

SERVICE FOR COMMUNITY – A PENAL SANCTION FOR THE FUTURE

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Abstract: *Community service is the subject of numerous discussions and controversies in the penal doctrine, especially when it is regarded as an alternative to imprisonment.*

The article focuses on the evolution in time of this type of punishment, the way of regulation in the national legislation and that of other European states, and it also brings up opposing provisions from several documents adopted by national and international organizations which contain such regulations.

There are several advantages granted by this type of punishment for all the participants in the justice process, that is, the criminal, the state, the prejudiced part, the judiciary body and those that supervise the serving of the sentence.

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JEL Classification: *K 14, K 41.*

1. Criminal law distinguishes between subject and object and provides a useful perspective in terms of our conception of who is convicted by courts and how they should be punished. The subject is the one who acts and the object is someone or something that was acted on. Do we follow the suspects and punished the offenders as subjects or objects? This question is never asked directly in criminal doctrine, but lies at the basis of many current disputes on the definition and determination of the one responsible for crimes.

In order to protect dignity, human beings must be treated as subjects rather than objects. Immanuel Kant expressed this idea, interpreting moral norms in order to be accepted following practical imperative: “act so as to treat humanity, whether is your person or another, never as a means but always as intended”. We can use objects as means, but must respect human beings as subjects, as purposes themselves. One clear consequence of Kant’s prohibition of treating human beings as means to achieve a purpose, is the rejection of deterrence (deterrence-engagements to apply retaliation if another party does not behave the way you want, focuses solely on negative sanctions or threats, and the prevention of unwanted behaviour), as a rationale for punishment. The punishment must look upon the offender as a purpose in itself, as responsible agent who will be punished for their reprehensible actions. From this perspective, legal systems vary

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by the respect shown to the criminals and suspects, treating them as subjects rather than objects¹.

Crime and punishment are each a moment of mutual reflections, the interaction between subject and object, a unique moment of struggle between them, with continuous overturning of each in its opposite-fight which is governed as a social threat of criminal law, and as a straightening law and the criminal intimidation. Once the offense and the created social danger, opposites have moved: the subject takes the object's place and the subject takes the object's place-and the fight continues.

Punishment represents the novelty that conquers. The man who committed the offence, becoming an offender, denied the guilt free man that he had been before. The application and execution of the sentence is made to transform the offender into an improved person, made of a huge leap of quality so that this new person constitutes a denial of the denial. If the re-education, was not appropriate, the man will fall into relapse, and the mentioned cycle will repeat, at a higher and more serious level of re-education, until, finally the truth is revealed, the complete leap, and the denial of the denial².

2. Beginning with these general coordinates, we will broach in this article the issue of community service, because it is the object of numerous and controversial discussions, which mainly targets the alternative of this with detention.

Broaching according to evolution, we find out that this means of punishment has known more forms of regulation. Beginning with ancient times, daily forced labour was used, which was included in the arsenal of the first ways of penal laws, punishment found in the ancient Roman legislation (*ad metalla ad triremes*³). Also, according to the law of the XII Tables, in the case of theft, the delinquent had the possibility of negotiating with the victim, if the victim wanted to make the offender work for a limited period of time or to ask him to pay a certain sum of money⁴. Though, the Roman jurists emphasised the utility of the punishment, Cicero stated that essential in every punishment was the interest of the state, this proceeds through exemplarity and intimidation. Seneca acknowledges the only one purpose of the punishment, assuring public safety, having to correct the guilty and to serve as proper example⁵.

The general system of the punishments during medieval times included capital punishments, afflictive and infamous, simply infamous or not infamous. The capital punishments were: death, galley for life and exile for life, which attracted civil death and confiscation of all the belongings of the offender and sometime of his family, too. The afflictive and infamous punishments included: galley for a limited time, prison, different types of mutilations, abjection pillar, the whipping, and exile for a limited period. The punishments during feudal times varied between the quality of the guilty offenders, as well as the rank of the victims, they were characterized according to the iniquitousness of the judge, inhuman and bloody practices, a complete ignorance of the individual.

A strong accusation act of the feudal penal justice and a brilliant contribution to the drastic transformation of the criminal law were brought by Cesare Beccaria, the father of the classical penal school, whose doctrine considered primarily punishment theory. From his vast contribution, we mention one of the principles promoted, according to which there should be a proportion between crime and punishment.

"The punishment must be as similar as possible with the type of offense. Therefore, offenses against the person should be punished with corporal punishment, crimes against

¹ George P. Fletcher, *Basic Concepts of Criminal Law*, New York, Oxford University Press, 1998, p. 43.

² Grigore Râpeanu, *Legi obiective în dreptul penal*, în „Analele Universității București”, Seria Științe Juridice, nr. 2/1971, p. 42.

³ Enrico Ferri, *Principii de drept penal*, traducere de Petre Ionescu Muscel, Editura "Revista Positivă Penală", București, 1940, p. 17.

⁴ Emil Molcuț, *Drept roman*, Casa de Editură și Presă „Șansa” SRL, București, 1993, p. 318.

⁵ Vasile Papadopol, *Studiu introductiv - Cesare Beccaria, Despre Infrațiuni și pedepse*, Editura "Științifică", București, 1965, p. XLIII și urm.

honour-the infamous, smuggling- with the confiscation of prohibited goods; theft also should be punished with a pecuniary penalty, but as it is the offense of misery, the most appropriate punishment is the temporary subjugation of work and the person of the perpetrator to society.”

As some authors regard it, the idea which was the basis for substantiation of work as a criminal punishment would have belonged to Cesare Beccaria, whose work was to inspire future penal policy⁶.

The positivist doctrine invented in the early twentieth century considers that the criminal act is not the product of free will, but is determined by biological or social causes. In the meaning of this doctrine, the sentences consisted of fine, local exile, mandatory labour, rigorous and continuous isolation, general exile, simple or rigorous imprisonment for political offenses, freedom through surveillance, correction vocational school, madhouse, house guard, special colony, forbiddance to work in public services, the expulsion of foreign offenders, bail for the arrangement of good behaviour⁷. Also, the ground for prison life must be work: to be as a way of payment to the public treasury and the victims, to be for the majority of prisoners a way of moral and technical education and hygienic life and therefore as a source of more confidence to return to a normal life, after the end of conviction⁸.

3. In Romania's legislation, the Penal Code's First Book from 1864 regulates the punishments and their effects, as actions are incriminated as crimes, misdemeanours or contravention. According to article 7, the punishments for crimes are lifetime hard labour, hard labour for a set period of time, between 5 and 20 years, confinement in a work institution for 10 years minimum, detention between 3 and 10 years, and civic degradation between 3 and 10 years. According to article 8, the punishments for misdemeanours are jail sentences between 15 days and 5 years, interdiction between 6 days and 6 years, of some political, civil or familial rights. The punishments for contraventions are mentioned in article 8, as well, and consist in jail sentence between 1 and 15 days and fines between 5 and 25 leis.

During that time and before the code as well, hard labour sentences were served in salt mines. Along with the Penal Code's release, hard labour sentences were not as harsh as in the past, when some of the convicted were forced to spend both day and night in the salt mines⁹.

Confinement, as well as hard labour, was an ordinary main punishment. The fact which made the difference between convicts' and prisoners' regime, besides the relative gentleness of the regime, was the small sum of money, which served as a means of survival after the release from jail.

Work during jail time, at that time, gave birth to important controversies. So, B. Boerescu stated that "labour should not be used in jails neither as a punishment nor as a means of recast and professional training because it would make no sense turning what defines one of the attributes of an honest man into an aggravation of a punishment". Apart from this, according to Ion Tanoviceanu's opinion, there is no doubt that penitentiaries should be based on compulsory labour. The lawbreaker, when he is not a beastlike villain, is a social parasite, who wants to live on somebody else's back. About the brutal or criminal antisocial it is enough to say that the society does not dispose of them by destroying them, but stating that society should work in order to help them survive is

⁶ P.D.Cant, *Le travail au profit de la communaute - une peine de substitution*, en "Revue de droit penal et de criminology", nr. 1/92, p. 8 apud de Gheorghe Diaconu, *Pedeapsa în dreptul penal*, Editura "Lumina Lex", București, 2001, p. 151.

⁷ Petre Ionescu Muscel, *Doctrina pozitivă penală; conceptul, metoda, aplicarea*, Tipografia și Legătoria Închisorii Văcărești, 1928, p. 80.

⁸ Enrico Feri, *Principii de drept criminal*, Editura „Revista Pozitivă Penală”, București, 1940, p. 291.

⁹ Ion Tanoviceanu, *Tratat de drept și procedură penală*, vol. III, Tipografia "Curierul Judiciar", București, pp. 476 și urm.

aberrant. About work it is wrong to say that it will fall in disgrace if prisoners will work, because work is a holy thing, and holy things do not smear!

Also, the work in the prison system met a threefold role:

- a) strong factor of will discipline, moral and physical education: educational role.
- b) helped to ease the prisoners' maintenance tasks as creating an income to the prisoners and largely relieve the honest people of a painful tribute: economic role.
- c) taught the offender a job or improved the job that he knew before, giving him the opportunity to lead an honest life after release, avoiding the return to the path of evil: preventative role.

Each prisoner is right to be given a professional guidance only in relation to his skills, but also with opportunities to use it in the environment in which he returns to release.

Many discussions were held at that time on the admission work outdoors "a l'aperto" of prisoners, that if the detainees could be used in the construction of buildings, roads, dams etc. It was considered that reported to that system since this way of punishment was the preferred form of execution, because it was better if the prisoner did something rather than sit and do nothing, but parasiting all the evil that he redraws in jail. This, of course, will not solve the problem of prison regime, but it will make use of thousands of arms that were crossed in vain.

Punishments were changed by the Criminal Code Charles II from 1936, being covered in Art. 22-24, depending on the nature of political or common law offenses for which they are enforced as follows: the punishment for crimes according to Art. 22, in common law is hard work, hard labour in limits of 5 to 25 years and imprisonment from 3 to 20 years. Punishments for crimes are set out in Art. 23 and the common law consists of corrective imprisonment from one month to 12 years and fine from 2000 to 20,000 lei, unless law provides another maximum, while in politics they are given by simple imprisonment from one month to 12 years and fine from 2000 to 20,000 lei. According to Art. 24 sentences for misdemeanours are prison police from one day to a month and fine from 50 to 1500 Euro.

Through this Criminal Code, it a solution to an error was sought, the one of replacing the term confinement (imprisonment), promoted in the Criminal Code from 1864, which was misunderstood by the population and for which, when the criminals were condemned, they asked themselves what that meant. This term was replaced by "temniță grea" (hard labour), which could be easily understood by the population¹⁰.

At the same time, a new settlement was given concerning the distribution of the work product of the condemned, aspirations were expressed by the doctrine, through which the condemned would be obliged, in order to feel the punishment more, to compensate entirely, through work, the Civil part from the damages suffered, admitting that from his work product a part was reserved also for compensating the Civil part in case the compensation was not made through other means. In order to raise the moral of the condemned, advantages were created for the "well-behaved and hard working" ones, giving them greater proportion to form a pellicle.

The detailed rules of punishment for each phase are provided synthetically in Art. 28-39, the predominant note of these ways being the obligation of work. The way of working is diverse depending on the punishment. The work product is assigned by some coefficients between the state, the uncompensated Civil part and the condemned. Part of what should belong to the convict is capitalised to form a pellicle backup, which will be returned to the prisoner on release.

¹⁰ Constantin Rătescu ș.a., *Codul Penal Carol al II-lea adnotat*, Editura "Librăriei Socec&CO", București, 1937, pp. 70 și urm.

Also the imposing of work upon convicts was what Vintila Donogoroz pleaded for, considering that work is required as a necessity of functional order, for which the prison was not only supposed to fine the offender, but also to prevent any bad habit, as the one of laziness¹¹. Work requires economic ways to further revenue for the state, from which they could cover the expenses necessary for maintaining the prisons, making it easier, this way, for the fair citizens to maintain the ones who broke the law.

Last but not least, the work product of prisoners can be used for other useful purposes of prevention work that covers the damages caused to the victim of the offense, helping the condemned's family as long as he cannot ensure its existence, raising a small capital for the day the prisoner will be released, capital that will be so much needed to reconnect with free life.

The organization of this work can be done under concerns of functional order, this work being an opportunity for criminals to recover under economical concerns, which work to provide maximum efficiency, or on both concerns (mixed criterion).

At that time, for the organization of work there were three systems:

a) administration system – the work is organized with the state's means and possibilities, which procure capital, instruments, etc. It is advisable to act as functional system, because the concern is not a material profile, but moral and social. In economic terms, this system is less productive, and sometimes costly.

b) contract system – the state entrusts the organization of work in prison to an individual, the contractor taking the task of maintaining the prisoners and doing everything that is required by the specifications, exploiting in exchange the work as he thinks it is best. It is a criticized system for referral of offenders, because of the unhindered contact between detainees and the desire of enrichment of the entrepreneurs who neglected other concerns, absorbing all the time of prisoners at work.

c) limited concession system: the state organises some workshops in exchange of a certain sum, leasing an individual labour exploitation of prisoners in that workshop.

It has been admitted that prisoners' work product belongs to the state, but in reality the product should be distributed in three: one part remains for the state, another part is attributed to the uncompensated victim and a third part to the sentenced.

In the actual Penal Law, labour is not to be found among criminal sanctions. Though there are some disparate definitions regarding this institution. Thereby, Art. 53-3 prefigures that "the treatment regarding the privation of liberty is based on the possibility of the convict to practice with their own agreement a useful labour, if they are capable of labour, on the education of convicts, on their respect for the interior order of the detention places, as well as the stimulation and reward for those persistent in work, disciplined and which give solid proofs of correction. After turning 60 for men and 55 for women, convicts can perform labour only on request, if they are capable of it".

According to Art. 53-4 concerning the work regime "the work made by the convicts is remunerated, except the good old work, which is necessary for keeping the place in case of disaster. The conditions for working, time and payment, as well as the allocation of money to the convicts are settled by the law concerning punishment".

At the same time, Art. 59 also foresees conditioned freedom, as a reward given to those hard working, who show discipline and who have proven that they can repent, taking into account the criminal records, the convicts have the possibility of conditioned freedom before they finish their entire punishment.

In Art. 86-1 and 86-3 of Penal Law we find settlements regarding the suspension of punishment execution under surveillance, when the court can dictate as obligation for the

¹¹ Vintilă Dongoroz, *Drept Penal* (reeditarea ediției din 1939), Editura Societății "Tempus& Asociația Română de Științe Penale", București, 2000, pp. 485 și urm.

convict on the probation term period, the deployment of some activities or to follow an education of qualification course.

In Art. 86-7 Penal Law the condition of application of punishment at the work place is specified, that "in case the court considers that there is enough evidence to achieve the goal of the punishment without the abridgement of liberty is enough sentence, bearing in mind the seriousness of the action, under the circumstances it has been done, the professional and general behaviour of the perpetrator and his chances of re-education, he being able to execute his punishment in his unit of activity or other unit, in every case with written approval of the unit, and if the following conditions are met:

- a) the applied punishment is maximum 5 years of imprisonment
- b) the defendant has never been convicted before with prison punishment longer than 1 year, excluding the case when the conviction is related to the cases in Art. 38 with regard not attracting the state of recidivism."

Uneventful definitions are included also in Art.103, paragraph 3, "c" regarding the scale of the educational supervised liberty, according to which the court can impose on the minor as obligation the performing from a judge's decision an unpaid activity in a public institution with a length of 50 between 500 hours, maximum 3 hours a day, after school activity, on non-working days and holidays.

It is worth mentioning that after the beginning of the implementation of the Penal Law, Bill 218/1977 was adopted, abrogated in present, the actions specified in the Penal Law, for which the sentence does not overcome 5 years, the court judges, bearing in mind the seriousness of the fact, the circumstances in which the crime took place and the behaviour of the defendant, will dispose, usually, that the pursuance of the punishment will be through work punishment without the abridgement of liberty in his unit of activity or other unit, in factories, farming units, work sites, or other economical sites. Reaching the goal of the punishment without the abridgement of liberty should not be considered as a simple approach that adds to the regulations in the current Penal Law, other than a new approach, in the meaning that some punishments and the way they are performed gained a new content, and other represent a greater value than in the past, under the aspect of educative efficiency, meant to contribute to the correction of the people guilty of defying the laws¹².

According to art. 53-4, stipulations from Penal Law will be completed with that from the law about execution of the punishment and the provision of the juridical organs during the penal process (law 275/2006 in this case), referring to the condition of performing work, the time and payment of this and the distribution of the deserving incomes of the convicts. Chapter 5 of this law refers to the work made by the persons convicted to the punishment without freedom as the art. 56 makes provisions for such a case, the work made by the persons convicted to the punishment without freedom is paid, with the exception of the activities in prison out of the activities necessary to community.

Art. 59 establishes the regime for performing the job. Convicts in penitentiaries have to work in this way:

- a) in a regime of performing services for economical agents, physical persons or juridical persons, in or out of the jail;
- b) in the administration of the penitentiary;
- c) for the benefit of the jail, for activities with a household fibre necessities to the jail;
- d) in the use of community.

¹² Ștefan Daneș, *Considerații în legătură cu executarea pedepsei închisorii prin muncă, fără privare de libertate*, în "Revista Română de Drept", nr. 11/1979, p. 34.

Regarding the allocation of the revenues, art. 61 establishes that the incomes mentioned in art. 60 are drawn by the penitentiary administration, in which the convicted person executes the privative of freedom punishment, and are distributed so:

a) 30% of the revenue goes to the convict, who can use during his/her imprisonment 90% of it, and 10% is consigned on his/her name, ensued to be collected, along with the afferent interest rate, at the moment of release;

b) 70% of the revenue goes to the National Penitentiary Administration, encompassing own revenues which are cashed, accounted and used according to legal disposition regarding public finance.

In the initial project of the Penal Law modification, published and adopted by law number 301/2004, the punishments applicable for physical persons were to be modified, after the previous model, which classified the punishments according to the rating of the delinquency, crime or felony (it must be mentioned that for contraventions there is a legal frame separated from the settlement according O.G. 2/2001). According to art. 58 of this project, the major punishment for crimes was detention for life and severe detention between 15 and 30 years, and the major punishments for felony were represented by strict prison between 1 and 15 years, prison between 15 days and a year, fine under the form of fine-days, between 5 and 360 days and labour in community service, between 100 and 500 hours.

This project treated in detail this type of punishment. So, in Art. 69, the possibility to replace the penalty fine as fine days was provided, with 500 hours of community work, or if the convict does not give his consent for this punishment, with strict imprisonment. In article 70 the content of the community work punishment and the way that it is executed were regulated, applicable to the crimes that are sanctioned with the imprisonment or with at most 3 years of strict imprisonment, when the court can order the execution of unpaid community service work instead of the imprisonment, for a period of at least 100 hours. The community work could be ordered only with the consent of the defendant, and if the convict did not execute this punishment or did not fulfil the obligations imposed, the court could have ordered, unless the law did not provide otherwise, the revocation of community work, replacing it with imprisonment or with at most 3 years of strict imprisonment.

Therewith, in art. 107 of that project the suspension of the penalty under supervision with the obligation of the convict to perform community work was governed, in case that the execution under supervision was suspended, the court having the possibility to establish the obligation of the convict to do community work of maximum 300 hours.

According to law 286/2009, the Romanian legislator adopted and published another project of Criminal Code, which will be enforced and which approaches the community work punishment differently. Firstly, this type of punishment is no longer in the main punishments that are listed in art. 53 and that are limited at life imprisonment, imprisonment and fine.

Regarding penalty fine according to art. 63, paragraph 1, if the penalty fine cannot be entirely or partially executed for reasons not attributable to the convicted person, with his consent, the court replaces the obligation to pay the fine with the obligation to perform unpaid community service, except for the case in which, because of health, the person cannot perform this work. One day of fine corresponds to one day of community work. The coordination of performing the obligation of community work is done by the probation service and the execution of the community work ordered in paragraph (1) stops by paying the fine that corresponds to the days that were not executed.

If the sentenced person, who is in the situation referred to in paragraph (1), does not give their consent to the provision of unpaid community service, the fine shall be replaced with the unsettled imprisonment under article 63.

If the offender has expressed agreement to perform unpaid work for the community and whether they are satisfied and some other conditions imposed in the article 83,

paragraph 1 of the act, it may qualify for deferral penalty, the court settling a surveillance period.

Similarly in article 91, the court may suspend execution of the sentence under supervision for meeting several conditions, with the agreement for the provision of unpaid community service work. In both cases, it is for the offender, along with others, the provision of community work for a period of 30-60 days, in the first case, and between 60-120 days for the second situation, under the conditions settled by the court.

In addition to legislative approaches that have sought to refine this type of punishment the research initiated by the Institute for Legal Research is considered, included in the plan of the Romanian Academy, on the cost of crime (the criminal enforcement) and costs resulting from the prevention, control and fighting crime during the years 2000-2004¹³.

Among the solutions proposed from the research perspective, was the one concerning the regulation of labour and prisoners in prisons, by supplementing legislation to make provision for the obligation of prisoners medically fit for work. It invoked the old law on the organisation and operation of the prison that providing funding to ensure that before all of their income, consequently it should be made compulsory labour and the place of detention, in order to achieve funding, that this does not remain a mere recommendation without coverage. This requirement is consistent with the provisions of the C.E.D.O. which allowed the imposition of a work normally to a person subject to detention under article 5, without being regarded as forced or compulsory labour.

Provision of a job in the prison will mean expansion of productive activities, setting work rules and a proper consideration to prisoners and encourage them to be interested in achieving their revenue. It was shown that the percentage of prisoners used for work in 2002 was 43% and 49% in 2003, while in the Dutch prison system, 90% of inmates working 4 hours a day.

The amending of the internal orders in the sense of recognition of time spent in prison as length of service was suggested. Providing a suitable framework for recovery of labour by creating indoor production has also been proposed, with facilities and organisation on economic principles, including the leasing of land and farms.

The meaning and legal nature of this type of punishment in criminal law differs from other states. It is considered that the first appearance of such legislative sanction was in England in 1972, where it can be seen as a punishment in its own right, so they created community service orders. Thus, courts may decide on the provision of unpaid work by adult offenders serving community service between 40 and 240 hours and be extended by one year. This penalty applies only to offenses punishable with custodial sentences.

After a comparative examination of laws for service for community in several European countries, we see that it takes several forms:

a) In the French Penal Law community service is correctional punishment Art.131-3, along with imprisonment, fine, day-fine, probation of civic values, stringent punishment and deprivation of rights and additional penalties. This type of penalty can be imposed on offenders who refuse or are not present at the meeting. President of the court before the pronouncement of the sentence, inform the offender of his right to refuse fulfilment of community work and receiving its response. Imprisonment may be pronounced with a cumulative effect of prison sentences and restrictive labour rights and no punishment for the community, this being a main, independent form of punishment.

Community work may attend the suspension of the penalty of imprisonment too, under obedience to evidence Art. 132-54. The court may require that the convicted person will perform over a period of 40 to 210 hours work on behalf of a public law legal person or

¹³ Rodica Mihaela Stănoiu, ș.a., *Sistemul penitenciar român. Realizări, dificultăți, perspective*, în "Revista de Drept Penal", nr. 3/2005, pp. 28 și urm.

an association authorised to implement projects of general interest, and the obligations may continue beyond the performance of community service over a period not exceeding 12 months.

b) The Finnish Penal Law sets in chapter 6, section 1, paragraph 1 general penalties: criminal charge, fine, conditional release, community work and prison. We will find in section 11 that community work is a substitute punishment, whereas the punishment may be substituted only for offenders sentenced to execution of a sentence of imprisonment of not more than 8 months, they may replace, unless the sentences of execution of a sentence of imprisonment, sentence of community work or other reasons prevent the implementation of the order of verdict of community work. Specific to this legislation is that the offender is required to attend such a sentence, thereby assuming that the offender will execute the sentence of community work, law not requiring the consent of the sentenced.

c) The Spanish Penal Code establishes community work in many types of punishment, giving it various roles in this regard. Punishments are classified in Art. 33 as serious punishments, less severe and mild. According to the number of days community work can be regarded as mild punishment when it is fixed for a period of 1 to 30 days, or is considered less serious punishment, for a period between 31 and 180 days. At the same time, according to Art. 39, work for the community is considered a punishment by deprivation of rights, which may have a duration from one day to one year. It cannot be applied without the consent of the prisoner, forcing him to provide unpaid work in certain public activities, which will consist, compared to the same type as the crimes committed by convicts, of work to repair the damage caused or the granting of aid or assistance to victims.

Participation in formative programme, working with other programmes represents one of the conditions for suspension from the execution of a sentence under Art. 83 of the Penal Law.

Not least, Penal Law established in Art. 88 that the courts will replace the beforehand hearing of the parts before the beginning of the execution, prison sentences that not exceed one year with fine or with the provision of community work, even if the law does not provide the punishment for the crime in question, when personal circumstances of the accused, the nature of the crime, his conduct and, in particular the effort to repair the damage caused recommends that, when it is not ordinary criminals, substituting it every day in prison with two fine allotments or one day of work. As it can be seen, community work can act as a substitute for custodial sentences, even if the judge does not expressly provide this, but personal and real circumstances recommend it.

d) In Art. 9 Penal Law of the Netherlands there is a classification of sentences in major penalties and additional penalties. Major penalties in turn consist of imprisonment, arrest, correctional activities and fine. An activity is either atonement correctional labour such as carrying out unpaid work in either a correction, such as compliance with a correctional project or a combination of both. The sentence will specify whether the work will consist of correctional labour punishment, correctional punishment or a combination of both, as well as the number of hours the sentence will last. The maximum number of hours of correctional work is 480, of which more than 240 hours of labour punishment.

e) In the German Penal Law community work remained according to paragraph 56b, 2 only one condition and in the same time one obligation, of whose realisation, besides other conditions and obligations, conditional suspension of penalty execution can be made. It could not assign its independent nature of a sanction, whereas the German Constitution admits forced labour only in prisons.

f) In Portugal, the provision of services for the community is also a substitute for both imprisonment and fine. According to art. 58 of Penal Law, if the convict is sentenced the one year imprisonment, the court replaces it with the provision of services for the

community, when it considers that this achieves properly and sufficiently the punishment goal. The provision of free service for the state, for other public persons or private entities whose goals are considered as community interest by the court and their duration is fixed between 36 and 380 hours.

It is worth mentioning that community work is also a substitute for fine, so that according to art. 48, if the convict requests, the court can order that the fixed penalty be wholly or partially replaced by days of work in institutions, offices or other work of the state or of the public persons or private institution of social solidarity, when it is considered that this manner of performance achieves adequately and sufficiently the punishment goals.

g) The Belgian Penal Law lists in art. 7 the punishments that apply for the infringement of the law. In criminal matter, these are confinement and detention, and in correctional and police matter, these are prison and custodial work. According to art. 37, when an act is likely to lead to punishment by the police or a correctional penalty, the judge can sentence as main punishment a labour penalty. The judge states, within the offense and punishment provided by law in force which refers to taking possession, an imprisonment punishment or a penalty which can be applicable in case of the non-execution of the labour penalty.

5) The problem of this type of punishment was also examined by the international organism which adopted numerous documents through which the limits, the content and the principles of application were drawn.

The main "testing" of regulations in this matter dates from the year 1976, when the Committee of Ministers of The Council of Europe adopted resolution R (76)10, which set the introduction of alternative penal measures to imprisonment in the criminal laws of Member States, including the unpaid service for community¹⁴. The Community Punishment or noncustodial one recruits more and more followers in the theory and practice of the field, providing European countries with several forms, such as unpaid work in community service, mediation, repairs, probation, electronic monitoring, etc.

Recommendation R (92)16 on the European rules about sanctions and measures applied in the community, adopted by the Council of Ministers of the Council of Europe on October 19, 1992 is set up within the European Regulatory concept of the measure or penalty applied to the community. The recommendation, the period of sanction or community measure refer to the measures and sanctions to maintain the offender in the community limiting his freedom by imposing conditions and/ or obligations for the implementation of which bodies established by law are responsible. Rule 67 of the recommendation establishes that "the penalties the condemned executed in the work for the benefit community must not be without meaning, but to be socially useful, to be meaningful and to develop skills to the greatest extent possible".

To these Recommendation R (2000)22 is added, which was adopted on November 22, 2000 by the Committee of Ministers of the Council of Europe on improving implementation of European rules, sanctions and measures imposed in the community, which reiterates the need for uniform legal rules and an intensification of international cooperation in the criminal field, recommending that Member States establish the necessary framework to implement in their own legislation subject the conciliation victim-criminal and the promotion of noncustodial measures and penalties.

These steps have been supported by the United Nations, which recommended the introduction and development of the community's sanctions, by approving the 8th Congress of the rules and minimum standards of the United Nations on noncustodial measures.

Therefore, in the 11th Congress of the United Nations for prevention of crime and penal justice, the Chart of Fundamental Rights of Prisoners was adopted for being applied

¹⁴ Nicoleta Miulescu, *Munca în folosul comunității, alternativă la privațiunea de libertate*, în Revista "Dreptul" nr. 3/2009, pp. 178 și urm.

by the member states, by the intergovernmental and nongovernmental organizations, as other entities or interested persons, in all the detention and incarceration centres. One of the rights that the prisoners can benefit from is the right to do a decent work and be paid for it which will encourage their self-respect and will facilitate their integration in the society and will allow them to sustain their personal and family financial needs¹⁵.

6) A very important document with applicability in the execution of work penal sanctions for the benefit of the community, is the Convention of protection of human rights and fundamental liberties, adopted in Rome on November 4th 1950 which regulates in Art. 4 the interdiction of slavery and forced work. This text foresees the following:

1. No one can be kept in slavery or in enslaving conditions.
2. No one can be constrained to do forced or obligatory work.
3. The following are not considered 'forced or obligatory work' in the meaning of the present article:
 - a. any kind of work enforced to an imprisoned person in the conditions of art. No 5 from the present convention or while the imprisoned person is on parole.
 - b. any military service or in the case of those who refuse to perform the service because of conscience reasons, in the countries where this thing is legitimate, another service to replace the obligatory military service.
 - c. any kind of service enforced in crisis, calamities, or situations which put life or the welfare of the community in danger.
 - d. any kind of work or service which is a civic obligation.

As it can be seen, the regulated situation in Art. 4, paragraph 3, 'a', the work enforced to an imprisoned person is not considered forced or obligatory work, namely the conditions foreseen in art. 5 from the Convention or while a person is on parole. The Convention does not define forced or obligatory work. But there are two specific international Conventions, adopted by the International Labour Organisation which define it and which refer to their jurisprudence¹⁶.

Thus, the International Labour Organisation Convention respecting the forced and compulsory work 29/1930 has in art. 2 paragraph 1, that it "means every kind of work or service asked from one person under the threat of some penalty and for which that person did not volunteer".

Also the I.L.O Convention respecting the abolishment of forced labour 105/1957, in its first article states that the countries which approve of this convention are engaging themselves in abolishing the forced or compulsory labour and do not get return to it under any circumstances:

- a. as a compulsion measure or an education policy or like a sanction to the persons who have expressed or are expressing some policy opinions or they are showing their ideological opposition to the settled policy, social or economical order;
- b. as a method of mobilisation and use of labour, for economic development;
- c. as a measure of labour discipline;
- d. as punishment for participating in strikes;
- e. as a measure of racial, social, national or religious discriminations.

It is estimated that there is no impediment in being submissive to such obligations, so applying the dispositions from art. 4, paragraph 3, "a", if they are in condition to discuss the continuing legality of the deprivation of freedom, in keeping with art. 5, paragraph 4 of the Convention (any person deprived of his liberty by arrest or detention shall be entitled to

¹⁵ Gheorghe Florian, *Prevenirea criminalității; teorie și practică*, Editura "Oscar Print", București, 2005, p. 200.

¹⁶ Corneliu Bârsan, *Convenția Europeană a Drepturilor Omului, Comentariu pe articole*, vol. I *Drepturi și libertăți*, Editura "C.H. Beck", București, 2005, pp. 262 și urm.

bring an appeal before a court for it to rule in the short term on the legality of its possession and to order his release if the detention is unlawful).

In other words, the person held legally on the base of art. 5, paragraph 1 can be submissive to a work which will not be considered forced or compulsory, but the right to dispute this ownership cannot be refused to him in front of a court and to apply for his freedom; art. 4, paragraph 3 sends us to entire art. 5 not only to the first paragraph¹⁷. This was the position of the committee, which, in one cause, ascertaining the violation of the disposition of art. 5, paragraph 4, because three persons detained for vagrancy could not challenge the administrative measure of their possession, but they were submissive to work, it considered that also the dispositions of art. 4, paragraph 3 of the Convention were violated¹⁸.

However, the Court has never restrained infringement of the last disposal, with motivation that obligation to work imposed on those three complainers has not passed normal limits according to art. 4, paragraph 3, "a" from the Convention, because it has as its purpose their social insertion and it has a legal base in national rules¹⁹.

The European Court has also decided that in order to be in conformity with the providences of art. 4, paragraph 3, "a", the work of prisoners should, beside their social insertion, create savings which they can use when they are freed²⁰. It is true that the analysed text does not contain reference to necessity to pay for the work of the prisoners but it does not impose obligation to affiliate them to a social insurance system²¹.

About the work which the prisoners do for a private society, the Commission decided that this form of work seems, in any way, whichever the advantage or disadvantage, to have entered in that norm for prisoners, according to art. 4, paragraph 3, "a", without a reference to a rule²².

6) To promote this kind of punishment many authors have spoken about this. French lawyer Jean Pradel considered that the most innovative punishment is the work for community and this should be an alternative for jail²³.

Gheorghe Diaconu in his work *The Punishment and Penal Law* said that the advantages for this kind of punishment are numerous. Besides avoiding prison overpopulation and budgetary savings, service for community avoids isolation promoting work in an open environment.

Indeed, in the new context, the question is no longer about whether to punish more severely or more leniently, but how to punish one better²⁴. In this regard, a frontal attack against a prison sentence was led. The supporters of the new school of social defense argue that a crisis broke out of prison would be the finding that prison is a factory that produces a recidivist and that by placing detainees in an environment cut off from any reality outside itself invalidate the idea of resocialisation. So they systems that open prisons like the one in which prisoners working in agricultural or industrial enterprises were founded. (a l'aperto labour in Italy, *établissements ouverts* in France)²⁵.

¹⁷ Velu J. et Ergec R., *La convention europeene des droits de l'homme*, Bruylant, 1990, pp. 233-234, *apud.* de Corneliu Bârsan, *op.cit.*, p. 268.

¹⁸ Comis. EDH, rap. 19 iulie 1969, Serie B, nr. 10, p. 96 și urm., *apud.* de Corneliu Bârsan, *op.cit.*

¹⁹ CEDH, 18 iunie 1971, precit. par. 90, *apud.* de Corneliu Bârsan, *op.cit.*

²⁰ CEDH, 18 iunie 1971, precit., par. 89-90, *apud.* de Corneliu Bârsan, *op.cit.*

²¹ CEDH, 6 aprilie 1968, nr. 3134/1967, Xc/Allemagne, *Annuaire de la Convention*, vol. XI, p. 529 *apud.* de Corneliu Bârsan, *op.cit.*

²² CEDH, 6 aprilie 1968, 21 detenus c/Allemagne, precit., p.529 *apud.* de Corneliu Bârsan, *op.cit.*

²³ Jean Pradel, *Droit penal general*, Tome I, Cujas, 1987, p. 595, *apud.* de Gheorghe Diaconu, *Pedeapsa în dreptul penal*, Editura "Lumina Lex", București, 2001, p. 150.

²⁴ Godefroy du Mesnil du Buisson, *Justice et chatiment: de nouvelles attentes pour la peine*, în "Revue de science criminelle et de droit penal compare", nr. 2/1998, p. 263, *apud.* de Victor Ionescu, *Unele controverse în dreptul penal la sfârșit de mileniu*, în Revista "Dreptul", nr. 7/1999, p. 73.

²⁵ Victor Ionescu, *art.cit.*, pp. 73, 75.

From a summary of community rules, one author reached a trichotomic reason for a penalty consisting of unpaid service for the community:

- impunity, by depriving it of the provision of leisure and nature activities reparatory to the community
- participatory community to justice.
- education, learning the social values: work, discipline, rehabilitation, since the penalty always runs with the consent of the detainee. Practice has shown that establishing such community sanctions has led to increasing community involvement, but also to the behavioural rehabilitation of the convict²⁶.

All this can be achieved but under some conditions:

- have a clearly defined purpose and endorsed by all involved
- one side containing both deprivation and behavioural and social rehabilitation
- to have adequate infrastructure to implement it in terms of quantity and quality
- enabling continuous information to the public and the judiciary on enforcement and effectiveness of such punishment.

We believe that through this article we have determined the interest for the relevance and benefits of this punishment in favour of all the participants at the act of justice who are the offender, the injured part, the state and the judicial bodies or those charged with the execution of the punishment and we have offered 'the ingredients' for finding the necessary regulations of the adoption and application of an efficient penalty system. Therefore, we believe that, taking into consideration the Romanian legislation, it is required to consider this punishment a principal one (according to other European countries) and not necessarily substituting the punishment, if the workforce is reduced and required in the penitentiaries as well as in the whole Romanian society, offering moreover the advantages mentioned above. This punishment must be certainly adapted to the offender's personality, considering the possibility that for some persons skilled at lucrative activities could not provide the necessary coercion. In this case, an attentive individualization of the punishment is required.

To the conclusions listed above, the legislation of other states can also be added, along with the recommendations and conventions adopted by numerous international organizations, from which we can remember that it is not necessary to ask for the offender's consent for the enforcement of the custodial work, if the convicted person can attack such a sentence to a higher court and the punishment may be transformed into a harsher one, according to a progressive penalty system, as well as being regressively applied, in reverse, when it is required as a consequence of the improvements and the correction of the offender's behaviour and conduct during the detention period.

²⁶ Nicoleta Miulescu, *op.cit.*, p. 177.