) the possibility for the judge to impose requirements (beyond merely not reoffending) to suspended and substituted sentences; and c) community service or unpaid work as a sentence. From this moment on a new system began to develop: this system included new penalties available to judges; a supervision system, albeit limited, by the 'probation service'[10]; and judicial supervision of the implementation of these penalties (Blay 2011). This new supervision system is more developed in Catalonia than Spain (Martin/Larrauri 2012) and although it does not carry the name of 'probation' it does involve supervision of unpaid work sentences and the requirements attached to suspended sentences (mainly but not exclusively attendance at educational treatment or drug abuse programmes) by social workers (employed or subcontracted by the Justice Department).

Today, then, community punishments in Spain basically consist of 'front end' measures such as unpaid work (*trabajo en beneficio de la comunidad*), suspended sentences with some requirements (*suspensión de la pena con reglas de conducta*) and a specific suspended sentence for drug users (*suspensión especial para drogodependientes*); and as 'back end' (or release)

[9] There are of course other types of punishments available to judges such as disqualification orders, for example. However these tend to be used in addition to prison, fines, or suspended sentence.

[10] We tend to write 'probation' in quotation marks because the origins, characteristic elements and evolution of probation have not happened in Spain in similar ways as in UK and there is no Probation Service as such. Sentences tend to be more determinate, there is no sentencing hearing, there is no general use of presentence reports and supervision tends to involve only attending specific programmes. All these elements that characterize probation can only be found in a very 'limited' way, in Spain, and perhaps in a less limited way in the Catalan system.

measures, the two main possibilities being open prison[11] (*régimen abierto*) and parole (*libertad condicional*). [12]

The landscape of punishment cannot be fully pictured, however, without reference to the growing field of *prohibition orders* available to the sentencing judge when the offender is found guilty. These orders, which may have a victim protection rationale (e.g. prohibition to approach or communicate with the victim) or an incapacitative one (eg. prohibition to drive, to undertake specific jobs) are important because they signal a shift, both towards the consideration of victims' needs, and towards placing increasing importance on 'preventive justice' (Ashworth/Zedner 2014) by the courts through specific tailored punishments (imposed in addition to other sentences). These are to some extent 'supervised' by 'probation officers'.

2. FOUNDATIONS

The possibility of conditionally suspending prison sentences was introduced in Spain in 1908 following the Franco-Belgian *sursis* model (Navarro 2002); subsequently, the penal landscape was constituted mainly by imprisonment, suspended sentences and fines.

As we mentioned in the introduction, the major shift for community punishments in Spain came about in 1995 (Cid/Larrauri 1997). The new Criminal Code aimed precisely at increasing the use of alternatives to prison. Thus, in the first place, the Code allowed for prison sentences of up to two years to be suspended, instead of prison sentences of up to one year as was the case previously. Moreover, new alternatives were introduced: unpaid work, the possibility of substituting prison sentences and of adding requirements to suspended sentences; the possibility of suspending a prison sentence of up to three years for recidivist offenders with a drug abuse problem (previously two years); and the possibility of substituting prison sentences of up to two years by fines or home arrest for recidivist offenders.

Rehabilitation (in the particular wording of "re-education and social reintegration", *reeducación* and *reinserción social*) is spelled out in the 1978 Constitution as an end at which punishments should aim[13]. However, and because the professionals drafting the new Code were heavily influenced by critiques of rehabilitation at that time, the main reason to introduce these

[11] Open prison usually involves individuals spending the day out of prison, either working or studying, and going back to prison for the night.
[12] Although open prisons and parole have been analysed by Spanish scholars, the focus has been on the problems to have access to them, not on the administration, supervision or experience of them.
[13] The exact wording of the Constitutional precept is that *deprivations of liberty* "shall be oriented towards reeducation and social reintegration" (art. 25 of the 1978 Constitution); a wide reading of the precept, common in literature, extends this orientation to punishments other than imprisonment.

new punishments was probably not so much influenced by rehabilitation as by 'decarceration' goals. The idea was not so much to rehabilitate or *re*-socialise with community punishments, but to avoid the *de*-socialization which imprisonment involved (see Muñoz Conde 1979, 1985; Larrauri 2001).

Although there is an argument that these punishments can achieve better rehabilitation and reintegration than imprisonment, it is important to notice that another main thrust for applying them is proportionality. According to this logic, alternatives to imprisonment for minor offences are developed not because they are more rehabilitative, but rather because prison is deemed to be too severe a punishment for certain offences and in certain circumstances in the first place (Mir 1984). This emphasis on the proportionality of the sentence (rather than on supervision) and on avoiding prison's de-socializing effects (rather than rehabilitating) is probably also part of the explanation of the slow growth of the organization needed to supervise the implementation of these community punishments.

The importance of philosophies like proportionality might also help explain why judges are credited with imposing these community punishments in an 'automatic' way (i.e. with scant individual information and rarely with individually tailored requirements). The ideas of the severity of the offence and the determination of punishment by the law are the main explanations for imposing any sentence in Spanish judicial culture. Moreover, according to our judicial culture alternatives to prison are primarily for first time offenders, who do not need (nor deserve) intervention or control. As a result, for these first time offenders, fines and suspended sentences (with no requirements but not to reoffend) are the appropriate responses. Once the person has a criminal record he no longer 'deserves' the alternatives to imprisonment and in general will get a prison sentence.

As we mentioned in the introduction, after Franco's dictatorship the so called Criminal Code of Democracy (the 1995 Criminal Code) imported some elements from the English tradition like community service orders and the possibility of adding requirements to a suspended sentence involving some form of supervision, though not probation as an autonomous punishment (Cid/Larrauri 1997). This led to the development of an incipient probation system, which was more visible in Catalonia. The Catalan administration developed a system for adults from within the juvenile system (Martin/Larrauri 2012). This system rested on the principal elements which characterize probation elsewhere: pre-sentence reports and supervision in the form of interviews and/or in the form of compulsory attendance to an educational programme; programmes mainly focused on gender violence, driving offences and treatment for drug offenders.

Although more requirements were added to supervision orders, the people on whom these community punishments were imposed were mainly the same as before: first time offenders (Blay 2010). This is mainly due to the requirements for suspending a prison sentence, i.e., suspension only applies to prison sentences no longer than two years and for those without criminal records[14]. These rules added to a judicial culture that sees alternatives as something to be granted only 'once' and which sees such sanctions as something less than 'real' punishment, which is still embodied only by the prison, might explain the reason why despite the Criminal Code of Democracy (in 1995) the sentencing pattern did not change radically.

3. DEVELOPMENT

More recently, the narratives around community punishments in Spain have entered a new stage – moving beyond proportionality and decarceration. After a first stage of a penal system based almost exclusively on prison, suspended sentences and fines, and the later introduction of alternatives to prison in the 1995 democratic Criminal Code, this (third) stage can be said to begin in 2003, when a major reform in the criminal code took place.

The climate in 2003 was one of soaring imprisonment rates (which had been growing since the 1970s – González Sánchez 2011) and of growing punitivism (i.e., the reform, for example, made the requirements to have access to open prisons more demanding). At the same time, however, these reforms enlarged considerably the scope for community penalties: they introduced unpaid work as a direct punishment for the less serious forms of domestic violence (thus judges had the direct choice between prison and unpaid work)[15]; and they established the possibility of unpaid work to substitute for prison sentences for recidivists (while maintaining suspended sentence for first time offenders)[16]. These reforms additionally introduced prohibition orders, such as the prohibition on approaching a certain place or on communicating with the victim (*penas de alejamiento*), which may be and often *have to* be imposed by judges (because the law requires it) together with, or as part of, community punishments.

In this stage the justification for punishments included a strong new emphasis on protecting the victim. The idea was probably to introduce more intensive and therefore *credible* alternatives to prison for recidivists (i.e., more requirements, controlling and supervised). Thus,

[14] And substitution of prison sentences which was possible for repeat offenders was scarcely used (Cid/Larrauri 2002).
[15] In the 1995 criminal code unpaid work could only be used as a substitute for home arrest and in cases of fine default, hence the initial rare use of this sentence.
[16] Substitution of prison sentences for recidivists was possible since 1995, but only by a fine. It was thought that allowing judges to substitute prison sentences also with unpaid work would increase its use by judges.

for example, if prison sentences for intimate partner violence are suspended or substituted, requirements of attending an educational programme and prohibition orders must *always* be imposed, the law not giving room for judges to decide otherwise.

Although more requirements were added, this probably did not change the main picture: culturally, community punishments are considered only adequate for first time offenders, as an act of mercy for a first offence. They are not seen as 'real' punishments, partly due to inadequate or inexistent supervision (in Spain) and many practical enforcement problems which create a perception that these are 'never enforced' (Blay 2007).[17]

More recent evidence, from our data gathered from 2012 onwards however, indicates that more community punishments are being imposed on repeat offenders, i.e. prison sentences are beginning to be substituted, and increasingly unpaid work orders and fines are imposed on offenders with criminal records, so this picture could be changing (see below section 4)[18].

Finally, reparation for the victim had only been a visible feature of the juvenile system, and although there were attempts to introduce victim-offender mediation for adults, they really never took hold, and even though they are still functioning they are kept at the stage of 'experimental pilot' and at the margins of the sentencing system.[19] There are some very recent (2013-14) initiatives to increase the scope for mediation in the area of criminal law. Though these initiatives are getting stronger, they are driven by individual judges and not so much by law makers (JA Rodríguez, personal communication). Beyond specific attempts to introduce reparation schemes, a narrative of reparation has also been used in political, administrative and judicial discourses when justifying the introduction or use of unpaid work as a sentence.

4. RECENT TRENDS

We will now explain the development of community punishments in terms of numbers and the problems they currently face. In this section we will concentrate on *suspended sentences* (with an obligation to attend an educational programme, or drug treatment programme), and *unpaid work*. Although some suspended sentences do have other requirements (like an interview with the administration officer) these are harder to quantify and little is known/published about them.

[17] We do not have general reliable data on judicial decision-making since the 1998 sample used by Cid/Larrauri 2002, although this conclusion may be inferred from other related studies (Antón/Larrauri 2009; Blay 2011).
[18] Preliminary statistical analysis of the results of a pilot undertaken in Barcelona involving 200 judicial rulings show that 35% of offenders receiving unpaid work have criminal records, as do 23% of those who are fined (Varona/Blay, in progress).
[19] In 2011 there were 1234 cases diverted to mediation and 1037 in the next year.

Table 1 shows the dimension of the penal field in terms of *sentences imposed* by the courts in Spain.

Table 1: Evolution of imprisonment/fines/unpaid work (dimension of/in the penal field) for Spain, including Catalonia

	2007	2008	2009	2010	2011	2012	2013
Prison	121217	129890	139663	141849	135713	142444	153950
Privation of liberty for fine default	11796	16734	11023	7873	7202	1667	41
Prohibition from a specific job	70813	84852	89331	94312	93566	103619	111335
Prohibition to drive	57916	79664	79699	75964	79453	74145	72197
Prohibition to bear arms	26983	29943	31175	31952	28966	28223	28578
Prohibition to approach the victim	27437	27413	-[20]	34881	30707	30516	32378
Prohibition to communicate with the victim	10895	19435	4269	4959	10265	10934	28155
Unpaid work	13803	91045	110659	102007	56426[21]	54070	56769
Fine	96717	145819	158250	126199	104783	108373	121971

Source: National Institute of Statistics

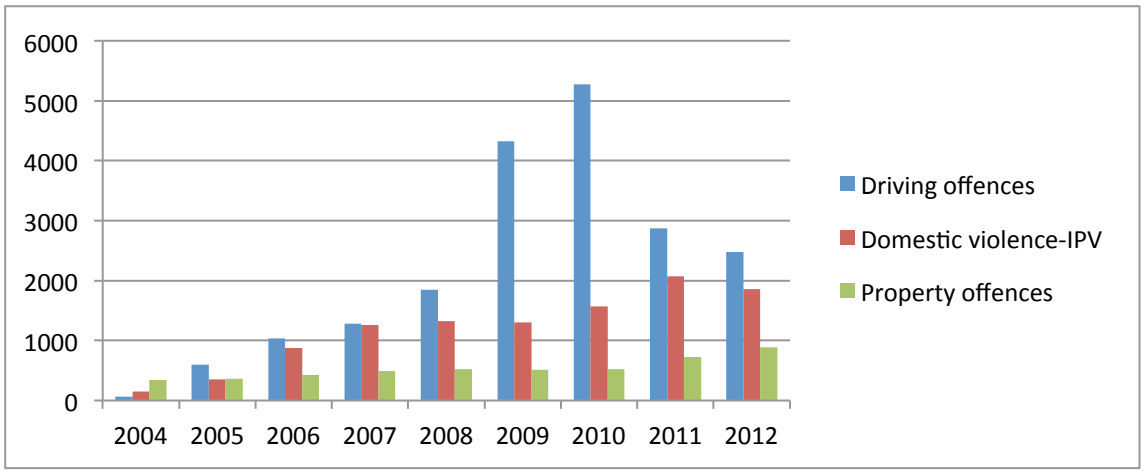
This table shows the number of sentences imposed by Spanish courts. This does not reflect how many prison sentences have been suspended or substituted, since this statistic is not published. As far as we know, prison sentences are suspended in 84% of the cases where it is legally possible to suspend, and they are substituted only in 12% of the cases where they may be substituted (Cid/Larrauri 2002). The table reflects the fluctuation in unpaid work sentences and the general increase in the number of prohibition orders imposed.

In order to picture *how much* supervision in the community there is, in Spain in December 2013 there were 56,103 prison inmates (sentenced), and there were approximately 52,203 individuals under supervision in the community[22].

The Figure below offers some data related to the Catalan Administration. This figure reflects the offences that community punishments are used for and the absolute number of individuals serving community punishments (mainly unpaid work and suspended sentences with requirements) in Catalonia.

Figure 1: Evolution of unpaid work and suspension with requirements in Catalonia: type of offence

[20] No data for 2009 was published on the prohibition to approach the victim.
[21] This sharp drop in the number of unpaid work sentences is due to a change in the Criminal code introduced in 2010 that allowed judges to punish driving offences with prison, a fine *or* unpaid work, instead of prison *or* a fine and unpaid work, which we refer to when dealing with recent trends.
[22] This is approximate because it is the number of sentences, not of offenders, under supervision. The number of offenders does not regularly appear in the Spanish statistic.



Source: Data from the Catalan Service of Alternative Measures.

From the preceding Table and Figure and a review of available literature we can offer the following reflections on the evolution and current application of community punishments following the logic of rehabilitation, punitive, reparative and managerial discourses (Robinson/McNeill/Maruna 2013).

4.1. Community punishments are used to punish specific types of offences. The penal reform of 2003 allowed *domestic violence/intimate partner violence and driving offences to be punished by a community sentence*. Thus, in the case of unpaid work, for example, it is established as a direct punishment[23] for intimate partner violence, and the judge may choose between prison and unpaid work. The rationale of the reform was that prison should only be used for the more serious cases, and fines were not appropriate to punish domestic violence (they could affect the victim's right to compensation). Unpaid work was for this offence just punitive enough to be acceptable as an alternative to prison. In the case of driving offences the rationale was probably to increase the punitive bite of the fine (see 4.2) as an alternative to imprisonment.

This leads to the fact, reflected in Figure 1, that, in practice, community sentences are mainly used for intimate partner violence and driving offences. Increases and decreases in the use of community sentences directly correlate to reforms in the criminal code in these two categories of offences.

4.2. The penal reform of 2003 *increased the severity of community sentences*. This evolution is reflected in the increase in the maximum number of hours/days of unpaid work, which were initially up to 380 hours, and were increased to 180 days of work (amounting to

[23] This means judges do not have to resort to suspended sentence or substitute a prison sentence, which involve longer procedures, but may directly grant a community sentence.

1440 hours of work), and in the possibility, and in certain cases the legal obligation, to add obligations to suspended sentences after the 2003 Criminal code reform. These punitive increases were justified in terms of unpaid work needing to reinforce its punitive credentials if it was going to function as an *alternative* to prison. Suspended sentences with the additional requirement of attending an educational programme have certainly witnessed an increase because from 2003 onwards when a judge decides to suspend or substitute a prison sentence for intimate partner violence the Code establishes that these requirements *must* be imposed. This reform was justified in terms of providing an alternative response to prison with more requirements, hence more *punitive* and with more content than 'only suspending' the sentence. As far as we know, besides intimate partner violence and to a lesser extent driving safety programmes in cases of suspending or substituting prison sentences for driving offences, judges make little more use of requirements for other types of offences (Varona/Blay in course).

4.3. Incipiently since 1995 but more importantly since 2003 we have witnessed the *development of different forms of supervision*. The two administrations responsible for supervising offenders in the community (Spain and Catalonia) have developed a slightly different orientation. Basic regulation on supervision is common to both territories, but its terms are vague enough to allow for considerable variation in how punishments are implemented by supervisors, and probably experienced by offenders. Although more research is needed on these variations, it can be suggested that the Catalan administration has more of a 'supervision and *probation*' ideology, reflected both at the level of official discourse of senior civil servants and working practices of individual supervisors (Blay forthcoming), whereas the Spanish Administration has a more 'sentence enforcement' orientation.

The nature and extent of supervision by the Spain's equivalent to probation officers has not to our knowledge been researched. It is difficult therefore to ascertain to what extent individual supervision (in the sense of a supervisory relationship between offender and officer) actually exists and what it consists of. However, an indication of this different orientation[24] might be seen in the fact that the supervision of community sentences in most of Spain is located within the Prison Service. In contrast, as we have mentioned above, in Catalonia probation officers (*delegats d'execució de measures)* came from the juvenile system and these professionals, mainly social workers and psychologists, play a central role in the implementation of suspensions with requirements and unpaid work in Catalonia.

4.4. Since 2003 we have seen the introduction of *risk assessment practices in the area of community sentences*. Several legal reforms affecting mainly driving offences (see 4.6 and footnote 21) have led to a reduction in the number of community sentences being implemented

[24] See also some more differences below in 4.4.

(Figure 1). This has been used as an opportunity by the Catalan administration to revise how supervision of unpaid work orders takes place. A risk assessment procedure[25] has been introduced, and offenders are tiered in three levels of risk and granted more or less intense levels of monitoring according to this assessment.[26] As a consequence, besides the enforcement of unpaid work, attendance at 'follow up' interviews with the supervisor are part of the community punishment for medium and high risk cases. As far as we know, this has not taken place in the Spanish context.

Risk assessment instruments are used in Catalonia by probation officers in cases of suspended sentences with requirements related to intimate partner violence offences[27] in order to determine priority and intensity in the management of cases (i.e., orders for high risk offenders shall be prioritized and more intensely supervised), and by psychologists who implement education and treatment programmes. Probation officers assess risk on the basis of the content of the sentence and an interview with the offender, but psychologists of the institution that delivers the programme use a standardised instrument, an adapted version of the Spouse Assault Risk Assessment instrument (SARA) (Andrés Pueyo/López 2005; Andrés Pueyo/López/Álvarez 2008 for an evaluation).

Part of the future of community punishments seems to be linked to the use of risk assessment tools.

4.5. *Formalisation and standardisation of judicial decision-making*. Specialised courts (*Jueces de Ejecución*) in the implementation of sentences (i.e., post sentencing decisions, such as suspending or substituting a prison sentence and imposing requirements, as well as supervising their enforcement) were introduced in 2000 in large constituencies, mainly with the aim of facilitating an expedient enforcement of sentences. In spite of this, formalisation and standardisation due to an enormous workload seem to be continuing trends by the new specialized courts both at the level of judicial imposition of community punishments and at the level of their supervision.

Community punishments are very standardised: although judges can choose among many requirements when suspending or substituting a prison sentence, judges tend not to make use of this discretion even though the Criminal code would allow them to do so. As noted above, this may be explained in part by the scarce use of pre-sentence reports by judges and thus the

[25] No instrument is used to assess risk in unpaid work cases, but supervisors use a previously established list of items thought to be relevant for this assessment.
[26] There is further need to study the type of supervision undertaken: the weight, length, depth and quality of the supervision, beyond legal regulation (Blay in course).
[27] Risk assessment tools are also used in the prison context in Spain to adopt some decisions (Martínez Garay 2014) and in the Catalan system (RISCANVI, Nguyen/Arbach-Lucioni/Andrés-Pueyo 2011). Additionally they might also be used by the Police, who are responsible for implementing victim protection/prohibition orders (Instrucción 5/2008 General Secretary of State for Security).

lack of personal and social information on the offender needed to individualise the punishment (Larrauri 2012; Larrauri/Zorrilla 2014 on pre sentence reports). Additional explanations of this lack of creativity in imposing community punishments might be the absence of an infrastructure in Spain to implement them, and high workloads in the Courts.

Regarding judicial supervision, this trend towards formalization is also explained, in part, by high workloads in the courts (mainly as a result of the increase in IPV and driving offences, formerly misdemeano~~ur~~rs or administrative infractions). In the context of a neoclassical culture (Beyens/Scheirs 2010), judges have adapted to an increase in the amount of work they have to deal with (not accompanied by an increase of resources) by supervising the enforcement of orders in a very formal manner (e.g. by limiting their control to hours worked or hours spent in a treatment programme) (Blay 2011). Moreover, judges do not tend to perceive that individual rights might be involved/infringed in the enforcement of community orders, so they tend to regard their supervisory task in this area as unworthy of judicial attention (in opposition to what happens with prison sentences, where it is very obvious that individual rights are involved) (Blay 2011). Also in judicial supervision prison is seen as 'the only real punishment'.

4.6. *The relevance of available resources*. Since 2003 some developments of community punishments indicate a marked managerial trend (Robinson/McNeill/Maruna 2013). Community punishments have been defended as *cheaper* responses to crime than prison. For example up to 2012 Catalan official statistics regularly featured the cost of one day in prison vs one day of community supervision. This idea of cheaper responses, together with the continental tradition of alternatives to prison not involving supervision (being suspended sentences/fines and thus needing few resources), has led to little public funding being allocated to the development of the appropriate personnel and infrastructure to implement them. This explains in part the limited development of a probation service as such in Spain.

The lack of sufficient resources has sometimes led to dramatic situations where orders could not be enforced and the statute of limitations prevailed; in some areas of Spain when such problems were at their worst, up to 90% of unpaid work orders expired (Blay 2010). The response to this situation (from 2007-2010) was not an increase in resources but rather changes in regulation. On the one hand, the Criminal Code was reformed, allowing judges to punish driving offences with prison, fines *or* unpaid work (instead of prison or fines *and* unpaid work). In practice, this led to an important reduction of the use of unpaid work for these offences (see Table 1). On the other hand, in order to facilitate the implementation of large numbers of orders, the Code allowed these sentences to be served in the form of group educational programmes, which were easier (cheaper) to organise than individual job placements for large numbers of offenders. The logic behind these reforms was to make the system sustainable, and thus it was a

managerial adaptation (adapting community sentences to resources, rather than the other way around).

A further development, privatization of the supervision of offenders, has also been resorted to in Catalonia (but not as far as we know to the rest of Spain), where supervision of community punishments is regularly contracted out to non profit organisations because it is deemed more appropriate from a managerial point of view (Larrauri 2010; Blay 2010; Martin/Larrauri 2012).

4.7. *Legitimacy of community punishments?* The legitimacy of community sentences was arguably at its highest when they were only an aspiration to be introduced in Spain. In the second stage, when they were introduced in the new criminal code in 1995, legitimacy was not drastically damaged because their scarce presence in the punishment system was attributed to a lack of use by judges (Cid/Larrauri 2002). [28] From 2003 their legitimacy has been damaged mainly due to law reforms that have made it mandatory to implement them and that have led to a great increase in the number of sentences being passed (mainly unpaid work for driving offences and educational programmes for intimate partner violence). Since the lawmaker provided no additional means to ensure this greater number of sentences could be appropriately implemented, this led as we have seen to a vast majority of sentences being not complied with.

Since legitimacy has different audiences maybe it is helpful to distinguish among judges, offenders and the justice administration. Our contention would be that community punishments are struggling for legitimacy in the sense that they remain somehow an alien concept and are not yet an embedded part of the penal landscape for the reasons previously explained (see Introduction).

On the other hand, how do we measure the legitimacy of community punishments? Being used by *judges* might give some idea of their legitimacy (especially when they may impose other punishments), and in this sense, as the statistics above have shown, they would seem to hold a certain legitimacy for them. However, according to our own qualitative research on the views of the majority of judges (Blay/Larrauri 2011; Blay 2011), sometimes a community sentence is used because judges do not want to resort to prison for a given offence in terms of proportionality, and a fine is not available, not because they think a community sentence is the most appropriate response.

An example of their limited legitimacy for the *law maker* might be the process followed since 2003: introducing unpaid work and educational programmes for only two types of offences, making them mandatory, not providing any additional means to ensure they could be effectively implemented, and finally changing again the law to try to limit their scope when it

[28] Actually from 1995 to 2003 it was not uncommon to hear that the Administration was providing more places for serving unpaid work than sentences imposed by judges (Blay 2007).

was clear that the system could not cope with the vast number of orders. [29] We would expect that a Parliament that believes in community sentences would at least promote the possibility of their implementation for other offences (particularly property crime), and create and appropriately fund a system of probation officers that would allow for their supervision, and which could finally convince judges that the option is not merely one between prison and impunity.

Regarding the *Administration* (that has to supervise and control offenders sentenced to educational programmes and unpaid work) we can observe a 'tale of two cities'. The Catalan *administration* has made an effort to develop front end measures, because both at a senior and at a practitioner level, officers identify themselves as *doing probation*. This may be linked to the fact that the adults' system stems from the earlier development of the juvenile system, based on pre-sentence reports and supervision in the community; it could also be linked to the religious tradition of the political party that has had the responsibility for the Justice Department for most of the time and finally, it may reflect a European influence[30]. This identity is reflected in the fact that the Catalan administration: a) does pre-sentence reports, b) has a structure of probation officers, c) has developed an accreditation process for non-profit organisations delivering supervision; d) has developed risk assessment procedures and instruments for offenders; e) makes an effort to ensure the coordination between the Administration and the courts specialized in the implementation of sentences (*Jueces de Ejecución)*; f) has provisions for implementing community sentences not only for primary offenders but also for higher risk and repeat offenders (Blay 2011 forthcoming).

No research has been published on the developments in Spain at an administrative level, so our knowledge stems from partial and anecdotal evidence. As far as we have been able to establish we can point to the following traits of the Spanish administration of community sentences: a) there is no mention of pre-sentence reports in regulations and there is no administrative body charged with preparing them; b) the supervision of offenders in the community is carried out by correctional social services (called open centres but physically in prisons); c) the delivery of the treatment and educational programmes is carried out by (public but) ad hoc institutions that do not have as sole purpose the supervision of offenders; d) no generalised use of specific risk assessment practices in the supervision and control of educational programmes and unpaid work, e) no comprehensive effort to establish a coordination between judges and the administration on the implementation of community punishments. Moreover the

[29] An additional indication is the abolition even of the possibility of asking for a Presentence report which is now not even mentioned in the new Royal Decree (Larrauri/Zorrilla 2014).

[30] For example Marc Cerón, Director of the Reparation and Penal Execution in the Community of the Catalan Administration has been the President of the European Organization of Probation, CEP, since May 2010.

participation in European forums tends to be minimal, albeit written reports for the CEP for example have been produced[31].

5. REFLECTIONS

Punishment in the community *as a concept* does not really make sense in Spain: the expression is not used in political, social or legal discourse, and in academic discourse it is a translation of the English expression and not a natural term. So, in this sense, community punishment is an alien concept and 'alternatives to prison' is the preferred term.

The 'alternatives to prison' model in Spain is still largely based on suspended sentences and fines, more with an emphasis on a reductionist aim than on supervision (understood as intervention, help, and control by the administration). Unpaid work and educational programmes have been introduced and used extensively, especially since 2003, and this certainly may reflect the limitations of an alternative system based on fines with no supervision. However no probation (or an alternative supervision system) has been developed, reinforcing therefore the lack of traction of 'community sentences'. The concept faces the same problems in Catalonia, but the supervision system is more developed for the reasons explained (see 4.7) and probably due to the previous existence of the juvenile justice system which has a long tradition of providing supervision as a way of helping juveniles *and* reducing confinement.

Punishments in the community may be seen to challenge the punitive penal climate, in the sense that they offer judges the possibility of avoiding prison sentences for certain offences, either directly or suspending or substituting prison sentences. However, at the same time, *they confirm a punitive penal climate*. They reflect increased severity in the sense that community punishments have evolved towards being more punitive than they were (e.g. longer unpaid work hours), and they often have a component of prohibition or control (prohibition to approach certain places or the victim as a standard requirement). In part because there is no tradition, and probably not enough resources for supportive supervision in the community, punishment in the community is in practice primarily about control. Prohibition orders/requirements, such as those prohibiting certain professions or activities, such as driving, or prohibiting the offender to approach or communicate with the victim, proliferate and are very often imposed on the very same individuals with community punishments involving supervision (and as we mentioned in Catalonia these requirements are to a certain extent being controlled by the probation officers – *Delegats d'execucio de mesures*). Moreover, the reaction to continuous breach in the case of a suspended or a substituted prison sentence is still a prison sentence, therefore we do not exclude

[31] See the online report on Spain in the CEP knowledgebase, for example (http://www.cep-probation.org/uploaded_files/Summary%20information%20on%20Spain.pdf).

the possibility that some people enter prison for breaching the education programme or the unpaid work and exhibiting a reluctant attitude, rather than for the seriousness of the original offence.

However, community punishment is not a static field and it obviously reflects wider social changes. After their introduction and limited use for some years, we witnessed a sharp proliferation of community punishments due to legal reforms (2003 and 2007) and further law reforms to restrict their scope (2010). It should not be ruled out that developments such as the introduction of risk assessment, better programmes, the European influence, economic reasons, the limitations of fines and unsupervised punishments, technological developments (electronic monitoring) all produce further moves from our traditional 'alternatives to prison' system.

In sum: community punishments are applied for a number of restricted offences in part because the main handicap they face is the strong cultural idea that they are not 'real' punishments. This is why they are only applied mainly to two types of offences and to a large extent to first time offenders. This is probably also the reason why, beyond legal reforms in the criminal code, no actual structure to implement community punishments has been created (introduction of presentence reports and probation officers). When they are implemented they are regarded as a 'one time' opportunity, and therefore not often imposed on people who have a criminal record. Although some community punishments involve 'supervision', this supervision has faced the problems of having to handle a very big increase in numbers over a short period of time. This has meant that supervision has developed in a formalized way and on occasions been privatized.

However, supervision has become more sophisticated in recent years due to the decreasing numbers and probably due also to the influence of European scholarship (Morgenstern/Larrauri, 2014). This means that risk assessments are being introduced and that besides offender behaviour programmes 'supervision' is being carried out through interviews by 'probation' workers, and that repeat offenders are increasingly kept outside ~~in the~~ prison (Blay forthcoming). This development is however different and more advanced in Catalonia than in Spain, thus leading to a tale of two cities.

In addition to these traditional community punishments (educational programmes and unpaid work) we witness that an array of 'prohibition orders' are being imposed by the courts on the same individuals. This is an indicator of the concerns to protect victims and maybe also a wish to enhance the punitive bite of community punishments. This implies that community punishments have a control dimension that might lead to an increased rate of breach. Unfortunately in some cases when the breach is persistent or the attitude is defiant some of these offenders might end up in prison for these reasons rather than by virtue of the seriousness of the original offence.

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