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Unpaid work as an alternative to imprisonment for fine default in Austria and Scotland

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Abstract

Many jurisdictions have introduced other non-custodial measures to decrease the usage of fines, nevertheless they are still a popular sanction. Although the majority of offenders fined pay their fine, some are unable or unwilling to do so and as a consequence can be imprisoned. At a time when prisons are overcrowded and short term sentences are a substantial administrative endeavour, with little to no re-socializing potential, many jurisdictions have implemented other measures to prevent imprisonment for fine default such as unpaid work. Both Austria and Scotland have implemented the possibility of unpaid work as an alternative to imprisonment for fine default. While Scotland has almost 20 years of experience, Austria has just recently implemented the option of community work for fine defaulters in 2008. This article examines the experience of unpaid work as an alternative to imprisonment for fine default in these two contrasting jurisdictions and discusses the key differences between them. It considers whether the implementation of unpaid work as an alternative to imprisonment for fine default in each jurisdiction fulfilled the original policy intentions and what wider lessons can be learned from their experiences of unpaid work for offenders who fail to pay their fines.

Keywords: Community Service - Fine default - Unpaid work

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Introduction

As Bishop (1988, p.79) observed in his overview of community-based sanctions in Europe "fines are among the oldest and most used of all the non-custodial alternatives". Despite its popularity, however, use of the fine in many jurisdictions has decreased through the introduction of other non-custodial penalties, with evidence that even measures intended to function as alternatives to imprisonment are often being used instead of fines. In the Netherlands, for example, although community service, when originally introduced, could only be used as an alternative to unconditional or part-suspended sentences where the custodial element was six months or less, there was evidence that it was often used as an alternative to other non-custodial sentences such as fines and suspended sentences, with net-widening being particularly evident when short community service orders were imposed (Spaans, 1998). Research into the operation of community service in the UK similarly suggested that orders were often being made instead of other non-custodial penalties such as fines (Pease et al., 1977; McIvor, 1990).

Non-payment of fines may also potentially undermine the use and legitimacy of financial penalties with the courts. Although the majority of offenders who are fined typically pay their fine (with or without further enforcement measures), some are either unable or unwilling to do so and in many jurisdictions imprisonment is a consequence of fine default. Although the proportion of those fined who are imprisoned for default is usually small, fine default can represent a high proportion of prison receptions. To address this issue, several jurisdictions have attempted to strengthen the enforcement of financial penalties and have introduced alternative responses to sustained fine default, including unpaid work.

Internationally, community service operates at a variety of points in the criminal justice process and is a well established sentencing option (Harris and Lo, 2002). Unpaid work for the community is most commonly available as an alternative to imprisonment or as a sanction in its own right, and in some jurisdictions such as the Netherlands (Boone, 2010) and Belgium (Beyens, 2010) is available as an alternative to prosecution for minor offences, however a number of jurisdictions have introduced provisions to enable the courts to impose a period of unpaid work as an alternative to imprisonment for fine default. Community service has been used for fine default in the Australian states and territories, in New Zealand (Ministry of Justice, 1999) and in Canada (Heath, 1979). In Spain, community service (work for the benefit of the community) was introduced by the 1995 Criminal Code (with subsequent amendments introduced in 2003 and 2004) as a substitute for prison sentences, as a direct penalty for certain offences and as one of a number of options for responding to non-payment of fines, though in practice this measure is used rarely, with the majority of fine default cases resulting in the offender receiving a sentence of imprisonment or suspended prison sentence (Blay, 2008). Elsewhere in Europe, community service was made available as an alternative to imprisonment for fine default in a number of states including Switzerland (Tak, 1986), Italy (Paliero, 1986) and Germany (Albrecht and Schädler, 1986; Dünkel, 2004).

Two pilot schemes were introduced in England and Wales to improve the collection of fines and provide alternative penalties for those who defaulted on their payment. The Crime (Sentences) Act 1997 introduced provisions for fine defaulters to be penalised through the use of community service orders, electronically monitored curfews or disqualification from driving as an alternative to imprisonment. Evaluation of two pilot schemes in Norfolk and Manchester (Elliot et al., 1999; Elliot and Airs, 2000) revealed that community service was the most frequent disposal made (in 81% of cases) with magistrates preferring this option because it enabled offenders to put something back into their communities and many offenders reporting that they preferred community service to paying a fine. However there was no evidence from the pilots that the new measures had increased the number of fines paid and they appear to have had little, if any, effect on the use of imprisonment because it was likely that most defaulters who received an order would not have been imprisoned in the first place (Elliot and Airs, 2000).

More recently, provisions were introduced though the Courts Act (2003) in England and Wales for fine defaulters who were unable to pay their fines to undertake unpaid work as an alternative to imprisonment. Fine Payment Work schemes, which aimed to improve fines enforcement and enhance the credibility of the fine as a sentencing option, were introduced in 5 court areas in 2004 and extended to 2 further areas in 2007 and 2008 "targeted at those who genuinely cannot pay and where all other enforcement mechanisms have failed or are likely to fail" (Rix et al., 2010, p.6). Under the scheme, which was voluntary and required their consent, offenders undertook supervised work placements in a variety of settings, the length of which was determined by the amount of outstanding fine (with a conversion rate of one hour's work for each £6 of fine outstanding). Although practitioners and offenders were broadly positive about Fine Payment Work, the take-up of orders varied across areas but was generally low, with only 217 orders having been made by 2008 and 101 of these successfully completed (Rix et al., 2010). The low take-up of orders by the courts was attributed to the availability of other measures to improve the enforcement and collection of fines while a range of other barriers to successful implementation of the pilots was identified including: insufficient staff resources; concerns about the 'contaminating effects' that may arise from offenders on Fine Payment Work orders being required to work alongside offenders undertaking unpaid work as part of a community order; the potential risks to untrained placement supervisors; the lack of clarity and consistency in monitoring attendance and responding to non-compliance; and the relatively high administrative costs (Rix et al., 2010).

Although the evaluators of the Fine Payment Work pilot recommended that the initiative be rolled out gradually and cautiously to enable the issues that had been identified to be addressed and resolved, the pilot was discontinued in April 2009 (Rix et al., 2010). However, the Northern Ireland Department of Justice has subsequently announced the establishment of a supervised activity order pilot in which offenders would be required to undertake between 10 and 100 hours of reparation, training or community work as an alternative to imprisonment for defaulting on the

repayment of fines of up to £500 (Northern Ireland Assembly, 2011). The pilot began in Newry in January 2012.

As the preceding discussion indicates, jurisdictions appear to have had varying experiences with the use of community service for fine defaulters and its use in this way is less developed and widespread than its use as a direct alternative to imprisonment or as a sanction in its own right. To explore further the capacity of unpaid work as an alternative to imprisonment for fine default to function as a credible sanction and its impact on rates of imprisonment, this paper focuses in greater detail on its use in two jurisdictions. In Austria, the introduction of community service for fine defaulters is a relatively recent initiative. By contrast, Scotland has had almost 20 years' experience of unpaid work being available as an option when offenders default on payment of their fines, albeit as one of a range of supervised activities that can be ordered by the court. The following analysis considers what can be learned from the experience of unpaid work as an alternative to imprisonment in these contrasting jurisdictions.

Unpaid work as an alternative to fine default in Scotland

Supervised Attendance Orders (SAOs) were initially introduced as a community-based alternative to imprisonment for fine default in Scotland under Section 62 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. They substitute the unpaid portion of a fine with a period of constructive activity, which can include unpaid work or educational activities, designated by the social work department, taking into account risk and needs assessment. The fine is the most commonly used disposal in Scotland and accounted for approximately 80% of all sentences imposed in Scottish courts during the 1980s, though its use steadily declined with the introduction of other community-based disposals including community service (in the late 1970s), electronically monitored restriction of liberty orders and drug treatment and testing orders and the strengthening of probation through the introduction of central government funding and national objectives an standards in 1991.

The issue of fine default began to attract policy attention during the 1980s when rising rates of imprisonment and prison overcrowding culminated in a period of unrest in Scottish prisons. Although the majority of those who were fined paid their fine in full (around 65%) or following enforcement measures around (27%) and although fine defaulters who were imprisoned made up a relatively small proportion of the daily prison population, because of the large numbers fined, they constituted almost half of all sentenced receptions to prison (Rifkind, 1989). The introduction in 1980 of a pilot fines officer scheme in two Scottish courts – aimed at improving the enforcement and collection of fines - was found to have had a positive impact on the level of default at each stage of the enforcement process and resulted in fewer offenders being received into custody for non-payment of their fines (Millar, 1984), however extension of the scheme to the larger sheriff courts in Scotland appeared to have had a limited impact on the number of offenders received into custody for fine default (Nicholson and Millar, 1990).

In 1989 the then Secretary of State for Scotland, in an address setting out its approach to penal policy, indicated the government's commitment to reducing the use of imprisonment through restricting it to those offenders for whom no appropriate alternative was available (Rifkind, 1989). Among the potential practical measures that he outlined was the introduction of a unitary (or day) fine system – where fines would be expressed in terms of days or units instead of sums of money – to make financial penalties more realistically linked to offenders' ability to pay in the hope that this would result in "fewer defaults, less need for enforcement measures and a reduction in the prison population for fine defaulters" (Rifkind, 1989, p.86). A framework for the introduction of day fines in Scotland was included in the 1990 Law Reform (Miscellaneous Provisions) (Scotland) Bill but it failed to achieve the necessary political support to gain legislative expression in the subsequent Act (McIvor, 1994).

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1991 did, however, introduce a new option for use by the courts in dealing with offenders who defaulted on payment of their fines by way of the supervised attendance order (SAO). Under the new order offenders who were facing imprisonment for fine default could be required instead to undertake between 10 and 60 hours of specified activity supervised by the local authority social work department[4]. Policy guidance accompanying the introduction of this new disposal identified the aim of the SAO as being to provide "constructive activity which is likely to include sessions on life skills as well as unpaid work, carried out wherever possible on a group basis" (Social Work Services Group, 1991). SAOs were not intended to address the underlying causes of offending behaviour but were meant instead to "constitute a fine of the offender's free time" (Social Work Services Group, 1991). The incorporation of activities other than unpaid work into the new order – and the name of the order itself – was symbolically significant as a means of indicating that it was not simply an extension of community service for less serious offences. While a working group on fines and fine default commissioned by the Association of Directors of Social Work had previously proposed that existing penalties such as probation and community service might be made available to the courts as options for fine default, this option was rejected by the Scottish Office partly on practical grounds but also because it was concerned that the credibility of community service as an alternative to imprisonment might be undermined if it were to be used in this way (McIvor, 1994).

[4] Scotland has no probation service. The supervision of offenders on court orders and following release from prison is undertaken by criminal justice social workers who are employed by local authority social work departments. Local authorities have been provided with ring-fenced funding for these services since 1991.

The SAO was introduced in 1992 on a pilot basis in three local authority areas served by five sheriff courts and one district court[5]. The types of activity varied across the three pilot schemes, with one providing unpaid work, one providing activities that were educational or focused on helping offenders to make constructive use of their time and the third providing a mixture of both. During the period of the pilot evaluation, 107 SAOs were made in the participating courts, accounting for approximately 15% of fine defaulters attending these courts and levels of compliance – measured in terms of attendance for scheduled appointments - were relatively high. The majority of orders (62%) were for 30 hours or less, with those given an SAO for default being younger and more often women compared to those upon whom a custodial sentence was imposed. There was a small decrease in the proportion of fine defaulters given a custodial sentence in two of the schemes following the introduction of the pilot, with SAO staff estimating that approximately three-quarters of orders had been imposed as an alternative to a custodial sentence (Brown, 1994).

SAOs were subsequently extended throughout Scotland during the mid to late 1990s and the original legislation was amended by Section 35 of the Criminal Justice (Scotland) Act 1995 and Sections 235, 236 and 237 of the Criminal Procedure (Scotland) Act 1995. Together these provisions: removed the requirement that an offender's consent was required prior to an SAO being imposed; increased the maximum length of the order from 60 to 100 hours (up to 50 hours for fines with an outstanding value up to level one on the standard scale[6] (£200) and up to the maximum for fines outstanding over that amount; and increased the length of custodial sentence that was available to the courts in the event of breach up to the maximum custodial sentence available to the court (at that time up to 3 months in the sheriff court and 60 days in the district court)[7]. Section 237 of the Criminal Procedure (Scotland) Act made it possible for an SAO to be imposed while allowing the offender further time to pay the fine (with the order being implemented only following further default) while Section 236 of the Act allowed for the imposition of an SAO as an alternative to a fine at first sentence for 16 and 17 year old offenders without the financial resources available to pay a fine. Section 236 of the Act made provision for the SAO to be the sole penalty for default where the outstanding value of the fine did not exceed level 2 on the standard scale (£500), though this provision was not implemented during the initial

[5] Sheriff Courts deal with offences in the middle range of seriousness (with the most serious cases dealt with by the High Court) while District Courts - which have since been replaced by Justice of the Peace Courts – dealt with the least serious offences and consequently had more restricted sentencing powers.

[6] All summary-only fines are on a five-point scale known as the standard scale, the monetary values of which can changed by Order or statute to take account of inflation.

[7] Previously, the maximum period of imprisonment was determined by the amount of fine outstanding when the SAO was imposed.

national rollout of SAO schemes. While standard SAOs (under Section 235 of the Act) were only made available for adult defaulters (aged 18 years and older), 16 and 17 year old defaulters could be sentenced to an SAO under Sections 236 and 237 of the Act.

National standards for the local management and operation of SAO schemes were issued by the Scottish Executive in 1998. The standards made it clear that a key objective of the SAO was to "instil discipline in the fine offender by requiring him or her to attend regularly and punctually, behave satisfactorily and participate fully" (Social Work Services Group, 1998, para. 1.8.2). While this might suggest an explicitly retributive orientation, it was also stressed that the punitive element of the order should reside in the demands placed upon the defaulter's free time and not within the nature of the activities themselves. The latter, it was suggested, should include a core induction module incorporating a component on debt awareness and financial management with the nature of the other activities (unpaid work or other constructive activities) at the discretion of individual local authorities who operated the schemes, provided that they were relevant to the offenders' circumstances, capabilities and needs (Social Work Services Group, 1998).

A national evaluation of SAO schemes, involving a survey of 30 local authorities in which they were operational and an in-depth study of 6 schemes, provided an insight into how orders were being implemented and enforced, their outcomes and their associated costs (Levy and McIvor, 2001). Survey responses indicated that the majority of schemes offered a core module followed by unpaid work and/or further training and development, the balance of which varied across schemes and according to the length of individual orders, with unpaid work tending to be the sole or predominant activity in rural areas where low numbers of orders tended to make other types of activities impractical. Community service work took a variety of forms including unpaid help for youth clubs, sports centres and charity shops and conservation or environmental projects. Unpaid work was more likely to take place in the evenings and at weekends and was slightly more common as an activity for male than for female defaulters. Offenders who were interviewed were generally positive about their experiences of undertaking an SAO and expressed no clear preference for unpaid work or other types of SAO activities.

The national survey revealed that the mean length of SAOs imposed in 1999-2000 was a little less than 35 hours in respect of an average outstanding fine of £163 (to which in 70% of cases no payment had been made). The majority of defaulters given orders were male (85%) and most (79%) were between 18 and 40 years of age. Just under one quarter (22%) had previous experience of an SAO: sentencers who were interviewed indicated that they would be happy to make repeat orders if a previous SAO had been completed successfully. Relatively little use was, however, made of Section 237 orders (the imposition of an SAO with further time to pay) - which were also associated with higher levels of non-compliance – because sentencers preferred defaulters to be in court when imposing an order so that the consequences of non-compliance could be clearly spelled out.

Overall, 85% of SAOs were completed successfully while 12% were breached and 3% were revoked for other reasons. Breach rates were higher for Section 237 orders (the imposition of an SAO with more time to pay) and particularly for Section 236 orders (alternative to a fine at first sentence for 16 and 17 year olds) which were being piloted in one area. This was a concern for sentencers because they had limited options available in the event of breach – they could only impose a custodial sentence if the decision was taken that the order should be revoked - with the result that 16 and 17 year olds were being imprisoned who would not have received a prison sentence for the original offence. Following complaints by sentencers to the Scottish Executive, the Section 236 pilot was discontinued.

The number of custodial sentences imposed for fine default decreased following the national roll-out of SAOs, although this was only partly as a result of the availability of SAOs because the number of case of fine default which resulted in the offender being required to attend a fines enquiry court (when an SAO could be made) also declined over the same period. Moreover, the impact on the use of imprisonment was also offset slightly by the imposition of a custodial sentence for SAOs that were breached. In practice, the average length of custodial sentence imposed following breach of an SAO was 27 days. Some sentencers indicated that they had reservations about imposing the maximum prison term available to them on the basis that it would not have been warranted by the seriousness of the original offence or the amount of outstanding fine. Taking the costs of breached orders and resulting terms of imprisonment into account, the average cost of an SAO was estimated to be £733 which, because most order were completed successfully and completed orders had lower average costs, was still lower than the average cost of a custodial sentence for fine default which was estimated as being £837.

An analysis of sentencing outcomes revealed that in 1999-2000 SAOs comprised 16% of alternative sentences imposed for fine default in sheriff courts and 14% in the district courts (Levy and McIvor, 2001). Even though the use of SAOs increased steadily, by 2003-4 the number fine defaulters who were imprisoned for fine default was still higher than the number given an SAO, and prison receptions overall were continuing to rise, with particular concerns being expressed about the imprisonment of women for fine default and its impact both on them and on the regime on Scotland's only female prison (Reid Howie Associates, 2006). To address this issue, a decision was taken by the Scottish government to implement the provision contained in Section 235 (4) of the Criminal Procedure (Scotland) Act whereby an SAO would be the sole penalty available to the court in the event of fine default for level 1 and level 2 fines. Schemes piloting the use of mandatory SAOs were established in two Scottish Courts (Ayr Sheriff Court and Glasgow District Court) in 2004. The pilot had a significant impact on receptions to custody for fine default, with a large increase in the number of SAOs imposed and no alternative custodial sentences imposed upon those defaulting on payment of level 1 and 2 fines. However, the levels of breach also increased, particularly in Glasgow where 52% of orders concluded by August 2006 had been breached albeit that the breach rate reduced somewhat in the second year of the pilot (to 42%) (Reid Howie Associates, 2006). Custodial sentences imposed for breaches

of SAOs tend to be much longer than those imposed for fine default. In the national evaluation of SAOs the average sentence of imprisonment on breach was, as previously noted, 27 days (Levy and McIvor, 2001). By comparison, 89% of receptions to prison for fine default in 2005-6 were for 14 days or less and 45% for 7 days or less (Reid Howie Associates, 2006). It is likely, therefore, given the high breach rate and even taking into account the finding that sentencers in Glasgow were often reluctant to impose a custodial penalty when breach of an SAO occurred[8], that the *net* effect of mandatory SAOs on prison days served was minimal and may even have increased: while fewer people were going to prison, those who were likely to be doing so for longer periods of time because they had not only failed to pay their fine but had also breached a court order. Despite the relatively high breach rate, the government decided in July 2007 to introduce mandatory SAOs across the country as part of a wider commitment to encouraging greater use of community-based penalties instead of short prison sentences.

A further pilot was introduced in 2005 when SAOs were implemented as a disposal of first instance in five Scottish courts (referred to as Section 236 orders) for offenders for whom a fine would be appropriate but whose circumstances suggested that they were unlikely to be able to pay a fine within 28 days. The Criminal Justice (Scotland) Act 2006 had amended the earlier legislation to enable SAOs to be made as disposals of first instance for any adult offenders (and not just 16 and 17 year olds as under that earlier legislation). An analysis of the characteristics of those given Section 236 SAOs indicated that they had high levels of unemployment and low levels of educational achievement and that they were similar in most respects to those given other types of SAOs, suggesting that if a financial penalty was imposed they would have defaulted on payment of the fine. However, although breach rates were found to be lower than for other types of SAO, the number of orders imposed during the pilot was significantly lower than expected because it appeared that the thresholds being applied by some sentencers were so high that many offenders with very low disposable income who might have benefited from an SAO were did not receive one: sentencers appeared to prefer the option of imposing a fine first with the option of making an SAO in the event of subsequent default (Reid Howie Associates, 2007). Unlike mandatory SAOs, Section 236 orders were not subsequently made subject to national rollout.

Most recently, further changes to SAOs were introduced by the Criminal Justice and Licensing (Scotland) Act 2010. From February 2011 a range of existing disposals, including SAOs, were replaced by the community payback order: a generic community-based disposal to which a number of requirement may be attached. These include an unpaid work or other activity

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[8] Although imprisonment is the only legislated sanction for breach of an SAO if the order is revoked, sentencers often imposed no further penalty or in some cases imposed a fine on the basis that if a custodial sentence was a competent disposal then a lesser sentence must also be competent (Reid Howie Associates, 2006).

requirement for between 20 and 100 hours which must now be imposed instead of imprisonment in the event of default on a level 1 or level 2 fine (with a maximum of 50 hours there the original fine or outstanding amount does not exceed £200). Other activities can focus on improving the offender's employability prospects or addressing other underlying issues that are influencing their offending behaviour, but these are restricted to 30 hours or 30% of the order, whichever is lower, with the majority of the order taking the form of unpaid work. There is an expectation that unpaid work requirements will begin within 7 days of sentence and that the work or other activities will be completed within 3 months. Although a social work report and the offender's consent is normally required before the court imposes a community payback order, this is not necessary when a community payback order is imposed as a penalty for fine default, however the fine defaulter will still have an opportunity to pay the fine after an order has been imposed in which event the court will discharge the order. Sentencers have the option of undertaking periodic court-based reviews of orders and breach of the order through non-compliance with the requirements can result in variation of the order to include new requirements, the imposition of a restricted movement requirement (electronically monitored curfew) or the imposition of a custodial sentence of up to 60 days in a Justice of the Peace Court or 3 months in a Sheriff Court.

Given their relatively recent implementation, there is still relatively limited information available about how community payback orders are being used. However, turning to the most recently published government statistics it is possible to examine trends in the use and outcomes of SAOs over the last 10 years. As Table 1 indicates, there was a relatively steady annual growth in the number of SAOs made until 2008-9 since after which their use appears to have declined. By way of explanation it has been suggested that the decrease might be attributable to the introduction of fines enforcement officers (who are responsible for giving help and advice to fine payers who are having difficulty making payments and taking enforcement action in the event of default (Bradshaw et al., 2011)) and other mechanisms that have been put into place to improve the collection of financial penalties as part of a wider package of summary justice reforms, a deliberate strategy on the part of some Justice of the Peace Courts not to impose SAOs to enable backlogs to be cleared and dissatisfaction among sentencers with the relatively high breach rate for the disposal (Scottish Government, 2011a). Data on terminations of SAOs in 2010-11 indicates that only 60% were completed successfully (compared with 65% the previous year) while 24% were breached, 6% were revoked following a review by the court and 10% were terminated for other reasons (Scottish Government, 2011a).

Table 1: Supervised attendance orders imposed 2001-11 (Sources: Scottish Executive, 2005; Scottish Government, 2008, 2011)

	2001-2	2002-3	2003-4	2004-5	2005-6	2006-7	2007-8	2008-9	2009-10	2010-11
Male	2208	2259	2510	2772	3233	2505	3693	3650	3345	2900
Female	394	441	511	588	616	542	745	656	514	407
Total	2602	2700	3021	3360	3849	3047	4438	4306	3859	3307

As can be seen from Figures 1 and 2, the national rollout of mandatory SAOs in 2007 had an immediate and dramatic impact on levels of imprisonment for fine default in Scotland, with the average daily population of fine defaults and the number of receptions to custody for fine default having decreased sharply since 2007, though these figures do not include imprisonment following breach of an SAO. It is important to note that during this period as a result of reforms of summary justice aimed at increasing the number of cases that are dealt with at earlier points in the criminal justice process, the number of people proceeded against in court and the number of fines imposed has also decreased steadily (Scottish Government, 2011c). Moreover, other measures have also been introduced as part of the package of summary justice reforms to enhance fines enforcement and these may also have had some impact on the use of imprisonment for default, although the evaluation of the reforms to fines enforcement would suggest that they had had a relatively limited effect in terms of improving the collection of fines (Bradshaw et al., 2011).

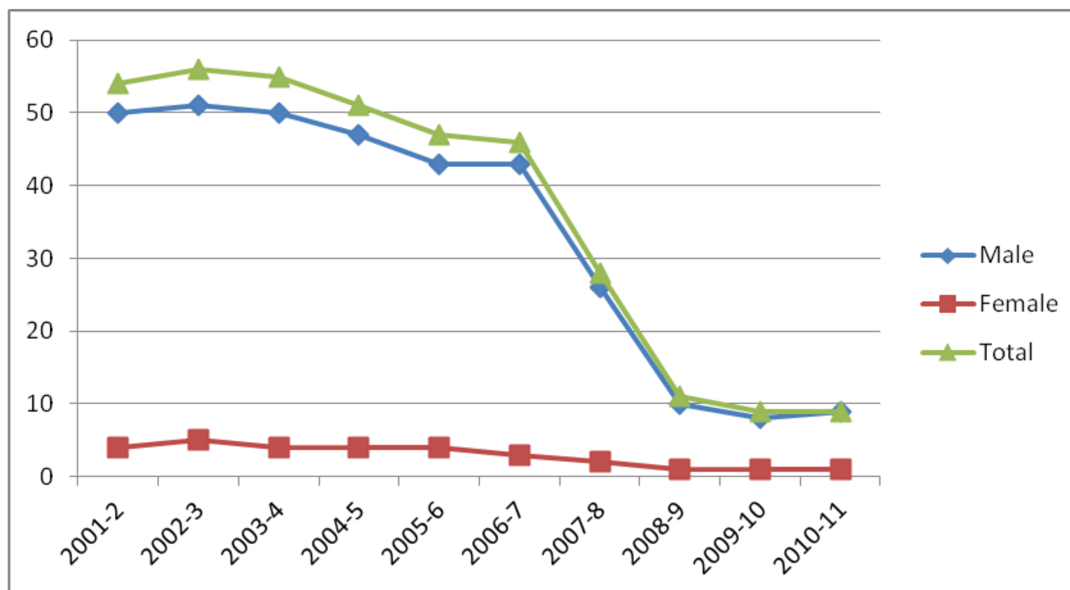

Figure 1: Average daily population of fine defaulters in Scottish penal establishments 2001-11 (Source: Scottish Government, 2011b)

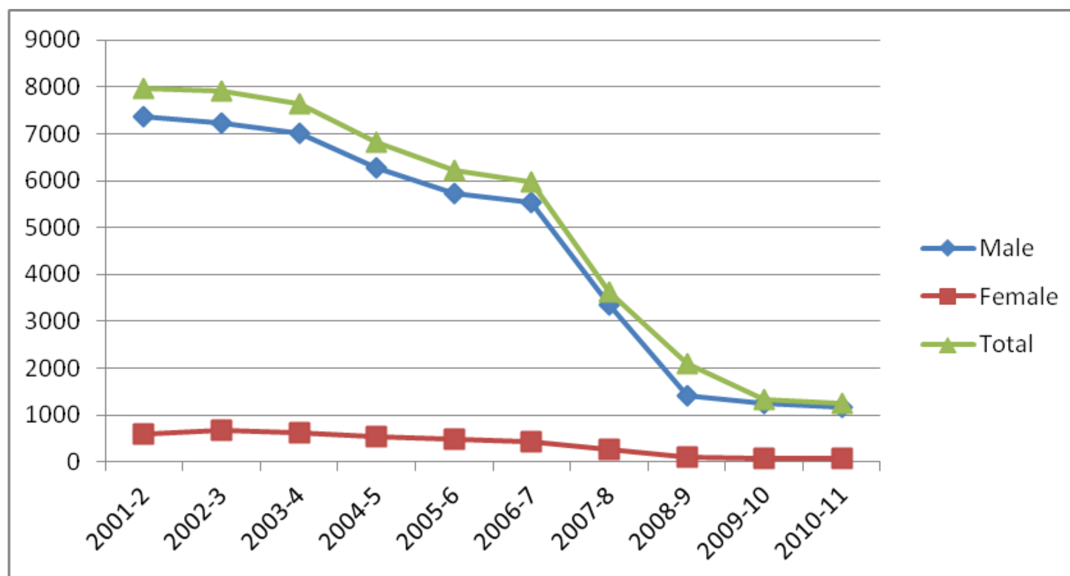

Figure 2: Fine defaulter receptions to Scottish penal establishments 2001-11 (Source: Scottish Government, 2011b)

Unpaid work as an alternative to fine default in Austria

Community service as an alternative to imprisonment for fine default was only recently introduced in Austria. In 2005 a working group consisting of judges, public prosecutors, scientists, representatives of the ministry of justice and the association NEUSTART (probation work) was set up to consider this issue. The outcome was a decision to set up a pilot project regarding community work as an alternative to imprisonment for fine default. The pilot project was set up between March 2006 and August 2007 and was scientifically evaluated (Stummer-Kolonovits/Grafl, 2009). Due to a positive interim report in December 2006 (Stummer-Kolonovits/Grafl, 2007), the pilot project was extended to the whole of Austria in September 2007[9]. In January 2008, the final law regulating community work as an alternative to imprisonment for fine default was passed and a few minor changes in the law were made in 2010.

The reasons for the establishment of the working group and the introduction of the pilot project were multiple. Although fines, due to the day fine system in operation in Austria, consider the financial means of the convict, there are still cases were fines are not or cannot be paid. As a consequence, the fine is converted into a prison sentence. These sentences are usually rather short and it was recognised that short prison sentences are usually counter-productive. Furthermore, the fact that a crime for which the appropriate sanction was a fine, then had to be served by imprisonment, was deemed problematic. Additionally, in a time were prisons were

[9] Erlaß zum Modellversuch “Gemeinnützige Leistungen statt EFS”, BMJ-L311.007/0006-II 1/2007.

overcrowded[10] and short term sentences were a substantial administrative endeavour with little or no re-socializing potential, a solution had to be found (Grafl et al., 2004). Finally, studies abroad had shown that the offender's conduct is usually better after serving a community sentence then after a short prison sentence (Killias, 2002; Gilliéron et al., 2006) and community work is also highly accepted by the public[11] and the media[12].

The pilot project was setup to operate between the beginning of March 2006 and the end of August 2007. Persons whose fines could not be collected and who received an order to serve a prison sentence instead were informed that they had the option of undertaking community work instead of serving time in prison. This option was available for all persons whose place of residence was in the regional court districts of Graz, Innsbruck, Linz and Wels and included all district courts in these areas as well as the district courts of Leopoldstadt, Favoriten and Döbling in Vienna. The reasons for the choice of courts, was to include different court jurisdictions as well as city areas and rural areas. For one day in prison, four hours of community service had to be served. The number of hours of community work was limited during the pilot project to a maximum of 240 hours, equivalent to sentences of up to 60 days in prison. In practice, the highest fines by law can be 360 day rates, which would amount to 720 hours of community work.[13] Depending on the occupation of the person concerned, the expectation was that 10 to 40 hours of unpaid work could be served per week. The cost for each case was calculated to be approximately 440€. The probation service was responsible for contacting the convicted person, to provide them with further information about the scheme and clarify whether they would be willing to perform community service. If the person was willing to do so, the necessary information was collected and an appropriate facility contacted. In cases were the person could not be reached, was willing to pay the fine or was unwilling to serve community work, the probation service reported back to the court. The probation service was also in charge of informing the court whether or not the community work hours were fulfilled. If the convicted person served the agreed hours, the sentence was considered as executed. If the hours were not fully served, the outstanding portion of the sentence had to be served in prison.

During the pilot project 1,399 people were assigned to the probation service for community work as an alternative to imprisonment for fine default. In 969 cases the gender was specified showing

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[10] Since the 1990s there has been a constant increase in the prison population resulting in overcrowded prisons in 2007.

[11] http://www.oekonsult.at/arbeitstattknast_gesamtergebnisse.pdf(25.9.2012).

[12] See for example: "Freiheit an der langen Leine", Salzburger Nachrichten, 25.9.2007, 7; "Arbeit statt Haft bald in ganz Österreich", Kurier, 20.8.2007, 1; "87,5 Prozent für Arbeit statt Haft", Salzburger Nachrichten 28.8.2007, 12; „Schwitzen, nicht sitzen, Sozialarbeit statt Gefängnis", Kurier 20.8.2007, 11.

[13] Fines imposed in financial criminal proceedings pose an exception as they can be higher because the day fine system is not applicable here.

that, as in Scotland, 85% were male. In 633 cases the nationality was known, of which 90% were Austrian. A similar age distribution was found as in Scotland, with three quarters of those given unpaid work being between the ages of 19 to 40. However, while in Scotland 14% of those given SAOs were 16 or 17 years of age, in the Austrian pilot only 1% were aged under 18 years indicating that community service had not played a role as an alternative to imprisonment for juveniles. The average amount of community work hours assigned was 4 weeks. In total around 17,400 hours of community work were performed. The average hourly rate was 4,2€, meaning that with an hour of unpaid work around 4€ of the fine were paid.

The end results revealed that 44% of the persons referred to the probation service could not be reached or did not turn up to the initial consultation (Stummer-Kolonovits/Grafl 2009). While this seems like a high percentage, considering that most persons of that clientele did not pay the fines after several summonses by the court and are in difficult financial and often social situations, the numbers are not surprising. Thirty-nine per cent notified the probation service that they intended to pay the fine within the month while3% partly performed community work and partly paid the fine,5% performed the community work fully, 5% performed it only partly and 4% did not perform it at all. Under the assumption that about half of the persons who discontinued their community work were able to pay the rest of their fine and that 88%[14] of those who announced that they would pay their fine in fact did so, the following assessment can be made: about 80% of those persons who attended the initial consultation with the probation service paid the fine or served the community work hours. This amounts to 45% of the total group initially referred. Another finding was that the pilot project contributed to a lower increase in the average number of days of imprisonment imposed for fine default in comparison with the national picture. While the number of persons sentenced to pay a fine decreased by 8% from 2004 to 2006, the number of days spent in prison for fine default increased over the same period. However, while the increase in the areas of the pilot project was 10%, it amounted to 25% in the rest of Austria (Stummer-Kolonovits/Grafl 2009). After this positive evaluation, the possibility of community work as an alternative to imprisonment for fine default was anchored in the law in 2008.

The new regulation on unpaid work as an alternative to imprisonment for fine default was introduced in §§ 3 and 3a of the Enforcement of Sentences Act (BGBl I 2007/109). § 3 states that the enforcement of a sentence for fine default has to be stopped if the convicted person has served community work. It further states that the convicted person has to be informed about the number of hours he/she has to fulfil in order to avoid the enforcement of the prison sentence and the probation service has to receive a copy of this information as well.

[14] In order to find out how many persons actually paid their fine, this information was recorded from September 2006 onwards, showing that 88% did pay their fine as announced.

Further details on how community service can be served as an alternative to imprisonment for fine default are contained in § 3a of the Act regulating the enforcement of sentences. The first clause of this paragraph states when and how the community service has to be performed. For example, the community service has to be completed during the convicted person's free time at an appropriate facility, with four hours of unpaid work equalling one day in prison. Once the community service is successfully completed, the sentence is considered executed. According to § 3a, the facilitator, who is not further specified in this paragraph, will work out a schedule with the convicted person, taking into account their occupation, and support him/her with the necessary submissions to the court. To avoid a prolongation of the time used to complete the community service, a limit was set; the time period in which the community service has to be completed may not be longer than the time the convicted person would need to complete a maximum of10 hours of work per week. Last but not least clause 1of § 3a refers to § 202 clause 1 last sentence as well as clause 3 and 5 of the Criminal Procedure Act. § 202 regulates community service as a diversionary measure, while the last sentence of clause 1 of § 202 of the criminal procedure act states that community service provisions that would constitute an unacceptable intrusion in personal rights or the lifestyle of the accused are prohibited. Clause 3 and 5 of the same paragraph regulate liability and insurance issues.

The second clause of § 3a regulates the time limits. The convicted person has to inform the court within one month that he/she is willing to undertake community service. After that, the convicted person has another month to find an appropriate facility where he/she can serve the community work and to inform the court about the arrangement. The facilitator has to support the convicted person with the communication with the court as well as with finding an appropriate facility to serve the community work. If the convicted person is not able to arrange where and when he/she can serve the community work within the one month period, they can be given another month in order to make the necessary arrangements. If, on the other hand, he/she is able to make all of the necessary practical arrangements, then the enforcement of the sentence of imprisonment is prolonged until the confirmation that the community work has been served.

Clause 3 of § 3a states that if the arrangements do not fulfil the legal requirements, the court has to inform the convicted person about what changes are required and set a time period of 14 days to comply. If he/she does not comply the sentence will have to be enforced. The fourth clause states that if the community work is not served at all or not fully served, the suspended prison sentence will be activated. However, hours already served will be taken into account with the result that the custodial sentence will be reduced according to the number of hours completed. If the convicted person can verify that unforeseeable or unavoidable events kept them from fulfilling their community work, the court has to provide more time for him to endeavour to do so. The last clause refers to § 7 of the Act on the enforcement of sentences, which regulates the procedural aspects.

In 2010 a limitation on the number of hours of community work was implemented (BGBl I 2009/142). In the 2008 legislation, no limitation on the hours of community work was set. As a

consequence, practical difficulties arose in the field of financial criminal proceedings with high fines. Thus, community work is now only permitted when the alternative prison sentence would be less than nine months.

As mentioned above, the law regulating community work as an alternative to imprisonment for fine default in Austria has been in force since the beginning of 2008. Drawing upon data provided by the Austrian probation service NEUSTART it is possible to examine the operation of community work as an alternative to imprisonment for fine default for the period 2009 to 2011.[15]

As in many other countries fines were the most popular sanction for a long time in Austria. In 1975, the first year of validity of the new penal code, fines comprised nearly three quarters of all sentences. After a steady decline in the following years the percentage of fines had reduced to63% in 1999. After the implementation of diversionary measures (payment of a fine, probation period with or without an additional court order, community service and victim-offender-mediation) into the penal code the absolute number and the percentage of fines declined tremendously because diversionary measures mostly replaced fines and not imprisonment. Therefore, fines today account only for a little more than 30% of all sentences in Austria. The majority of convictions are imprisonment, mostly imposed conditionally (Bruckmüller and Grafl, 2010).

Between 2009 and 2011 a total of 10,841 people were referred to NEUSTART for community work as an alternative to imprisonment for fine default, about 3,700 in 2009 and 2010 and about 3,500 in 2011. The gender and age distribution was similar across each of these three years. As in the pilot project, 85% of those referred were male and the great majority (89%) were adults, that is 21 years and older. Only 2% were juveniles and 9% were young adults between 18 and 21 years of age.

A very important question, particularly for politicians and policy makers, is how many of those persons referred complete community service successfully. The more recent national results are similar to those observed in the pilot project. Thirty-seven per cent of all fine defaulters referred could not be reached by NEUSTART or did not turn up to the initial consultation. Compared to the pilot project the percentage of these “unapproachable” people declined but is still high. In fact, the number of “no-shows” depends on the amount of efforts (in terms of time and manpower) dedicated to persuading clients that they should cooperate with the justice system (Stummer-Kolonovits, 2008).

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[15] Due to legal obligations to delete data after two years information concerning the year 2008 are not available anymore.

After consultation by NEUSTART 10% of those referred reported that they had paid their fine and 26% notified the organisation that they intended to pay the fine. This latter percentage seems to be rather high since it relates to a group who may needa significant amount of support to fulfil their obligations, given that they have already been reminded on numerous occasions of the need to pay their fines or otherwise be imprisoned. Apparently, written orders and notifications by the court or prosecution service are less effective than the personal conversation with a probation officer who is able to “translate” judicial orders into an effective and realistic solution.

Between 2009 and 2011 8% of all persons assigned to NEUSTART for community service as an alternative to imprisonment for fine default completed community service successfully and another 8% performed community work partly. This represents an increase compared to the pilot project. On the other hand 6% of agreements were unsuccessful: in the majority of cases (5%) the person did no community work at all despite an indication that they would do so while a small number (1%) were imprisoned straight away because they did not intend to pay the fine nor intend to do community work.

The mean length of community service under taken by fine defaulters in 2009 to 2011 was 195 hours. Counting only cases of community service completed successfully the mean length was 237 hours. As can be seen in Figure 3 the majority of orders (53%) were for 161 hours and more, with 30% exceeding240 hours.

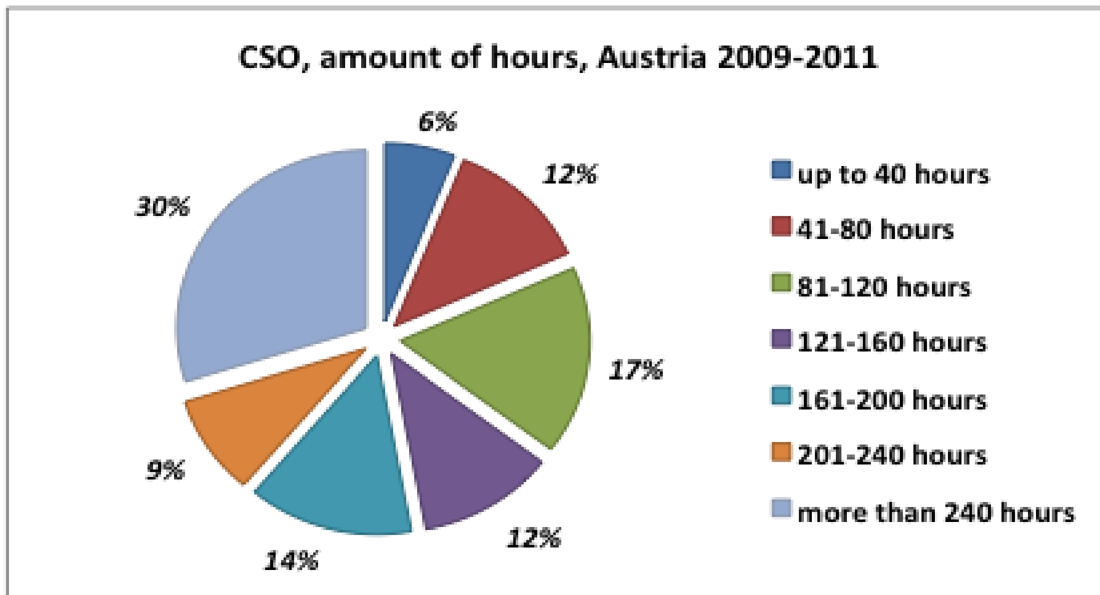

Figure 3: Community service orders 2009 to 2011: number of hours to be fulfilled (Source: NEUSTART)

The figure changes when looking at the number of hours actually performed by fine defaulters as opposed to the number of hours ordered. Whereas 6% of all orders were orders up to 40 hours in 2011 the percentage of performed community service hours up to 40 came to 22%,suggesting

that fine defaulters completed community service more successfully when they had to perform fewer hours. Indeed, within the category of up to 40 hours nearly 50% of all community service orders were performed in 2011. For orders of more than 40 hours, only around 10% of the hours ordered were actually undertaken.

The probation service calculated the cost of each case during the pilot project to be approximately 440€. However, as early as 2007 the amount off unding per case was reduced to approximately 200€ because the majority of clients were identified by NEUSTART not to require additional support in order to fulfil community service. This meant that the time and effort that were required per case were less than expected.

An important indicator of the success of community work as an alternative to imprisonment for fine default is the amount of prison days saved by community service. After a sharp decline of about 25% from 2007 to 2008 (that is, in the year following the national introduction of the alternative community service) the number of imprisoned fine defaulters remained stable since 2008.Whereas in 2007 674 people were imprisoned because of fine default, from 2008 to 2011 the number wasabout500.

In 2011 about 600 fine defaulters completed community service successfully or partly. The number of hours of community work performed by these 600 people amounted to slightly more than 90,000 hours equalling about 22,500 days of imprisonment. In the end about 900 fine defaulters declared that they would in fact pay the fine and thus not serve the community hours. Assuming that 50% did in fact pay[16] nearly 105,000 hours community service or roughly another 25,000 days of imprisonment could be avoided. Calculating expenses for one day imprisonment as100 € and subtracting costs of 300,000 € for managing the cases suggests that community work in the end saved nearly 4.5 million Euro in 2011.

Discussion

In this paper we have considered how two different European jurisdictions with different legal systems have implemented the same criminal policy "solution", with an emphasis on the obstacles each faced and how successfully the respective systems work. As the preceding discussion indicates, the introduction of unpaid work as an alternative to imprisonment for fine default in Austria and Scotland illustrates some interesting points of convergence but, equally, important differences in philosophy and operation.

[16] This is a rather cautious assumption as in the pilot project nearly 90% of clients who intended to pay the fine really did pay.

The option of imposing a period of unpaid work (or other supervised activity) on offenders who default on payment of their fines has a longer history in Scotland than in Austria where it has only recently been introduced. Yet in both jurisdictions, rising prison populations, prison overcrowding, the lack of effectiveness of short prison sentences and normative concerns regarding the imprisonment of offenders whose original offence was deemed to warrant a fine can be identified as common policy drivers.

Similarly, in both jurisdictions there was initial concern about the ability for unpaid work to operate successfully at more than one point in the criminal justice process. In Austria, a minority of judges raised the question whether community service can be considered a "real sanction" (Stummer-Kolonovits and Grafl, 2007). Another discussion focused on whether different forms of community service, as diversionary measure on the one hand and as alternative to imprisonment for fine default on the other hand can or should coexist (Grafl and Stummer-Kolonovits, 2006). More than five years after introducing the new regulation on unpaid work as alternative to imprisonment for fine default there is no doubt that different legal types of community work do work well in practice. Despite the new legislation concerning community service as an alternative to imprisonment for fine default, the number of community service as a diversionary measure (§ 201 Austrian Criminal Procedure Act) did not drop down but remained stable (3,200 in 2007, 3,000 in 2008 and 3,300 in 2009). In

Scotland, the concern was that introducing community service as an alternative to imprisonment for fine default would undermine the credibility of community service orders as an alternative to an immediate custodial sentence (McIvor, 1994). The introduction of a new order – the SAO - which *included* the option of unpaid work but was not *restricted* to it was therefore intended to help preserve the status of community service as a distinctive and high tariff sentence.

There are also some interesting similarities in the characteristics of fine defaulters made subject to unpaid work, with similar proportions of men and women receiving this sanction in both jurisdictions. Data that would enable a more detailed demographic comparison are not available, though it would appear that, while in both jurisdictions the majority of defaulters were adults aged between 21 and 40, community service was less likely to be used with juvenile defaulters in Austria. The reason for this difference could be that in Austria the number of juveniles fined is very small: only about 5% of all persons convicted to a fine in Austria in 2011 were juveniles.

A number of other relevant practical differences have been identified. One key area is the manner in which the outstanding fine is 'translated' into an equivalent number of hours of unpaid work. The existence of unit fines in Austria means that a clear and transparent calculus exists for converting an outstanding fine into a number of days of imprisonment that can, in turn, be converted into a number of hours of unpaid work. In Scotland, the process of translating a fine into an equivalent number of hours of supervised activity is both less structured and less transparent, with no direct correspondence between the two: the upper levels of fines that can be converted into a community payback order and the minimum number of work hours are

enshrined in legislation but there is no guidance to indicate the number of hours that should be imposed for a particular level of outstanding fine.

On the other hand differences in the *number* of hours that can be ordered for fine default in the two jurisdictions raise questions of proportionality and commensurability of punishments. While in Scotland a maximum of 100 hours of unpaid work (or other activity) can be imposed for non-payment of a fine and should be completed with 3 months, in Austria, where community service can be imposed instead of a custodial sentences of up to 9 months, it would be possible for an offender to be required to undertake up to 1,080 hours of unpaid work over a period of more than two years (§ 3a Austrian Enforcement of Sentences Act). It is disparities such as these that highlight the need for the increased harmonisation of community penalties across Europe. A first step could be the recognition of foreign community sanctions in order to enforce them in another country, for instance the country where the convicted persons actually lives.

Austria and Scotland also differ with respect to by whom the order or offer to undertake unpaid work is made. In Scotland an order is made by a sentencer while in Austria an offer is made by the prison administration. These differing arrangements are also associated with differing approaches to the issues of enforcement and consent. With regard to enforcement, for example, the fact that an alternative prison sentence has already been indicated means that this sentence will be activated in the event of the defaulter's failure to comply and there is no additional penalty imposed for the breach of community service *per se*. By contrast, in Scotland the community payback order for fine default (previously SAO) is imposed in court instead of a prison sentence and breach of the order in itself constitutes an offence that can be punishable by a prison sentence that may be longer than would have been appropriate had community payback order not been imposed. While it is possible that long prison sentences could result from breach in Austria (where unpaid work can replace prison sentences of up to 9 months) this arrangement is less likely to result in net-widening since the consequences of breach are clearly prescribed when the offer to undertake community service instead of going to prison is made. We return to discuss the implications of this shortly.

A second important distinction relates to the issue of consent and here we again see diverging positions and practices. In Austria the undertaking of community work as an alternative to imprisonment is voluntary on the part of the defaulter, a position that was deliberately adopted to avoid accusations that the penalty amounts to forced labour. In Scotland, however, an offender's consent is not required prior to a community payback order being imposed by the court in the event of fine default, raising potentially significant human rights concerns regarding state imposition of forced labour (Morgenstern, 2010; McIvor et al., 2010). Two practical considerations are, perhaps, relevant here. First, the community payback order does not *necessarily* involve unpaid work, with the content of the penalty being determined by those responsible for implementing the sanction. Second, the extent to which consent is absent in

Scotland is unclear. Levy and McIvor (2001) found that despite not requiring the offender's consent before imposing an SAO, sentencers would usually determine whether offenders were willing to complete an order before making one and were generally reluctant to do so in the knowledge that the offender would not comply. There is little reason to believe that judicial practice differs significantly when a community payback order for fine default is imposed.

Conclusions

The experiences in Austria and Scotland of introducing unpaid work as an alternative to imprisonment for fine default suggest that community service can, on the whole, operate at different points in the criminal justice process. Indeed in both jurisdictions, the further expansion of community service to other types of cases or to other parts of the criminal justice system has been explored. In Austria, for example, there has been the proposal to introduce community service as an alternative to imprisonment of up to six month (Grafl et. al., 2011) and to extend unpaid work as an alternative to imprisonment for fine default to fines imposed in administrative law cases (Stummer-Kolonovits and Grafl, 2009).In Scotland, Fiscal Work Orders (FWOs) involving between 10 and 50 hours of supervised unpaid work for the community as an alternative to prosecution[17] were introduced on a pilot basis in 2008. FWOs are principally aimed at those accused of committing minor offences who may not have the financial resources to pay a fiscal fine (one of a range of options that are open to the procurator fiscal as an alternative to prosecution) and are therefore imposed *instead of* a fiscal fine (McIvor, 2010). An evaluation of the FWO pilots concluded that their policy objectives had in the most part been met, though the number of referrals was lower than anticipated (Richards et al., 2011).

Policy-makers in Austria and Scotland, as in other jurisdictions facing rising rates of imprisonment that have introduced similar provisions, regarded the introduction of community service (or other supervised activities) for fine defaulters as a mechanism for reducing the use of short prison sentences that were regarded as ineffective yet costly and that contributed to growing prison numbers and overcrowding. Analysis of recent trends in sentencing in the two jurisdictions suggests that they have met with some success in this regard, though the impact has been greater (indeed dramatic) in Scotland following the introduction of mandatory SAOs for offenders defaulting on fines of up to £500. In Austria, by contrast, the decline has been more modest, due to the lack of available data the diversionary impact is difficult to assess.

Yet in Scotland breach rates for SAOs have been relatively high and it is likely that some of the observed reduction in imprisonment for fine default has been offset by increasing numbers of offenders being given custodial sentences as a consequence of breach, and for longer periods of

[17] This is similar to the Netherlands where community service can be imposed both by judges and by prosecutors, in the latter case as an alternative to prosecution (Boone, 2010).

time than would have been warranted by the original fine. In other words, it is not unreasonable to assume that the overall net impact on prisoner numbers in Scotland has been minimal especially since they have continued to rise despite the fall in direct receptions for fine default (Scottish Government 2011b). Net widening of this kind is less likely to occur in Austria, where the custodial penalty has already been determined when the offer of the alternative is made and re-activated in the event of breach with no further sanction imposed.

For these reasons we suggest that the availability and use of community service as an alternative to imprisonment for fine default is unlikely in itself to make noticeable inroads into reducing the growing rates of imprisonment that have come to characterise many western jurisdictions in recent years (Aebi et al, 2010) and its 'effectiveness' might best be assessed in relation to other penal aims, such as the avoidance of ineffective and costly short prison sentences where this does occur. Instead, we would argue that concerted political and policy commitment that directly addresses the central position of the prison as a penal response to relatively minor crimes, such as is evident in Finland (Lappi-Seppala, 2006) will be required to arrest or reverse this trend.

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