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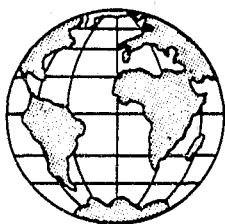
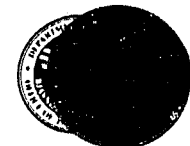
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International Summaries

A Series of Selected Translations in Law Enforcement and Criminal Justice

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From West Germany

Alternatives to Imprisonment

A comparative study of the use of alternatives to imprisonment in the member states of the Council of Europe.

By Peter J.P. Tak

Introduction

During the last 100 years, criminal justice policymakers in Europe have become convinced of the limited usefulness of short-term imprisonment. The deterrent effect of this sanction seems insignificant when weighed against the damaging effects of short-term imprisonment on the offender, his or her home environment, and, eventually, on the community.

This realization has led most western European countries to implement far-reaching changes in sanctions with a view to drastically reducing short-term imprisonment as a judicial response. Legislators have attempted to achieve this reduction by:

- Abolishing prison sentences of less than 1 month.
- Radically restricting the opportunity to pass short unconditional prison sentences.
- Widening the applicability of the suspended sentence.
- Strongly emphasizing noncustodial sentences.

Summarized from *Community Service as an Alternative to the Prison Sentence*, "Alternatives to Imprisonment," by Peter J.P. Tak, with permission of the International Penal and Penitentiary Foundation, Bonn, West Germany. 1987. 14 pp. NCJ 106912. Summary published January 1989.

- Restructuring the fines system by introducing community service orders of "day fines" and unpaid labor and widening the applicability of monetary sanctions. (Under day-fine systems, the number of fine days, or severity of punishment, is determined by the seriousness of the offense but without regard to the offender's means. The monetary value of each day is then set explicitly in relation to what the offender can afford.)
- Introducing new sanction modalities, such as the declaration of guilt without imposition of a punishment or a warning.

None of these legal measures has had the desired effect; the short prison sentence still seems to be the preferred sentence for misdemeanors and other minor offenses. For this reason, much creative and energetic work has been put into creating sanctions with the same punitive value as the short-term prison sentence, but without the damaging consequences of short-term imprisonment. These newly developed sanctions are therefore known as alternative sanctions.

Major impetus for the development of these alternative sanctions came from the Council of Europe. In 1976, the Committee of Ministers of the Council of Europe adopted a resolution asking member state governments to study various alternatives

to prison sentences. In particular, the member states were requested to look into the advantages of community work, such as the opportunity it provides for the offender to make amends and for the community to participate in the offender's rehabilitation. The resolution led a great number of member states to study the desirability and possibility of legally implementing the alternative sanctions; in particular, the community service order. This study compares the responses from the various member countries, some of which have passed legislation and some of which have bills pending.

Shortage of prison capacity

Almost all member countries of the Council of Europe are struggling with a prison capacity shortage and therefore many have found alternative sanctions desirable. Several countries have made attempts to increase capacity that include:

- Automating the administration of the prison system in order to use prison space more efficiently (Sweden).
- Building new correctional facilities and reopening those previously closed (The Netherlands).
- Granting general amnesty or pardon (France and Italy).

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- Downgrading property offenses, whereby the maximum imprisonment was reduced by 25 percent (Denmark).
- Double-celling inmates (Austria, France, and Belgium).
- Increasing the use of conditional release (The Netherlands and Denmark).

Although these measures have alleviated crowding to some extent, they are still insufficient to resolve the projected long-term prison capacity shortage. Also, in many countries, expansion of prison capacity by building new facilities has encountered political resistance due to financial and other considerations. The economic recession in Europe, therefore, has played a part in compelling governments to look for alternatives to the short-term prison sentence.

Legislative action

In Spain, extensive discussion on community service orders took place during the preparation of a new criminal law code in 1980. The reason the concept of alternative sanctions was not included in the code was that a well-organized probation service to supervise community service work did not exist. Instead of introducing unpaid labor as an alternative to the short-term prison sentence, in 1983 a second bill was introduced requiring prison sentences of less than 6 months to be abolished in Spain.

The second bill clearly shows the influence of attempts in the Federal Republic of Germany, Austria, and Portugal to eliminate short-term prison sentences, even though in the first two countries a less far-reaching regulation has been included in their penal code. The German Penal Code and Austrian Penal Code legislate that a sentence of up to 6 months may not be given unless special circumstances, such as a need for deterrence, make a prison sentence advisable. The Portuguese Penal Code goes a step further by requiring that all prison sentences up to and including 6 months be converted into fines, unless imprisonment is necessary to prevent further offenses from being committed. Three very recent bills (in France, Switzerland, and Belgium) now have similar provisions, with the Swiss bill further providing that prison sentences of up to 1 year may only be

passed if deemed absolutely necessary to prevent the offender from recidivating. And, a bill for a new French Penal Code contains a provision that would convert sentences of less than 4 months into fines.

In Belgium, the commission that had the task of reviewing the penal code discussed community service orders in its final report, but felt compelled to reject both a statutory regulation and experimentation because of a shortage of personnel to supervise the performance of community service. However, it appears that there is a definite tendency toward dismantling the short-term prison sentence.

Sweden has decided against community service as an alternative to the short-term prison sentence. In the final report of the Frivardskommitten (the commission for noncustodial sentences), the following reasons were given:

- There are few figures available on the effects of alternative sanctions and, insofar as data exist, community service is given as an alternative to imprisonment in fewer than 50 percent of the cases.
- Community service orders assume that the person to perform the work has certain social skills. The majority of the current Swedish prison population—often drug addicts and/or alcoholics—do not have these skills.
- Swedish society is highly professionalized, and most available work is done by professional staff trained for the job. It would be difficult to find suitable community service tasks for offenders.
- Finally, it was felt questionable whether work could be used as a sanction, because work is generally seen as a privilege and forms an important part of social life.

The judicial sanction of unpaid work can be imposed as a principal sentence in the United Kingdom, France, and Portugal, and as a condition of a suspended or conditional sentence in the Federal Republic of Germany, France, Denmark, Luxembourg, Norway, and The Netherlands. The United Kingdom has had the most experience with community service orders and has become a model for other European countries.

Experiments with community service

In Denmark, the experiments with community service (samfundstjeneste) were initially restricted to Copenhagen and northern Jutland, but when, after a slow start, the experience seemed positive, the experiments were extended to the entire country. The experimental phase was concluded in 1986 and a decision will be taken shortly on whether a legal framework for this sanction is feasible.

In Norway, experiments with community service orders (samfunnstjeneste) have been conducted in Stavanger and Rogaland since 1984; they were extended to the rest of the country in 1986.

In The Netherlands, after 5 years of experimentation, a legal regulation has been prepared in which unpaid community service as a principal penalty at the final sentence is the only modality.

In Luxembourg the situation is somewhat different. Until September 1986, the Justice Minister could authorize those sentenced to imprisonment to carry out community service activities in order to be eligible for a pardon. Initially only those sentenced for up to 1 year of imprisonment were allowed to do community work, but later those with longer sentences were also considered. The Luxembourg system at that time lacked both legal regulation and fixed guidelines, and one of its disadvantages was that even when community service had been completed, it was still uncertain whether the offender would be granted a pardon. Occasionally, a pardon was not granted. In September 1986, new legislation was adopted that provided a legal basis for community service. The judge may now impose community service as a condition attached to the decision to defer or suspend a sentence.

In Switzerland a bill was presented at the beginning of 1986 to revise the penal code; the bill proposes community service as a principal sentence, instead of a prison sentence of less than 1 year or a fine.

In Belgium there is a noticeable swing in favor of community service. A proposed bill provides that where a prison sentence is given for a crime, and the accused has not had any unconditional sentences of

more than 4 months during the 5 years preceding the committed offense, the judge may order the offender to perform unpaid work for at least 40 hours, and up to 240 hours. The text of this bill is a literal translation of an article of the French Penal Code, which regulates community service as a principal sentence.

In late 1985, Belgium published a draft penal code that provides for the replacement of a prison sentence by community service. The draft only contains a summary scheme for this alternative penalty; it is, for example, unclear what would be the maximum term of imprisonment for which community service could be substituted, and under what judicial framework it could be imposed. Little more can be deduced from the text except that community service cannot be imposed as a principal sentence.

The viability of community service work as an alternative to prison

The starting point of all written statutory regulations and experiments concerning community service is that the penalty of unpaid work replaces the unconditional prison sentence that a judge would otherwise impose. Two questions are important in this connection:

1. For what maximum term of imprisonment is community service an alternative?
2. Can community service be applied as a punishment for all indictable offenses?

Both of these questions were amply dealt with in all member states' studies; however, there was little uniformity in the answers.

In some countries no maximum is given for the application of community service. In France, community service can only be imposed as a principal sentence for an offense that carries a prison sentence of between 2 months and 5 years. Theoretically, therefore, community service can replace a prison sentence of up to 5 years. Where community service is imposed as a condition under a suspended sentence, this form of sanction may also be given for crimes that carry a prison term of 5 years or more. In the Federal Republic of Germany, where the imposition of

community service under a suspended sentence is one available option, the theoretical upper limit is 2 years, being the maximum suspended sentence that can be imposed.

In Portugal, The Netherlands, and Switzerland the maximum prison sentence that can be replaced by a community service order is 3 months, 6 months, and 1 year, respectively. In Luxembourg, the maximum penalty that could be considered for substitution was 1 year in principle, but longer sentences were not expressly ruled out. Since the new legislation came into force in September 1986, the maximum penalty has been 2 years of imprisonment.

Especially for those countries where only a general indication is given of the maximum term of imprisonment for which community service can be an alternative, the answer to the second question above can provide more detail in the area of applicability. In theory, none of the statutory or experimental regulations exclude particular indictable offenses from the application of community service; in some regulations provisional reservations are made. In the Danish experimental regulations, for instance, drunken driving is excluded because it is feared that insufficient work projects could be found to meet the demand from this category of convicted persons. For other indictable offenses, mainly violent and sexual crimes, there is an obvious argument for not applying it.

Community service is also not seen as the most appropriate penalty for drug and alcohol offenses, or offenses committed by addicts, because it is feared that addicts would not be in a fit state to perform community service properly. In France, recidivists who in the 5 years prior to the new sentence had been sentenced to an unconditional prison sentence of 4 months are only considered for community service under a suspended sentence. Finally, in Switzerland, a community service order can only be issued to first offenders where it does not seem necessary to impose a fine or a prison sentence to deter him or her from committing further offenses.

The general picture that emerges is that this alternative sanction appears appropri-

ate for misdemeanors and nonserious crimes, such as property offenses. Further inquiry about the practical application of the community service order showed that property offenses are most frequently punished in this way in all countries.

Attempts to discover the maximum sentence for which community service can form an alternative are frustrated by the fact that The Netherlands is the only country in which judges are required to make explicit what sentence the community service order is replacing.

The number of community service hours

A study of the minimum and maximum number of hours of community service that can be imposed results in an uneven picture. In Portugal, the minimum number of community service hours is 9; in the Swiss draft bill, 10 hours; in Denmark, France, and the United Kingdom, 40 hours; and in Norway and Belgium, 50 hours. In The Netherlands during the experimental period it was 30 hours, but no minimum is stipulated in the pending bill.

Similarly, the maximum number of community service hours shows differences. In Portugal it is 180 hours; in Denmark 200 hours; in France, Norway, The Netherlands, Switzerland, and the United Kingdom, 240 hours; and in Belgium, 300 hours. The German Penal Code has no minimum or maximum number of community service hours that can be given under a suspended sentence. In Luxembourg, prior to the 1986 legislation, 1 week of community service had to be worked for each month of a prison sentence. This took place mostly during holidays and vacations and could be spread out over several holidays. The new legislation stipulates that the Attorney General is to make the decision concerning the community service (type of work, number of hours, and period for completion).

In almost all countries where community service can be given as a principal sentence, the judge's task is confined to setting the number of hours of community service and the period within which it must be completed.

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Specific compliance with the order and its performance is supervised by the probation service (Denmark, Norway, Portugal, the United Kingdom, and Belgium); by the sentencing judge (France); by the Attorney General (Luxembourg); and the Public Prosecutor's Office (Federal Republic of Germany).

Nonfulfillment of a community service order

Failure to discharge the duties of a community service order made as a principal sentence can have different consequences in different countries.

In the United Kingdom it leads either to a fine of up to 400 British pounds (approximately \$476) or to the revocation of the order and a new penalty. In France, nonfulfillment is itself a punishable offense for which an offender can receive a prison sentence of up to 2 years as well as a fine.

In The Netherlands, a community service order that has not been fulfilled is converted into the prison sentence it originally replaced.

The Swiss bill proposes that the community service order be converted into a prison sentence at a rate of 1 day of imprisonment for each 6 hours of community service not fulfilled. The Belgian draft bill provides that where the order has not been carried out satisfactorily, the sentencing judge may increase the community service order by up to 30 hours. Therefore, the consequence of failure to discharge community service duties given as a principal sentence is fundamentally different from that which results from nonfulfillment of the conditions laid down under a conditional or suspended sentence.

In the case of nonfulfillment of the community service order given as a principal penalty, the accused only knows the fixed minimum and maximum terms that can be given for this new punishable offense, but is uncertain as to what he or she would actually receive. Considering that the sentence is being given for a new punishable offense, and that the original offense plays no part whatsoever in the assessment of the level of punishment,

the accused risks getting a prison sentence considerably more severe than that which he or she would have been given for the original offense. For this reason, the Dutch bill includes the provision that the judge must indicate the unconditional prison sentence that he was considering imposing, so that the convicted person knows precisely what to expect if he or she fails to do the unpaid community work.

Other applications of the community service order

The discussion above has only dealt with the sanctions systems in which community service plays a role as an alternative to the short-term prison sentence. However, community service also has a role as an alternative to other principal sentences or consequences of sanctions.

In a number of European countries, the community service order can be imposed instead of a fine, at the request of the person fined. And in Switzerland, when an offender defaults on payment of a previously imposed fine, he or she can be ordered to perform community service in lieu of imprisonment. In Norway, the possibility of performing a community service as an alternative to detention for fine default was abolished in 1986. Finally, in the Federal Republic of Germany, community service is playing an increasingly significant role as an alternative to imprisonment following fine default. Since this form of community service is regulated at the State rather than Federal level, the regulations governing it vary.

Conclusion

Many European countries have introduced the community service order during the last decade, either as a principal sentence or as a condition under a suspended or conditional sentence. Both the idea and its implementation have varied somewhat in the different countries. There is, for example, a marked contrast between France and the Federal Republic of Germany in the statutory regulations dealing with community service orders that may be attached as a condition to suspended sentences.

Whereas in France there is scarcely a judicial facet of community service that has not been regulated in detail, German regulations are conspicuous for their lack of detail. This has led to an extremely marginal application of community service as an alternative to imprisonment in the Federal Republic of Germany.

Besides a well-reasoned statutory regulation, a carefully prepared infrastructure is also needed for the sanction to be successful. This is clear from experiences in Portugal, where the practical application of this alternative has been very limited.

In other countries—Denmark, France, Norway, and The Netherlands—the experience accumulated in the first year of the experiments and the statutory regulations showed that few community service orders were issued. As time went on and more experience was gained, the orders increased.

With regard to those countries where this alternative sanction has not yet been discussed, or where opinions about it are still being formed, a more intensive legal treatise on this sanction could act as a stimulus to speed up the process. A comparative study of this kind would have to describe the systems of sanctions within which community service has acquired a place, and give an overview of the experience acquired in practice. An essay of this nature could also be of use to those countries where the application of community service is still experimental and where a statutory regulation has yet to be made. Finally, the countries that have already implemented community service in their penal codes would also profit from such a survey, since it would point out possible measures to expand the applicability of community service as an alternative to other sanctions, such as fines or detention for fine default, as well as ways to improve existing infrastructures.

The Assistant Attorney General, Office of Justice Programs, coordinates the activities of the following program Offices and Bureaus: National Institute of Justice, Bureau of Justice Statistics, Bureau of Justice Assistance, Office of Juvenile Justice and Delinquency Prevention, and Office for Victims of Crime.