

University Doctoral (PhD) Dissertation Abstract

Sanctions Involving Labour in Hungarian Criminal Law

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Debrecen, 2017

Antecedents and Objectives of the Thesis

Research assignment

This doctoral thesis endeavours to present the distinctively special system of labour penalties, which can easily be distinguished from other sanctions, or, to be more precise, punishments and acts that include sanctions related to work.

Since the regular alterations in this sanctioning system also result in certain distortions, a thorough investigation of the elements of the system is necessary from time to time, both individually and as a whole. Accordingly, it is important to form the aspects of amendments and to formulate factual proposals as well.

Being the only form of work penalties in the period following the change of political regime in Hungary, community service has gone through crucial alterations in the past few decades, including substantive law, procedure law, and enforcement law, which makes a harmonised investigation of these three areas necessary beyond a more detailed analysis of substantive law.

Regarding the fact that the number of community service penalties has nearly reached the amount of 25 % of all sentences imposed, as compared to a few years ago when the same number of probation officers dealt with only about a third of the present number of cases, this thesis also proposed to examine the question to what extent a probation officer is able to act in their traditionally supporting role during the period of the process or the penalty, beyond their duties of administration and supervising.

Since the introduction of community service, one of the most important and recurring issues in the literature on the topic is the problem of consent and the prohibition of forced labour. The present thesis attempts to find an answer to this debate and controversy which concerns a lot of professionals and academics.

The unexpected occurrence of reparation work, being a new element among the sanctions, also calls for the individual investigation of the motives behind the creation of this legal institution and its role in the system of actions, its substantive regulations and the parallels with international documents, the recent practice, and, finally, the occurring problems during its legal practice.

Methodology

The applied methods for the above described research topic and the proposed questions are the approaches of law history, dogmatics and comparative law. The present dissertation thesis, however, does not attempt to apply the certain methods individually, but also employs other different approaches which are dominant elsewhere, but also necessary for the topics of the certain chapters. Consequently, one can meet the dogmatical-analytical method in the historical chapter, and the historical method in the chapter presenting an international perspective.

The thesis thus does not limit its approach to certain methods, instead it aims to offer a comprehensive analysis, and subordinates the different methods to the examination of the specific issues. Often it reaches back to the findings of the historical review during the investigation of a question, and similarly, it applies a comparative approach parallel with a dogmatic or analytic method.

The structure of the thesis

The thesis is divided into five chapters.

According to the title, *Chapter one* presents the foundations, aiming to enlist and to define the basic concepts of the research topic. The three concepts without a comprehensive knowledge of which the issue cannot be discussed are work, penalty, and work as penalty. Reaching beyond the actual definition of these concepts, this chapter attempts to locate work penalties in the system of sanctions and to find the answer for certain epistemological questions.

Beyond the philosophical foundations, the chapter discusses not only the view of the Bible and Christian devotions concerning work, but also the changes and the development of their approaches. It is justified by the fact that the Bible and both the Catholic and the Protestant Churches have a fundamental influence on our images of the world, given that in the thinking of European people the archetypal images of the Bible are closely connected to basic concepts. Besides basic symbols such as the wine, the water, the bread, the grape, or the lamb, also punishment and grace have gained completely different and definitely more meanings in European culture than elsewhere. The same is relevant for the complex view on work, too. The fact that there is time for both work and rest in the Old Testament, or that the parable of the workers in the vineyard serves as the allegory of salvation, makes work itself a sacred symbol, even without putting the characteristically Protestant notion of vocation into the centre of work-related investigation.

However, it is true that the importance of Church and religion has been effaced in the last century, but as an omnipresent social reflex, it still affects us in the cultural sense, which explains why for me work as punishment would be uninterpretable in its depth without presenting the essential cultural and historical background.

In the end of the first chapter I present the historical forms of labour penalties such as slavery, galley-slavery, boat-towing, Opus Publicum, workhouses, and also modern forms of work penalties, followed by a systematisation of labour penalties among the other forms of sanctions.

During the research prior to the actual writing of the thesis it soon became obvious that, since neither community service, nor reparation work were not invented in Hungary, it is essential to review, present, and analyse the relevant international documentation to found a thorough and analytic elaboration of labour-related sanctions.

The regulations of labour-related sanctions concern several international documents. Whichever European state's effective regulation we examine, we can claim that the conformities can be related to the common rules in the first place, while the minor differences in the infliction and the effectuation make the given state's regulation unique.

Chapter two deals with the history of codified labour penalties in Hungary.

The history of labour penalties in Hungarian criminal law began with Act XXI of 1913, so this chapter begins with the background of the birth of this act, and finishes with the countermanding of close correctional-reformative work.

In Hungary sanctions involving works have a long history, with a lot of accumulated experience. The experience from the past is always a capable tool for avoiding failure in the future. In this chapter I attempt to reveal through the relevant issues of law history whether work-related sanctions have any common characteristics, which are present in the Hungarian legal system independent from time or social institutions.

Regarding the history of work penalties, legal literature has not come up with a retrospective, evaluating, and reviewing presentation of the formerly codified, however, in present-day substantial law not effective work-house, close work-house, correctional-reformative work and close correctional-reformative work. This chapter also tries to review these four institutions, keeping in mind the fact that this thesis is primarily about substantial law and not about the history of law. As a result, confined to the extent of a PhD thesis and restricted to one chapter,

I attempt to describe the codified institutions which are supposed to be of interest for the history of law. This chapter is a crucial part of the thesis, since it helps us interpret present-day problems. The specifically Hungarian problems which appeared, for instance, at the introduction of the work-house (lack of an execution structure), or of the correctional-reformative work (theoretical founding and lack of time to prepare), were also present at the codification of community service and reparation work. One of the drawbacks of Hungarian legislation was that it adapted the sanctions with no detention into the Hungarian penalty system and expected their frequent, successful, and economical application without creating the necessary infrastructural and financial conditions at the same time. The absence of these conditions resulted in foreseeable anomalies in the structure.¹

Chapter three discusses the penalties in the Hungarian system of sanctions which concern work, namely common service work and reparation work. The primary aim of this chapter is a detailed analytic description of these two sanctions which are present in the actual Hungarian substantial law. Furthermore, in connection with the introduction of community service, it seems to be necessary to examine which examples and international solutions served as models for the codification of community service. My presumption was that as a kind of dual conquest, it was first introduced in 1987 as a mean of implementation of the correctional-reformative work, and the later independent version of 1993 was adapted to Hungarian criminal law with regards to different models.

Among the restorative sanctions, which are the essential means of modern penology, labour penalties and sanctions involving labour are important. Work penalties play a role not only in coherence with the strictly restorative jurisdiction, but also as a possible instrument in victim-centred jurisdiction. We must not forget, however, that the frequentation of the detriment of work penalty (namely the obligation to do the work) has already been a mean of retorsion, and it was thought to be the wonder-substance of prevention by the school which focused on the offender.

The distinction developed by Csaba Kabódi accentuates the role conflict of labour. According to Kabódi work done as penalty may be accustoming to work, punishing with work, correction with work, and there are also employment during imprisonment and symbolic work penalty,

¹ KEREZSI Klára, *A hazai pártfogó szolgálat átalakítása*, Belügyi Szemle, 2002/2-3, 186.

and, of course, it can appear as the forced labour as the exploitation of the “enemy’s” labour force without penal content.

By seeming to be a capable tool of too many penal purposes in different ages, obligatory labour imposed by the judiciary or the authorities becomes somewhat suspicious. If we believe that obligation to work is capable of achieving so many penal purposes as a kind of philosopher’s stone of penal law, we tend to lose faith in the efficiency of work penalty, given that the efficiency of multipurpose tools is widely known to be less. Namely, what is good for everything, is good for nothing in fact.

Even if we do not accept that it can be feasible for every purpose, but hope that community service and reparative work can fulfil their role defined in the preamble of the Criminal Code, then it is necessary to define the conditions to which the modern forms of work penalties have to meet. For this aim, the examination of the explicit requirements of the international documents and the conclusions drawn from the examination of law history appear to be capable methods.

The increasing significance of community service in penal law is greatly due to the introduction and development of community sanctions, which were primarily supposed to decrease prison population, and, as an alternative to deprivation of personal freedom, decrease the costs of penal jurisdiction. One of the final, concluding questions of the thesis must consequently be the one whether community service has served its duty since its introduction.

The title and issue of *Chapter four* includes work-related sanctions in some European countries. For the review the international observations on community service I attempted to choose countries and regulation forms which have achievements that can even serve as examples for the development of the Hungarian regulation. Researching the different solutions I found it justified to examine only the continental legal systems, given that Hungary belongs to this legal culture. Hungarian legal system basically belongs to the Roman-Germanic jurisdictional branch. Accordingly, I did not include the Slavic and the Anglo-Saxon jurisdictional systems among the examined systems in order to form a relatively homogenic comparative basis, even though community service was developed in the United States, and was listed among the sanctions for the first time in England and Wales, not to mention the Polish example, which is treated as a specific, non-mainstream alternative. It was also an important factor that the

countries already described by Ferenc Nagy² were ignored since their study would not mean any novelty in Hungarian legal literature.

Therefore my scope focuses on Belgium, the Netherlands, France, and the Scandinavian countries, excluding Iceland, because, among many reasons, the community service of these countries has not been investigated in the Hungarian language literature. The presence of the Scandinavian countries on the list is justified by their traditionally good criminal and prison population indicators and the great quantity of data, moreover, according to OECD statistics, the citizens of these countries have the strongest faith in their jurisdiction.³ The examination of the Netherlands, Belgium and France is justified by the fact that they do not only show a lot of similarities with Hungary in terms of jurisdiction, but also remarkable differences and sizable experience is accumulated regarding community service. By describing the regulation of other countries and their practical results and contrasting them to Hungarian regulation and practice, I can highlight on both the advantages and the disadvantages in a wider scope. To achieve this aim, a dogmatic and comparative analysis of foreign and Hungarian laws is necessary.

The fifth chapter summarises the yet unsolved problems which arise in the first four chapters of the thesis. It also offers conclusions which we can draw from the parts discussed so far, alongside with the formation of suggestions how to solve them. All the ideas of this chapter are discussed in details among the academic achievements of the thesis.

New academic achievements of the thesis

Conclusions of the history of labour penalties

In Hungarian criminal law labour penalties have a long history, as described in the relevant chapter. As it became apparent during the investigation of the century-long history of labour penalties, the different forms of these penalties and their introduction and application in different ages show certain characteristic similarities, which can be edifying also for those, whose aim is to discover and amend the problems of modern-age work penalties.

It is also true for the work-house, strict work-house, correctional-reformative work, and strict correctional-reformative work that these were not invented in Hungary, Hungarian criminal law adopted them. Before their introduction the conditions without which their adoption threatened

² NAGY Ferenc, *Munkabüntetések a büntetőjog szankciórendszerében*, Acta juridica et politica, Szeged, 2004.

³ http://www.keepeek.com/Digital-Asset-Management/oecd/governance/government-at-a-glance-2015_gov_glance-2015-en#page173 (21 February, 2016)

with failure, had been or should have been familiar. The problems which other countries had to face well before Hungary introduced these sanctions were well-known. It is also true that in each case they were introduced rather for political and not jurisdictional reasons.

Characteristically, at the time of the introduction of all the sanctions, the financial, technical, and infrastructural conditions were absent which would have been essential for their adoption. The practice of all the sanctions began by deploying the duties of a new jurisdictional institution upon a structure which had been organised to serve the objectives of another, already existing penalty. As a result, the structure could not come up to the new expectations with the unchanged financing and headcount.

The lack of performance conditions later always resulted in foreseeable disturbances, for which the answer was not the follow-up creation of conditions, amendments or assuring the financial background, but slow decay instead. Work-houses and strict work-houses were never built in Hungary, as we have seen. The provisional regulations passed at their adoption remained in effect until they were fully decayed.

The further mistake with the adoption of correctional-reformative work was that there had not been a comprehensive theoretical discussion beforehand. The new sanction was simply introduced with a political-administrative decision. As a result, jurisdiction was not, or rather could not be aware of the experience which the legal literature of the Soviet Union had already accumulated. Consequently, jurisdiction had to face the same problems which the Soviet practice had gone through, and which they had known or should have known at the time of adoption.

Unfortunately, the adoption of community service work repeated the same mistakes. The first version was adopted from Polish jurisdiction, and then the next was the Anglo-Saxon-type of community service work, and at both versions, the experimentation period was skipped, unlike to Western countries, that is why there was no time to gain experience. Community service work was adopted without initiating the necessary effectuation conditions, and even though the international experience had already been known, and, by not acknowledging them comprehensively, the Hungarian practice made the same mistakes which could have been avoided after a moderate, unhurried introductory period. To leave the implementation on an already existing infrastructure, without having developed the financial and technical background, criminal policy repeated the same mistakes, which had already been known from the history of the work-house and the strict work-house.

Criminal policy is still indebted for not bringing forth the essential conditions for the successful implementation of community service work. It seems necessary to compensate for these unresolved conditions, and not strictly in the financial and infrastructural sense.

It is essential to make society aware of the advantages of this type of sanctions, accentuating primarily its values as opposed to imprisonment, the opportunities of reintegration, and also that it produces values, and is economical. It would be useful to promote a public awareness campaign about the advantages of community service and about the fact that for the efficient implementation of this sanction a lot of social activity would be necessary.

It is also up to this campaign to increase the number of available places to serve that suit the penal objectives of community service most.

To design a targeted and efficient campaign, a previous research is essential which reveals the information which the society is aware of, even the wrong, stereotypical conventionalities.

Conclusions of labour sanctions in an international outlook

After reviewing the foreign examples of labour sanctions, a wide range of conclusions opened up. Of course, examining the regulation of certain countries in detail we can find partial resolutions which may be of interest, but reviewing the examined countries globally, one conclusion turns up that is, however, the most important achievement of the whole thesis, but not at all new in Hungarian legal literature.

“The possibility and efficiency of the implementation of community service is determined by the well-organised and carefully controlled effectuation” – as Ágnes Kelemen put it in 1989 in her study titled “Community Service – about the experiences of the sanction in Great Britain”⁴. Her statement is still valid today. The international examples show that the regulation of community service can be casuistic, as in Belgium or France, or, as in Sweden, it can work with a surprisingly short substantive and procedural regulation. If there is enough energy, attention and financial background to implement it, and the tools are also at hand, the legal institution works well, however, no matter how sophisticated and carefully accomplished the regulation is, if the implementations is not correct, the sanction will not be efficient.

⁴ Kelemen Ágnes: *A Community Service – közérdekű munkavégzés – büntetés angliai tapasztalatairól*, Magyar Jog, 1989, 36. évf. 1. sz. 74-79.

Conclusions concerning the effective regulation and the practice of community service

Necessary substantive amendments during the infliction of the sanction

The conclusions of the thesis based on the research point at several problems concerning the practical infliction of community service. In 14 % of the cases described during the research, the defendant had already been sentenced to community service prior to the inflicted community service. Unfortunately, before the judiciaries inflicted community service for the second time in these cases, only 45.5% of the previously inflicted cases had finished efficiently. A fifth of the cases finished with alteration to imprisonment, while nearly a sixth of the cases were unenforceable when, nevertheless, the court still decided on imposing community service again. At the same time we can also claim that the efficiency or inefficiency of the previously inflicted sentence can predict the efficiency or inefficiency of the next sentence with high accuracy. If the convict finished their first sentence efficiently, then it has an 80% probability that the next is also going to be efficient. The correlation is even more relevant vice versa: if the previous sentence finished with alteration to imprisonment, the same happened in 89% of the upcoming sentence.⁵

We can also claim that the proportion of the efficiently served sentences was the highest among first offenders (84.3%), and from the one-time recidivist to the multiple recidivists the rate of efficiency constantly decreases. In the cases of multiple recidivists, the prospect for efficiency was only 21%, while to alteration it was 39%, so we can claim that in the cases of multiple recidivists the prospect for an efficient serving is evanescent.⁶

If we consider the following data, it seems obvious that community service should be (or should be allowed to be) imposed on people who are not among the above mentioned recidivists, or at least we should make efforts to decrease the proportion of recidivists among those inflicted to community service as compared to the average.

The circle of offenders for whom community service is the most promising possibility are people committing vandalism (76.3%), those who have qualification from a vocational school or a secondary school (78.6%), and those who are officially employed (83.7%).

⁵ GOMBIK Gergely, *A közérdekű munka büntetés* (Community service) In.: A kriminálpolitika és a társadalmi bűnmegelőzés kézikönyve – 2009 II. Borbíró Kiss Andrea – Velez Edit – Garami Lajos (editors) p257.

⁶ GOMBIK: *Ibid.* p259.

In sharp contrast with the present routine, implementation of community service is expedient and economically efficient in the first place for those first offenders who committed vandalism (instead of crime against property), who are qualified and employed. Consequently, it seems irremissible to regulate and limit in some form the possibility of imposing community service. The most plausible to avoid the trap of imposing community service for people who have only mathematical chance to fulfil the aims of this form of sanction would be to limit it by inhibitions of substantial law.

The possible regulation would be the following:

De lege ferenda section 47. (5) Community service may not be imposed on a multiple recidivist and on a person who has previously been sentenced to community service, and community service failed as a result of their own fault.

The necessary procedural amendments for infliction

Since the amendments of Act CLXI of 2010, according to section 544 of the criminal procedure law, community service may be imposed without a process, in a court decision. Moreover, section 547 (1) of the criminal procedure law allows the judiciary to apply community service besides other sanctions, adding (in paragraph 5) that “if the prosecutor proposes the preterition of the process, the decision may be made by the judicial secretary”.

It is questionable, whether in case of a dispensed process, what how does the judicial, or the judicial secretary with probably less experience justifies this decision, which is very important from the point of view of sanction efficiency objectives. However, as we have seen, this does not generally happen, or does not happen at all. According to the second expression of the section, though, the law may force the judiciary to acquire a guardian’s opinion. My *de lege ferenda* proposal in this case accordingly suggests that the criminal procedure law should make it compulsory to procure a guardian’s opinion as follows:

De lege ferenda section 544. (3) In case of preterition of the process, before imposing community service of reparation work, the judiciary ordains the procurement of a guardian’s opinion.

Suggested amendments for the execution of the sanction

The question of consent

In order to get a better understanding of the relationship of community service and forced or compulsory labour, it is necessary to review convention 29 accepted on the 14th session in 1930 of International Labour Organisation (ILO) about forced or compulsory labour (ILO Convention later on). According to the convention⁷ forced or compulsory labour means all kinds of work or service which is exacted from any person under the menace of penalty, and for which the person forced to work has not voluntarily offered him/herself. The basic conceptual element in forced or compulsory labour is work (or service), the notion of penalty, and the lack of free will or consent.⁸

Exception to the regulations of the convention is work or service which is exacted from a person as a consequence of a conviction in a court of law, but only if the work or service is carried out under the supervision and control of an authority, and the person is not hired by private individuals, companies or associations. Compulsory labour which does not belong under this provision of the convention can practically be compulsory prison labour or any other labour as a result of a judiciary decision, such as community service.⁹

⁷ Article 2 1. For the purposes of this Convention the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

2. Nevertheless, for the purposes of this Convention, the term forced or compulsory labour shall not include--

(a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;

(b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;

(c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;

(d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;

(e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

⁸ Eradication of forced labour, Report III (Part 1 B) General Survey concerning the Forced Labour Convention, 1930 (No.29.), and the Abolition of Forced Labour Convention, 1957 (No.105) Third item on the agenda:

Information and reports on the application of Conventions and Recommendations Report of the Committee of Experts on the Application of Conventions and Recommendations. International Labour Office, Geneva.

⁹ Ombudsman's Report AJB-2551/2012.

Compulsory labour done by a convicted person can only mean an exception to the scope of the Convention if it meets the conjunctive requirements laid down in the Convention collectively and simultaneously. The criteria of the Convention were defined and the normative concepts were circumscribed for the practice at the 2007 International Labour Conference, pronouncedly in terms of community service order. According to the report on it when imposing community service, the following aspects have to be kept in mind to meet the requirements of the Convention:

a) Labour as a consequence of judicial decision

The Convention declares that work can be demanded only “as a consequence of the decision of the court”. Consequently, any kind of compulsory labour imposed by the prosecutor, an administration, infringement or any other, not judiciary body cannot be harmonised by the Convention, since the textual formation does not allow any exceptions. As a result, practically the investigation of the accordance to this section does not mean any difficulty for the Labour Committee¹⁰, if the regulation or national law of the given state makes it possible only for the courts to impose community service, then it suffices to the conditions, while if it is not so, it conflicts the Convention.¹¹

The case law of the Committee offers orientation about the formal and compendiary criteria of the court decision. For example, in a direct request to Mauritius in 2005, the Committee reminded that it is the court’s duty to define the detailed conditions of community service, which are the following: the court must decide about the workplace, the name of the employing charity or voluntary institution, and the actual place of service. Supervision is the duty of the supervising guardian later on too during the execution.¹²

b) Work or service must be performed under the supervision and control of the authorities

According to article 2, 2c), compulsory labour of service inflicted on the sentenced is only excepted from under the effect of the prohibition of forced or compulsory labour, if it is done under the supervision and control of an authority. Conditions here are also conjunctive, supervision or control during execution is necessary. So, if for any reason these are not realised,

¹⁰ Committee of Experts on the Application of Conventions and Recommendations

¹¹ „The first condition does not generally pose any difficulty, since under the national laws which the Committee has been able to examine community work is a penal sanction which can be imposed only by a court.” Eradication of forced labour, Report III (Part 1 B) p. 68 sec. 125.

¹² Eradication of forced labour, Report III (Part 1 B) 69.

no matter that formally there is the opportunity of realising the conditions, the practice of the given state contradicts the Convention, because the text of the convention does not only demand the availability of control, but the fact of control, and practice falls under the exceptions defined by the convention only in this case. The aim of regulation is to withhold bodies other than the authorities from determining the conditions of work for the sentenced. This is very important because, as it is well-known, community service does not mean employment relationship, instead, the sentenced works in a law-enforcement relationship. As a result, the guaranties characteristic to an employment relationship, the wide regulations, trade unions and interest groups do not defend the sentenced, since the duties of the above-listed are limited only to the defence of the employers' interests. It is important therefore, that the conditions of work should not be determined by the employer, but instead the entitled authority, and it is similarly important that a well-prepared and entitled authority should monitor the conditions during execution.¹³

c) Prohibition of allowing the work obligant to companies or associations

The third condition of the Convention is that compulsory work or service can be excepted from under the effect of the Convention if the convict of community service is not passed on to private persons, companies or associations. The condition means that the work is allowed to be done only for the state or various divisions.¹⁴ However, non-state charity organisations and services are not explicitly excluded either. The Committee, when looking into the question, seeks assurance that work done for such private associations are genuinely for public interest. Another important aspect is that the work cannot be done to make profit or on behalf of non-profit-making associations, which condition can also be included among the regulations.¹⁵ The Committee receives information by asking governments to provide a list of authorised associations and institutions, or by asking governments involved in the convention to give examples of the type of work involved in community work, and the authorised associations who are ready to carry out community service. The fact itself that Hungarian regulation does not bind the infliction of community service to the prior consent of the sentenced, does not conflict

¹³ Ombudsman's report on case AJB-2551/2012.

¹⁴ „... the work in question is performed for the State or its various divisions (administrations, regions, public services and establishments, etc.)”. Eradication of forced labour, Report III (Part 1 B) p. 68 sec. 125.

¹⁵ In such cases, the Committee seeks assurance that work done for such private institutions is genuinely in the general interest. This involves determining whether the work is of real benefit to the community and whether or not the body for which the work is done is a non-profit-making organization. Legislation may stipulate explicitly that the association for which the work is done should not be profitmaking, 292 or that the work should not serve the purpose of economic gain. Eradication of forced labour, Report III (Part 1 B) p. 69 sec. 128.

Hungarian regulation with the prohibition of forced labour. It does not so, even though it is apparent from the international chapter and the Finnish example, that prior consent contributes to the success of enforcement.

However, article 280 (2) of Act CCXL of 2013 calls for amendment.

“Execution of community service is the duty of the supervising guardian service, which works in accordance with central or local government budget authorities, or one of their associations, bodies of local public services, associations for maintenance of government or local government properties, legal persons of the church, associations of public interest, civil associations, and business associations (later on together as workplace), and government employment bodies.”

The last item in the list is not defined in the enforcement law, while article 459 (1) of the criminal code refers to the Civil Procedure Code. Civil Procedure Code, or article 396 in Act III of 1952 includes all the entities of business in a long enumeration, ranging from business associations to self-employed entrepreneurs.

It is not only possibility, as for example in Debrecen, the workplace which has employed most convicted people in recent years is Praktiker DIY Store, which means that not only present Hungarian regulation is against the Convention, but also everyday practice.

It seems necessary to omit the item “and business associations” from the list of the enforcement law, or at least the enforcement law should include a specified term for business associations in order to harmonise with the prohibition of forced labour accentuated in Act XXXI of 1993. As local governments play a special employment role, the simplest solution should be omitting the term “business associations”, since employment is manageable without them.

De lege ferenda: section 280 (2) of Act CCXL of 2013. “Execution of community service is the duty of the supervising guardian service, which works in accordance with central or local government budget authorities, or one of their associations, bodies of local public services, associations for maintenance of government or local government properties, legal persons of the church, associations of public interest, and civil associations (later on together as workplace), and government employment bodies.”

Problems rooted in overlapping terminology with civil offence law

During execution, it occurs as a specific problem that, based on act II of 2012, there has been a possibility to alter on-the-spot fine or fine to community service since 15 April 2012. As an ombudsman's report claimed, in approximately one hundred cases a year, regional enforcement services face the fact that when they get in touch with the sentenced, they have already "enforced" their sentence.

In these cases the sentenced who is not fully informed about the difference between community service defined in civil offence law and community service defined in the criminal code, after being sentenced, visits the local job centre, which is also unaware that enforcing community service is the duty of the Service in these cases, so the job centre offers a job for the sentenced, and the notary assigns the employer in a decision, and thus everything goes on its way, however not in the correct way. The reasons for this solution may be found in the effectual Hungarian law, where there are different versions of community service at the same time. For civil offenders civil offence community service is applicable, while also the administrative fine can be compounded with this sanction. In these cases the enforcement of community service is not the duty of the Supervising Guardian Service, but of the job centres and the notaries.

The solution would be to terminate the parity in the terminology, as there are no misunderstandings in the terms of fine. To avoid misinterpretation, it seems necessary to change the related offence terminology and the name of offence community service in order to make offence and criminal sanctions distinguishable for the laymen, as it is in the case of fines or imprisonment. The new term could be community service for offence.

De lege ferenda the new terminology of section 7 (1) of act II of 2012 could be the following:

Sanctions applicable for offence are:

civil offence imprisonment,

fine,

civil offence community service.

Increasing the numbers of supervising guardians

Community service is a sanction which involves a lot of participants compared to other sanctions. However, the most important part falls upon the supervising guardians, and the body responsible for the enforcement is the supervising guardian service.¹⁶ In theory, the supervising guardian acts an active role during the enforcement of community service from the time of infliction, but in reality their role is only administrative, since there are a great number of cases for each of them, often 400, but 300 in average. In recent years the increasing number of imposed community services also increased the burden on the guardians which had already been great before. The changing practice also caused an increase in the number of cases, and similarly, the reorganised and newly appeared duties originating in the changes of the law, such as obtaining an expert's opinion on employability, and assigning the workplace, also mean a considerable burden. The supervising guardians are responsible for different professional duties without specialisation characteristically in most counties, besides enforcing and controlling community service, they make environment reports, supervising guardian's reports, minister the enforcement of community service, mediate in criminal cases, and as a result of the changes in the law, they also minister preventive guardianship, enforce reparation work, and mediate in civil offences.

All in all, it is characteristic in all kinds of cases that the number of cases has increased in recent years. There were 66,000 ongoing cases in 2004; 81,000 cases in 2008; 99,000 cases in 2012; 103,000 cases in 2014; in the first half of 2015 the number of ongoing cases reached 80,747, of which 40,726 cases were community service cases. At the same time the number of supervising guardians decreased, with 11.4% between 2010 and 2014, at the end of 2014 there were 347 supervising guardians in Hungary.¹⁷ According to the new enforcement law¹⁸, 30 people were reassigned as law enforcement supervising guardians, decreasing the number, and increasing the number of cases per guardian.

From the aspect of labour sanctions, it is essential to increase the number of supervising guardians, and it is also essential to determine an unsurmountable uppermost limit for the number of cases in order to support the maintainability of the necessary control of the enforcement of community service. International examples show that the right number of

¹⁶ Enforcement law, 280 (2)

¹⁷ <http://igazsagugyhivatal.gov.hu/szeiberling-tamas-a-bunelkovetok-felugyelete-kozossegi-erdei> (30 January, 2017)

¹⁸ Enforcement law, 3. 3

supervising guardians is a necessary requirement for the efficient enforcement. In Sweden, for example, each supervising guardian has thirty cases on average, which result in a 98% efficiency and a 20% recidivism rate.

Increasing the number is necessary not only in order to increase efficiency, but also in order to come up to the expectations of international treaties. In the chapter on international environment, I have given a detailed description of section 2 (2c) of the ILO Convention, which declares that any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority. The conditions are conjunctive, supervision, just like control is necessary during enforcement. Consequently, if any of these does not realise, no matter that the law secures the conditions formally, the given state's practice conflicts the convention, as the texting of the convention does not only requires the opportunity of control, but the realisation of control, and only in this case can practice fall under the exception determined in the convention.

Regarding the necessary increase in the number of supervising guardians, it is enough to reach back to the conceptual declarations and expectations which are determined in article 7 of the supplement of Government Decision 1183/2002 (X.31.) about the regulation principles of the establishment and maintenance of Supervising Guardian Service.

The government decision declares that "Supervising Guardian Service must be formed in the way that the supervising guardian of juveniles ministers the supervision of 45 people at maximum, the supervising guardian for adults ministers the supervision of 65 people at maximum. Besides qualified supervising guardians auxiliary and administrative crew is to be employed in sufficient number."¹⁹ We can definitely agree with these principles.

The headcount of supervising guardians was prevised by the 2001 conception as 900 for the year 2009, as it was grounded in the government decision. Between 2003 and 2005 there was an appropriate increase. In this period the number of supervising guardians for the juvenile increased by 17.07% on average (28 people), while the number of supervising guardians for

¹⁹ Government Decision 1183/2002. (X.31.) on the principles of establishing and maintenance of Supervising Guardian Service (Kormányhatározat a Pártfogó Felügyelői Szolgálat felállításának és működésének szabályozási elveiről)

adults increased by 176.05% (125 people), and the full headcount increased by 65.1% (153 people).²⁰

This tendency ceased from the year 2006, with stagnating headcount. On 1 January, 2010, there were 387 supervising guardians ready for assignment, of whom 192 for the juvenile, 195 for adults. Until 31 December, 2010 there was an increase of five people, so at the end of the year there were only 392, of which, 185 for the juvenile, 207 for adults, as a result of a minimal increase and reorganisation.²¹ In 2011 the number of supervising guardians decreased by 9.2%, that is, 36 people.²² On average there was an increase in 2011 from 227 to 270 a year, but in certain counties such as Borsod-Abaúj-Zemplén, Pest, Nógrád, and Szabolcs-Szatmár-Bereg counties, where the burden of the supervising guardians was above 300 for a person a year. In 2015, the number of cases reached 104,814, which is nearly 9,000 more than in 2011, while the number of supervising guardians decreased, as we have seen. How many supervising guardians are working at present in Hungary, the meanwhile reorganised Office of Justice was not able to tell, because as a result of decentralisation, they do not have the relevant data.

Developing the enforcement of community service, collective enforcement

Thanks to the highlighted project TÁMOP 5.6.2, now it is obvious that the collective form of enforcement for community service is efficient in Hungary. It is justified to use the experience gained here in the development of community service.

Although article 24 (4) of Ministry Statute 8/2013 by the Ministry of Trade and Industry determines the legal background of collective community service, but it seems necessary to regulate collective enforcement in the enforcement law. According to the statute, the government administration office employs assistants for the supervising guardians and taskmasters, who under the control of the supervising guardian, take part in preparing the enforcement of community service, in controlling community service, in preparing reports, and in organising and the enforcement of collective of community service.

Collective form of community service could contribute to the releasing of supervising guardians by employing less qualified and consequently more inexpensive taskmasters, and could also

²⁰ Report by the Service for Justice of the Ministry of Administration and Justice for the year 2011, p20.

²¹ Ibid.

²² Ibid.

decrease the number of inefficient services in more risky cases. Collective form of enforcement is available in France and Ireland, where it is exactly constant control that means the greatest advantage of this form of enforcement.²³

In the cases of those sentenced to community service, after questioning the sentenced and estimating risk carefully, the supervising guardian could ordain whether the sentenced shall do community service individually without direct and constant supervision, or on a group constantly supervised. The new regulation would be as followed:

De lege ferenda section 280 (3) of the Enforcement Law: The sentenced does community service individually or collectively under constant supervision, depending on the decision of the supervising guardian.

Conclusion about the regulation and the practice of community service

The practice history of reparation work is as short as its regulation. However, there are a few problems (childhood illnesses of a new legal institution) which await solutions.

The possible venues for enforcement are listed categorically in the law. The person sentenced to reparation work can choose from among bodies of local government or government, associations of public utility, legal persons of the church to perform reparation work. In practice the term “or for those” can cause problems. In this case the place of enforcement is not going to be a body of local government or government, an association of public utility, or a legal person of the church, but the sentenced does some kind of work which turns out to be useful in a way for the above listed entities. The problem is, that the strict and taxative list is broken by this interpretation. As we have seen, this phrasing is difficult to interpret. It seems necessary to supply a legislator’s interpretation or to omit the phrasing from the regulation.

According to the second phrasing of section 68 (2), if the offender cannot certify the performance of reparation work for reasons of health, the deadline for certifying the performance of reparation work can be extended with one year.

In this case it is not clear, to whom the reasons of health concerns, also to a relative or only to the person sentenced to reparation work? It would be unfair if the sentenced was not allowed to

²³ <http://www.probation.ie/pws/websitepublishingdec09.nsf/Content/How+Community+Service+Works> (2017.11.02.)

refer to the severe illness of a close relative, this would, however, be worth being recorded in the regulation this way:

De lege ferenda the second phrasing of section 86 (2) would be altered as following: If the offender cannot certify the performance of the reparation work as a consequence of their illness or the illness of a close relative, the deadline of certification of performing reparation work can be extended with one year.

According to section 70 (2) of the Criminal Code, the duration of guardian supervision for reparation work lasts until the person sentenced to reparation work certifies, but at maximum for one year. According to the maximised one year rule, guardian supervision cannot last for more than a year, even in cases when the duration is prolonged from health reasons. It is questionable whether the legislator really wanted this, or the term “at maximum one year” is just a mistake. If the court decides on reparation work and guardian supervision simultaneously, then the court must consider it necessary to be enforced. In those cases, however, when the possible timespan for enforcement extends with a year for conditions upcoming later (such as illness of the sentenced or of a relative), the person sentenced to reparation work is not under the guardian’s supervision in the period when they would really need it. In the present state the judge cannot do anything.

The unnecessary limitation should be omitted from section 70 (2) of the Criminal Code.

According to section 70 (1), the duration of the guardian’s supervision equals to the duration of probation, the approbation period of probation, the approbation period of the suspended prison sentence, and the duration of the delay of impeachment, but at maximum five years. Nothing justifies that, in a case determined by the law reparation work exceeds one year, why should not the appointed guardian supervision last until the end of the service, similarly to other cases determined in section 70 (1). From the aspect of burden of processes it would not mean disproportionate burden on the supervising guardians, concerning the frequency of imposing community service and the fact that the court does not always decide on parallel guardian supervision, but when it does, then it surely does so because it considers it necessary.

According to section 119 (2), along with imposing reparation work on juveniles, the court has to impose guardian supervision too. As the law does not contain regulations for juveniles in this sense, consequently this wrong regulation is valid for them too. This means that although guardian supervision is mandatory, the juvenile does not – cannot – belong under guardian

supervision in the second half of the time assured for the modification as a result of health problems when the juvenile serves reparation work. Concerning this, it is even more justified to alter the recent regulation in the following way:

De lege ferenda: According to section 70 (2) of the Criminal Code, the duration of guardian supervision ordained parallel to reparation work lasts until the person sentenced to reparation work certifies the performance of the work, but at maximum two years.



Registry number:
Subject:

DEENK/20/2017.PL
PhD Publikációs Lista

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MTMT ID: 10034618

List of publications related to the dissertation

Articles, studies (5)

1. **Sipos, F.:** A kényszermunka tilalma és a beleegyezés kérdése a közérdekű munka büntetés kapcsán.
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Level of HAS Committee on Legal and Political Sciences: A
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Level of HAS Committee on Legal and Political Sciences: A
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Level of HAS Committee on Legal and Political Sciences: D

By the directives of HAS Committee on Legal and Political Sciences:

Publications in periodicals level „A”: 5, related to the dissertation: 4.

Publications in periodicals level „D”: 1, related to the dissertation: 0.

The Candidate's publication data submitted to the iDEa Tudóstér have been validated by DEENK on the basis of Web of Science, Scopus and Journal Citation Report (Impact Factor) databases.

08 February, 2017

