The Hungarian Helsinki Committee and the Hungarian Civil Liberties Union's Joint Opinion

On the New Draft Law on Misdemeanors, the Misdemeanor Procedure and the Misdemeanor Registry System

October 7, 2011

Comments on the Legislative Process

The Government published the new draft law on misdemeanors, the misdemeanor procedure, and the misdemeanor registry system (henceforth: Draft) on its website on September 29, 2011.

In accordance with Act XC of 2005 on the Freedom of Electronic Information, drafts laws need to be published on the submitting ministry's website. It is a welcome development that this time an important new law is born according to this requirement; at the same time it is clear that based on the comprehensive nature of the regulation and the volume of the Draft, the less than six working days deadline to submit comments is not enough for an extensive analysis and evaluation of the text. As a consequence, the present comments relate only touch upon the procedural provisions of the Draft, the time available not being sufficient for a review and constructive opinion of the substantive norms.

Moreover, according to Act CXXX of 2010 on Legislation, the ministry in charge of the preparation of the bill shall introduce those social, economic, professional causes and objectives in the justification that make the proposed legislation necessary; furthermore, it presents the probable effects of the legal regulation. The justification of the Draft clearly fails to fulfill these requirements. The justification is actually a simpler formulation of the normative text, and on occasion, it is nothing more than a mere repetition of it – the text contains the regulative causes and objectives only on occasion, and representative of its superficiality is that on one occasion (at Section 99), it slips compared to the normative text, and certain questions appear with a different substance compared to the normative text (e.g. while Section 101 of the Draft states that in case of a petition for a hearing, the misdemeanor authority has to issue a citation within five days, the relevant part of the justification– which mistakenly refers to Section 100 as the relevant paragraph – states that the citation has to be issued within ten days). This deficiency not only makes forming an opinion on the Draft difficult, it can also prove to be an obstacle for the adequate operation of law.

Comments regarding the Draft

General Comments

The relationship between misdemeanor law and criminal law – "it is more worth while" to commit a crime than a misdemeanor

The Draft does not change the regulative system introduced by Act LXXXVI of 2010 on Certain Amendments Necessary to Improve Public Safety, which disrupts the dichotomy of criminal law and misdemeanor law. The accord between the current Criminal Code (Act IV of 1978) and misdemeanor law ceases when the perpetrators of certain misdemeanors can expect a more rigorous sanction than those individuals that perpetrate the criminal version of the offence. The Draft does not change this approach, therefore the law of misdemeanor continues to remain on the level of criminal law (in certain cases – for example with regards to the longest duration of community service – it even surpasses it), but it does so without the legal institutions of criminal law protecting the rights of the accused, and the more and more broadly applied mediation procedures.

Absence of the Introduction of Mediation Procedure

Current Hungarian criminal law recognizes and applies mediation procedures in certain crimes against property of a lesser value. The application of this legal institution – by encouraging active remorse and repayment of the damage – means real reparation for the victims, besides giving way to the state's criminal law interests. There can be no reasonable excuse as to why in the case of misdemeanors against property, where the damage is obviously smaller than in the case of the criminal categories, the mediation procedure cannot be introduced. This often-emphasized deficiency is not solved by the Draft – despite the fact that the regulative concept clearly follows the structure and normative text of the Criminal Code and Act XIX of 1998 (Code of Criminal Procedure).

The provisions regarding juveniles do not serve the interests of children

With regards to juvenile offenders, Section 108 (3) of the Criminal Code states that "a measure or punishment involving the withdrawal of freedom may only be applied if the aim of the measure or punishment cannot otherwise be achieved". Thus, even in case of the perpetration of a criminal act, withdrawal of freedom can only be a last resort. The Draft, however, still doesn't change the rule that it is possible to use withdrawal of freedom for juvenile offenders in the case of less serious, less dangerous activities.

According to the Draft, there is still a possibility of confinement for juvenile offenders, as well as for the change of fine into confinement in case the fine is not paid. We would like to note that according to the detailed justification of the Act on the Amendments Necessary to Improve Public Safety that entered into force on August 19, 2011, the reason for making confinement available for juvenile offenders was because according to the act on misdemeanors, no fine can be imposed on a juvenile offender lacking independent income or property, and "therefore the authority hardly had any options for sanctions in case of a misdemeanor committed by a juvenile offender".

The present Draft introduces the possibility of community service as a sanction for juvenile offenders over 16 years of age. This modification mostly eliminates the previous justification used by the Government.

The elimination of confinement as a sanction is warranted not only by the research results detailed below, and by an adherence to the international legal commitments of Hungary, but also by the absence of the practical application - which is very much advocated, for that matter - of the legal institution.

Imprisonment for juvenile offenders is unacceptable for the following reasons:

(i) The Draft completely disregards the international legal obligations of Hungary by maintaining the possibility for confinement and also by not making any alternative sanctions available for juvenile offenders. Juvenile offenders should only be confined as a last resort, and in their case, the central focus of the criminal justice system should be education and reintegration. According to international legal rules, individuals under 18 are considered children, and this should be the primary perspective through which we evaluate all legal solutions relating to them. Article 37 of the Convention on the Rights of the Child, adopted in New York on November 20, 1989, clearly requires that the arrest, detention or imprisonment of a child should only be applied as **a measure of the last resort**, and only for the shortest possible period of time. Moreover, amongst others, Recommendation Rec (2003) 20 of the Committee of Ministers of the Council of the European Union, adopted on September 12, 2003, concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, and the Beijing Rules (the UN

Standard Minimum Rules for the Administration of Juvenile Justice) also state: in the case of juvenile offenders, the criminal justice system needs to avoid a retributive approach. The objective of the sanction according to these documents is the correction and education of the juveniles, and not punishment. The Draft goes against these international rules.

For instance, the Draft would punish by imprisonment those juvenile offenders who negligently cause damage to a public transportation vehicle, or who steal a bag of sugar from the grocery store. In our view, in the case of such offenses, the use of mediation procedure or community reparation services would contribute to the education of the child. Imprisonment is also seriously stigmatizing for juveniles in their home, peer and school community, and it endangers their moral development. As a result of imprisonment, juvenile offenders are torn out of their usual setting, and the confinement could, on occasion, endanger the continuation of their studies. Imprisonment in a penal institution is also a more emphasized criminogenic factor for juveniles who are particularly predisposed for negative influence, as it can increase the danger of future criminal behavior. In light of the above, it is clear that the use of imprisonment cannot serve the utmost interests of juveniles, and it violates Article 3 of the New York Convention on the Rights of the Child, according to which "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

(ii) According to the Draft, confinement is to be carried out - in accordance with Statutory Rule 11 of 1979 on Punishments and Measures - in a penal institute. Thus the Draft **excludes the possibility of carrying out the confinement in a juvenile correctional facility**. Therefore the Draft still goes contrary to Article 19 of the Beijing Rules, the commentary of which explicitly states that if a juvenile must be institutionalized, the loss of liberty should be restricted to the least possible degree, with special institutional arrangements for confinement and bearing in mind the differences in kinds of offenders, and giving priority to correctional or educational institutions. We would like to emphasize that the Parliamentary Commissioner for Civil Rights established that even for juveniles in pre-trial detention, thus for juveniles who have committed rather more serious activities than misdemeanors, that it is a abuse of the juveniles' right to satisfactory physical, mental and moral development if their confinement does not take place in a juvenile correctional facility or a juvenile penal institution (See case OBH 4841/2007).

The Introduction of Community Service as an Independent Form of Sanction and the Structural Framework of its Execution

One of the objectives of the preparatory conception of the Draft was to create the applicability of community service as an independent sanction. This was justified by the conception due to the following reasons: "Among those committing misdemeanors there are more and more of those who do not have a workplace, income, or in whose case paying the fine could on occasion endanger the subsistence of the family. Moreover, the misdemeanor authority would receive more latitude in meting out the punishment, as a result of which individual prevention could have a more emphasized role".

We agree with introducing community service as an independent form of sanction and with the reasons for doing so, with the modification that in our view, it is not among those who commit

misdemeanors, but among those who are being fined that there are more and more for whom paying the fine would mean an extraordinary burden or would be impossible due to their income status. Only a fraction of actually committed misdemeanors are investigated and sanctioned, so we cannot have a realistic picture of the employment rate and income conditions of those committing a misdemeanor.

In order so that community service as an independent sanction could indeed become a verily applied form of sanction, we would find it important to make a detailed framework of community service, based on the detailed comments made to Section 139 below.

Detailed Comments

Section 9 – The regulation according to which the perpetrator who has been held accountable conclusively for a misdemeanor within six months prior to committing the misdemeanor – with the exception of instant fine – **can be punished by confinement by the court as a result of the new misdemeanor, even if the statute does not prescribe that as a possibility, is problematic**.. Based on this, for a small misdemeanor – for example, a public cleanliness misdemeanor, that is, littering – someone could receive a warning the first time, then for another act of littering within six months, he could suffer a loss of freedom.

Without a conversion rule or regulations regarding the fraction hours, it is incomprehensible that if the confinement period is determined in days, then **how** the duration of the misdemeanor custody and the arrest lasting longer than four hours, being counted by the hour, **can be comprised in the imprisonment** (for example, how can the judge take into account two hours of a six-hour long arrest in case of a ten day imprisonment as sanction).

Section 11 – According to current misdemeanor law, the minimum amount of a pecuniary fine is 3,000 HUF, and the maximum amount is 150,000 HUF. The Draft talks about a 5,000 HUF minimum fine and a 300,000 HUF maximum fine. In our opinion, **the raise in the maximum fine amount** at the time of an economic crisis, taking into account the continuously deteriorating standard of living, **cannot be considered warranted**, especially at the rate stipulated by the Draft.

Sections 12, 15 and 97 – According to the Draft, failure to fulfill the fine, community service and instant fine, automatically – without a judicial decision – "changes" the fine into confinement. Besides failing to define – thereby violating the due process of law – how the sanction of community service can be considered not fulfilled, **the automatic application of the institution of confinement is entirely unacceptable**. This change **goes against Decision 1/2008 (1/11) of the Constitutional Court**, which states that "the hearing of the offender cannot be omitted, as without this, the procedure relating to the withdrawal of his freedom could not be a due one, since the abridgement of his freedom is to be based on the decision of the court changing the sanction. Abridgement of freedom cannot be based on the administrative decision issuing the fine, or the one changing the fine to community service, or the measure containing the instant fine. It can only be based on a judicial decision". The decision of the Constitutional Court also states that the decision about change can only lead to a change from one form of punishment to confinement based on the balancing of a set of diverse conditions. These conditions can be best accounted for by the offender, therefore his hearing cannot be omitted. Based on the above, the elimination of the rule with regards to automatic conversion and its amendment in accordance with the decision of the Constitutional Court is essential.

Section 14 – The disruption of the proportions between criminal and misdemeanor law is well characterized by the change that a longer term of community service can be imposed for a misdemeanor than an act of crime. According to the Draft, the shortest term of community service is 30 hours, and the longest is 360 hours, while according to Section 49 (4) of the Criminal Code, the shortest term of community service for an act of crime is 42 hours, but the longest is only 300 hours, which means that for a misdemeanor**, it is possible to receive a sentence of community service that is 20% longer than for a criminal act**, even though there is no substantial difference in the content of the two legal institutions.

Section 27 – The **rules regarding juveniles result in an absurd and unacceptable situation.** As a pecuniary fine can only be imposed on a juvenile if he has an independent income or adequate assets, therefore on the majority of juvenile offenders, only confinement or community service can be imposed, but the latter only – probably because of rules forbidding child labor - if the offender is at least 16 years old. This eventually leads to the result that **those between 14 and 16, thus the youngest ones, may find themselves in a situation where if the authority does not find warning a satisfactory sanction, then only confinement can be imposed on them**. The legislator has a duty to remedy this awkward situation (for example by introducing mediation or other alternative forms of sanctions).

Section 34 – **The Draft declares the right to defend oneself, but does not fill this declaration with substance**. Especially problematic is the total lack of legal guarantees with regards to the right to counsel (in the Draft's official usage: "the representative of the accused"), which violates the international legal obligations of Hungary. According to the consistent practice of the European Court of Human Rights, it is essentially not the domestic legal qualification, but the nature of the procedure and the weight of the imposable sanction that determine whether a procedure is a criminal one according to the European Convention on Human Rights. Based on the test applied by the Court (see Engel v. Holland), it is without a doubt that the misdemeanor procedure that can end in a possibly 90-day-long confinement in a penal institute shall be considered a "criminal procedure" according to the Convention. This also means that the rights of due process, stated under Article 6 of the Convention, have to be afforded to the accused, **such as the right to counsel from the start of his arrest (misdemeanor custody**), **or if he cannot afford his own counsel, then the state has to provide one for him for free.**

Section 51 – As for other the rights of the accused, it is not defined at what procedural steps the accused can be present (and the legislator fails to do so even at the regulation of the individual evidentiary acts, such as the hearing of an expert, inspection). Therefore it can only be deduced from Section 84, relating to notifications, that the accused can be present for example at these acts.

Section 56 – The Draft is missing those safeguards from among the rules of evidence that are contained by the Code of Criminal Procedure with regards to the treatment of the accused, such as Section 77 (2) of the Code of Criminal Procedure, which states that throughout the course of the evidentiary procedure, the personal rights of the accused and the rights of reverence need to be respected, and there need to be safeguards assuring that data regarding privacy are not unnecessarily publicized.

Section 61 – According to the Draft, the hearing of witnesses takes place "as far as possible" in the presence of the accused. It is clear that **"as far as possible" does not fulfill the requirements of due process of law**, since it does not create an adequately enforceable obligation for the authorities.

Section 70 – **With regards to the testimony of the accused, several important safeguards are missing** that can be found in the Code of Criminal Procedure (e.g. Section 117), and the omission of which cannot be explained by differences between the two types of procedure. Such rules are for example the warning against false accusation, or recording that refusing to testify does not affect the right of questioning and annotation by the accused, and so on.

Section 72 – According to Section 72 (5), the accused or his representative may appeal against the misdemeanor custody at the announcement of the sentence, and this appeal is adjudged by the local court at the trial. This solution **makes the possibility of appeal entirely formal and unintelligible**, since as a result of the trial, the misdemeanor custody ends one way or another (in case of a judgment of imprisonment, the confinement continues, and in other cases, the accused is free to go). This means that the accused will not posses a meaningful, efficient remedy against the misdemeanor custody.

Section 84 – According to the Draft, the accused and the aggrieved party need to be informed of the place and time of the hearing of the witness, the expert and the inspection. As opposed to the citation (with regards to which the Draft contains a minimum interval of two days), the Draft does not contain a deadline for these. This means that even a notification of a few hours can be considered valid. If we take this together with the above criticized rule that the hearing of the witness has to take place only "as far as possible" in the presence of the accused, we have to come to the conclusion that the authorities will not find it hard to create a situation in which the accused cannot be present at the hearing, and exercise his right of questioning and annotation. **Therefore it would be reasonable to determine a minimum interval, or at least to stipulate that the notification needs to take place at such a date so that the presence of the accused at the evidentiary act could in fact be possible.**

Section 96 – The amount of the instant fine – similarly to the pecuniary fine – **increases disproportionately and unduly:** instead of the current 3,000-12,000 HUF framework, the new framework is 5,000 – 50,000 HUF; moreover, in case of a repeated offense within six months, the amount of the instant fine can be as much as 70,000 HUF.

Sections 102 and 118 – In accordance with the Draft, "the accused – in case the conditions for enforcement of the community service are present – has to make a formal statement whether he or she agrees to the enforcement of community service. Failure to make a statement shall preclude the enforcement of the community service". This rule is disconcerting in more than one respect.

First of all, it is not clear what it means that the pre-condition of the statement is the presence of the conditions for enforcement of the community service. As community service can be imposed for any misdemeanor, this narrowing clause, taken in the most benevolent sense, could apply at best only to those under 16 or those who are completely disabled. It could also be interpreted to apply to the situation when there are **no adequate work opportunities** in the area, but **to use this deficiency to the disadvantage of the accused would clearly not be acceptable**. As the reasoning also remains silent on this question, it would be necessary to make it clear that based on this clause, for example, confinement cannot be applied against someone who would otherwise be willing to do community service.

Moreover, it also needs to be made clear that **it is not the default of statement** (as this could happen as a result of the omission of the misdemeanor official in charge or the judge) **but the refusal of agreement that precludes the enforcement of community service**.

Section 131 – Similarly to the rule regarding the presence of the accused at the witness' hearing, the phrasing that "the hearing of the juvenile shall **generally** take place in the presence of the legal representative" is also problematic. **This does not impose a sufficiently enforceable obligation on the authorities**, and can easily lead to abuse. The rule should be phrased in such a way that it lists those – narrowly defined – cases where the presence of the legal representative can be justifiably set aside.

Section 138 – According to the Draft, there will be a 15 days deadline instead of the previous 30 days to make payment of a fine, thus **the deadline for voluntary fulfillment is substantially shorter**. This could mean an extraordinary burden for the less wealthy members of society, and could lead to a string of defaults through no fault of the offenders.

Moreover, as we have already noted above, missing the deadline would automatically make imprisonment a possibility, without the Draft using the guarantee of gradation applied by the current regulation. This modification – beside the insolvable qualms noted earlier – **unduly brushes aside the option of exaction as taxes**. Thus, those who commit a misdemeanor face a stricter sanction and a shorter deadline than those committing a crime.

Furthermore, based on the modification, the absurd – and clearly contrary to the Draft's preferred approach of aggravation - situation arises that the pecuniary sanction cannot be enforced against those who are exempt from confinement and community service, as the possibility of exacting the fine as taxes is eliminated, but in their case, there is nothing to change the fine to. Thus these individuals (e.g. those receiving in-patient care, pregnant women and so on) cannot be held responsible in the absence of their voluntary performance for misdemeanors that they committed.

Section 139 – In case the fine is not paid, currently the sanction automatically changes into community service. The application of this obligatory and automatic "second step" of the enforcement procedure was in accordance with the principle of gradation in the sanction system. Contrarily, according to the Draft, in the future **it is possible for the offender to redeem the change to confinement by doing community service**. Even if we were to accept the change of the current automatic – but in practice, often left out – grade of enforcement to a redemption option dependent on the intention of the offender, it is still very problematic that according to the Draft, the offender has only **two working days** after the decision is rendered final to report to the state employment agency for redemption. Moreover, the draft law does not specify what form the reporting should take (does it have to be a personal appearance, or is enough to do the reporting by phone, mail, or e-mail?). If the rule means an obligation to appear in person, then **the two working days deadline is extremely short** and for many, impossible to fulfill through no fault of their own, especially taken into account that the local offices of the state employment agencies (unemployment centers) can only be found in larger townships, and travelling there costs time and money.

The strict deadlines stipulated under **Sections 138** and **139** all project **that there would be a significant number of changes to confinement**, which goes against the preparatory conception for the misdemeanor law, which stated: "in the course of the review of the applicable procedures during enforcement, an effort has to be made to use change to community service instead of change to confinement".

Using confinement as a sanction in significant proportions goes contrary to the basic premise of misdemeanor law, according to **which actions that are less dangerous to society can only be punished by imprisonment in exceptional cases**. Considering that the change to imprisonment applied in the enforcement procedure makes loss of freedom possible even in the

case of the smallest actions sanctioned by fine or instant fines, this expectation shall not be fulfilled.

The frequent use of imprisonment **does not support the state's economic interests** either, since the enforcement of imprisonment, besides meaning default of payment on the fine, entails significant costs for the state and increases the overcrowding of penal institutions, and the already significant burdens of the staff of penal institutions.

The Draft places the task of **assigning the appropriate work** based on the offender's health, skills, and aptitude for work on the state employment agency instead of the authority. Although it is possible to deduce it from the above rule, it would still be necessary to state explicitly in the law that in case the state employment agency cannot offer community service suiting the conditions defined in the statute, **this should not fall as a burden on the offender**, that is, no change to confinement should be possible. Due to the imperfect and contradictory nature of the regulation, we often experience that in case the offender undertakes the community service, but the locality does not have community service possibilities, a change to confinement still takes place in violation of the principle of gradation.

Furthermore, the Draft does not deal with the question of the place of community service. In order to avoid the abuses experienced in practice, it should be regulated what is the **maximum distance to work** that the offender is obliged to accept, moreover, the bearing of costs of travel should also be stipulated (in case of community service as a punishment applied in criminal procedure, the employer is obliged to reimburse the costs of travel to the convict, in case the convict does not perform the work at his place of residence).

Besides the Draft's stating that no legal relationship is created with the workplace for the duration of the community service, the **legal loopholes** that make the execution of community service almost impossible in the current system **have not been eliminated**. At least it should be determined in an implementing decree what non governmental or local organizations, institutions (minority governments, civil organizations, churches, etc) can employ community service workers; what the rules are regarding damage caused or suffered in the course of community service; who or which organization bears the costs of community service (health aptitude tests, labor safety monitoring, tools).

Allocating the enforcement of the community service sanction to the state employment agency also raises the question as to whether it is effective to **mix communal work and the organization and execution of the community service** as sanction for a criminal act. It is also worth thinking through whether it is justified that the Government does not apply the model developed and introduced to make the fulfillment of the community service sanction more efficient under prioritized project no. 5.6.2. of the Social Renewal Operational Programme, lead by the submitter of the present Draft, the Ministry of Inferior, to misdemeanors, thus the Probation Supervision Service and the community service sentence - of a similar nature - enforced by the state employment agency shall operate as two parallel systems. The reparative nature of the community service sentence shall cease completely by fulfillment being relegated to the employment agency. The objective of the sentence (was) namely not only retribution, but also recognizing the consequences of the act, and taking responsibility for it.

Section 145 – It is an undue limitation that the petition in equity for remittal or reduction of the sentence can only be submitted until the deadline is open to pay the pecuniary fine, or in case of a different sanction, **until the enforcement has begun**. According to the Draft, equity can be exercised if after the decision in the case has been rendered final, a new, previously unknown condition arose, due to which the enforcement of the sanction without

application of equity would mean a disadvantage for the offender that cannot be reconciled with this law. Such a condition can of course arise after the enforcement of the sentence has begun (for example, serious illness of a single relative after the start of the imprisonment), therefore the limitation is undue and on occasion can go contrary to the requirement of humane treatment and proportionality.