Community service sentences within a penological perspective

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Introduction

This article seeks to provide a perspective upon community service within a penological framework on the basis of the unpublished research by Avery (1987), conducted within such a framework. Community service has not been widely researched in South Africa. The thrust of research undertaken, for example that of Van Gass (1981), is towards the practical implementation of community service. With the enactment of sections 20 and 21 of the Criminal Procedure Amendment Act, No. 33 of 1986 (which have yet to come into operation by proclamation), comprehensive statutory provision was made governing community service, and the country is poised to launch a community service programme. There is a need to augment existing published material relating to this form of punishment, by focusing attention upon fundamental, theoretical issues, thereby making known the rationale of community service and contributing to clarity as to what a service programme should seek to achieve. Research into the “why?” should precede that into the “how?” of a phenomenon.

The rationale of non-custodial punishment as the avoidance of imprisonment

The search for alternatives to imprisonment

Penal reform in South Africa down the decades, has been largely motivated by a search for semi-custodial and non-custodial alternatives to short-term imprisonment (i.e. under two years). Such imprisonment gives rise to dysfunctional consequences and its avoidance, where possible, has been advocated. Two agents concerned with penal reform regarding community service as such an alternative, namely the Penal Reform Commission (Viljoen Commission), appointed during 1974, and the Working Group on Overcrowd-
The consequences of imprisonment

As illustrated by Du Toit (1981: 253–256) with reference to the authorities, imprisonment is intended to fulfil a punitive function, a protective function, including general deterrence and prevention of crime, and a reformative or rehabilitative function. Its consequences, however, place the efficacy of imprisonment in jeopardy. Such consequences have been classified as primary and secondary (Republic representatives debates, vol. 3, 1986: Columns 744, 755).

Primary consequences

These affect the prisoner directly and most intimately and include:

• contamination (Viljoen Commission, 1976: 105);
• disruption of family life (S v Botha, 1970(4) S.A. 407(T) at 409A);
• loss of employment (S v Hoffman, 1978(4) S.A. 61(A) at 65B);
• stigma and disgrace (S v Scheepers, 1977(2) S.A. 154(A) at 159B); and
• lack of treatment facilities (S v Shange, 1967(2) S.A. 81(C) at 82E).

Secondary consequences

These include, firstly, overcrowding which militates against proper accommodation and breeds unrest. Per capita the Republic has one of the highest prison populations in the world (Viljoen Commission 1976: 105; Krugel Working Group 1984: 24). Secondly, the already high cost factor to house, feed and clothe prisoners is compounded by overcrowding (Krugel Working Group, 1984: 8).

Avoidance advocated

Within the framework of balanced sentencing principles, the Viljoen Commission (1976: 105) advocated the avoidance of imprisonment. The Krugel Working Group (1984: 32) perceived community service to be "een van die uitvloeisels" of the continued search for alternatives which avoid the dysfunctional effects of imprisonment.

Statutory provision for community service

Creation of statute

Since the first order of community service in S v Bock, 1963(3) S.A. 163(GW) to date, this form of punishment may only be legally imposed as a condition to a postponed or suspended sentence, which mechanism is governed by statute.

The Criminal Procedure Act, No. 56 of 1955

In terms of the Criminal Procedure Act, No. 56 of 1955, community service was imposed under the phrase "or otherwise" in section 352(1)(a) of that Act, by reference to the eiusdem generis rule. It was not mentioned by name. The Penal and Prison Reform Commission (Lansdown Commission), appointed in 1945, which was instrumental in placing many of this Act's provisions on the statute book, promoted the advantages of the avoidance of imprisonment to be attained through its suspension, thereby enabling the offender to undertake something worthwhile in the community (Lansdown Commission 1947: 82–83). Indeed, since the Criminal Justice Administration Act, No. 40 of 1914, the first statutory provision in South Africa which regulated postponement or suspension of sentences, the objective of the avoidance of imprisonment is encountered (Union Assembly Debates, 1914: Column 2774).

The Criminal Procedure Act, No. 51 of 1977

The Viljoen Commission (1976: 3) perceived that it was appointed to find solutions for the alarmingly high prison population. The Viljoen Commission went out of its way to create measures to keep accused out of prison, and for this reason it thoroughly re-examined the provision for postponement or suspension of sentences (Republic Assembly Debates, vol. 66, 1977: Column 437). Upon the recommendation of the Viljoen Commission, explicit statutory provision was made in section 297(1)(a)(ii)(cc) of the Criminal Procedure Act, No. 51 of 1977 for the rendering of some service for the benefit of the community as a condition for postponement or suspension of sentence.

The Criminal Procedure Amendment Act, No. 33 of 1986

The Krugel Working Group on Community Service adopted as its approach during 1983 the evaluation of community service to determine whether it could contribute to relieving the overcrowding problem (Krugel Working Group 1984: 1). Against this background the Krugel Working Group made certain recommendations which resulted in the enactment of sections 20 and 21 of the Criminal Procedure Amendment Act, No. 33 of 1986. The ratio behind these measures appears from paragraph 9 (p. 23) of the Memorandum on the Objects of the relevant bill as the promotion of the application of community service as an alternative for short-term imprisonment, an objective woven like a thread throughout the fabric of all
the statutory provisions referred to in this article. This second objective was to accommodate the recommendations by the Krugel Working Group referred to later in this paper.

Community service as a positive condition to postponed and suspended sentences

Importance of postponement and suspension as a sentencing mechanism

As a sentencing option and alternative to imprisonment, postponed and suspended sentences constitute an important mechanism. The Viljoen Commission (1976: 108) highlighted this importance, as did Du Toit (1981: 362). Community service being a condition to postponement and suspension is inexorably bound to the objectives of this sentencing mechanism.

Objectives of this mechanism

The following principal objectives may be identified, namely:

- it is “strafverligtend” or has a benign effect (R v Hendricks, 1915 C.P.D. 821 at 826) (Du Toit 1981: 363);
- it provides an opportunity for expiating an offence (R v Hendricks, 1915 C.P.D. 821 at 832/3), e.g. community service retribution in the “verhewe” or exalted sense (Du Toit 1981: 376);
- it deters both individually (Persadh v R, 1944 N.P.D. 357) and generally (Du Toit 1981: 364);
- it is rehabilitative (S v Van Rensburg, 1978(4) S.A. 481(T) at 483F);
- it provides for flexibility and thus greater individualisation (Du Toit 1981: 387 ff) through provision for further postponement or suspension, amendment of conditions or imposition of a fresh sentence (Sections 297(7), (8) and (9) of the Criminal Procedure Act, No. 51 of 1977); and
- it avoids the disruptive effects of custodial punishment.

These objectives are realised in the conditions of postponement or suspension which may be couched in negative “don’t-do-it-again” terms or positive terms as in the case of S v Bock, 1963(3) S.A. 163(GW), the latter being perceived as “heelwat meer opbouwend” (S v Edward, 1978(1) S.A. 317 (NCD) at 318B) than the former. Positive conditions do more than merely avoid the disruptive effects of custodial punishment, but also promote better offender integration.

Community service as positive condition

The positive character of community service as condition type, was highlighted by the Krugel Working Group (1984: 32) in that such a sentence balances the various interests to be taken into account in the sentencing process. The major objectives of punishment are served in that:

- it is “regverdige vergelding” (Krugel Working Group 1984: 32), proportionate punishment (S v C, 1973(1) S.A. 739(C) at 744 C–D), and brings home to the accused what he has done (S v Khumalo, 1984(4) S.A. 642(W) at 645 B–C);
- it promotes both individual and general deterrence (Krugel Working Group 1984: 32); and
- it requires of the offender to be a “doer”, responsible for his self-rehabilitation, provided the nature of the service is constructive (Viljoen Commission 1976: 120).

Community service promotes normative adherence and a positive life style (S v Bock, 1963(3) S.A. 163(GW) at 164 E–F). It is more cost-effective than imprisonment (Krugel Working Group 1984: 4). It may, if successfully executed, enable the offender to win over society to greater understanding of his position.

Statutory provision for community service under the criminal procedure act, no. 51 of 1977

Legislative inadequacy

After S v B (1963(3) S.A. 163 (GW)), community service was imposed under the implicit provision therefor, in section 352(1)(a) of the Criminal Procedure Act, No. 56 of 1955. Doubts were expressed as to the correctness thereof, and upon the recommendation of the Viljoen Commission (1976: 121) explicit reference was made to community service in Section 297(1)(a)(i)(cc) of the Criminal Procedure Act, No. 51 of 1977. The reluctance of magistrates to impose community service, revolved around three major issues which are now referred to (Van Gass 1981: 216).

The need for legislative guidelines

The Viljoen Commission (1976: 120) had foreseen that difficulties surrounding the imposition of community service would be experienced. Van Gass (1981: 231/2) pointed to the need for sentencing guidelines relating, inter alia, to the age of the offender, the period of service to be imposed and the like considerations. Legislation to remedy this shortcoming was advocated by magistrates themselves (Van Zyl 1983: 218; Reid 1984: 128). S v Khumalo (1984(4) S.A. 642 (W)) provided some guidance by the Supreme Court.
Provision for adequate supervision or control

By their very nature, positive conditions for suspended or postponed sentences such as community service, require control measures to ensure that they are complied with (S v Mbele, 1970(4) S.A. 484(O) at 485G; S v Jones, 1976(1) S.A. 239(T) at 241A). The Viljoen Commission 1976: 121) referred to the need to create an infrastructure, including provision for competent supervision.

The need for legal certainty regarding liability for injury or damage

The Krugel Working Group (1984: 44) singled out fears of legal liability arising in the event of injury or damage resulting from the performance of community service, to be the major stumbling block to its wider utilisation. Legal uncertainty in this regard inhibited both the judiciary and placement agencies (Van Gass 1981: 230), and legislation to provide legal certainty was advocated. S v Khumalo (1984(4) S.A. 642 (W) at 646 DP) went some way to clarifying the legal question of liability.

Sections 20 and 21 of the criminal procedure amendment act, no. 33 of 1986

Rationale

Through the enactment of sections 20 and 21 of the Criminal Procedure Amendment Act, No. 33 of 1986, the legislator, acting largely upon the recommendation of the Krugel Working Group, intervened to promote the application of community service. From the Memorandum on the Objects of the Criminal Procedure Amendment Bill, No. 15 of 1986 (p. 23) it appears that it did so by addressing, among others, those factors which previously inhibited the wider utilisation of community service (Republic Assembly Debates, vol. 7, 1986: Column 2234), and which are mentioned seriatim.

A clearer definition of community service

In its report the Krugel Working Group (1984: 2/3) recommended that a clearer definition of community service be provided, one which spelled out the "elements" of such service, including provision for supervision and control. In its response, the legislator provided a definition from which it appears that community service is a gratis service, performed in the community, for its benefit, subject to supervision or control by a body which, or a person who promotes the interests of the community (vide section 20 of the Criminal Procedure Amendment Act, No. 33 of 1986). Public involvement was perceived to be vital for the extension of community service in South Africa (Krugel Working Group 1984: 38; Republic Assembly Debates, vol. 7, 1986: Columns 2238–40).

Minimum period and age

The Krugel Working Group (1984: 2, 40) recommended that legislative guidelines be provided regarding the minimum and maximum period, as well as the minimum age limit for the performance of community service. These, the legislator accepted and stipulated as being for a period of not less than 50 hours (with no maximum however), provided an accused is 15 years or older (vide section 20 of the Criminal Procedure Amendment Act, No. 33 of 1986).

The cancellation of a community service order

The legislator not only provided for the cancellation of a condition of community service, as recommended by the Krugel Working Group (1984: 4), but took the matter further in amending section 297(8) of the Criminal Procedure Act, No. 51 of 1977 to provide for the cancellation of the order of postponement or suspension as such (vide section 20(c) of the Criminal Procedure Amendment Act, No. 33 of 1986).

Notice to accused and creation of offences

The Krugel Working Group (1984: 2/3) recommended that statutory provision be made for the service of a notice on an accused, ordering him to perform community service, and that certain offences be created for failure to comply with the order, being intoxicated when rendering service and impersonating such an accused, on the basis analogous to the corresponding provision for periodical imprisonment. This the legislator did (vide section 20(d) of the Criminal Procedure Amendment Act, No. 33 of 1986).

Liability for patrimonial loss

The Krugel Working Group (1984: 4/5) recommended amending legislation to remove existing legal uncertainty in the matter, and in its draft, inter alia, provided for ex gratia compensation by the State for injury or damage. The need for legislation was accepted in principle, and the legislator unequivocally provided for patrimonial loss to be recovered from the State, with discretionary ex gratia payments where that is not possible (vide section 21 of the Criminal Procedure Amendment Act, No. 33 of 2286).

Looking ahead

Creating an infrastructure

Without an infrastructure for the implementation of community service, including the creation of facilities, proper selection of offenders and adequate supervision, sections 20 and 21 of the Criminal Procedure
Amendment Act, No. 33 of 1986, would be a dead letter upon the statute book. This was recognised by both the Krugel Working Group (1984: 7) and the legislator (Republic Assembly Debates, vol. 7, 1986: Columns 2239/40).

Recent research

Research provides direction for, and gives impetus to the creation of a viable community service system in South Africa. To this end, and with reference to the position in England under the Powers of Criminal Courts Act, 1973, which has been comprehensively explored recently by St Q Sken (1988) and does not warrant specific mention here, Avery (1987: 377/8) makes the following recommendations:

- That after the probation service has been extended, amending legislation be introduced requiring the court, prior to being able to impose a community service order, to consider a report by a social worker.
- That consideration be given to the publication of regulations under the Criminal Procedure Act, No. 51 of 1977, governing community service.
- That the statutory enabling provision for community service, be re-examined periodically in conjunction with other forms of non-custodial punishment.
- That the extension of the probation service receive the serious attention of the authorities.
- That all aspects relating to community service be researched on an ongoing basis, including the following:
  - a manual for community service;
  - all aspects relating to the education and motivation of the general public;
  - the accountability of community service;
  - the extent to which sections 20 and 21 of the Criminal Procedure Amendment Act, No. 33 of 1986 have promoted the application of community service; and
  - the cost effectiveness of community service.
- That positivistically dominant research into community service be tempered by phenomenological studies.
- That suitable success rating criteria for community service be sought.
- That the authorities seriously consider creating a research body to undertake research and provide guidance in connection with all facets of the criminal justice system.

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10 346 homes in Jo'burg robbed

More than 10,000 vehicle and cycle thefts were reported in the same area last year.

In the two Soweto police districts, 1 113 murders — an average of 3.1 cases a day — and 494 cases of culpable homicide were reported.

These figures were disclosed by Law and Order Minister Adriaan Vlok in response to questions tabled by Helen Suxman (FDP, Houghton) and Peter Soal (FDP, Johannesburg North).

The figures reflect high levels of crimes of violence in black residential areas and high levels of crimes against property in white areas on the Witwatersrand.

At the nine police stations in the Johannesburg district, 422 murders, 166 culpable homicides, 1 326 cases of assault with intent to do grievous bodily harm and 4 329 common assaults were reported. At the eight police stations in Soweto, 1 113 murders, 494 culpable homicides, 5 195 cases of assault with intent to do grievous bodily harm and 5 877 common assaults were reported.

While 1 464 cases of rape were reported in Soweto, 328 rapes were reported in Johannesburg.

In Johannesburg 3 365 robberies, 10 076 cases of theft of vehicles and cycles, 10 346 cases of housebreaking and 2 264 cases of damage to property were reported.

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