

## **Community service in Belgium, the Netherlands, Scotland and Spain: a comparative perspective**

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### **Introduction. The challenge of comparing penal discourses and practices**

Current criminological research is particularly interested in the question whether or not we are witnessing a punitive turn and it seems that Western democracies today punish differently than a few decades ago. The 'new punitiveness' literature (Pratt, et. al., 2005) and David Garland's (2001) study on the culture of control have fuelled an ongoing debate and research on this question. There are however many ways to compare penal practices and measure punitiveness. Leading comparative research by Cavadino & Dignan (2006) for example relates variations in incarceration rates to contrasting kinds of political economy. However, punitiveness rankings vary substantially depending on the indicator used and ideally we have to take into account all of them to make sense of the assumed penal change. In this special issue we have focused on the use and implementation of community service and have focussed on its characteristics as a contemporary form of punishment. Through a detailed description of the different aspects of the rhetoric on and practice of community service, we aim to identify commonalities and local differences and attempt to understand and explain them. The question of increasing or decreasing punitiveness therefore is only one of our points of interest.

David Nelken (2007) points out the special difficulties comparative work has to face. "These range from the technical, conceptual, and linguistic problems posed by the unreliability of statistics, lack of appropriate data, meaning of foreign terms, etc., to the

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complications of understanding the differences in other languages, practices and world views which make it difficult to know whether we are comparing like with the like." (Nelken, 2007: 147-148). We have struggled with them all. However, by giving rather detailed accounts of 'law in books' and 'law in action' in the different countries we have tried to get some purchase on the main developments in community service in Scotland, Spain, the Netherlands and Belgium. In doing so, the authors of the articles on individual countries drew upon their own research and on knowledge of the social practices and penal cultures with regard to community sanctions in particular and punishment in general in their own countries.

An important issue in comparative research is the use of an adequate terminology. There is not only the use within an individual jurisdiction of different terms over time that expresses a changing approach towards community sanctions, but we see that there are also cross-national differences. In this comparative article we choose to make use of the generic and most widely used term, i.e. community service.

We have explicitly chosen to analyse relatively small or non - Anglo-Saxon countries, to avoid the Anglo-Saxon criminological supremacy or yard-stick for comparison. In this comparative article we start from contemporary experiences but also use an earlier comparative chapter by Albrecht and Schädler (1986) to reflect on how things have changed in a broader sense. As Van Kalmthout and Tak (1988: 15) have observed, despite having been well received in most European countries "there are such major differences in the ways in which [community service] has been worked out that it is impossible, indeed irresponsible, to transpose the experiences of one country upon another". However, van Kalmthout and Tak (1988:15-16) also recognise the value of comparative analysis for identifying broader lessons from the operation of sanctions in different jurisdictions. As they have argued: "It is possible to describe and analyse the way in which each country has given shape to this sanction within its own social and juridical context, and each country's experiences with it. Only then is it possible to see whether there are any conclusions to be drawn which would apply elsewhere".

### **The introduction and expansion of unpaid work**

In their comparative analysis on community service in Europe, Albrecht and Schädler (1986) observed that community service was a sanction in its own right only in the UK because in other jurisdictions it could only be imposed instead of an alternative disposal (for example, a prison sentence or a fine). Even in Scotland, community service orders are only supposed to be used if the court would otherwise impose a prison sentence, though there is no requirement that the alternative custodial sentence is stated at the point of sentence and in practice CSOs operate as autonomous sentences. Albrecht and Schädler predicted that across Europe community service would increasingly acquire the status of a sanction in its own right and this has occurred in Belgium, where in 2002 community service became an autonomous 'work penalty' (having previously operated as a condition of probation) and where, as a consequence, its use by the courts increased significantly. In Spain, following the initial use of community service with juveniles, legislative provision for unpaid work as an adult sanction was introduced in the 1995 Criminal Code, though Work for the Benefit of the Community (WBC) orders could initially be imposed only in lieu of weekend arrest or as an alternative to imprisonment for fine default; following extensive changes in the Criminal Code in 2003, it may currently be imposed as an autonomous penalty, as a prison substitute or instead of a

deprivation of liberty in cases of fine default. Likewise, in the Netherlands, following early experimentation with the use of orders, unpaid labour was formally introduced into the Dutch penal code in 1989 as a third formal sentence alongside imprisonment and fines (though until 2001 unpaid work was only intended to be used as a substitute for a short prison sentence) and in 2001 it became possible for the prosecution service to impose a community service order as an out of court settlement (diversion from prosecution). The current proposals to replace existing community sanctions in Scotland with a new 'pick and mix' form of community sentence, on the other hand, will result in unpaid work losing its status as a distinctive sentence becoming, instead, one of a number of possible requirements of a generic community order.

By the mid 1980s, community service was already becoming well established as a community sanction in Europe (Albrecht and Schädler, 1986) and its availability has increased further since then. Community service has been available in the jurisdictions under consideration for varying degrees of time, having been established first in Scotland (in 1979) then in the Netherlands (formally in 1989) and most recently in Belgium (in 1994) and Spain (in 1995). A key feature, however, has been its expansion in use following its introduction, though this has occurred in different ways and for varied reasons in different countries. In Belgium, for example, the use of community service increased dramatically following its introduction as a sentence in its own right (as opposed to being available only as a condition of probation). In Spain, expansion has occurred through community service being made available as a sentencing option for offences which take place very commonly, related to road safety and non serious forms of family violence (though this has, arguably, also resulted in net-widening). In the Netherlands, the number of community service orders made has doubled between 2000 and 2008, reflecting the effect of provisions in the 2001 bill aimed at encouraging the use of community service as a 'mid-range' sentence (located somewhere between prison and a fine) and extending its use as an alternative to prosecution. Finally, in Scotland, the use of community service orders rose markedly following the introduction of central government funding and national objectives and standards, almost doubling in the five year period to 1996 (McIvor, 1996) though the number of orders made then remained relatively stable until 2004/5 when it began once again – for reasons that are not immediately obvious - to rise (Scottish Government, 2009a).

Of course, the successful implementation of community service requires a plentiful supply of work and the support of all relevant justice professionals (Albrecht and Schädler, 1986). The observed expansion of unpaid work as a penalty is likely, in part at least, to reflect judicial confidence in the measure. For example, in Scotland there was, from the outset, relatively widespread support for community service among sentencers presiding over the sheriff courts sheriffs, who appeared to value its 'tangible' nature (Carnie, 1990) while lay justices in the district courts were unhappy that they were not, like those in the higher courts, given access to community service as a sentencing option. Judicial confidence has also clearly been a factor in the increasing use of community service in Belgium and, less explicitly perhaps, in the Netherlands and in the extension of WBCOs to additional offences in Spain.

In Spain the delayed implementation of WBCOs in some parts of the country, long waiting lists and the potential for large numbers of orders to 'expire' has attracted criticism from judges who have also voiced their concerns about offenders' lack of compliance. Similar concerns have arisen in Scotland where, despite general support for

community service among the judiciary, delays in matching offenders to placements and getting their orders started have led to public criticism by judges and resulted in the provision of additional funding by the government to speed up the process of implementation. In Belgium, too, long waiting lists have periodically occurred as a result of the success of the work penalty, though this appears not yet to have resulted in the sentence becoming discredited among magistrates.

Delays in the implementation of orders can be attributed to insufficient resources to manage orders efficiently, exacerbated in some jurisdictions (e.g. Belgium and Spain) by the sharp rise in recent years in the numbers of community service orders made. It is also worth acknowledging, however, that the very nature of the work undertaken by offenders on community service – in particular, the explicit requirement in each of the jurisdictions examined that it should be work that would not otherwise be carried out (i.e. it should not replace paid employment) - places significant constraints upon the operational capacity of schemes, particularly during evenings and at weekends. This is a particularly salient concern if – as in Scotland – proposals are in place to significantly increase the number of offenders ordered to undertake unpaid work by the courts.

Operational capacity is also likely to impact more on the operation of community service in countries in which unpaid work accounts for a larger share of sentences imposed. We have been struck by the wide differences across jurisdictions in this regard. Although in Scotland, community service accounts for a very modest share of the sentencing 'pie' (e.g. only 4% of persons convicted in Scottish courts), in the Netherlands, community service represented 30% of sentences imposed in 2006 while WBCOs are now used for almost half (45%) of those sentenced in Spain. The limitations of Belgian sentencing data mean, unfortunately, that the proportionate use of the autonomous work penalty in comparison to other disposals cannot readily be discerned.

### **Implementation: diversion from custody and net widening**

In Scotland as in the rest of the UK, community service was introduced to expand the range of options available to the courts as an alternative to custody. The role of community service as an alternative to prison was formalised in the late 1980s when prison overcrowding and record levels of imprisonment resulted in policy demands for more use to be made of existing community sanctions and for these to be strengthened through the introduction of full central government funding and associated national objectives and standards. The introduction of legislation in 1991 was intended to ensure that community service was used by the courts only as a direct alternative to prison (though in practice this does not seem to have occurred). In the Netherlands and in Belgium the introduction of community service was also motivated by a concern to address the lack of prison spaces and to reduce the use of imprisonment. As in Scotland, community service was intended to replace (short) prison sentences. In Spain, community service was identified as extending the range of sanctions available to deal with non-serious offences that did not require imprisonment, though the diversionary potential of the orders was initially limited to cases involving weekend custody and fine default and only some years later could they be used to substitute prison sentences of up to one, and exceptionally two, years.

In all jurisdictions considered there is evidence that unpaid work by offenders has been introduced at a number of different points in the criminal justice process: for example, both as an alternative to imprisonment, as an alternative to imprisonment for fine default and/or as an alternative to prosecution. There is also evidence that orders are not always being used as an alternative to imprisonment and that a degree of net-widening has occurred. For example, in Spain the extension of the WBCO to less serious (driving) offences provides clear evidence of net-widening, particularly since some of the offences for which WBCOs can now be imposed were previously administrative (rather than criminal) offences. In Scotland there is evidence that community service – although a legislated alternative to imprisonment – is probably used as often instead of other non-custodial sentences. For example, the number of community sanctions (including community service) has increased in Scotland in recent years, while the prison population has continued to increase at unprecedented levels, suggesting that community sanctions are replacing other non-custodial options such as fines. A similar general trend is found in the Netherlands. Moreover, unpaid work has been introduced as an option for fine default and, more recently as an alternative to prosecution for minor offences. A similar ‘downwards’ expansion of community service occurred in the Netherlands where in addition to serving as an alternative to a short prison sentence it could be imposed as an alternative to prosecution and where the number of short prison sentences (which community service was intended to replace) increased between 1995 and 2003 . In Belgium, the increase in the use of community service has been accompanied by a concomitant increase in the size of the prison population, though the picture here is complicated by the introduction of electronic monitoring as a modality of executing prison sentences up to three years and the non-execution of short prison sentences.

Net-widening becomes a particular concern, of course, in the event of a community service order being breached since at this point it is possible that a more intrusive penalty (such as imprisonment) will be imposed than would have been warranted by the original offence. When community service operates ostensibly as a direct substitute for another disposal there will be little leeway for the sentencer in deciding how to deal with the breach: where there is greater flexibility, the possibility of ‘up-tariffing’ as a consequence of net-widening can arise. Interestingly, research conducted in Scotland revealed that sentencers could be more or less lenient when re-sentencing for the original offence (depending on how ‘wilful’ the non-compliance was perceived to be) and that they varied with respect to their willingness to ‘discount’ any resulting prison sentence to take account of the proportion of the order that had been completed when the case was returned to court (Carnie, 1990). As a procedural safeguard, in the Netherlands it is a legal requirement that the sentence imposed upon breach is discounted by taking into account of the amount of community service that has already been carried out. This same safeguard is established in Spain when WBCOs are imposed as prison substitutes; however, when imposed as autonomous penalties, the only possible reaction to breach is a fine.

The introduction of community service as a community penalty across Europe coincided with a broader shift in the penological climate towards increased punitiveness. The question arises, then, as to whether community service in itself has contributed to a rise in punitiveness - through its explicitly retributive aims and by providing opportunities for ‘real’ punishment in the community - or whether it is itself a product of an increasingly

punitive climate in which sanctions such as probation were becoming discredited with the 'demise' of the rehabilitative ideal. We suspect the latter to be the case. Furthermore, while the net-widening potential of community service may be a source of concern, its success in becoming well established arguably owes much to its use as an intermediate sanction in cases where a prison sentence is considered too heavy and the other available options are thought to be too light.

### **Stated and actual goals and how they are achieved**

It is a characteristic of all penal sanctions that contradictory aims are served with them. For community sanctions, however, the objectives that have been attributed to them have always been very unclear and conflicting, though with good reasons. The jurisdictions we have considered have various stated aims for community service, including providing a more humane alternative to prison, rehabilitation and reparation. While these aims are largely shared across jurisdictions, within different jurisdictions they are assigned varying degrees of importance. Furthermore, the relative importance attached to different aims has changed over time in each jurisdiction. It is therefore instructive to consider to what extent the penal aims have changed and to reflect both on factors that might have influenced these changes and on their practical implications.

Rehabilitation is still a stated goal of community service in all jurisdictions; however, the understanding of what rehabilitation implies has changed. Rather than being broadly defined as a change in the offender's attitudes and views that could be promoted through useful work or contact with its beneficiaries, it is now more narrowly or more explicitly conceptualised as reducing reoffending. While other objectives related to changes in offenders may still be articulated, reducing reoffending is prioritized. This seems to be the case of Scotland, the Netherlands and Belgium (albeit not explicitly). And even rehabilitation in this very narrow sense is not seriously pursued since in all of the jurisdictions considered most orders are increasingly carried out without much personal support. In Spain, for example, increasing workloads are leading to more standardized and less interventionist practices. In Scotland, community service officers are not required to be qualified social workers, and offenders who are considered in need of social work support are likely to be recommended for probation instead of community service. The Belgian case is more ambivalent in the sense that the executive authorities allow little or no support, but the justice assistants have demonstrated resistance towards this 'naked' execution. So the initial bend towards rehabilitation is no longer unambiguously reflected in implementation practices. The prediction was made in an earlier review of community service in Europe that "(re-)socializing effects of Community Service will become increasingly important in the future and that its role as punishment (e.g. by taking away a part of the offender's leisure time) will disappear" (Albrecht/Schädler 1986:192). However, in light of the developments in all jurisdictions, the opposite seems to be the case. Rehabilitation is, if not shrinking, at least being more narrowly defined, and retributive aspects of the order are being stressed in an effort to garner public and judicial support.

There seems currently to be a greater relative emphasis upon the retributive aim of community service in all jurisdictions. Although community service has always been associated with punishment – and initially met with some resistance among probation officers in the UK and the Netherlands for this reason – originally the punitive aspect of the sanction has been attached to the deprivation of the offender's free time, in accordance with the doctrinal view on the punitive element of the prison sentence. The work itself must not be explicitly punitive therefore (Ashworth 1992, Boone 2000). This has changed, however, mainly as a result of establishing community service as a direct or autonomous penalty and a prison substitute and the perceived need to underline its credibility if it is to be used as such (Spain, the Netherlands) and the need of the Government to enhance the credibility of the penalty in order to command public support for the order (Scotland, Belgium, the Netherlands). Public acceptance of community service as sufficient punishment seems to be needed in order to ensure that it is widely implemented and the public credibility of the sanction has been, and remains, an issue in most jurisdictions. In the Netherlands, for example, while they enjoyed broad popular support at least until the early 1990s (Van der Laan 1993), CSOs are currently being questioned by the media and in other public for as too light for some categories of crimes. In Spain enhanced credibility has been pursued through increasing the number of hours or days to be worked by offenders. It is of particular concern that in the Netherlands, increasingly punitive public attitudes have resulted in more demanding tasks for offenders while in Scotland there have been periodic –though short-lived - political calls for work that is both visible and physically demanding. This is unfortunate because there is evidence that offenders' experiences of undertaking community service can have an impact on their compliance and even, in the longer term, upon recidivism (McIvor, 1992). In particular, work placements which require a degree of practical or personal skill and which are rewarding both for offenders and for the beneficiaries seem more likely to support the process of desistance from crime or at the very least to enhance the positive meaning of the sentence for the offender.

Reduction in the use of prison sentences was also initially a widespread aim of community service in all jurisdictions. This was stated very clearly in the Netherlands, where it was introduced to provide a more humane response that could alleviate prison cell shortages. In Scotland legislation was introduced to encourage the courts to use community service only in cases where the offender would otherwise be imprisoned and therefore to reduce the use of short prison sentences. In Belgium, it is explicitly stated in the law that the work penalty may not be imposed together with a prison sentence. Whilst reductionism remains as an aim in Scotland "to ensure that courts have access at all times to a community disposal, which offers a credible alternative to a sentence of imprisonment or detention" (Scottish Government 2009b:2), it has been dropped as an explicit aim of community service in the Netherlands.

Reparation, finally, is a stated goal of community service in some jurisdictions, though reparation is usually couched in symbolic terms whereby offenders make amends to the community rather than to the victims of crime (even in Spain where the reparative aim is stated in law but has little significance at a practical level). There is some evidence of reparation being re-cast in more retributive terms as in the proposed introduction of 'payback' in Scotland. Here, increasingly, local communities are being offered the opportunity to identify projects for offenders to carry out. The implications of this development will need to be carefully assessed: will it result, for example, in the

identification of increasingly demanding and punitive placements that reflect a public's thirst for vengeance? Or will it instead inculcate a deeper sense of community commitment towards offenders and greater willingness to support their reintegration once they have symbolically repaired the harm.

These shifts in the meaning attached to the various aims and in their relative emphasis have occurred in response to a number of factors. It appears, for example, that the change in the penal climate has had some impact upon community service at least in some jurisdictions. Organisational arrangements also have had implications for the development of the various aims of the order, and in particular in relation to rehabilitation. The agencies responsible for executing and supervising the orders (social work local departments in Scotland, the Probation Service in the Netherlands, the Penitentiary Social Services in Spain and the Houses of Justice (cf. probation service) and local authorities in Belgium) all have a commitment to intervention. This organisational basis has probably meant that there was, from the outset, the possibility of a rehabilitative 'slant' to community service, even if its rehabilitative aims were implicit or incidental rather than explicitly stated by authorities. However, there may also be tensions between the officially stated aims and the implementation of community service 'on the ground', which may explain why the rehabilitative content of the order may in practice appear exaggerated or, conversely, underplayed in comparison to official statements of aims. Tensions between stated and actual goals - which transform the interpretation and implementation of rehabilitation - can occur at various levels in the implementation process. Analysis of the aims of community service therefore needs to occur both at the level of official statements and at the level of implementation practices and attention needs to be paid to the changing and complex influences and relations between these two levels.

### **Characteristics of offenders**

The analyses of community service across jurisdictions revealed interesting differences in the characteristics of offenders required to undertake unpaid work for the community, reflecting differences in the location of community service in relation to other sentences available to the courts. In Belgium, the Netherlands and Scotland, for example, where community service is intended to replace (short) prison sentences, the types of offences for which offenders receive community service are broadly similar. By contrast, WBCOs in Spain have been targeted upon particular categories of offences – domestic violence and traffic offences – and this results in a different profile of offenders sentenced to unpaid work.

In each of the jurisdictions examined, community service is predominantly imposed upon men, in part because men make up the majority of defendants appearing before the courts. The underrepresentation of women on community service in comparison with men, evidenced in Scotland and Spain, could be a result of persisting patriarchal attitudes that associate labour with men and possibly of a lack of infrastructure – in the form of adequate childcare provision – for women given orders. However, in Scotland, Belgium and the Netherlands women also make up a higher proportion of those on community service than of those in prison. In Belgium, for instance, women make up 8% of those on community service but only 4% of those in prison. This may be because in some cases women are perceived as care takers with family responsibilities (who

therefore should not be imprisoned) or because they are perceived by the judiciary as having committed less serious crimes (and therefore being less dangerous and not in need of imprisonment) (Beyens, 2000). In Spain and in Scotland, however, women are more likely to receive a prison sentence than community service. In Spain, this is despite the fact that WBCOs are increasingly widely used and it may be explained by reference to the type of offence targeted for these orders.

It would also appear that access to community service by non-nationals varies across jurisdictions, with individuals of immigrant origin being under-represented on community service in the Netherlands and Belgium (but overrepresented in custodial populations); and non-Spanish offenders being over-represented both in community service and (much more so) in the prison population (there are no published data for Scotland but overall the population is ethnically very homogenous: only 2% were from minority ethnic groups according to the last (2001) census). The under-representation of non-nationals on community service in Belgium and the Netherlands is probably due to the fact that sufficient ability to speak the national language is still an important criterion for imposing a community service order. Most countries also exclude undocumented foreigners from sentences in the community.

The demographic profile of offenders also differs. Although the age profile of offenders is typically young, this is particularly so in Scotland, where 69% of offenders are 30 years of age or younger (and where the age profile of those on community service is younger than the age profile of the overall sentenced population (Scottish Government, 2010)). The younger age profile in Scotland in comparison to the other European jurisdictions examined is likely to reflect in part the fact that young people aged 16 years and over are subject to adult jurisdiction, while in the other countries - and with relatively few, if any exceptions - those aged 18 years and older are dealt with in the adult courts.

With respect to employment status and educational level, the profile of offenders in Spain is of particular note, being more likely to be employed than those given community service in other jurisdictions and with a relatively high proportion being educated beyond school level (the rather different demographic profile of offenders in Spain - and the types of offences they are sentenced for - may also account for the comparatively low levels of recidivism following community service in that country). This, we suggest, reflects the targeting of WBCs in Spain upon offences that are less likely to have a strong association with deprivation or poverty. It may be suggested that a trend is developing whereby more deprived offenders face a greater likelihood of being sent to prison while community service is more readily considered for middle class offenders (as evidenced, for instance, in the courts' reluctance to impose prison sentences upon students if this can be avoided).

Overall, these findings appear to offer some support for van Kalmthout's observation that 'when we look at the characteristics of offenders sentenced to a community sanction, we must conclude that very important categories of offenders (such as drug addicts, foreigners and homeless people) are highly under represented. Also, some types of offences (such as drug crimes, violent crimes, drunken diving and sexual crimes) are under-represented in many countries, because formal regulations or sentencing practices exclude them from the application of a community sanction. Not infrequently, offenders with a previous criminal conviction are also excluded. This corresponds with the characteristics of the prison population, which is changing

dramatically and becoming more and more the refuse dump for certain categories of offenders for which no community projects are available, due partly to lack of financial means and partly to lack of political will' (Van Kalmthout 2000, p. 131/132).

## **Operational issues**

We have already noted how there has been a shift in the aims of community service in each of the jurisdictions considered away from rehabilitation and towards retribution (as evidenced, for example, in an emphasis on publicly visible physical work). This philosophical shift has also been accompanied by what can perhaps be best conceptualised as a practical shift from offender supervision to offender management, that is characterised by the gradual erosion of social work/welfare support to offenders undertaking unpaid work and a diminution in attention to the rehabilitative potential of orders. Interestingly, in Belgium there has been considerable resistance to such a development among justice assistants who are responsible for the implementation of orders and who, being social workers, regard supervision and support as indispensable for the successful implementation and termination of a sentence. Similar resistance in the Netherlands seems to have all but disappeared with the arrival of the next generation of staff. However, with the implementation of the 'Business Process Reengineering' a managerial oriented approach was introduced in Belgium, which initiated a move towards more standardization and less freedom in the execution. There are indications that this could usher in a same movement as what happened in the Netherlands. In Spain, the pressure of numbers and the increase in the caseloads assigned to supervisors has rendered interventionist practices impracticable, and a clear shift towards more expeditious, managerialist styles of supervision is taking place. In Scotland the introduction of national objectives and standards and central government funding in 1991 is likely to have eroded the explicit social work approach adopted by some Scottish schemes that was identified by McIvor's (1992) research, though the continued assumption of responsibility for community service by social work departments suggests that an *implicit* welfare orientation may still apply

It has been argued that community service can have an important 'communicative' function (Duff, 2001) as a type of public reparation in which the censuring of the offender is accompanied by opportunities to "express his or her understanding of what he or she has done and his or her renewed commitment to the community" and for the community to accept that "in completing community service the offender has sufficiently apologised for the crime" (Rex, 2004, p. 117). This perhaps lies behind Albrecht and Schädler's (1986) emphasis on the importance of convincing offenders that society appreciates the contribution made by their work and their contention that that is best achieved by identifying and enhancing the use of agencies that are "capable of providing community service places which give the offender a feeling of performing *meaningful work*." (p. 193, original emphasis). As Boone points out in her paper, there is, however little empirical evidence for these processes and their effects, a fact that probably must be ascribed to the current preoccupation with reducing reoffending. There is, in our opinion, considerable scope for exploring further whether, in what ways and how personal and social change may be achieved or triggered by unpaid work.

This raises important questions about the likely impact of a more managerialist/administrative approach to community service as exemplified, for instance, by the introduction of contestability in a relevant region in Spain (Catalonia) and by the increasing involvement of the private/commercial sector in placement provision in the Netherlands. Both of these developments, which appear to be primarily financially driven, coupled with increased demands for community service by the courts, may result in the increasing availability of work opportunities that are less resource intensive, less 'public' (in the sense of bringing offenders into contact with the beneficiaries of the work), less 'generative', less imaginative and less effective. Interestingly, this has not yet occurred in Spain where, to accommodate increasing numbers of offenders on community service, placements are being identified that are increasingly public and sometimes very imaginative (though perhaps less effective overall as a result of the absence of supervisory support).

### **Effectiveness – lack of robust data**

Despite the fragmentary character of community service in terms of aims there is nonetheless a degree of convergence and consensus across jurisdictions that rehabilitation (in a broader sense than reductions in recidivism), substitution of the prison sentence (in at least some cases) and reparation or conflict solution are important aims. It is surprising, therefore, that we know relatively little about the effectiveness of the community service with respect to these aims.

Besides substitution (see above), the only objective that has been a systematic focus of research in Spain and the Netherlands, is diminishing recidivism. This is, however, not an easy topic to investigate, because offenders who receive a community service order often differ substantially from offenders receiving a prison sentence. Randomised control experiments, however, meet with important legal and moral objections or unresolved implementation problems. Despite that, the results of the studies that have been performed are encouraging. Recent data from the Scottish Government indicate lower reconviction rates among those given community service, particularly among offenders with more extensive criminal histories (Scottish Government 2009c). These data show that offenders can also 'learn' from community service orders in a latter stage and must therefore be considered as an argument against giving up on offenders too easily by only sustaining a community service order for first offenders. In the Netherlands a study was recently published in which most selection effects could be controlled. The conclusion is that offenders who received a community service order do much better than offenders who served a prison sentence. In the first year after conviction recidivism rates were 67% lower for property crimes and 60% lower for violent crimes. These results hold for the next eight years. After eight years, recidivism rates are still 50% lower (Wermink et al. 2009).

Almost no recent research has been conducted to the other aims that are attributed to community service orders, including the aspects of rehabilitation that consider the well-being and social integration of the offender. What do we know about the way offenders experience community service orders? What did they learn from it and what did it bring them? And how do 'employers' experience community service orders? Do they appreciate the work of offenders? And does the experience change their view on crime and criminals? Apart from a recent, but rather limited and descriptive Belgian study, and an ongoing research in Spain, we found little systematic and *recent* data concerning

those questions (there has been research on these topics in the Netherlands and Scotland but this was conducted around 20 years ago). This shortage of interest from the government arguably reflects a lack of ambition concerning the other (possible) aims of community sentences. In the context of community service, interaction happens on a daily basis between thousands of persons convicted for a criminal offence and people who benefit from them.

Still, we know very little about the contribution or harm this interaction does to these broader social processes. There is clearly scope for more contemporary and critical analyses of the operation of unpaid work in different jurisdictions.

## **Human rights**

It is another illustration of the diffuse character of community service orders that they have and are probably still seen as a 'favour'. This may explain why, in the Netherlands, Spain and Belgium some aspects of the legal position are still scarcely worked out or not seriously implemented (Kelk 2003), at least in comparison to the prison sentence. From a comparative perspective, the legal position of offenders on whom a community service order is imposed could be the topic of a separate special edition, but there are two important human rights issues we did not want to ignore.

### *Forced labour*

A first issue concerns the requirement of consent in relation to the prohibition of forced labour in the European Convention on Human Rights (Section 4) and in most national constitutions. In Scotland, Spain and Belgium, oral consent by the defendant or his defence lawyer is still a requirement for imposing a community service order. In the Netherlands, however, the requirement that the offender has to give his consent in an oral or written statement is abolished, due to the desire to impose a community service order in cases that the offender is sentenced by absentia. According to the legislator at the time, the consent could also be expressed by just starting to work. The question arises how this situation relates to the obligation of informed consent in the jurisprudence of the European Court of Human Rights (Van der Musselle, EHRM 23 November 1983 Series A, vol. 70), a requirement that also seems to be expressed in rule 31 of the European Rules on community sanctions and measures which says that 'a community sanction or measure shall only be imposed when it is known what conditions or obligations might be appropriate and whether the offender is prepared to co-operate and comply with them. This is a problem, however, that also can arise if the offender has to give his consent in court, because in the Netherlands, Belgium and Scotland, for example the probation service decides on the content of the community service order after the trial, so even if the offender has to give his consent, he does not really know where he agrees with. In Belgium, an attempt has been made to avoid this difficulty by stating in the law that the judge has to inform the defendant about the implications of the work penalty. However, due to the judges' lack of knowledge of the content and organisation of the work penalty this requirement can be regarded as being of somewhat symbolic importance. In Spain, on the other hand, the offender gives his consent twice: once before sentencing, to the judge; and a second time to a particular placement, with a stated working schedule. And for all countries the problem arises that the offender will have to choose between an unsuspended prison sentence and a community service order, two options that are so unequal that we have to question whether the offender has a truly free choice, another requirement of the European Court of Human Rights (Deweert, ECHR 27th November 1980, NJ 1090, 561, Series A, vol. 35,

o. 49) (see also van Zyl Smit, 1994). In Scotland this is compounded by the fact that there is no need for the court to indicate what the 'alternative' sentence would be, with the result that offenders may consent to community service in the erroneous belief that they would otherwise be imprisoned.

According to Van Kalmthout, the abolition of the requirement to consent is not really a problem since the emphasis of the review of the European Court of Human Rights lies on the content of the sanction (Van Kalmthout 1993). A sentence can also be defined as forced labour 'if the work or service be performed is unjust or oppressive or the work itself involves avoidable hardship' (ECHR Van der Musselle, EHRM 23th November 1983 Series A, vol. 70). Although this requirement does not neutralise the significance of the first requirement in our opinion, it is interesting that the Court speaks out clearly against a too severe content of the community service order, a demand that is frequently heard in all four countries. Practices such as the ones taking place in Spain, for example, where, allegedly for health and safety reasons, some offenders have to wear a brightly coloured vest reading 'Community Services' on the back, must be firmly rejected based on this argument. The same conclusion can also be drawn by way of other human rights, for example the prohibition of inhuman treatment and humiliation and the general penological principle that rejects additional punishment.

The requirement of consent remains important, however, because it protects the offender against forced labour beforehand. One could probably defend the opinion that the offender gives his consent by starting to work, but he should at least have the possibility to let his case be judged again in case he does not come to an agreement with the probation service (Boone 2000). The current situation in the Netherlands is that the Prosecution Service can demand default detention immediately after it receiving notification that the offender had refused to go at work.

### *Proportionality*

The above mentioned issues also relate to the issue of proportionality, a legal requirement for all governmental interventions in the personal life of inhabitants that is also stressed in the European rules on community sanctions and measures (section 6). First, the situation in Spain catches the eye where offenders can be required to undertake very long orders in comparison with the other jurisdictions. In theory, an offender could be ordered to undertake unpaid work for around 720 days if a prison sentence of two years was being substituted (on the basis that one day of imprisonment translates to one day of unpaid work). Although one could defend the opinion that if two years of imprisonment is in proportion to the crime, this counts for 720 days of community service as well, these lengths of orders are in such contrasts with the prescriptions in other jurisdictions of what can be asked of the offender (240-300 hours), that they must definitely be considered as disproportionate. The fact that the length of orders imposed in practice is not very different from the other countries does not change this conclusion, particularly since the length of a resulting WBCO is sometimes used by judges as a reason not to substitute prison sentences.

On the other hand, Van Kalmthout raised the question as to whether relatively low maxima of hours could really be seen as proportionate reactions to more serious crimes (Van Kalmthout 2000). What we see in practice is that judges scarcely use the full amount of hours, but impose relatively low amounts of hours for relatively non-serious

crimes. For more serious crimes, he or she can use a combination order to add a rehabilitative component to a sentence for a more serious offender. In Belgium, for example, a number of hours of non-conditional work penalty can be combined with a number of hours of conditional work penalty and a probation order, though this tends to be confined to offenders with other personal problems. Similarly, in Scotland courts tend to use probation orders with a requirement of unpaid work with offenders who commit more serious offences, either to enable support to be offered to offenders at risk of imprisonment who have other personal difficulties or to add some punitive 'bite' to what would otherwise be a primarily rehabilitative sanction.

A final remark related to proportionality concerns the procedures for and outcomes of breach. Since community service orders replace prison sentences only very partially and, as previously indicated, are mostly imposed for relatively non serious crimes, one might question, in accordance with the standard minimum rules of the Council of Europe (rule 86), whether imprisonment should be an automatic reaction to non-compliance. In most countries, at least, a new hearing is necessary to prosecute breach. In the Netherlands, however, the Prosecutor can demand default detention immediately after receiving notification that the community service order was not carried out satisfactorily. The offender has the right to appeal, but the appeal does not suspend the execution of the default detention. The judge (or the probation commission or the public prosecutor in the case of Belgium) has the option of letting the community sentence be continued, but it would be much better if the judge took the original offence into consideration and also had the possibility at that stage to alter the sanction, as is partly the case in Belgium and in Scotland. This is less of an issue in Spain, however, because imprisonment can only be imposed as the default sentence when community service replaces custody and in most cases (as a direct or autonomous sentence) the default sentence shall be a fine.

## **Conclusion**

From a quantitative point of view, community service can, without any doubt, be regarded as one of the most 'successful' late modern punishments. Due to its (ascribed) punitive character it has achieved a vested position in the punishment scale as an intermediate sanction (Morris and Tonry, 1990) between the 'soft' alternative of probation and imprisonment. In most jurisdictions community service has also evolved from a purely rehabilitative 'measure' to a punishing community 'penalty'. This evolution is interpreted as an expression of a general trend towards a demand for more credible alternatives by the public and the judiciary. The question of net-widening, relevant from a penological and reductionist point of view, is still unresolved, partly due to the difficulties to demonstrate it with reliable data. From the point of view of net – widening, it becomes however relevant to question the quantitative success of community service. Although we might presume that it can have a certain substitutive effect on imprisonment, its introduction has not led to a shrinking prison population: on the contrary, the growth of unpaid work by offenders has accompanied increase rates of imprisonment, pointing to significant penal expansion. This would appear to indicate the salience of a global need for punishment in society related to different social, cultural, political and penal factors, which are only touched upon in this special issue.

Our analysis does not display community service as a purely punitive measure. Especially with regard to its implementation we see that there are internal countervailing

forces, entailing a multi-faceted, ambiguous implementation practice, which cannot be grasped on a simple continuum of punitive – non-punitive. The country reports illustrate very clearly that the operation of community service in different jurisdictions is shaped by local circumstances and existing sentencing cultures but that across jurisdictions we can see evidence of the influence of ‘universalising’ trends, such as net-widening and the increasing amount of punishment in society, accompanied by a shift from supervision/rehabilitation to offending management/reducing offending. We also see a selective use of community service with regard to certain groups of offenders (underrepresentation of non-nationals and of socially and physical disabled offenders), introducing an additional layer of bifurcation in the criminal justice system.

In conclusion we would argue that our analysis shows that the quantitative success of a penalty is not a guarantee for its qualitative success, particularly with regard to its execution, which is currently confronted with similar problems as the prison system, namely shortage of capacity and a lack of social support and individual follow-up. More resources to establish an execution system that can guarantee a qualitatively individualised follow-up can be regarded as the big challenge for the future. We also see a tension between the need for professionalization in placement provision (thought the use of appropriately trained staff who are able to accommodate ‘problem’ offenders and thereby ensure equal opportunities for diverse groups of offenders) and the importance of the embeddedness of community service in the community to preserve its fundamental characteristic as a *community* sanction (Luypaert, *et. al.*, 2007). We believe that to promote this latter dimension of community service and enhance its capacity as an effective and constructive disposal the involvement of volunteers, where appropriate, is crucial. At the same time we should be aware that there is a limit to how much society and its component citizens can be made responsible for punishment. Moreover the risks attached to instrumentalisation of the community for criminal justice objectives must not be neglected (Beyens, 2006).

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