

PUNISHMENT AND PUNISHMENT IN THE MIDDLE AGES IN THE TERRITORY OF AUSTRIA-HUNGARY

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Abstract:

The intention of this paper is to provide an insight into the history of alternative punishments. It examines punishment in the territory of Austria-Hungary, Czechoslovakia and traces the historical development of punishment and punishment in Slovakia throughout history. It introduces the concept of ordalia as a form of medieval punishment in the territory of Hungary and the subsequent abandonment of the harshest forms of punishment. The article deals with forms of punishment in the Czechoslovak Republic after the Second World War.

Key words: Alternative punishments. Restorative justice. Ordalia. Austria-Hungary. Czechoslovakia.

Introduction

The punishment of perpetrators of criminal offenses has always been, given the nature of criminal law, which primarily serves the purpose of repression, i.e. punishing the offender, focused primarily on penalties that significantly interfere with personal rights, or in the past (or present in some countries) with the right to life. This emphasized the necessity of punishing the offender for their actions, with laws always allowing primarily the possibility of imposing a penalty that affected the infringement of personal freedom. Later, with the development of society, ideas of imposing other punishments - so-called alternative punishments

- began to emerge, or punishments that are not associated with such infringements of personal freedom, as a result of which the person would be placed in an institutional facility. The first alternative forms of dealing with perpetrators of antisocial activities began to be applied at the end of the 19th and the beginning of the 20th century, primarily in North America and in countries or states of Western and Northern Europe. Prior to this, an acceleration in the burden on prisons was recorded after World War II. With the post-war development of the world, the extent and structure of committed criminal offenses partially changed. The escalation of this negative trend, the increase in crime, occurred around 1970. That is after Europe, constantly referred to as the “old continent,” was hit by the consequences of the so-called oil crisis. The inflexible European criminal justice system, unprepared for the new economic, political, and social situation, initially responded by imposing stricter penalties on perpetrators of criminal activities. It mainly reacted through the imposition of unconditional deprivation of liberty sentences, which subsequently led to the overload of the entire prison system of practically all Western European countries. The organization, institutional, personnel, and material increasingly cumbersome functioning criminal justice system historically created in Western European countries finally matured to a stage that was an obvious precursor and later a part of the outbreak of its serious crisis.¹ The society was thus directly forced to seek ways, methods, tools, and means to effectively eliminate the negative impact of the persisting “prison crisis” on other social relations and thus prevent potential social explosion. Therefore, it was necessary to involve existing relevant scientific capacities of society in solving the complex of these expanding social problems.²

Experts in the field of justice have begun to strongly question the validity of the approach that relied on criminal law enforcement tools, which included the imposition of short-term sentences of imprisonment on offenders who committed less serious antisocial acts that could have been effectively sanctioned by other, non-established means. Furthermore, it is necessary to emphasize that as a result of such a criminal policy, prisons were overcrowded with socially insignificant or low-risk offenders. Essentially, these were individuals who were unnecessarily removed from their functional family and work environments, and were considered “non-criminal,” committing only misdemeanors. However, this had a negative impact not only on their personal structure, mental integrity, and social integration, which contributed to the emergence of a socially excluded

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- 1 In this context, I draw attention to the possibility of comparing the views of the authors mentioned e.g. in STRÉMY, T. (ed.), 2015. *Restoratívna justícia a alternatívne tresty v aplikačnej praxi. Zborník z medzinárodnej vedeckej konferencie*, 376 p.
 - 2 RAK, P. *Alternatívne tresty z pohľadu transformácie spoločnosti a psychologického pohľadu*. 123 p.

mass of the population, but it also deprived the state and society of economically exploitable and socially significant human resources. In fact, this policy deprived the state of huge financial resources, the absence of which as necessary sources of national wealth created conditions for unbalanced budget management. The burden of these financial and material costs of relatively unnecessary imprisonment of offenders of misdemeanors was naturally borne by taxpayers, both individuals and legal entities. Therefore, it was necessary to reduce the high costs of the prison service as soon as possible.

According to official United Nations statistics from 1974, the worldwide cost of running prisons reached a staggering 62.5 billion USD at that time. There were two main reasons why the Seventh (VII) Congress of the United Nations, held in Milan, Italy in 1985, adopted a resolution on the necessity of reducing the prison population through the application of alternative punishments and reviewing the appropriateness of imposing short-term sentences of imprisonment for less serious anti-social offenses. Congress participants agreed on the need to ensure the social integration of offenders engaged in anti-social activities.³

In response to the aforementioned United Nations Resolution adopted in 1985, the Council of Europe (CoE) addressed this significant interdisciplinary issue by adopting a document entitled “Alternative Measures to Imprisonment” in 1991, which divided such penalties according to their impact on the offender into three groups. The CoE then adopted principles in 1992 that are perceived as a parallel to the European Prison Rules (EPR) and provide a summary of requirements recommended to member states or countries for use in creating new legislative measures in the field of criminal law.⁴ A significant stimulus for the development of the institution of alternative sanctions on an international scale was a resolution by the United Nations Commission on Crime Prevention and Criminal Justice, which in 2002 contained a document on basic principles for the use of restorative justice in criminal matters. From this fact, a new approach gradually emerged towards the adoption of sanction measures unrelated to deprivation of liberty, which we attempt to expressly record in this contribution. The development and application of alternative sanctions subsequently followed several directions, ranging from the financial form of alternative punishment to mandatory work sentences. The concept of “forced labor” is rightly rejected in Slovak criminal law. This form of inhumane punishment imposed on racially, politically, and socially persecuted communities was known in areas of Europe occupied by the

3 Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milano, 26. august – 6. september 1985 UN document: Resolution on the independence of the judiciary.Zdroj: [www.ustavnsud.sk]/dokuments/IPD2.pdf.

4 See BOBEK, M., BRÍZA, P., KOMÁREK, J. *Vnitrostátní aplikace práva Evropské unie*. 606 p.

German Wehrmacht during World War II. Punishing the population categorized solely based on their “suitability” for life in the “New Europe” corresponded to the methods of governance employed by dictatorial Nazi regimes of terror, which, led by Adolf Hitler, dominated the Greater German Reich until 1945. The Nuremberg trials, which resulted in the international court’s verdicts condemning and punishing perpetrators of mass crimes against humanity, gradually created optimal conditions for the creation of a pan-European justice system that would become the cornerstone of humane criminal policy within the EU in future periods. Therefore, specific credit can be attributed to the UN, the Council of Europe, and the EU for the genesis and promotion of the idea of utilizing alternative sentencing institutes if adequate objective and subjective conditions are in place to permit their use.

The history of punishment, ordeals

Every human activity has its history, and from it emerges a continuous or discontinuous present. This usually implies references to the past, being historically superstructure and the development of the experiences and knowledge of past generations.⁵ This is fully reflected in the issue of criminal law and punishment. To gain a more comprehensive understanding of the current state of criminal legislation, including forms and the social role of punishment, it is necessary to know at least fragments of their rich history. The Middle Ages represent an epoch in the historical development of Europe between antiquity and modern times, i.e., according to most authors, the period from the fall of the Western Roman Empire in 476 to the discovery of America in 1492. The Middle Ages not only did not know the concept of criminal law, nor did they perceive it as a public law institution, but they accentuated its exclusively private law character. The assessment of the criminality of behavior was within the competence of the victim or people close to them. The criminal process was typically initiated by the victim or their family, and punishments were based on legal customs, gradually involving the monarch or church. The purpose of punishment was not to protect society or reform the offender, but rather to compensate for the damage caused by the offender,⁶ or to exact revenge for the committed crime. The nature of the punishments themselves was not a fundamental problem. Reciprocity, in line with the well-known biblical principle of “an eye for an eye, a tooth for a tooth,” was the most commonly applied principle. It is clear from the early Middle Ages that there was considerable particularism in this legal area, without a uniform legal

5 See DAŠKA, V., PICKOVÁ., D. *Dějiny středověké Evropy*. 364 p.

6 This type of punishment developed only in the later medieval period - author’s note

framework across the entire state. "Similarly, the legal regulation in the earliest times was not included in written legal regulations, but had the character of unwritten legal customs (which were only gradually supplemented by regulations of the church or monarchs)."⁷ In addition, it was typical for the early Middle Ages that "there was no firmly defined circle of criminal offenses or firmly defined consequences in the form of sanctions."⁸ It is necessary to emphasize at the outset that in the Middle Ages, there was no standard, universal type of punishment such as imprisonment in an unconditional or conditional form, which is in use today. Instead, the whole range of ordeal punishments existed and was applied, which usually had a fatal character for the accused and therefore utilized irrational evidentiary means in the form of ordeals (*judicium Dei*).⁹ Generally, these tests were used subsidiarily but very effectively because supernatural forces or "divine will" decided in them. In the early Middle Ages, trial by combat was a frequent form of punishment, in which fighters fought without armor, armed only with a sword and shield, and the fight was decided by the judge until the first drop of blood appeared or until one of the combatants was killed. These fights were public but without the participation of women in the audience, as the fighters had no clothing, and the moral code of the time prohibited women from looking at naked male bodies (except for their husbands). Without great demands on the costs associated with the execution of punishment for its executor, the trial by cold water was a typical punishment. It consisted of immersing the accused in cold water, and if he surfaced, the water rejected him, and thus he was guilty as unclean. In the opposite case, when the accused sank and did not resurface (i.e. drowned), they were considered pure and thus acquitted as innocent. The same algorithm was used in the trial by fire or hot water. In this trial, the accused was required to pick up a red-hot stone or metal object and walk a certain distance with it, or plunge their hand into boiling water, and if they could do so without sustaining any injury (burns or damage to the skin), or showing any signs of pain (verbal or facial), they were considered innocent; otherwise, they had proven their guilt. The trial by ordeal of the cross operated on a similar principle. The accused demonstrated their innocence by standing on tiptoe by the cross located near the altar, in full view of all the faithful, wearing only a loincloth, and with outstretched arms, imitating the posture of Jesus Christ on the cross, without moving throughout the entire Mass. The slightest movement or facial expression would result in the accused being condemned to death. The less frequent trial by bread and butter required the accused to feed a dog or a cat with this delicacy without any resistance from the animals or any harm to the accused (such as

7 See ROMŽA, S. a kol. *Alternatívne spôsoby výkonu trestov*. p. 7.

8 See ROMŽA, S. a kol. *Alternatívne spôsoby výkonu trestov*. p. 8.

9 See RAŠLA, A. *Inkvizícia nezomiera*. 224 p.

bites or scratches). Otherwise, it was clear evidence of the guilt of the accused person. Equally bizarre was the identification of the murderer of a human corpse. This was achieved through the trial by bleeding, which consisted of requiring the suspect to touch the corpse, and if this contact resulted in bleeding or the emergence of any animal from the body of the deceased, the answer to the question of who was the murderer was clear. The trial by ordeal was also used, whereby a child drew a cube from a pouch containing two cubes - one white and the other marked with a cross. If an "unblemished" child drew the white cube, it signified the innocence of the accused, while the opposite indicated guilt and punishment. Medieval criminal law was based on the principle of "confessio est corona probationem,"¹⁰ and if the accused refused to confess, a process of forced confession by torture ensued.¹¹ The medieval torture chamber was a workshop of pain and suffering, where the tortured were interrogated during breaks aimed at obtaining a confession. The torture instruments were the result of the torturers' perfidious thinking, and their diversity and effectiveness were a flagrant testament to the anti-humanism of the Middle Ages. Among the most common punishments used by executioners in the Middle Ages were quartering, hanging, drowning, burning, burying alive, and beheading, especially for nobles and women. In addition to these capital punishments, corrective and preventive punishments such as amputation, whipping, and fines were also applied. Some punishments were reserved for specific groups, such as public shame in the town square and ear amputation for a beggar caught begging for a second time.

Punishment and Penalties in the Modern Era

The modern era is characterized by a departure from the use of cruelty in the imposition and execution of penalties. Gradually, there has been a shift away from the principle of revenge and towards a more rational approach of compensating for the damage caused. The economic impact of punishment has taken precedence over its emotional impact on the parties involved, thereby diminishing the need for retribution and vengeance on the part of the victim, and the torment of the perpetrator of the crime. However, this process was not without its challenges, and its retardation was mainly due to slow legislative implementation of new trends in criminal law. In the Czech Kingdom, at the beginning of the 18th century, the *Constitutio Criminalis Josephina*, which regulated the rules of the inquisitorial process, was in force (for the first time, torture, or the law on torture, was introduced in the new code, according to which torture became part of the

¹⁰ „confession is the queen of evidence“ - author's note

¹¹ See RAŠLA, A. *Inkvizícia nezomiera*. 224 p.

investigation of crimes and was intended to extract confessions. Inquisitorial proceedings were also introduced for the first time).¹² The criminal code of Queen Maria Theresa's *Constitutio Criminalis Theresiana* of 1768 followed this code. Despite many positive changes in criminal legislation, the modern era also brought with it negative aspects that are still difficult to comprehend today, such as the expansion of the scope of punishment to include the perpetrator's family. The affected person was not only the offender himself but also his family, which undoubtedly had a significant psychological impact and influence on the behavior of potential offenders in society. It was not uncommon for the entire family to be executed alongside the perpetrator. The penalty of imprisonment did not yet exist, and various forms of confinement such as prisons, dungeons, and hunger cells were used increasingly only in relation to preventing the escape of the offender awaiting trial and subsequent judgment. Significant changes in criminal law occurred only during the period of enlightened absolutism, particularly under the rule of Joseph II. The principle of "nullum crimen sine lege, nulla poena sine lege",¹³ was introduced into criminal law and remains relevant today. Attempted commission of a criminal offense was made punishable, and the important principle of presumption of innocence was established. Torture as a means of evidence was prohibited, and fundamental changes also occurred in the perception of the purpose of punishment. Punishment ceased to be merely a means of retribution and deterrence, as evidenced in judicial practice. Most importantly, ideas about the corrective and educative purpose of punishment began to be gradually advocated in the field of criminal law theory as well. The Law on Criminal Offenses and Serious Police Offenses of 1803 added further criminal offenses for which absolute punishment was imposed. Overall, the death penalty could be imposed for high treason, counterfeiting or spreading counterfeit banknotes (so-called bankocetles), murder, robbery, and arson with aggravating circumstances. In addition, during the period of martial law, rebellion and arson. However, the significant progress in humanizing criminal law and the execution of punishments in today's territory of Slovakia only occurred at the beginning of the 19th century. Joseph II's criminal code was abolished in 1803 by the Law on Crimes and Serious Police Offenses, which had not only a material but also a procedural character and remained in effect until the adoption of the Austrian Criminal Code No. 117/1852 Z. z. of May 27, 1852, which regulated criminal law throughout the entire monarchy due to the absence of codification of criminal law in Hungary. This occurred only with the adoption of Hungarian Act No. V/1878, the Criminal Code on Crimes and Misdemeanors. The following year, in

12 Trestní zákoník Josefa I. [zapadoceskebaroko.cz]

13 „No crime without law, no punishment without law“ - author's note

Hungary, the Misdemeanor Act, Act No. XL/1879,¹⁴ was also adopted. Directly revolutionary changes in the alternation of punishments and their execution occurred in the territory of Austria-Hungary just after the adoption of these legal provisions. The Austrian Penal Code confirmed the application of the principle “*nullum crimen sine lege, nulla poena sine lege*”,¹⁵ and emphasized the death penalty (execution by hanging) as the main punishment, and the punishment of deprivation of liberty, known as imprisonment, was introduced.¹⁶ Imprisonment could be aggravated, for example, by ordering fasting (water and bread), the convict could be ordered to be confined to a “hard bed,” or placed in solitary confinement. In the case of foreign perpetrators, it was possible to impose a punishment of expulsion from the country. Offenses and misdemeanors were punished with fines, confiscation of property, loss of rights and permits, imprisonment (jail or hard labor), corporal punishment, or banishment from a certain place or even from the country. As a novelty, the punishment of house arrest was introduced, as well as the consideration of mitigating and aggravating circumstances and the application of extraordinary mitigating law.¹⁷

The Hungarian Criminal Code mirrored the spirit of the time, which was characterized by the humanization of criminal law, punishment, and sentencing. Like the Austrian codification, it distinguished criminal offenses in three degrees: crime, offense, and misdemeanor. The types of punishments included the death penalty, imprisonment, and fines. When determining the severity of the punishment, this law also applied mitigating or aggravating circumstances. Imprisonment penalties included jail, prison, or state prison. In addition to these punishments, the law also allowed for secondary penalties such as loss of office and political rights or a prohibition on practicing a profession. The 1908 amendment to the Criminal Code, Article 36/1908, introduced for the first time the institute of conditional sentencing and conditional release.¹⁸

From the fragments of the development of criminal law and punishment on the territory of Austria-Hungary, it is clear that there was an acceptance of the humanization of criminal law that was taking place in Europe, and a process of aligning criminal law regulations with the development of criminal law in the

14 Trestní zákoník Josefa I. (zapadosceskebaroko.cz)

15 No crime without law, no punishment without law - no one can be punished without law.

16 The law differentiated between imprisonment and hard imprisonment and between life imprisonment and temporary imprisonment - author's note.

17 Corporal punishment was abolished in 1867, but its modification persisted in the Act. No. 96/1854 ř. The so-called Spanking Patent allowed persons sentenced to imprisonment to be punished by beating with a stick or a whip, or in the case of so-called anti-police behaviour violating order and decency, e.g. at political demonstrations, etc. - author's note.

18 Criminal amendment in force in Slovakia (Art. 36/1908).

advanced countries of Europe. Criminal law underwent a qualitative leap into a different, modern dimension of its development, as opposed to the constants integrated into medieval criminal law. The vast difference is visible primarily in the understanding of the purpose of punishment, types of punishment, and opportunities for finding optimal alternatives to punishment.

Criminal law regulation in the territory of the interwar Czechoslovak Republic and its satellite successor states determined the current social order.

Punishment of perpetrators of anti-social acts in the former Czechoslovak Republic, as well as in the successor state of the militarily defeated Austro-Hungarian monarchy, was not radically different from the legal order of Austria-Hungary, the monarchist state entity that ceased to exist in 1918. However, unlike the democratic construction of the state legal foundation of Czechoslovakia, its socio-economic relationships remained essentially interdependent with the past period. Nonetheless, historical development reached a new stage characterized as a process of developing a renewed state legal position of the Slovak and Czech nations in the geopolitical environment of Central Europe, i.e., national-state maturity, whose manifestations were anchored in the modern history of shaping the state-forming aspirations of both nations. The modernization or Europeanization of the legal order of the new state entity also became a necessity. The day of October 28, 1918, became a milestone and a symbol of self-determination and finding a firm point of anchoring in the political world of European nations for both nations, Slovaks and Czechs. On this day, among other things, Act No. 11/1918 Coll. was adopted to establish an independent Czechoslovak state. In accordance with the new law, it was stipulated that: "All regional and imperial laws remain in force for the time being." The reason for this approach was very simple - to preserve the continuity of the previously applicable legal order with the new one. This legal norm was therefore given the name "reception norm."¹⁹ This reception statute accepted the legal dualism of Austria-Hungary with the aim of promptly recodifying criminal law in the Czechoslovak Republic. Unfortunately, the complexity of this process caused incredible delays and legal uncertainty for the legislature. The process of unifying the law in general, and criminal law in particular, also encountered reluctance to abandon the legal dualism of the defunct Austria-Hungary, and thus the Criminal Code no. 117/1852 Coll. on crimes, misdemeanours and offences remained in force in

19 See MARKOVÁ, V. Zmeny v koncepcii trestných kódexov od roku 1918 až po súčasnosť. In: *Notitia Iudiciales Academie Collegii Aedilium in Bratislava*, roč. IV, č. 2, 28 – 55, p. 29.

the territory of Bohemia, Moravia and Silesia, while in the territory of Slovakia and Subcarpathian Ruthenia, the Act no. V/1878 on criminal offenses and the Act no. XL/1879 on offenses were in force. The effort to unify the legal order in the creation of the reception statute no. 11/1918 was conceived by the Minister of Finance of the first Czechoslovak Republic, JUDr. Alois Rasin,²⁰ and continued until the dissolution of the Republic in 1939. Nevertheless, it cannot be said that there were no attempts to unify the legal system, including criminal law, in the Czechoslovak political and legal environment.

The truth is that work on the basis of a new criminal law began as early as 1920, which resulted in the proposal of a complete criminal law called “*Prípravné osnovy Trestného zákona o zločinoch a prečinoch a zákona priestupkového*” in 1926. Another version of the draft criminal law from 1937 did not find political consensus in a politically turbulent environment and so, in the end, it can only be stated briefly that during the existence of interwar Czechoslovakia from 1918 to 1939, there was no unification of the legal regulation of criminal law and the creation of its codified form valid throughout the country. Partial adjustments were made, such as the Act No. 50/1923 Coll. on the Protection of the Republic or the Act No. 48/1931 Coll. on juvenile criminal justice, but there was no comprehensive legal regulation of criminal law until the dissolution of the state and its division into the independent Slovak state and the Protectorate of Bohemia and Moravia. Despite the fact that the Act on the Protection of the Republic represented a legal norm that was characterized by restricting civil rights and freedoms,²¹ it represented the first legal norm in this area after the establishment of the independent republic from the perspective of criminal legislation. However, it is clear that during this period, the efforts of government representatives began to prevail to ensure primary protection, especially of state interests. Government proposals declared that the interests of the current state were in line with the principles of democratic government, but it was necessary to adjust legal regulations in accordance with the newly conceived constitution of 1920.²² At the same time, legislators acknowledged that it was not possible to wait for a complete reform of the criminal law, as there were serious crimes committed by hostile elements attacking the life and health of significant constitutional authorities. It was necessary to regulate this area as soon as possible, with the new legal framework aimed at removing the principles of the old regime and introducing

20 Muzeum 3000 | První zákon československého státu – papír plný škrťů (nm.cz) zákon č.11/1918 o zriadení samostatného štátu československého

21 See FRANCEK, J. *Zločin a trest v českých dějinách*. p. 74.

22 See Zákon č. 121/1920 Sb. Národního shromáždění, kterým se uvozuje ústavní listina Československé republiky. [online]. [cit. 27. 8. 2018]. Dostupné na internete: <http://spcp.prf.cuni.cz/lex/121-20.htm>

increased protection for elected representatives of the people in accordance with peace treaties. Legal regulations needed to be created that people would perceive as an expression of their own will, rather than a continuation of the former Austro-Hungarian Empire. It was also necessary to protect the military power of the republic against the destructive efforts of internal or external enemies.²³

²⁴ In this context, the historical “unification paradox” was highlighted, which also affected Austrian criminal jurisdiction. After the unsuccessful Hungarian revolution in the late 1840s, the Austrian criminal code was introduced in 1852 on the territory of Hungary and Slovakia, and its validity in Hungary ended in 1861. The nine-year period of validity of the Austrian Imperial Criminal Code imposed on Hungary on the territory of the entire monarchy from 1852 to 1861 can therefore be considered unifying, progressive and unifying in terms of criminal law. However, the developmental trend of unifying criminal legislation was not fulfilled in subsequent years. Such a criminal-unification process on the current Slovak state territory began to be gradually implemented again only after the formation of Czechoslovakia in 1918. The legal-unification process in the new Czechoslovak state, however, was extremely lengthy, controversial, and only partially successful. The law on conditional conviction and release, for example, Act No. 562/1919 Coll., can be mentioned as a successfully unified and generally binding criminal law act. The interwar Czechoslovak Republic, or the Czechoslovak Republic, gradually moved towards its temporary demise. The Sudeten German Party first declared its demands in April 1938. In the so-called Karlovy Vary demands, the Sudeten German Party requested from the Czechoslovak Republic: territorial autonomy, the assurance of rights to all other Germans in the territory of the republic, freedom for Nazi propaganda and Nazi organizations, the abolition of all previous allied treaties, and an orientation of Czechoslovakia towards cooperation with Germany.²⁵

On March 14 and 15, 1939, two new state entities were established on its territory, formally independent Slovak State and Protectorate of Bohemia and Moravia, both under the universal tutelage of the German Reich. These state changes were to some extent reflected in the criminal law of both new Central European states. In the Protectorate of Bohemia and Moravia, criminal regulation approached the criminal regulation of the German Reich. Its essence was therefore strictly Nazi-fied and manifested in the priority of racial and national discrimination, as well as in the legalization of political persecutions. Criminal law in the Slovak State,

²³ Explanatory memorandum to the draft Government Act No. 50/1923 Coll. [online]. [cited 27 August 2018]. Available from: <https://www.nrsr.sk/dl/Browser/Document?documentId=23167>

²⁴ See MARKOVÁ, V. Zmeny v koncepcii trestných kódexov od roku 1918 až po súčasnosť. In: *Notitia Iudiciales Academie Collegii Aedilium in Bratislava*, roč. IV, č. 2, 28 – 55, p. 29.

²⁵ See Vojáček, L., Schelle, K. *Právní dějiny na území Slovenska*, Ostrava. 2007, p. 282.

or the Slovak Republic, was created by extraordinary legislation that allowed the use of increased criminal penalties. It was primarily manifested by its racially discriminatory nature. Based on Nazi-fied criminal norms, it was possible to restrict or abolish basic civil rights and freedoms in Slovakia. The first example was Government Regulation No. 32/1939 Coll. on the security detention of enemies of the Slovak State. This law was followed by Law No. 320/1940 Coll. on criminal offenses against the state, which abolished some provisions of the law on the protection of the republic from 1923. This law expanded the range of political offenses for which the death penalty or life imprisonment was imposed, and the upper limits of penalties were also increased. Repression became the primary sanction in the Slovak State. Therefore, no alternative penalties could be considered during this period, because forced labor, which was primarily designated for racially or politically discriminated persons, cannot be considered in any case as a form of alternative punishment. In general, however, it can be stated that legal continuity with the previous Czechoslovak Republic was maintained in some areas, with the majority of public and private law norms being reciprocated with the necessary adjustments caused by the wartime situation in which both state entities found themselves.

Criminal law after World War II

World War II left a lasting impact on Central Europe's political map. What was not possible to achieve from a geopolitical standpoint in the field of criminal law until the dissolution of Czechoslovakia in 1939 was legally anchored in the Criminal Code No. 86/1950 Coll. This legal act, in the new conditions of the existence of the proletarian dictatorship state, completed the endlessly dragging process of recodification and removed the persisting undesirable state of legal dualism. In addition, two significant aspects of the new legal regulation need to be emphasized, namely the acceptance of the Soviet model of criminal legislation and its class nature. This meant, in addition to the requirement to fulfill the formal characteristics of the criminal offense, respecting the aspect of the danger of conduct to society. Its class nature was accurately reflected in the formulation of the purpose of punishment: „The purpose of punishment is to:

- a) neutralize an enemy of the working people,
- b) prevent the offender from committing further crimes and educate him to observe the rules of socialist coexistence,
- c) have an educational effect on other members of society.“²⁶

²⁶ See Zák. č. 86/1950 Zb. § 17 ods. 1

The individual types of punishments specified in the Criminal Code corresponded to the purpose of punishment. The Criminal Code distinguished between two types of punishment, namely primary and ancillary. As primary punishments, it specified:

- a) „the death penalty,
- b) deprivation of liberty,
- c) corrective measures.“²⁷

According to the applicable legal regulation, ancillary punishments were:

- a) „loss of civil rights,
- b) exclusion from the army,
- c) loss of military rank,
- d) forfeiture of property,
- e) fine,
- f) prohibition of activity,
- g) expulsion,
- h) banishment,
- i) confiscation of things.“²⁸

The legislator did not perceive ancillary penalties as alternative punishments, but exclusively as supplementary punishments, because „an ancillary penalty can only be imposed together with the main punishment.“

In addition to the Criminal Code, the National Assembly also passed Act No. 88/1950 Coll., the Corrective Criminal Code, which regulated the punishment of misdemeanors. The Criminal Code was amended by Act No. 63/1956 Coll. prior to the adoption of a new legal regulation in 1961, which, among other things, abolished life imprisonment and replaced it with a maximum sentence of 25 years' imprisonment. The amended law also paid increased attention to the purpose of punishment and the specification of the elements of individual criminal offenses. In accordance with the stabilization of the social situation, it significantly reduced the severity of individual sentences and introduced the possibility of waiving punishment if certain specific conditions were met. In 1961, a new Criminal Code, Act No. 140/1961 Coll., was adopted in line with the new Constitution of 1960. This Criminal Code was amended multiple times and remained in effect until 2005, when it was replaced by modern substantive criminal law regulations as its structure and basic institutes no longer corresponded to the new social

27 See Zák. č. 86/1950 Zb., § 18 ods. 1

28 See Zák. č. 86/1950 Zb., ods. 2

conditions that arose after November 1989.²⁹

The Criminal Code of socialist provenance from 1961 specified its purpose, which the legislator pursued as follows: „The purpose of the criminal code is to protect the social and state system of the Czechoslovak Socialist Republic, socialist property, rights, and legitimate interests of citizens, and to educate for proper fulfillment of civic duties and adherence to the rules of socialist coexistence.“³⁰ The law also defined a criminal offense as „an act that is dangerous to society, the characteristics of which are listed in this law.“³¹ At the same time, it also regulated the possibility of waiving punishment depending on the degree of danger that the unlawful act poses to society, such that „an act whose degree of danger is negligible is not a criminal offense, even if it otherwise exhibits the characteristics of a criminal offense.“³² The degree of danger to society itself is defined by this law based on the significance of the protected interest, the modus operandi of its commission, its consequences, the circumstances of the commission of the criminal offense, the person of the perpetrator, the degree of culpability, and their motives.

The law broadly conceptualized the purpose of punishment, which is to „protect society from offenders, prevent the convicted from committing further criminal activity, and educate them to lead a decent life as a working individual, thereby also having a positive educational impact on other members of society.“³³

In terms of types of penalties, the death penalty was accepted as an exceptional punishment, and in addition to it, it was possible to impose a sentence of imprisonment (for a maximum period of 15 years), corrective measures, loss of honorary titles and decorations, loss of military rank, prohibition of activity, confiscation of property, fines, and expulsion. Apart from the new regulation of types of penalties, the law allowed for the application of the institute of conditional sentencing, conditional release, and effective remorse. A new feature was the regulation of protective measures, such as protective treatment, seizure of property, and protective education of minors.³⁴

The amendment of the Criminal Code No. 45/1973 Coll. subsequently introduced the possibility of imposing a sentence of imprisonment for a period of 15 to 20 years if a 15-year sentence would be unreasonably lenient, but at the

29 See Úst. zák. č. 100/1960 Zb. Ústava Československej socialistickej republiky

30 See Zák. č. 140/1961 Zb., § 1

31 See Zák. č. 140/1961 Zb, § 3 ods. 1

32 See Zák. č. 140/1961 Zb, ods. 2

33 Zák. č. 140/1961 Zb, § 23 ods. 1

34 Zák. č. 305/2005 Z. z. o sociálnoprávnej ochrane detí a o sociálnej kuratele a o zmene a doplnení niektorých zákonov v znení neskorších predpisov

same time, the imposition of the death penalty would be unreasonably severe. This also allowed for the differentiation of perpetrators of criminal activity, as well as the nature of the criminal offense itself.³⁵

Alternative Penalties Today

At the beginning of the 1990s, the system of criminal sanctions was dominated by the imprisonment penalty, which was already considered ineffective or insufficiently effective in many countries. At the same time, it was an impetus that forced those involved to reconsider the sense of imposing the imprisonment penalty even in cases where it was not necessary. Increasingly, proposals for the introduction of alternative penalties began to be developed. This shift in penal policy began primarily in Western Europe with regard to perpetrators of less serious offenses, in the 1970s, and essentially continues to this day.³⁶ Modern forms of punishment are still not fully adopted in the legal conditions of the Slovak Republic. Alternative forms of punishment represent a pressing issue of punishment in Slovakia. These concerns have influenced the creation of new criminal codes in our socio-legal conditions.³⁷ The adoption of the Criminal Code No. 300/2005 Coll. and the Criminal Procedure Code No. 301/2005 Coll. played a crucial role in the introduction of modern forms of punishment in the legal system of the Slovak Republic. Additionally, *lex specialis*, such as Act No. 550/2003 Coll. on probation and mediation officers approved by the National Council of the Slovak Republic in 2003, became effective in Slovakia in 2004. This placed Slovakia among the countries that directly incorporated the institute of mediation into their normative legal system. The introduction of mediation into the system of criminal proceedings meant that alternative punishments became part of the new Criminal Code No. 300/2005 Coll. Furthermore, this legal act expanded the list of alternative punishments and the possibility of imposing them in the Criminal Code, specifically in § 49, § 50 as a conditional deferral of the sentence of imprisonment, in § 51, § 52 as a conditional deferral of the sentence of imprisonment with probation supervision, in § 53 as a home imprisonment sentence, and in § 54, § 55 as a mandatory work sentence, in § 56, § 57 as a fine. An important achievement, among others, enabling support

35 See MARKOVÁ, V. Zmeny v koncepcii trestných kódexov od roku 1918 až po súčasnosť. In: *Notitia Iudiciales Academie Collegii Aedilium* in Bratislava, roč. IV, č. 2, 28 – 55, p. 29.

36 More details In: KLÁTIK, J. STRÉMY, T. *Alternatívne tresty*. Bratislava: CH:Beck, 2018, 5. p.

37 In these contexts, teaching aids have also begun to emerge, educating adepts in the study of law in a new understanding of criminal law, see IVOR, J. a kol., 2006. *Trestné právo hmotné I.*, 530 s., see also IVOR, J. a kol., 2006. *Trestné právo hmotné II.*, 607 p.

for the implementation of alternative punishments, was the introduction of electronic monitoring of individuals.³⁸ This means of monitoring the execution of alternative punishments is also intended to reduce the cost of prison services.³⁹

According to a 2016 survey by the FOCUS agency, less than 46 percent of Slovak respondents were aware of the existence of alternative sentences in the justice system of the Slovak Republic. This is not only in terms of significant economic savings for the state, but also of the fact that such forms of punishment have a significantly better impact on the rehabilitation of offenders than custodial sentences. The Slovak judicial practice still does not use alternative sentences to a sufficient extent, which is confirmed to a certain extent by the program declarations of governments over the past two decades. While the government cabinet program for the years 1998-2002 made no mention of alternative sentences,⁴⁰ a favorable situation in this regard emerged in the following four-year period (2002-2006), which was reflected in the laws adopted.⁴¹ Even in the years 2006-2010, the incoming government declared its interest in using alternative forms of punishment and also expressed its intention to relieve the state budget of a significant portion of funds that would otherwise be spent on the operation of prisons.⁴² However, in the years 2010-2012, there was no mention of alternative punishments in the government's program declaration. In the following period from 2012 to 2016, the new government once again promised to improve the prison system, including supporting alternative punishments and implementing the Electronic System for Monitoring Persons (ESMO), which aims to effectively monitor their execution.⁴³ In this regard, there have been several efforts by government representatives to properly apply alternative sanctions, which have been and still are underutilized in the conditions of the Slovak Republic. Since the introduction of the ESMO system, we can observe several changes to the provisions of the Criminal Code that would enable their more effective use.⁴⁴ However, despite these changes, there is still a lack of frequent application. It can be stated that further efforts of the Ministry of Justice of the Slovak Republic

38 See STRÉMY, T., KLÁTIK, J. *Alternatívne tresty*, p. 19.

39 See KURILOVSKÁ, L., BLAŽEK, R., LORKO, J. *Hodnotenie Implementácie a budúceho vývoja sankčného mechanizmu po 10 rokoch účinnosti trestných kódexov v Slovenskej republike*. 228 p.

40 www.vlada.gov.sk/vlada-slovenskej-republiky-od-30-10-1998-do-15-10-2002/ [online]. Cited on Available on the Internet: <https://www.vlada.gov.sk/8/urad-vlady-slovenskej-republiky/?csrt=8962128212212268611>

41 www.vlada.gov.sk/vlada-slovenskej-republiky-od-16-10-2002-do-1-10-2006/

42 www.vlada.gov.sk/vlada-slovenskej-republiky-od-7-10-2006-do-8-7-2010/

43 [www.rchiv.vlada.gov.sk › old. uv › programové-vyhlásenie vlady od-9-7-2010- do- 4-4-2012 a od -27-4-2012-do-22-4-2016](http://www.rchiv.vlada.gov.sk/old_uv/programove-vyhlasenie_vlady_od-9-7-2010-do-4-4-2012_a_od-27-4-2012-do-22-4-2016)

44 For example, Act No. 214/2019 Coll., which made it possible to extend the imposition of the penalty of house arrest also to offences whose upper limit does not exceed 10 years - until then it was possible only for misdemeanours (upper limit up to 5 years).

from 2022-2023 confirm the efforts to adjust the legal status in order to enable the effective application of alternative penalties. This is also reflected in the latest amendment to the Criminal Code, on which the Ministry of Justice of the Slovak Republic has been working in recent months with the support of several experts in the field of criminal law.⁴⁵

The public opinion of the Slovak public on alternative sanctions

Public opinion on the use of alternative sanctions in criminal justice policy is important for their implementation. It is assumed that public opinion in favor of the use of alternative sanctions in the criminal process is one of the factors that would strengthen the dynamics of their use. At the same time, the moral pressure expressed by the group pressure of public opinion would positively influence the judicial practice of granting alternative sanctions, which is currently minimal and insufficient in Slovakia. Although normative creation has created new progressive possibilities for punishment, judicial practice in the use of sanctions is rigid and stereotypical. Although there are various factors that contribute to this, there is concern that the low support of public opinion, which is currently more punitive, significantly influences the underutilization of alternative sanctions in judicial practice.⁴⁶ Although the codification of alternative sanctions undoubtedly belongs among the important steps of modernizing the criminal justice policy also in Slovakia, their implementation into judicial practice has not been ideal in Slovak conditions so far.⁴⁷ Official statistics even show that despite the original intentions of the legislators, alternative measures remain largely unfulfilled. This conclusion can be supported by the publicly known fact that in 2020, Slovakia was among the countries with the highest number of prisoners per 100,000 inhabitants in the EU. While in 2011 there were 184 prisoners per 100,000 inhabitants, by 2020 there were already 195. As of December 31, 2020, there were 10,504 imprisoned convicts or persons restricted in their freedom in eighteen institutions under the competence of the Prison and Judicial Guard Service. However, compared to 2011, the number of crimes committed in Slovakia in 2020 decreased by a third. The number of imprisoned persons during this nine-year period, on the other hand, increased by eleven, as it emerged from the report on the fulfillment of tasks arising from the updated Concept of Imprisonment

45 Modern criminal policy - draft amendment to the Criminal Code [online]. [Cit 12.03.2023]. Available from Internet: <https://www.justice.gov.sk/tlacovespravy/tlacova-sprava-3780/>

46 See STRÉMY, T., KLÁTIK, J. *Alternatívne tresty*. 2018, p. 39.

47 See ŽILINKA, M. *K alternatívnym spôsobom vybavenia trestných vecí podľa zákona č. 301/2005 Z. z. Trestný poriadok*, p. 199-203.

for the years 2011 to 2020.⁴⁸ According to Tomáš Strémy and Jaroslav Klátik, authors of the publication „Longer Alternative Sentences,“ the judiciary has long argued that alternative sentences are not being used because there is insufficient control over the process of resocialization in the Slovak judicial system. Slovakia has implemented the Electronic System for Monitoring Persons (ESMO) only to a minimal extent, and the number of alternative sentences has essentially remained unchanged for a long time. Based on the conclusions of the Supreme Audit Office's (NKÚ) audit, it can be stated that this system was highly ineffective and inefficient after January 1, 2016, and its basic goals and expected benefits for society were not met. NKÚ found that in 2016, the number of persons monitored through ESMO was only 25, representing only 1.25 percent of the total 2,000 persons sentenced to alternative sentences annually. Of this number, only eight persons were given a sentence of house arrest.⁴⁹ According to the Ministry of Justice of the Slovak Republic as of March 8, 2017, 30 individuals were monitored through electronic monitoring, nine of whom were serving home imprisonment sentences. With such a small number of monitored individuals and utilization of ESMO, there was a risk of non-return on this investment, which was calculated over a six-year analysis. It turned out that there were certain fears or feelings of apprehension from prosecutors and judges in imposing home imprisonment sentences. However, the use of this sentence is humane towards the convicted person since it does not result in a disruption of social or work relationships.⁵⁰

In fifty European countries, the so-called „old continent,“ there were more than 1.5 million people in prison in January 2020, which averaged 103 imprisoned per hundred thousand inhabitants, compared to 131 in 2013. The number of prisoners for the given period decreased by one fifth, as regularly reported by the RE. Although the total number of prisoners in Europe has been decreasing for seven years in a row in 2020, the situation in Slovakia was different in this indicator, as was neighboring Czech Republic. The development and implementation of alternative punishments in Slovakia are apparently significantly influenced by ongoing changes in the political and judicial system. This is despite the fact that more than three decades have passed since the politically, socially, economically, culturally, and legislatively transformative year of 1989. In this context, we have conceived this article, which features its own theoretical foundation as a suitably appropriate starting point for developing innovative ideas related to the issue of

48 TA SR, 2021. Slovakia has the highest number of prisoners in the EU. Available on the Internet: <https://spravy.pravda.sk/domace/clanok/584845-slovensko-ma-druhy-najvacsi-pocet-vaznenych-osob-v-eu/>

49 Elektronik version (<https://www.nku.gov.sk/documents/10157/265201/96037 - 145052- 57 -pdf>)

50 See STRÉMY,T., KLÁTIK, J. Alternatívne tresty. 2018, p. 43.

alternative punishments.⁵¹

Conclusion

The issue of alternative sanctions has been one of the attractive and lively topics for several decades, expressing the explicit direction of humanizing punishment and penalizing beyond the horizon of distant future development of criminal law and penal policy of modern state.⁵² In recent times, a significant amount of information has emerged dedicated to the analysis of the relevant issue from various erudite legal theory and practice authorities. Many of them formulated fundamental cognitive conclusions aimed at preparing the general public and law students for new challenges associated with the humanization and streamlining of punishments and their enforcement. This process is associated with well-known names in the professional community, such as Prof. Jozef Čentés, Prof. Gustáv Dianiška, Prof. Lucia Kurilovská, Prof. Tomáš Strémy, Prof. Jaroslav Klátik, Doc. Miroslava Vráblová, as well as the names of experts from practice such as Prof. Ján Mazák, Doc. Ján Drgonec, and others. Their published views, opinions, and analytical perspectives were valuable guidance and inspiration for the authors of the article, who sought a comprehensive perspective on this continually evolving issue.

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51 EUROSTAT, 2020. *Prison statistics*. Available on the Internet: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Prison_statistics

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