



Electronic monitoring as a non-custodial sanction:

implementation, experiences, and Nordic criminal policy

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Introduction

NTfK dedicated a special issue to non-custodial sanctions 20 years ago, which demonstrated the similar backgrounds and penal values in Finland, Sweden, Norway and Denmark (Kyvsgaard, 2001a). Since then, penal systems have evolved, electronic monitoring being one of the most recent reforms. In all the four countries, short prison sentences may be replaced with electronic monitoring. Main difference is that in Finland electronic monitoring is a court-ordered sanction, whereas in other Nordic countries the decision is made at the enforcement stage. As a consequence or not (one the questions of this study), the application rates have remained the lowest in Finland (see table 1).¹ The legislator aimed at averagely 130 offenders *per day* (Gov. Prop. 17/2010): what is the reason for this outcome?

Table 1. *Electronic monitoring as prison alternative in Sweden, Denmark, Norway and Finland.*

	Sweden	Denmark	Norway	Finland
Introduction	1994 (<i>intensivövervakning</i>)	2005	2008 (permanent 2014)	2011 (<i>monitoring sentence</i>)
Decision-making authority	Criminal sanctions authority	Criminal sanctions authority	Criminal sanctions authority	Court
Max. length of convertible prison sentence	6 months	6 months	6 months*	6 months
Started enforcements in 2017 **	1 642	2 088	2 882	246

* Amended in 2020 (*Prop. 132 L (2018-2019)*). Previous max. was 4 months.

** Compiled from *Nordisk Statistik för Kriminalvården i Danmark, Finland, Island, Norge och Sverige 2013-2017* (Kriminalvården). Available at: https://www.rikosseuraamus.fi/material/attachments/rise/julkaisut-tilastollinen-vuosikirja/JNMJb7iPv/Nordisk_statistik_2013-2017.pdf.

The rationale for electronic monitoring has been to ease prisons' capacity problems in a cost-effective manner, reduce the negative impacts of prison

1. Electronic monitoring is also used as part of early release, as an alternative to pre-trial detention, and in various other forms, which fall out of the scope of this article.



and support offenders' reintegration. Nordic criminal policy have traditionally been supportive for these type of aims and prison alternatives. Initially, limiting the use of prison and the adoption of alternative sanctions represented the modernisation of penal system and rejection of repressive penal ideology (Bondeson, 1977, p. 36). Non-custodial sanctions highlight »important symbolic and political purposes« (Kyvsgaard, 2001b, p. 94).

However, repressive arguments have become more prominent also in the Nordic countries. There has been an increased pressure on Nordic criminal policy (Boucht 2020; Lappi-Seppälä 2013). Punitive trends usually threaten the legitimacy of non-custodial sanctions: it is challenging to find a credible equivalent to prison, which would conform to the demands for tougher punishments and incapacitation (Robinson & McNeill, 2016, Lappi-Seppälä, 2001). Furthermore, non-custodial sanctions have fundamentally reformed the principles and theoretical foundations of penal system and sentencing, mainly proportionality and equality, as offenders must be *suitable* for the sanction (Andersson, 2002, p. 188-191). Are the sentencing criteria and the logic of the reasoning against the principles in an amount that would explain the current challenges of monitoring sentence? Hence, although the aims of electronic monitoring were rather harmonious (and mainly preventive), it is less clear whether the coherence of these aims still exists, is supported by the public and practitioners (Boucht, 2020, p. 223) or is applicable in court practice.

This research will contribute to this discussion by examining the functioning of monitoring sentence, and the experiences of authorities and offenders. This study provides five empirical perspectives on monitoring sentence: *judges, prosecutors, enforcement authorities, offenders* and *the public*, complemented with quantitative analysis on the sentencing practice and qualitative analysis on the reasoning of court decisions. The leading question is whether the criminal policy objectives of monitoring sentence are met, and viewed in a coherent manner by these actors. Does monitoring sentence serve as a legitimate sanction, are the »traditional« rationales for non-custodial sanctions – prevention and rehabilitation – still relevant *in practice*? Or does electronic monitoring only add to the »punitive bite«? The analysis of the study concerns the practices and justification of monitoring sentence in all three phases: legislation, sentencing and enforcement (see Matikkala, 2021).

1. Research questions and methods

In 2011 a new sanction, monitoring sentence, was introduced to Finnish penal system. This study explores the functioning of this penal law reform. Its goal is to examine the implementation and effects of monitoring sentence: what were the aims of the legislator, how the legislation is applied and what has its effects been, and how is monitoring sentence perceived by authorities and



offenders. Furthermore, the study analyses how the sanction is imposed and reasoned by courts.

The empirical analysis is based on surveys, interviews and register data. Surveys were conducted with prosecutors (59 responses) and offenders (35 responses). Interviews were made with Criminal Sanctions Agency personnel (30 interviews), judges (9 interviews), prosecutors (5 interviews) and offenders (16 interviewees, and 7 of them were interviewed twice). Register data consists of court decisions (n=1 001) and enforcement data.

Interviews with judges, prosecutors, criminal sanctions officials and offenders examined their experiences and perceptions of electronic monitoring, as well as more profound understandings concerning non-custodial sanctions. Authorities and practitioners have an important role in applying the objectives of penal law: they participate in the reproduction of criminal policy aims. Perceptions of the public have been surveyed to assess the »public sense« and acceptance of monitoring sentence in Finland (findings reported in Lähteenmäki & Kääriäinen, 2021).

Empirical assessments of electronic monitoring have previously been conducted in other Nordic countries (for instance BRÅ, 1994:4 & 2003:4, Rasmussen et al., 2016, Sorensen & Kyvsgaard, 2009.) This study is the first Finnish study concerning monitoring sentence. This is also the first study, in general, to apply these different types of interviews, surveys and court decisions (and enforcement registers) to analyse the functioning of a penal sanction. Therefore, the methodological setting is diverse and the findings are hoped to deepen the understanding of monitoring sentence and also the penal system in a wider perspective.

It is expected that the findings reflect a legitimizing framework provided by penal theories. In the final analyse, the study applies a theoretical model based on retributivism, utilitarianism, and restorative justice, and explores the extent to the perceptions of judges, prosecutors, criminal sanctions officials, offenders and citizens – and the sentencing and enforcement practices of monitoring sentence – conform to these theories. For instance, one may assume that because of the inclusive and rational criminal policy, reintegrative and rehabilitative programs are crucial for the enforcement of electronic monitoring. Rejecting the idea of »stand-alone« house arrest, without any elements aimed at reducing reoffending, is a valuable Nordic attribute, compared to several Anglo-Saxon countries.

2. Sentencing: sentencing practice and judge and prosecutor perceptions

First purpose of the study is to analyse how judges and prosecutors perceive electronic monitoring as a criminal sanction and how is the sanction imposed in the sentencing practice. Analysis of the sentencing practice is based on



interviews (judges and prosecutors) and court decisions (n=1001). Interviews discuss the perceptions and values of judges and prosecutors, their views on the purposes of punishment and their experiences of the functioning of monitoring sentence. Sentencing analysis is expected to reveal the possible challenges and drawbacks of the legislation, which hamper the application of monitoring sentence; is there some aspects that legislator did not sufficiently anticipate, but which occur only in the practice?

For instance, one question is what is the role of the purposes of punishment (rehabilitation, general prevention, deterrence, incapacitation, retribution) in the choosing the sanction between prison and monitoring sentence. Another question is what is the role of individual preventive aspects in sentencing. In Finland, sentencing is guided by proportionality according to the harm and risk involved in the offense and culpability of the offender (Penal Code 6:4). Monitoring sentence means that the sanction should reflect the blameworthiness of the act, but the offender must also be suitable (prior convictions, personal circumstances, drug use). The purpose of the interviews was to discuss the transition from the neoclassical ideal based on few sanctions to the more versatile penal system. Main question is, whether it has affected the justification of sentencing; and does it contribute to the current marginal position of monitoring sentence.

Quantitative analysis of the court practice focuses on analyzing the main offense categories and variations in the practice depending on the offense or the previous convictions of the offender. Is the reasoning different in cases with excessive criminal background compared to cases with lesser criminal history? What is the role of offenders' social situation? Study also explores whether there is variation in different offense groups (for instance drunken driving and assault). Court decisions are also read manually to explore the wording of the decisions and the application of mitigating or aggravating factors.

3. Enforcement practices and perceptions

As opposed to other phases of criminal procedure, little attention has been paid to the enforcement of sanctions. This research examines the enforcement of monitoring sentence and the perceptions of the enforcement officials. In Finland, Criminal Sanctions Agency, operating under the Ministry of Justice, is responsible for the enforcement of sanctions. Criminal Sanctions Agency also conducts pre-sentence reports, which are important in the sentencing phase, as they ascertain the suitability of the defendant. The organization of Criminal Sanctions Agency consists of prisons and probation agencies, and this study carried out 30 interviews with the probation agency personnel, mostly with probation supervisors and directors. The purpose of these interviews was to examine the enforcement practices (control, support), as well as the working paradigms and principles of probation. Traditionally, individual prevention



has had the strongest position in the enforcement phase. It is important to investigate the approaches and practices which aim at fulfilling the individual preventive impacts, such as rehabilitation, and then discuss what does rehabilitation actually mean in the practice.

4. Offender experiences

It is important to give voice to the persons subject to the penal sanctions, as punishments have several impacts on their lives, personal circumstances, family relations and financial situation. Punishment may affect the behavior and attitudes of offenders, and this is crucial for punishment's rehabilitative, motivating and/or deterring function. In this study, interviews were undertaken with offenders serving monitoring sentence. Some of the interviewees were interviewed twice: first time during the enforcement, and second time couple of months after the completion of the sentence. This setting was used to explore the development of offenders' life situations and to create case studies.

This study presents *eight case studies* of the offenders sentenced to monitoring sentence. These case studies include narratives – expressed in their own terms – concerning offenders' life courses, criminal histories and challenges in the society. Case studies deepen the understanding of the motivation and attitudes, and desistance (described by themselves): what is most important, what is detrimental? What hopes do they have for future? As many interviewees had been in prison previously, it was possible to examine their comparative experiences of prison and electronic monitoring. Case studies will also use register data, consisting of offenders' prior convictions and socio-economical characteristics. Case studies examine how offenders define the impacts, pains and benefits of monitoring sentence, the fairness of the procedure and trust in the authorities.

5. Public perceptions

Public sense of justice has become a frequent argument in criminal policy. It refers to the perceptions of the citizens, whether they perceive the penal system as just and legitimate. Finnish government stated in 2015 that the correspondence of imposed sanctions and the public's sense shall be evaluated. Legislation of non-custodial sanctions was amended in 2015, and the importance of general acceptance of penal system was highlighted. From legitimacy perspective, it was stated, that acceptance increases the willingness to comply with the law and abide by the rules (Gov. Prop. 214/2014). This is the foundation of indirect general prevention. However, empirical verification of this mechanism is problematic. In general, citizens are not familiar with the



penal system. First, it shall be established whether public sense of justice concerns the severity of sanctions in general, certain type of offences, or certain type of sanctions.

This research used an informed survey method to explore the perceptions of Finnish citizens (n=2000). Survey presented an example case (an assault in a restaurant, provided with information of the offense and the offender). Respondents were advised to act as lay judges and choose a sanction in the case (prison or monitoring sentence). Majority of respondents chose monitoring sentence instead of prison. The theoretical analysis concluded that respondents gave two main justifications for monitoring sentence: it must work as rehabilitation *and* as punishment. Results indicate that citizens are not overly punitive, but also want rehabilitative efforts. Furthermore, survey found that a general punitive attitude weakened respondents' perception that monitoring sentence will meet its objectives as a punishment, whereas trust in the legal system strengthened this belief. It can be concluded that public sense of justice is a complex issue, which is shaped by individual values and societal situation. Sense of justice is not only a perception of penal sanctions *per se*, but reflects individual perceptions of how the society should work and ease the concerns of the citizens (safety, financial), how trustworthy the legal institutions are and how should we react to, and tolerate persons who are not complying with the mutual norms (Lähteenmäki & Kääriäinen, 2020).

6. Concluding remarks

This study uses multiple data sources to analyse the functioning of monitoring sentence as a penal sanction: interviews, surveys, court decision and other register data. The analysis concerns the role and justification of monitoring sentence in the Finnish penal system. Is monitoring sentence functioning as it should, meeting with the requirements set by the legislator? Furthermore, are utilitarian, retributive and reparative goals (or other legitimacy aspects) relevant in the sentencing practice and perceptions concerning monitoring sentence?

It would be interesting to compare results of similar studies from other Nordic countries. Research would probably reveal new similarities or divergence in the Nordic penal systems, as well as in the views of the persons who are working closely with criminal control or who are serving these sentences. Nordic penal reforms have usually been encouraged by the research data available from other countries. In general, it is necessary to receive more empirical information on electronic monitoring and other non-custodial sanctions. When these sanctions are understood and acknowledged as legitimate prison alternatives, they can establish a stronger position in penal systems.

Introduction of new technologies narrows the gap between the society and penal control. Consequently, prisons become more polarized: the most



dangerous recidivists and members of criminal organizations end up in prisons, whereas other offenders are placed under electronic surveillance. There might be no effective means to reject this outcome, because the preconditions for electronic monitoring concern the length of the sentence and individual risk evaluation. However, also the most vulnerable offenders, suffering from drug problems and health conditions, are usually excluded from monitoring sentence and other prison alternatives. The data from this study may help to discuss whether it would be reasonable to develop the penal system further, and take health care aspects into consideration (for instance *kontraktsvård* in Sweden).

The questions of this study inspire to think about the future of prison. In the literature, electronic monitoring has been referred to as *virtual prison* or *panoptic ideal* (Roberts 2004, see discussion in Daems, 2020, pp. 8-9 & 39). The development of surveillance technologies will eventually reform prison institution. Some of the open prisons in Finland use monitoring tags to control prisoners. Future research interests concern the meaning of incapacitation in modern penal system. It is interesting to analyse whether electronic monitoring could constitute incapacitation, or »home incarceration«. Analytically it shall be made clear whether electronic monitoring represents a form of prison (in the same severity level) or a non-custodial sanction (more lenient than imprisonment). These analyses are necessary in order to prevent net-widening and the intensification of control.

Kontaktuplysninger

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