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SUBSTITUTE COMMUNITY SERVICE IN CASE OF NOT PAYING A FINE

Pre-evaluation

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Summary and conclusion

In July 2020, a motion by Member of Parliament Groothuizen (Democrats 66, D66) was adopted by the House of Representatives, requesting the government to examine whether community service can be imposed as a possible alternative sanction to a substitute custodial sentence, in the event of non-payment of a fine. The motion included the presumption that substitute detention related to fines could result in many (generally short-term) custodial sentences, which can have far-reaching consequences (such as loss of housing and/or income), and may therefore not help in reducing the likelihood of re-offending. A further question was whether a substitute custodial sentence in the form of a short period of detention (which is imposed when an offender fails to pay a fine) is appropriate for the relatively minor offences for which the court in the first instance usually issues a fine.

On the basis of this motion the Research and Documentation Centre of the Ministry of Justice and Safety (WODC) approached Leiden University to conduct a preliminary study on the possibility of introducing a substitute community service order into the system of sanctions in the Netherlands. This preliminary study had to address a number of key questions:

What is the expected effect on the individual concerned and on society as a whole of introducing into the legislation the option of imposing a substitute community service order on an offender who fails to pay a fine issued under criminal law? What positive and negative consequences can be expected, and what are the grounds for these expectations?

These questions have been studied by consulting relevant literature and documents, including parliamentary documents, analysing Central Judicial Collection Agency (CJIB) data and conducting 23 interviews with key individuals and experts within criminal law for youth and adult offenders. In addition, data gathered for a recent study on financial supervision, in which several of the authors were involved, were analysed in light of the questions posed in this study (Koenraadt et al. 2020).

Below a summary of the main findings of this preliminary study is presented, followed by answers to the research questions and a number of brief recommendations.

1. Summary

In chapter 2 we concluded that imposing a substitute community service order for non-payment of a fine has previously not been considered in the Netherlands. In itself this is surprising, since the necessary starting points for introducing a substitute community service order are present in the history of the law, case law and the practice of sentencing. This additional 'big stick' as an incentive for offenders to pay the fine is in line with the rationale and current implementation practice and, from a legal dogmatic point of view, could offer a solution for the situation where a fine is the appropriate sanction in a particular case but the offender is unwilling or unable to pay. The three judges that we interviewed as part of this study, were unanimous in welcoming such a broadening of the arsenal of sanctions. At present, they can only resort to imposing a community service order if information is made known at the court hearing that a defendant is most probably unable to pay a fine. However, if the offence does not lend itself to this more serious form of settlement (i.e. a community service

order), from a dogmatic legal perspective, this is inappropriate and will also have serious consequences for the suspect if, due to the prohibition on community service orders (*taakstrafverbod*), no further community service order can be imposed on a defendant in the event of any subsequent conviction. Unlike in adult criminal law, the judge in juvenile criminal law is not required to include a substitute sentence in the judgement in advance when issuing a fine. If the fine is not paid, he can, at the request of the Public Prosecutor, still impose a substitute detention or, at the request of the juvenile, decide on a substitute community service order. This practice is described in chapter 3. Even if the judge has included substitute juvenile detention in the judgement, the juvenile can ask for the fine to be converted into a substitute community service order if the fine is not paid. The substitute community service order will be imposed in relation to the sum due (Article 6:6:30 paragraph 2 Criminal Procedure Code (CPC). In practice, a conversion key of €5 per hour applies (LOVS [National Consultation on the Content of Criminal Law], 2021). The possibility of a substitute community service order was introduced into juvenile criminal law in the same legislative amendment where community service was given a legal basis. When the possibility of substitute community service was introduced in 1995, the intention was to emphasise the educational nature of juvenile justice. This option also aligns with the international standards that focus on the reintegration of juvenile offenders and emphasise that custodial sentences should be used as a measure of last resort and for the shortest appropriate period of time.

In practice, very little use is made of substitute community service in juvenile criminal law. This can in the first place be explained by the fact that very few fines are imposed in the juvenile justice system. For various reasons this is not considered an appropriate sanction for juvenile offenders. More frequent use is made of a compensation scheme, which, in line with the Public Prosecution guidelines for criminal proceedings relating to juveniles and adolescents (2021R001), takes precedence over a monetary fine. In the event of non-payment, this measure cannot, however, be converted into a community service order. A second reason why little use is made of substitute community service is that people are not familiar with this possibility. This option is not included in the LOVS reference points for the judiciary, and in their judgments judges only include the possibility of substitute detention, in case of non-payment of a fine. Juvenile themselves may therefore not be aware of this option, which can be problematic in cases where they are not automatically assigned a lawyer. The CJIB figures show that in 2019 and 2020, 180 fines imposed on juveniles were converted into substitute detentions. The CJIB states that it adopts the same approach regarding enforcement for juveniles as for adults. Apparently, the option of substitute community service is at this stage not explicitly offered to juveniles. Although substitute community service is rarely used, all the juvenile criminal law experts we interviewed are of the opinion that this option must be retained and that it should be publicised more so that it can be applied more frequently.

Chapter 4 shows that the possibility of a substitute community service order for non-payment of a fine is also applied in other countries. A quick scan of the scant literature published on this subject yielded a list of fifteen countries where we are certain that this possibility is part of the legislation. Systematic research would most probably generate a longer list. In chapter 4 we took a closer look at the situation in Norway and Germany, because research has been conducted in these countries on the effectiveness of substitute community service orders. A number of striking similarities with the Netherlands have been identified. In both countries, moral objections against detaining offenders who had initially been given a fine were the primary reason for introducing a substitute community service order. Both systems also require that the offender accepts the substitute community service; in Germany, the individual concerned must offer this option him- or herself.

The main difficulties in implementing substitute community service concern reaching the target group and identifying suitable work or other activities. The success in resolving these difficulties seems to correspond with the efforts made and the flexibility that is built into the implementation of the measure. The evaluations of the projects and pilot projects discussed in this chapter are positive about the results, even though these may at first sight seem modest. The high financial and social costs associated with detention also means that considerable benefit can be achieved if even only a proportion of the unpaid fines can be dealt with by means of community service.

The analysis of the data from the CJIB in chapter 5 shows a number of striking characteristics of fines and conclusions about the application of substitute detention in adult criminal law. A counter-intuitive finding is that lower fines remain unpaid much more frequently than higher fines. Fines up to €200 are paid in roughly half of cases, while fines of €200 and higher are paid in three-quarters of cases. Lower fines appear to result in substitute detention orders substantially more often than higher fines. Offering a payment scheme seems to be effective. When a payment scheme is agreed, sentences involving fines result considerably less often in a substitute detention. Another striking finding is that a relatively high number of fines are imposed for fare-dodging (the Dutch Passenger Transport Act (WPV)), but these fines are paid relatively seldom and consequently result relatively frequently in a substitute detention. This also applies for fines imposed for ID offences, although such fines are less common. Lower fines thus lead remarkably often to very short substitute detentions. Half of all substitute detentions are just for one or two days.¹ Three-quarters of substitute detentions are for periods of less than six days. It is also evident, however, that some substitute detentions are for longer periods of time. Moreover, the qualitative part of this study clearly shows that detainees often serve several substitute detentions consecutively. The available data did not allow us to quantify how often this occurs and for how long.

With regard to the characteristics of the offenders who serve substitute detentions, the analysis of the CJIB data in chapter 6 shows that offenders who serve a substitute detention due to non-payment of a fine are more likely to have been issued with fines frequently and are more likely to have been convicted of previous offences compared to offenders who simply paid their fine. At the same time, there is also a substantial minority who had never or scarcely ever come into contact with the justice system in the period covered by our CJIB data (Table 13). Offenders whose sentences end in substitute detention are less likely to have agreed payment arrangements, which is an incentive to use this option more often. A substantial part of the research group at the centre of this study are detained in a detention centre. Unfortunately, we have not been able to establish how this group relates quantitatively to the group of detainees who are detained in other facilities. A number of recent policy documents on detention centres and the interviews with three respondents working in these centres, however, show us a picture of the group that is the focus of this study.

In addition to financial problems, this group struggles more than the average with addiction and housing problems. Because of these background characteristics, the respondents were of the opinion that the majority of the detainees who serve substitute detention are actually unable to pay the fines. However, they also pointed to two distinct minority groups: those who did not realise they had unpaid fines until after they had been imprisoned and then did everything in their power to pay them. And a category of prisoners who refused to pay on principle, for example because they did not agree with the fine imposed.

¹ Interviews with key persons discussed in other chapters of this report suggest that many of the short-term substitute detentions are served immediately after offenders have served detention for another offence. However, the available data does not allow this information to be verified.

There is an overwhelming body of evidence in the penological literature that short detentions have adverse social consequences, but this is probably less true for the very short detentions that are largely the result of substitute detention orders. At the same time, scientific studies show that the likelihood of recidivism also increases even if people have been detained only for a very short period of time (less than 14 days). Community service orders perform much better in this regard, while they do not have the adverse social consequences that are inherent to detention. One of the research questions was whether people who fail to pay their fine would be willing to carry out community service. Although we were unable to ask detainees this question due to the corona crisis, prison staff estimates that this will be the case for a part of this group. It is conceivable, however, that offenders who are already in detention may prefer to serve a few more days in detention instead of doing community service. The general opinion is that detainees will be able to carry out community service, provided the work is simple and they are supervised. Simple working activities are sometimes also offered within prisons. Many detainees entering a prison are already in a poor social situation. Rather than asking whether community service can prevent the harmful consequences of detention, it would be better to ask whether detention or community service could improve the situation of this group of offenders. Although more attention has been paid recently to screening this group of short-term detainees regarding the most important life aspects, after care following detention often does not take place. In the opinion of most respondents, community service therefore offers more benefits, but only if there is intensive supervision and room for coaching activities.

Finally, we made an estimation of the costs and benefits of substitute detention and the degree to which introducing substitute community service could change these factors. We calculated that offenders issued with a fine in 2019 and 2020 together served 47,154 days of substitute detention. Based on the cost per day of detention, this amounts to approximately €14 million, for a total amount of fines imposed of less than €3 million. If the unpaid fines could have been settled by means of substitute community service, the costs would have been roughly €2 million. Both sanctions obviously have many positive and negative side-effects. We have identified a number of these without being able to attach a concrete price to them.

2. Answering the research question

Returning to the research question, we come to the conclusion that there are arguments for incorporating the possibility of a substitute community service order in Dutch adult criminal justice.

In the first place, the current practice of substitute detention only makes limited contribution to achieving the general objectives of criminal justice, but it does entail high costs for society.

1. First of all, substitute detention is applied relatively frequently for relatively minor offences and sanctions. These are mainly short detentions for relatively small fines. On the basis of the literature, it is probable that even short detentions contribute to recidivism and in any event do not lead to reintegration into society. Moreover, detention is in most cases not in proportion to the original offence.
2. It should also be borne in mind that a large proportion of the fines issued that end in a substitute detention were originally penalty orders imposed by a public prosecutor – which were not paid. Apparently, the threat of a fine and substitute detention does not have the intended deterrent effect. The question is even whether a substitute community service order might have a more deterrent effect for some in this target group, since a substitute detention can also be seen as an inexpensive way of ‘paying’ your fines by serving time.
3. Finally, it should be noted that implementing substitute detention entails significant costs for society. We calculated that offenders who were issued with a fine in 2019 and 2020 together served 47,154 days of substitute detention. Based on the daily cost of detention, this amounts to around 14 million euros compared to a total sum of unpaid fines of close to 3 million euros. If the unpaid fines could have been settled by means of a substitute community service order, the cost would have been around 2 million euros.

A second conclusion of this study is that there are sufficient indications that substitute community service as an alternative for substitute detention could work, but also that it will be difficult to implement this.

Although substitute community service is not applied in juvenile criminal law – for reasons discussed in chapter 3 – the grounds on which the regulation was introduced and the arguments of experts who advocate that this possibility should be retained and used more extensively are largely also applicable in adult criminal justice. We also observed that substitute community service has been implemented in many other jurisdictions as a possible response to non-payment of fines, and in Norway and Germany is regarded as relatively successful. At the same time, it has to be said that, in view of the characteristics of the target group, implementation is not easy and also of course takes place in a different legal and practical context, so that the results cannot be applied directly to the Dutch situation.

For the Dutch situation, it is also questionable whether parts of the target group will actually cooperate in carrying out community service or will be willing to do so. Our respondents comment, however, that this is not a reason to exclude this group categorically. From discussions with staff of the probation service, it is clear that, given their current experience with various groups of offenders on whom community service is imposed, they believe they are adequately equipped to implement community service orders successfully for this target group, although for a part of the target group it will be necessary to build in more flexibility and supervision than is the case with regular community service orders. The two other probation organisations, the Addiction probation service, and the Salvation Army have already gained more experience with this. The situation in Norway can also be taken into consideration, where offenders can do their hours of community service at flexible times in places where simple work is offered.

3. Recommendations

The discussions held with in particular the judges and our own legal expertise led us to conclude that it would be preferable to incorporate the possibility of imposing a substitute community service order into the legislation in addition to the possibility of substitute detention. The judge can then choose to include one or both options in the judgment. In line with the situation in juvenile and adult criminal law, there seems little point in imposing substitute community service on an offender against his will, quite apart from the question of whether this could be reconciled with the prohibition on forced labour (Boone, 2010). If it is clear at the court hearing that the convicted person is unwilling to pay a fine, this could be a reason for the judge to decide on a substitute period of detention, in the same way that the court can also give advice on enforcement of the sentence (Article 6.1.1. paragraph 3 CPC). It can be left to the CJIB to enforce the substitute sentence, in the order set by the court.

Although our research findings indicate that there are good reasons to introduce a substitute community service order, this does not mean that this is the only measure that can contribute to reducing this population of detainees. We will therefore conclude by indicating a number of alternatives:

1. In some cases it is preferable for the judge when imposing a sentence to opt for community service rather than a fine (see chapter 2). One problem here is that at the hearing the judge may not be fully informed of the financial situation of the suspect, for example because there is no probation report or in the report not much information is available on the financial situation of the suspect (chapter 2 and recently Koenraadt et al., 2020).
2. Also, community service may not be the only alternative for a substitute detention. Our study shows several indications that community service may be accompanied by a limited form of supervision or may even replace it altogether. For the category of offenders for whom community service is not a suitable option, a substitute detention involving electronic monitoring can be considered.
3. Finally, there is also the option of not imposing any substitute sanction at all when a fine is not paid, but to apply such a sanction only in the event of a future prosecution. This model appears to be common in Denmark, although we have not been able to verify this from the Danish legislation. An advantage of this system appears to be that it saves the costs and effort of a substitute sanction, while at the same time not signalling that it is cheaper for an offender to simply serve time in lieu of a fine.