



This is a repository copy of *Consent and cooperation of the unfree – introduction to the Special Issue*.

White Rose Research Online URL for this paper:
<http://eprints.whiterose.ac.uk/87470/>

Version: Accepted Version

Article:

Morgernstern, C. and Robinson, G.J. (2014) Consent and cooperation of the unfree – introduction to the Special Issue. *European Journal of Probation*, 3 (6). 203 - 208. ISSN 2066-2203

<https://doi.org/10.1177/2066220314561147>

Reuse

Unless indicated otherwise, fulltext items are protected by copyright with all rights reserved. The copyright exception in section 29 of the Copyright, Designs and Patents Act 1988 allows the making of a single copy solely for the purpose of non-commercial research or private study within the limits of fair dealing. The publisher or other rights-holder may allow further reproduction and re-use of this version - refer to the White Rose Research Online record for this item. Where records identify the publisher as the copyright holder, users can verify any specific terms of use on the publisher's website.

Takedown

If you consider content in White Rose Research Online to be in breach of UK law, please notify us by emailing eprints@whiterose.ac.uk including the URL of the record and the reason for the withdrawal request.



eprints@whiterose.ac.uk
<https://eprints.whiterose.ac.uk/>

Consent and cooperation of the unfree: Introduction to the Special Issue

Christine Morgenstern, Ernst-Moritz-Arndt-Universität Greifswald, Germany

Gwen Robinson, University of Sheffield, UK

The idea for this special issue of the European Journal of Probation originates from discussions within a European academic network, the COST Action on Offender Supervision, which commenced its work in 2012.¹ In the first book resulting from its work (McNeill & Beyens 2013), which comprised reviews of literature relevant to four Working Groups, we promised to attend to certain 'cross-cutting' issues which we think are crucial to offender supervision because they concern all national systems or jurisdictions and because they concern common underlying values and offenders' rights in Europe (Morgenstern & Larrauri 2013).

All four of the COST Action's Working Groups have come across the issue of the offender's consent before or during supervision. Obviously, this question must be discussed from the point of view of the offender him- or herself and third persons affected by supervision: it thus relates to the interests of the Working Group (WG) on *Experiencing Supervision*. Equally, those who are responsible for supervising offenders have to deal with the question of how to obtain their consent and (if and) how to achieve their co-operation – a task for the WG on *Practising Supervision*. The WG concerned with *Decision-Making* has also been confronted with this issue because certain decisions are dependent upon or follow from the offender giving, refusing or withdrawing consent. And lastly, the issue also has a European dimension, relating to common human rights standards as well as cross-border implications and thus relates to the work of the fourth WG on *European Norms, Policy and Practice*.

So 'consent' seemed to be a compelling theme, to which a whole issue of this journal could easily be dedicated. The reader may however have noticed that we have also used the term 'co-operation' to describe the theme of this special issue. We did this in recognition of the multi-disciplinary nature - and interests - of our research network, and the potentially very different perspectives that could be brought to bear on the issues of interest here. These, we think, go well beyond consent in its purely legal sense, potentially incorporating attitudes, behaviours and negotiations over the whole length of a period of supervision and in a variety of possible contexts beyond the courtroom. We also thought it important to acknowledge that in the context of supervisory sanctions and measures, some degree of cooperation (or compliance) on the part of the individual is essential to its meaning and effectiveness, in a way that is not true of other types of penalty (McNeill & Robinson 2013). In any case, both terms (consent and

¹ www.offendersupervision.eu

cooperation) in our understanding are linked to the idea that an offender who is supervised must not be seen as a mere object of supervision but taken seriously as a person: they are thus both linked to the values of human dignity and autonomy.

But how do these ideas fit into criminal justice contexts? Two problems are immediately obvious: the first being that *consent* and *punishment* appear to be contradictory concepts. Why should someone have to consent to a punishment which is the consequence of his or her wrongdoing? That inevitably leads to the question of what punishment means, and what its aims or purposes are. Certainly it has something to do with inflicting pain, and to the extent that it has retributive aims it is difficult to see the relevance of consent. But when punishment claims to have consequentialist, communicative or restorative aims, concerning itself with the prevention of individual re-offending and/or the reintegration of the offender into society, it becomes easier to see the relevance of consent and co-operation as potentially important elements of an effective sanction.

The second obvious problem is whether and how an offender may give his consent *freely* within the straightjacket of the criminal justice system. If consent to a community sanction is not given, very often prison is the alternative, such that the offender is caught between a rock and a hard place (or if we put it in French, Dutch and German it might be even worse: the offender is forced to choose between the plague and cholera!). There is thus likely to be at least some pressure (if not coercion) on the offender in giving his or her consent, in that their choice is likely to be constrained by the (real or perceived) consequences of refusal (Day et al. 2004). There are arguably further complications when a supervisory sanction is a direct substitute for a custodial term, imposed by a judge or other legal actor with a view to relieving pressure on custodial establishments or minimising the harms of imprisonment. In such cases, should offenders be given the option to suffer the pains of imprisonment rather than the (potentially longer lasting) 'pains of probation' (Durnescu 2010)?

Further questions concern the way in which consent needs to be expressed: must it be explicit; or can it be implicit? Should it be in written or verbal form? A related issue is that the offender must know what he or she is consenting to, so what are the requirements for *informed consent*? How much, and what type of information is required? We may also wish to look closely at certain contexts in which consent is required from a legal point of view: for example because supervision is executed prior to a judicial decision and conflicts with the presumption of innocence; because it involves an obligation to work and may thus conflict with the prohibition of forced labour (Morgenstern 2010); or because it is connected to therapeutic interventions and may thus collide with ethical medical requirements.

There are also questions about the *temporal aspects* of both consent and cooperation in the context of punishment. For example, when in a criminal justice process (and to whom) should consent be given? Once affirmed, can it be assumed to endure? Given that

punishment is in most cases an ongoing experience, lasting months or years, should consent and cooperation be treated as dynamic concepts, subject to fluctuation, withdrawal, and perhaps even renewal? What are the consequences of such a stance for the enforcement of community sanctions and measures?

Existing European standards and norms in the field of offender supervision in the community indicate that there should be some common ground in Europe, even though only the standards of the *European Convention on Human Rights* are binding, whereas other standards developed by the Council of Europe as recommendations are not. The *European Rules on Community Sanctions and Measures*, adopted in 1992, state that “[a] community sanction or measure shall only be imposed when it is known what conditions and obligations might be appropriate and whether the offender is prepared to co-operate and comply with them” (ER CSM, No. 31). Another recommendation, from the *European Probation Rules*, asserts that “[a]s far as possible, the probation agencies shall seek the offender’s informed consent and cooperation in decision-making on matters of implementation” (EProbR, No. 6). Both these aspects, the active involvement of the offender as someone who ‘has a say’ in the probation process to make it work, as well as consent and cooperation as aspects of human rights, might be expected to have lost ground in times of increased punitivity and risk-based decision-making; however, these are empirical questions which require attention at the level of national jurisdictions.

The authors represented in this issue offer a wide and fascinating range of answers to many of the questions we have identified above, and we are delighted to be able to include both theoretical and empirical contributions from five jurisdictions: England & Wales, Greece, Croatia, Denmark and Norway. Three of the contributions come from England & Wales, and while some may argue that this is the typical overrepresentation of Anglo-Welsh and in any case native English-speaking authors, we defend our choice unhesitatingly, because each brings something unique to the table. That said, we have chosen to ‘top and tail’ our special issue two of these contributions because of what they share in common: both present perspectives on the intriguing story of the fall from grace of ‘consent’ in England & Wales. While *Rob Canton* presents the origins of consent in relation to the probation order and other community penalties in England and Wales and discusses its conceptual background, development and decline, *Peter Raynor’s* contribution focuses on the arguments and attitudes which lay behind its abolition. These accounts, we think, frame our special issue beautifully (though admittedly without presenting a very optimistic outlook).

In setting out to explore the significance of consent to community sanctions and measures (deploying England & Wales as an illustrative case study), *Rob Canton’s* contribution is the most wide-ranging, bringing to the fore fundamental questions about why consent is (or should be) valued; its importance in relation to community sanctions and measures of various types; and issues of choice and coercion in relation to consent. In addition to these ethical/philosophical questions, Canton attempts to unravel the

relationship between consent and cooperation, drawing attention to the complexity and fragility of both.

Maria Anagnostaki considers issues of consent and cooperation as they relate to the evolving range of community sanctions and measures in Greece. In a penal system which has traditionally valued the principle of minimum intervention, 'supervisory' sanctions and measures are a relatively recent phenomenon, borne largely out of managerial concerns with prison overcrowding. Anagnostaki teases out the implications of different types and degrees of intervention for "types and scales of approaches" to consent and cooperation in the Greek context.

Berit Johnsen and *Anette Stoorgard* present insights from Norway and Denmark, bringing a comparative perspective to our special issue. They argue that, despite different rationales for seeking consent and cooperation, both countries have adopted policies which enable offenders to be actively involved in decision-making processes concerning the imposition of a community sanction and sentence planning. This valuable comparison, in a nutshell, generally shows that the requirements of obtaining an offender's consent in both countries appear to live up to the above mentioned European standards which the authors consider to be an "indicator of humanity" in penal practice.

Ines Sučić, *Neven Ricijaš* and *Renata Glavak-Tkalić* introduce the Croatian probation system that, despite having much older roots, has only been in full operation since 2009. While the Croatian legislation at first glance seems to be well in line with the requirements mentioned above, a small qualitative study conducted by the authors reveals some problems in practice. Their study shows that probationers do not always realise in court that receiving and accepting a conditionally suspended sentence requires them to comply with the conditions set. The authors demonstrate how "shock, disbelief, resistance and sometimes even regret for not being sent to prison" impedes the development of a relationship between probation officer and client. They also show that the consent that later is required when the client needs to sign an "Individual Treatment Plan" is merely formal and has little to do with substantive cooperation during the period of supervision. One of the authors' conclusions is that "the execution of community sanctions starts at the court", and consequently this is where their suggestions for improvements begin.

Beth Weaver & Monica Barry present findings from their empirical study of high risk sexual and violent offenders' experiences of supervision. In their fascinating paper, they explore concepts of consent, compliance and cooperation, and the relationships between them, drawing on data from interviews with 26 offenders and 26 professionals responsible for their supervision. They illustrate how perceptions of enduring 'riskiness' on the part of supervisors ultimately undermine opportunities for genuine cooperation and encourage instrumental compliance motivated by little more than a desire to avoid recall to prison.

Finally, *Peter Raynor* presents a discussion of ‘consent to probation’ in England & Wales which focuses on the abolition of consent in the late 1990s and considers the implications of this and other more recent politically-motivated decisions relating to the theme of our special issue. Raynor concludes that what probation in England & Wales desperately needs is “a reconfigured and more traditional understanding of the purposes of probation, and of the relationship between punishment, help and consent”. This, he argues, will only be possible with reference to knowledge of the past and both its successes and mistakes.

The papers in this collection, coming from so many different backgrounds and with very distinct focuses, allow no clearcut conclusions. Nevertheless, it appears to us that some common themes emerge.

In virtually all papers we find examples of how, as *Maria Anagnostaki* puts it for Greece, ‘rhetoric and practice’ of obtaining consent and cooperation often diverge. The authors find several, partly overlapping explanations for this divergence. In Greece – and this may be true for other European countries like Italy that originally adopted a minimum intervention approach in criminal justice – it is attributed partly to the fact that these systems do not cater for assistance and support by agencies like the probation service and therefore so far have not developed a practice to actually achieve active and lasting cooperation by offenders/clients. In Croatia, one explanation given is the lacking sensitivity for and understanding of the probation process of judges and lawyers at court that leaves the difficult task of informing and motivating offenders to probation officers. At this point, their clients have already accepted their community sentence, having bought a ‘pig in a poke’ (or, as in German, a cat in a bag). Yet another explanation centres on managerialist and security-oriented approaches that concentrate on formal compliance rather than on enabling cooperative relationships.

We also see examples of how attempts to ensure consent and cooperation may be problematic in certain contexts, as we alluded to above. *Anette Stoorgard* and *Berit Johnsen* draw our attention to the fact that often the offender is involved and his or her cooperation is sought at the pre-trial phase. But while the preparation of a tailored sentence with appropriate measures or conditions attached seem to make this involvement a necessary prerequisite, the offender’s status as ‘presumed innocent’ collides with this necessity. In this paper but also in the papers by *Rob Canton*, *Peter Raynor* and *Maria Anagnostaki*, the above-mentioned problem of community service and the prohibition of forced labour is discussed. It is interesting to note that in Denmark and England & Wales consent used to be a requirement for imposing a sentence involving unpaid work but this ceased to be the case in the 1990s. In Greece a similar development seems likely. This means that the provision of Art. 4 of the European Convention on Human Rights, prohibiting forced labour with the exception of “any work required to be done in the ordinary course of detention [...] or during conditional release from such detention”, has been interpreted differently over time – a sign of shifting policies?

Where consent is legally required, its legal and ethical value depends on the provision of sufficient information, as several of the authors emphasise and particularly the study conducted in Croatia strikingly shows. Where consent has been given, as *Rob Canton* puts it, as an “initial agreement”, it “must be constantly refreshed and sustained through skilled professional engagement and negotiation if it is to become the basis of an effective working alliance”. What Canton refers to as “substantive consent”, and sees as a prerequisite for cooperation, therefore must be understood as “iterative”. The importance of ongoing communication and “negotiation” between probation officers or other persons with supervisory tasks and the offender is also stressed by *Beth Weaver* and *Monica Barry*. The users’ voices they have captured illustrate this idea of cooperation as a dynamic concept and the disappointment when the result of that communication, as one service user puts it, “...doesn’t sort of live up to what they tell you sometimes.”

All of the authors also address the problematic interaction between the aims of punishment and questions of consent and co-operation in one way or another. While rehabilitative purposes are those that can be reconciled best with consensual elements, we can find sceptical or even doubtful notes on that notion as well. For example, in Denmark, the way in which the suitability of a person for certain community sentences is assessed (by hearing and involving the offender) may just be seen as “an estimation of the person’s ability to discipline himself within the framework the sentence set”. In a similar vein *Beth Weaver* and *Monica Barry* remark that in the eyes of some “the meaning of the word ‘rehabilitation’ has [...] become synonymous with self-risk management and responsabilisation”. Seeking to obtain the offender’s consent and co-operation, it seems, is thus not necessarily congruent with respect for his or her autonomy but can become part of the disciplinary apparatus in a Foucaultian sense, as *Anette Stoorgard* and *Berit Johnson* suggest.

In nearly all the contributions, however, we find interesting retorts to the popular argument that asking an offender for his or her consent within the criminal justice system does not make sense or is even cynical where prison always is present as the *ultimum remedium*. At first glance and as mentioned above, it seems to be evident that the offender can only choose between the plague and cholera and is thus not exercising his or her free will. The consequence of this line of reasoning seems to be not to ask the offender at all – a doubtful suggestion. Moreover, we have to note that an unconditionally enforced prison sentence is not always the consequence when consent is denied: it may be in some contexts that a fine is the result, as *Peter Raynor* recalls for times when consent was still was a requirement for probation in England & Wales. The same is said for Denmark today and even if a prison sentence is passed, “it may be shorter and experienced as a less burdensome task than a long probationary period.” Would it be fair to deny this option to the offender? In Croatia probation officers suspect that some offenders probably would appeal the suspension of their prison sentence if they knew beforehand that obligations and conditions are attached to the suspended sentence that can be onerous, and rather choose to go to prison. This results in the

interesting view of one probation officer quoted in the Croatian study: "... and the question is what re-socialisation and rehabilitation effect prison has... so maybe it is sometimes good they do not have a right to choose...". Yet this paternalistic attitude is hard to reconcile with the idea of the offender as an autonomous person. The general problem is probably best summed up in *Peter Raynor's* remark: "If part of the purpose of a probation order is to encourage the probationer's active co-operation and participation, denial of choice seems a strange starting point."

References

Day, A., Tucker, K. and Howells, K. (2004) 'Coerced offender rehabilitation: a defensible practice?' *Psychology, Crime and Law*, 10, 3: 259-69.

Durnescu, I. (2010) 'Pains of probation: effective practice and human rights', *International Journal of Offender Therapy and Comparative Criminology*, 55, 4: 530-45.

McNeill, F. & Beyens, K. (eds.) (2013) *Offender Supervision in Europe*. Basingstoke: Palgrave Macmillan.

McNeill, F. & Robinson, G. (2013) 'Liquid legitimacy and community sanctions', in A. Crawford & A. Hucklesby (eds.) *Legitimacy and Compliance in Criminal Justice*. London: Routledge.

Morgenstern, C. (2010) The requirement of the offender's consent to community service, in M. Groenhuijsen, M. Kooijmans & T. de Roos (eds.) *Fervet Opus. Liber Amicorum Anton van Kalmthout*. Apeldoorn, Antwerpen, Portland: Maklu.

Morgenstern, C. & Larrauri, E. (2013) 'European norms, policy and practice', in F. McNeill & K. Beyens (eds.) *Offender Supervision in Europe*. Basingstoke: Palgrave Macmillan.