The Refusal to Carry Out Unpaid Work for the Benefit of the Community by the Defendant – From Right to "Procedural Trap"

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Abstract

This approach starts from the regulation contained in Article 4 of the European Convention on Human Rights, which regulates as a fundamental right the prohibition of slavery and forced labour. The purpose of this right – the right not to work forcibly – is obvious, but the way in which Member States protect this right through domestic regulations can be different and can create controversy.

In our analysis we want to stop in criminal and criminal proceedings, being certain that other matters of law may face regulatory problems, but also considering that the scope of criminal law in general presents a series of hypotheses with special consequences, including, as we shall see, in the freedom of the individual. Far from wanting to find a clear solution to the problems that we will expose, we want to ask some questions regarding the internal protection offered in criminal law and criminal proceedings in relation to Article 4 of the Convention.

Does the legislator manage to be predictable? Is the right to refuse unpaid community service a "trial trap"? These are just two of a few natural questions raised as a result of the careful passage of the texts of law, but also from the analysis of case law in the matter.

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I. ECHR Standard Art. 4 – forced or compulsory labour

According to Articles 4 par. 2 and 3 of the European Convention on Human Rights, "2. No one can be compelled to perform forced or compulsory labour. 3. 'forced or compulsory work' within the meaning of this Article shall not be considered as: any work normally imposed on a person subject to detention under the conditions laid down in Article 5 of this Convention or during his or her probation".

For the purposes of this Convention, the term "forced or compulsory labour" means "any work or service claimed by an individual under the threat of any punishment and for which the name individual has not willingly offered himself". The Court adopted this definition as a starting point for the interpretation of Article 4 § 2 of the Convention (Graziani-Weiss against Austria; Stummer vs Austria (MC) and Adigüzel vs Turkey)[1].

Article 4 § 2 of the Convention prohibits forced or compulsory labour [Stummer vs Austria (MC)]. However, Article 4 does not define what is meant by 'forced or compulsory work', and the various Council of Europe documents relating to the

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[1] Art. 4 ECHR guide, p. 8, www.ier.gov.ro, 13.12.2020.

preparatory work of the European Convention (Van der Mussele against Belgium, point 32) do not contain any guidance on this matter. In Van der Mussele v Belgium, the Court invoked ILO Convention No 29 on forced or compulsory labour. For the purposes of this Convention, the expression "forced or compulsory labour" means "any work or service claimed by an individual under the threat of any punishment and for which the name individual has not willingly offered himself". The Court adopted this definition as a starting point for the interpretation of Article 4 § 2 of the Convention (Graziani-Weiss against Austria; Stummer vs Austria (MC), and Adigüzel vs Turkey (paragraphs 26 to 27, and the caselaw cited there)[2].

Article 4 § 3(a) of the Convention states that the expression 'forced or compulsory work' does not include 'any work normally imposed on a person subject to detention' (Stummer vs. Austria (MC), point 119) or while he is on parole.

In determining what type of activity must be considered as 'work normally imposed on a person subject to detention', the Court shall take into account the standards prevailing in the Member States (point 128). For example, when the Court had to consider the work imposed on a repeat offender, whose release was conditional upon the accumulation of a certain amount of savings, although he admitted that the work in question was compulsory, found no infringement of Article 4 of the Convention on the grounds that the requirements laid down in Article 4 § 3(a) (Van Droogenbroeck against Belgium, point 59) were met. In the Court's view, the work imposed on him did not go beyond what was 'normal' in this context, since it was established to help him reintegrate into society and was legally based on provisions which have an equivalent in certain Member States of the Council of Europe (Stummer vs Austria (MC), point 121; De Wilde, Ooms and Versyp against Belgium, point 90][3].

As regards the remuneration of detainees, the Commission stated that Article 4 does not contain any provision concerning the remuneration of prisoners for the work carried out (Twenty-One persons held against Germany, the Commission's decision; Stummer vs. Austria (MC), point 122). The Court noted that there have been further developments in attitudes to this issue, reflected in particular in the European Prison Rules of 1987 and 2006, which require fair remuneration of the work of prisoners (Zhelyazkov against Bulgaria, point 36); Floroiu vs. Romania (point 34).

However, it considered that the mere fact that a prisoner was not paid for the work carried out does not, in itself, preclude the finding that such work constitutes 'work normally imposed on a person subject to detention' (paragraph 33). For example, in Floroiu against Romania, the Court noted that inmates could perform in prison either paid work or, as regards the day-to-day administration of the prison, unpaid work, but which granted the right to a reduction of the sentence. Under national law, detainees could choose between the two types of work after being informed of the conditions for each type of work. Given that the applicant has been granted a significant reduction in the remaining sentence to be served, the Court found that the work performed by the applicant was not deprived of any form of remuneration and that the work carried out by him can therefore be regarded as 'work normally imposed on a person subject to detention' within the meaning of Article 4 § 3(a) of the Convention (paragraphs 35-37)[4].

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[2] *Ibidem.*

[3] Art. 4 ECHR guide, p. 11, www.ier.gov.ro, 13.12.2020.

[4] *Ibidem.*

In a case in which the complainant complained about the obligation of detainees to work in prison after they had reached retirement age, the Court, having regard to the purpose of the required activity, its nature and extent, as well as the manner in which it was to be carried out, and noting that there was no consensus among the Member States of the Council of Europe on this matter, decided that there could be no absolute ban on the existence of an absolute prohibition under Article 4 of the Convention, and that the work of the applicant could be considered in the meaning of the compulsory person concerned[5].

The imposition of unpaid work shall not constitute forced labour under Article 4(3) of the final sentence of the Convention.

Must a state of parole be given a *lato sensu* interpretation? Does it refer only to the situation following the conditional release and the completion of the term of punishment, or should it cover all situations where an obligation to work against a person is ordered as a result of the determination of his or her guilt as a result of an offense (e.g. in the case of ordering a solution to postpone the application of the penalty or suspended under supervision of the execution of the sentence)?

It is important to specify the position of the Constitutional Court which, by Decision no. 666/2018[6], established that the concept of "conditional freedom" used in Article 42 paragraph (2) letter b) of the Romanian Constitution is synonymous with that of "conditional freedom" contained in Art. 99-106 of the Criminal Code.

Therefore, the unpaid work of a convicted person cannot be regarded as being forced within the surveillance period set as a result of the order of conditional release.

The premised situation regulated by Art. 91 par. (1) lett. c) of the Criminal Code does not concern the conditional release, but the order of suspension of the service of the sentence under supervision, so that the exceptional situation related to the work performed during the period of conditional liberty is not incidental in question. Therefore, the Court finds that, in the event of ordering the suspension of the service of the sentence under supervision, any unpaid work for community service must be qualified as forced, in the absence of consent of the offender[7].

Thus, at least internally, we cannot establish as a similar situation unpaid community service during the term of conditional release and unpaid community service as a result of the suspended sentence under supervision of the sentence. As regards the second situation, the consent of the convicted person shall be required, contrary to being in the event of forced labour, thereby infringing, including Article 4 of the Convention.

II. Refusal to provide unpaid community work – a right or a procedural trap?

Under Art. 83 par. 1 lett. c Criminal Code, the court may order the postponement of penalty enforcement, establishing a period of supervision, if the following conditions are met: The offender has consented to perform unpaid community service, and according to Art. 91 par. 1 lett. c) Criminal Code, the court may order the suspension under supervision of execution of the penalty if the following conditions

[5] Art. 4 ECHR guide, p. 12, www.ier.gov.ro, 13.12.2020.
[6] Online at www.ccr.ro, 13.12.2020.
[7] Parag. 22 of Decision No. 666/2018 of the Constitutional Court.

are met: The offender has expressed his consent to perform unpaid community service.

Also, other European legislations have similar provisions. Thus, carrying out a comparative law study, the Constitutional Court[8] observes that in many European countries performing an unpaid work for community service, namely performing a "work of general interest" – in case of suspension of the service of the sentence under supervision, the conditional suspension of the execution of the sentence, the suspension of the trial with probation, substitution/replacement of penalty of fine or imprisonment, or as a primary or complementary punishment – is ordered by the court only with the consent of the convict.

Thus, in Albania, Article 63 of the Criminal Code stipulates that, in case of conditional suspension of penalty enforcement, the court may order, with the consent of the convict, the performance of unpaid work for community service. In Andora, according to Art. 49 par. 1 of the Criminal Code, community service consists of an unpaid provision of public utility services in favour of the state, other public institutions, associations or foundations, which always require the prior consent of the convict. In Armenia, Article 54 of the Criminal Code defines community service as the performance of authorised, unpaid and useful activity to society by a person convicted in his spare time, in accordance with the provisions of the local authorities. Community service is decided as an alternative to the prison sentence, with the written consent of the person to be convicted, given prior to the sentence. In Belgium, according to Article 375 of the Criminal Code, for less serious offences, the judge may issue a penalty for employment in the case of community service, stating in the sentence the amount of the fine or the length of the prison to be served in the event of non-compliance. This punishment may be applied at the initiative of the judge, prosecutor or defendant. Community service may be imposed only with the informed consent of the defendant, expressed directly or through intermediary. In Bosnia and Herzegovina, Art. 44 par. 1 of the Criminal Code stipulates that the court may order, with the consent of the convict, that the sentence of imprisonment under one year shall be replaced by community service. In Croatia, Art. 43 par. 2 of the Criminal Code stipulates that, in cases where the criminal fine cannot be paid, the court shall decide, with the consent of the convict, to replace this penalty with community service. In Estonia, Article 69 of the Criminal Code provides for the possibility of the court to substitute the penalty of imprisonment up to 2 years with unpaid work for community service, with the consent of the convict. In Finland, Section 11 of Chapter 6 of the Criminal Code provides for the possibility for the court to substitute the penalty of imprisonment for up to 8 months with community service, with the consent of the convict. In Luxembourg, Art. 22 of the Criminal Code stipulates that the court may order, in the case of offenses punishable by imprisonment under 6 months, that the convict performs unpaid work for community service, as a primary punishment. This measure cannot be taken with regard to a defendant who is not present at the hearing. Before the sentence is given, the president of the court must inform the defendant of his right to refuse the execution of community service[9].

Coming back internally, from our point of view, domestic legislation presents a vicious circle. In order to be able to order a solution to postpone the application of the

[8] Parag. 28 and following from Decision No. 666/2018 of the Constitutional Court.
[9] *Ibidem.*

penalty or to suspend under the supervision of the execution of the sentence, the defendant must agree to preset unpaid work for community service.

If the defendant refuses to agree to work, the court, if they find him guilty, will order a detention sentence, failing to meet the positive condition.

Subsequently, the defendant, permanently sentenced to a custodial sentence, is incarcerated and forced to perform certain household activities (which can often be the equivalent of unpaid community service).

Regarding the obligation of detainees to perform certain unpaid activities the European Court of Human Rights has consistently established that they do not violate the protection afforded by Article 4 of the Convention.

In fact, even Art. 4 of the Convention excludes from protection the case of activities performed by inmates, specific to the place of detention.

Where the Court had to examine the work imposed on a repeat offender, whose release was conditional upon the accumulation of a certain amount of savings, although it admitted that the work in question was compulsory, it found no infringement of Article 4 of the Convention on the grounds that the requirements laid down in Article 4 § 3(a) were met (Van Droogenbroeck, point 59). In the Court's view, the work imposed on him did not go beyond what was 'normal' in this context, since it was established to help him reintegrate into society and was legally based on provisions which have an equivalent in certain Member States of the Council of Europe (Stummer vs Austria (MC), point 121; De Wilde, Ooms and Versyp against Belgium, point 90].

Therefore, we can appreciate the fact that the condemned person, even if he refuses to work, will still work in the end. In these circumstances, we consider that we are in the situation of a procedural trap that can derive from both the manner of regulation and the way in which the possibility of refusal to work is presented to the defendant by the judicial bodies.

Is this refusal presented as a genuine right or is it presented as a condition without which the defendant will not be able to enjoy the gentler individualisation of the penalty, according to Art. 83 and 91 Criminal Code?

III. Internal jurisprudential controversies

By criminal decision no. 680/A/14.07.2020 Timisoara Court of Appeals accepted the appeal declared by the defendant C.C. against criminal judgment no. 970/27.03.2020 rendered by the Timisoara Court[10].

The defendant was sentenced by the first court to a sentence of execution under detention because the condition of the agreement to perform unpaid community service was not fulfilled, and he did not appear before the judicial bodies in order to express his consent to this effect.

However, the defendant was present before the appellate court, where he made a statement acknowledging the facts, filed an employment contract and requested a postponement of penalty enforcement.

Thus, the appellate court found that, given that more than 3 years have passed since the defendant committed the offense, who at that time was 30 years old, that he is a socially integrated person with a job, and the act for which he was convicted by the first instance represents an event isolated in relation to his conduct, that he is at

[10] Unpublished.

the first contact with the criminal law, it is necessary to change the solution of the first court and to punish the defendant by delaying the application of the penalty for a period of time.

In this respect, we note that the appellate court only changed the individualisation of the penalty given that during the appeal phase the defendant fulfilled the positive condition of giving his consent to perform unpaid work for community service, without which the court cannot order a solution to postpone the application of the penalty or to suspend under supervision of the execution of the sentence.

By criminal decision no. 791/A/05.09.2019 Timisoara Court of Appeals accepted the appeal declared by the defendant C.S.D. against criminal sentence no. 2502 of 19.07.2019 delivered by the Timisoara Court in case no. 3816/325/2018[11].

The defendant's chosen lawyer has requested the admission of the declared appeal and ordering the suspension of the execution of the sentence under supervision, taking into account the reduced gravity of the offense, the fact that the defendant has given her consent to perform unpaid work for community service and the mitigating circumstances provided for by Art. 75 par. 2 let. b Criminal Code, respectively the circumstances related to the committed act that diminish the seriousness of the offense or the danger of the offender.

It is also stated by the defendant's chosen lawyer that the damage was recovered in full and also that the conditions for ordering the suspension of the execution of the sentence under supervision and in first instance, with the exception of the defendant's agreement to perform unpaid community service, were met, which could not appear in order to give herself this agreement.

Also, the chosen lawyer shows that the defendant has admitted her crime since the criminal investigation and her mistake may also be blamed on her youth.

The prosecutor also placed conclusions to admit the appeal declared by the defendant, and the conditions for ordering a suspended sentence under supervision of the execution of the sentence were met.

The defendant said she was asking for a change in how to individualise the execution of the sentence.

We note that in both cases the appellate court abolished the judgment of the first court without finding an error of judgment, but, on the contrary, considering that, indeed, the substantive court had not fulfilled the positive condition that there was an agreement to perform unpaid work for community service, a condition subsequently fulfilled by presenting the defendants before the appellate court and expressing consent to work.

IV. Procedural problems

Therefore, the question of practitioners after the entry into force of the Criminal Code and the Code of Criminal Procedure was whether this agreement is necessary even if the court does not move towards a solution to postpone the application of the penalty in which to oblige the defendant to work unpaid for community service.

This litigation dilemma arose as a result of the non-binding disposition of unpaid work in the event of a postponement of penalty enforcement, as opposed to the suspension under supervision of the execution of the sentence.

[11] Unpublished.

We mention that it was attempted to validate or invalidate the imperative character of the agreement to work by the High Court of Cassation and Justice itself, but the complaint was rejected as inadmissible by decision no. 27 of 12.12.2017[12].

Before the Supreme Court, a preliminary ruling was sought to resolve the following issues of law in principle:

"- if the manifestation of the agreement to perform unremunerated community service by the defendant, provided by Art. 83 par. (1) lett. c) of the Criminal Code, is an imperative condition in order to be able to retain as being satisfied the conditions provided by Art. 83 of the Criminal Code for the postponement of the penalty application in the situation where the defendant does not present himself for trial in order to express his consent to perform unpaid work for the benefit of the community, and the court considers that no penalty is imposed on the provision of the obligation provided by the Community.

— if the manifestation of the agreement to perform unpaid work for community service by the defendant, provided by Art. 83 par. (1) lett. c) of the Criminal Code is an imperative condition in order to be able to retain as being fulfilled the conditions provided by Art. 83 of the Criminal Code for the postponement of penalty enforcement in the situation in which the defendant at the hearing shows that he does not give his consent to perform unpaid work for the benefit of the community, and the court considers that no penalty is required to establish the obligation stipulated by the letter provided by the law".

In relation to the method of formulation of the two questions by the referring court, which combines elements of fact and law or which concerns the specificities of the case concerning the presence/absence of the defendant from the appeal trial or the procedural position of the defendant in the sense of expressing the refusal to perform community service, the High Court of Cassation and Justice found that, in reality, it is not required to interpret legal provisions *in abstracto*, but a resolution of the substance of the case within the limits of the appeal procedure, which refers to the fact that the law of the court is not required to interpret legal provisions *in abstracto*, but a resolution of the substance of the case within the limits of the appellation, which refers to the condition of the court of appeal.

With regard to this solution, we consider that some ideas should be remembered from the prosecutor's conclusions at the time of the settlement of the referral of the High Court of Cassation and Justice[13].

Thus, it was stated by the prosecutor before the Supreme Court that "the postponement of the penalty enforcement has a double nature, by substantial law (a means of legal individualization of the sanction) and of procedural law (procedural solution of the criminal action under Art. 396 par. 4 of the Criminal Procedure Code).

As a means of individualization, the legislator imposed a number of conditions for the incidence of this institution. The inclusion of the consent of the offender to perform unpaid community service, as a subjective condition, among the conditions of incidence of the institution leads to a single conclusion, that it has the same legal value as the other conditions, that is, it is an imperative condition which must be fulfilled cumulatively, along with the others. Just as the absence of any of the conditions stipulated by Art. 83 par. 1 letters a, b, d of the Criminal Code prevents the incidence

[12] www.scj.ro, 20.12.2020.

[13] www.mpublic.ro, 02.01.2021.

of the postponement of penalty enforcement and the absence of the conditions stipulated by Art. 83 par. 1(c) of the same code has the same effect, regardless of the concrete form in which the absence of this condition may be materialized (the defendant, present at the resolution of the case, refuses to express any position on this issue or, expressly, shows that he does not express his consent, according to Article 378(3)).

Therefore, the conclusion of the imperative nature of the condition stipulated by Art. 83 par. 1 letter c of the Criminal Code results from the systematization of the regulation of the postponement of penalty enforcement.

In the context of characterizing the postponement of penalty enforcement as a means of individualization, based on whether or not the condition stipulated by Art. 83 of the Criminal Code is fulfilled, the judge has the possibility of valuing the conduct of the perpetrator also during the criminal trial, respectively his attitude towards the realisation of justice[14]. In the same sense, it was pointed out[15] that, even if the imposition of an unpaid work for the benefit of the community is optional, it is important the consent given by the defendant, an agreement meant to emphasize his desire to act for the benefit of the social order which he disturbed or[16] the conduct of the defendant is assessed in the light of some objectified elements, such as the agreement to perform work for the community, being obvious that the assessment of the postponement of penalty enforcement can be more easily used in the form of the disobedience of the criminal order.

Moreover, the doctrine expressly stated that, in the absence of such an agreement, it cannot be ordered to postpone the application of the penalty, even if the imposition of unpaid work for the benefit of the community is optional in nature[17].

Therefore, the condition stipulated by Art. 83 par. 1 letter c of the Criminal Code is not in an exclusive relationship, unequivocal with the obligation stipulated by Art. 85 par. 2 letter b of the same code, but is, first of all, in relation to the necessary conditionality with the very existence of the institution to postpone the application of the penalty. In other words, Art. 83 par. 1 letter c of the Criminal Code has, in relation to the institution of postponement of the penalty enforcement role as an imperative condition of its incidence/existence, and in relation to Art. 85 par. 2 letter b of the same code has the nature of a guarantee of compliance with Art. 4 paragraphs 2 and 3 ECHR.

A similar argument is represented by the provisions of Art. 378 par. 3 of the Code of Criminal Procedure, which provide that, in situations where the law provides for the possibility that the defendant may be obliged to perform an unpaid work for community service, he shall be asked whether he or she expresses his consent in this respect.

Therefore, the manifestation of the defendant in the specified sense must exist when there is a legal possibility, and not a judicial possibility (by the specific assessment of the court) to have applied the obligation to perform unpaid work for the benefit of the community.

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[14] D. Nițu, *Cancellation of waiver and postponement of penalty enforcement. Incongruities in practical application,* Judicial Coordinator no. 3/2014, p. 162.

[15] A. Rasnita, *Delaying the penalty enforcement in the new Criminal Code*, Criminal Law No. 2/2013, p. 95.

[16] F. Ciopec, *Judicial Individualisation of Penalties*, CH Beck Publishing House, Bucharest, 2011, p. 410, 411.

[17] M. Udroiu, *Criminal Law, General Part*, Edition 3, CH Beck, Bucharest, 2016, p. 347; L.V. Lefterache in M. Udroiu (coordinator), *Criminal Code. Comments on articles*, Edition 2, CH Beck, Bucharest, 2016, p. 299.

Consequently, regardless of whether or not the court will establish the obligation stipulated by Art. 85 par. 2 letter b of the Criminal Code under the defendant, in order to order the postponement of the penalty, there must be the consent of the defendant to perform an unpaid work for community service.

Even the mere fact that the defendant is willing to perform unremunerated community service may be a catalyst in the process of establishing the opportunity to order a solution to postpone the application of the penalty, and it is not necessary to effectively perform work[18].

Therefore, it can be concluded that in the absence of this agreement, the defendant does not have the vocation to benefit from the postponement of the penalty, regardless of whether or not the court seeks to oblige him to perform unpaid work for the benefit of the community, the failure to fulfil this condition leading to the inapplicability of the institution".

V. Conclusions

Regardless of the position we mean to embrace – as a procedural trap or as a right, the way in which the defendant will relate to express the agreement to perform unpaid community service is based on the very way in which the judicial body presents the legal issue, before or during the hearing.

The good faith of the judicial bodies must prevail in this case, as agreement on unpaid work may raise issues of loyalty of the administration of proof to criminal procedural requirements in relation to the right to a fair trial.

That is why a mistake by the judicial bodies at this stage of the hearing can lead to a double violation of the standards imposed by the European Convention on Human Rights. On the one hand, the obligation to work unpaid for community service, without a valid agreement, leads to violation of Art. 4 of the Convention, and on the other hand, the honest failure to present the consequences of the absence of this agreement may outline a violation of Art. 6 of the Convention, given the loyalty of the administration of proof in the component of the defendant's declaration regarding the giving of consent to work.

In our conclusions we cannot fail to consider some of the arguments presented by the conclusion of 22 June 2017, delivered in Case no.2.048/197/2016, by which the Court of Appeal Brasov – Criminal Section notified the Constitutional Court with the exception of unconstitutionality of the provisions of Art. 91 par.(1) letter c) of the Criminal Code.

In order to justify the exception of unconstitutionality, the author states that, by obliging the defendant to obtain the consent of the defendant to perform community service, prior to the ruling on the defendant's guilt or innocence, the judge of the case is placed in the situation of pronouncing the defendant's guilt. The criticized provisions oblige the judge to seek the consent of the defendant to perform community service before remaining in judgment on the merits of the case, which is likely to affect the judge's impartiality, especially in cases where the defendant has not recognized the commission of the offence of which he is accused. If the defendant does not recognize the commission of the offence, his question by the judge about his consent to perform unpaid community

[18] Alexandru Rîşniţă, Ioana Curt, *Resignment of Punishment. Postponement of penalty enforcement*, Legal Universe, Bucharest, 2014, p. 160.

service may lead to the idea that the judge will order a solution to the conviction in question.

We appreciate the need for the legislator to consider whether or not order should be reversed. Thus, by law *ferenda*, we consider that it would be more appropriate for the agreement to work to be taken in the execution phase by the Probation Counsel and not by the court.

In support of this position, we can argue that the court should individualize the execution of the sentence according to the specific circumstances of the case, without negotiating with the defendant what way of individualization fits in the file (negotiation being specific to the criminal investigation phase, for example in the case of concluding a guilty plea).

Regardless of the solution adopted, what must be the first step in a possible change in the logic of agreeing to work is predictability. Therefore, the way in which the agreement to work will be taken must ensure that the defendant has a real representation of the consequences of a possible refusal. At the same time, we cannot fail to conclude our brief approach with a question: Is it fair that refusal to work should lead to punishment?

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