

## Alternative Sanctions in the Spanish Criminal Law<sup>1</sup>

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**Abstract:** *The paper is mainly focused on alternative sanctions that are amended in the Spanish criminal law. We think that the Slovak criminal law is not very different in developing alternative sanctions as the Spanish criminal law and this is the main reason why we have entitled the present-ed paper with the above-mentioned title. The Spanish legal system (and most of legal systems) allows that some sanctions of deprivation of liberty can be suspended or substituted by other sanctions that prevent entry in prison if the offender fulfils the requirements.*

**Key Words:** *Criminal Law; Restorative Justice; Retributive Justice; Criminal Code; Alternative Sanctions; Compulsory Labour; House Arrest; Electronic Devices; Spain.*

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### Restorative justice versus retributive justice

The retributive theory means that the punishment is deserved, which in practice is often counter-productive for the victims and the offenders. On the other hand, the restorative justice theory shows that addressing the needs and harms done to the victim is needed in combination with an active effort to support the offender to accept responsibility for committed crimes and to focus on the causes of his/her behaviour.<sup>2</sup>

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<sup>2</sup> See ZEHR, H. *The Little Book of Restorative Justice*. 1<sup>st</sup> ed. Intercourse, PA: Good Books, 2002, pp. 58-59. ISBN 1-56148-376-1; DIANIŠKA, G., L. KLIMENTOVÁ, J. KOPRLOVÁ, V. KUBALA, T. STRÉMY a M. VRÁBLOVÁ. *Kriminológia*. 2. rozšír. vyd. Plzeň: Aleš Čeněk, 2011. 351 p. ISBN 978-80-7380-344-5; and SCHEINOST, M. Úvodní poznámka. In: Z. KARABEC, ed. *Restoratívni justice: Sborník příspěvků a dokumentů*. 1. vyd. Praha: Institut pro kriminologii a sociální prevenci, 2003, p. 4. ISBN 80-7338-021-8.

According to Howard Zehr, the differences between restorative justice and retributive justice are:<sup>3</sup>

*Restorative justice:*

- ✚ the crime presents a disruption of personal and interpersonal relations;
- ✚ the disruption leads to obligations;
- ✚ in the restoration process, justice involves: victims, offenders, and the society;
- ✚ focus is laid on needs of the victim and the offenders and on responsibility for restoration of damage.

*Retributive justice:*

- ✚ the crime presents a disruption of law and of the interests of the State;
- ✚ the disruption leads to guilt;
- ✚ the justice requires the State to decide on the guilt and to impose punishment;
- ✚ focus is laid on the offender who should get what he/she deserves.

The retribution theory believes that the harm caused to the victim will be remedied, but it is often counter-productive in practice for the victim and the offender. On the other hand, the restorative justice theory argues or, more precisely, really advocates for becoming aware of the damage the offender has caused to the victim, together with the effort to encourage him/her to assume the responsibility for the offence. At the same time, the restorative justice has the potential to transform the lives of the offender and the victim in a positive way.<sup>4</sup>

The proponents of the restorative justice have a different opinion from the traditional reformers of criminal law. Before they see victims, they also see offenders and how to get them back into society, i.e. how to reintegrate them. Naturally, the victims are people that were “hurt” by

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<sup>3</sup> See ZEHR, H. *The Little Book of Restorative Justice*. 1<sup>st</sup> ed. Intercourse, PA: Good Books, 2002, p. 21. ISBN 1-56148-376-1.

<sup>4</sup> See ZEHR, H. *The Little Book of Restorative Justice*. 1<sup>st</sup> ed. Intercourse, PA: Good Books, 2002, p. 59. ISBN 1-56148-376-1; BECK, E., N. P. KROPP and P. BLUME LEONARD, eds. *Social Work and Restorative Justice: Skills for Dialogue, Peacemaking, and Reconciliation*. 1<sup>st</sup> ed. New York: Oxford University Press, 2011. 313 p. ISBN 978-0-19-539464-1; and BRUNK, C. G. *Restorative Justice and the Philosophical Theories of Criminal Punishment*. In: M. L. HADLEY, ed. *The Spiritual Roots of Restorative Justice*. 1<sup>st</sup> ed. Albany: State University of New York Press, 2001, pp. 31-56. ISBN 0-7914-4851-7.

the offence, but, at the same time, they should be able to empathise with the offender as a person who could be punished in another way than by a verdict of imprisonment. The restorative justice focuses, inter alia, on the return of the victim into the society.<sup>5</sup>

From the seventieth of the last century, prison has been settled as a way for re-education and social reinsertion, since the “criminology of social reaction” has emerged,<sup>6</sup> which considers crimes not as an individual act, but as a product of social structures. However, this resocializing goal has the opposite effect. The internal population exceeds the capacity of the system and this obstructs the implementation of any social policy for prisoners with the adequate programs to help their social reinsertion.<sup>7</sup>

From the different angles, it has been questionable the possible resocialization, re-education, or reinsertion of criminals during the execution of a penalty of prison. It is held on the same idea: if the cause that led a person to commit a crime was his/her lack of adaptation to the social environment, he/she could hardly be readapted through a measure of deprivation of liberty. These measures will not let him/her interact with the environment in equal conditions as by the rest of citizens.<sup>8</sup>

It is known that the Spanish legal system (and most of legal systems) allows that some sanctions of deprivation of liberty can be *suspended* or *substituted* by other sanctions that prevent entry in prison if the offender fulfils the requirements. The legal basis for alternative sanctions instead of imprisonment creates the Article 25 paragraph 2 of the Spanish Constitution which highlights the final aim of punishments: “*The custodial*

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<sup>5</sup> See CLEAR, T. R. Community Justice versus Restorative Justice: Contrasts in Family of Value. In: D. SULLIVAN and L. TIFFT, eds. *Handbook of Restorative Justice: A Global Perspective*. 1<sup>st</sup> ed. New York: Routledge, 2008, p. 464. ISBN 978-0-415-35356-4.

<sup>6</sup> See De la CUESTA ARZAMENDI, J. L. La resocialización: objetivo de la intervención penitenciaria. *Papers d'Estudis i Formació*. 1993, n<sup>o</sup> 12, pp. 9-21. ISSN 0213-6015.

<sup>7</sup> See De la CUESTA ARZAMENDI, J. L. La cárcel no es la solución. *El Ciervo*. 1994, vol. 43, n<sup>o</sup> 515, p. 7. ISSN 0045-6896.

<sup>8</sup> See KASINEC, R. Alternativné tresty v pop kultúre. In: T. STRÉMY, ed. *Restoratívna justícia a alternatívne tresty v aplikačnej praxi*. 1. vyd. Praha: Leges, 2015, pp. 296-309. ISBN 978-80-7502-104-5; KLÁTIK, J. Uplatnenie práva na náhradu škody pri rozhodovaní o odklonoch v trestnom konaní. In: T. STRÉMY, ed. *Restoratívna justícia a alternatívne tresty v aplikačnej praxi*. 1. vyd. Praha: Leges, 2015, pp. 193-205. ISBN 978-80-7502-104-5; and KURILOVSKÁ, L. Rekognoscácia probácie a mediácie v slovenských podmienkach. In: T. STRÉMY, ed. *Restoratívna justícia a alternatívne tresty v aplikačnej praxi*. 1. vyd. Praha: Leges, 2015, pp. 51-71. ISBN 978-80-7502-104-5.

*sentences and security measures will be aimed at re-education and social rehabilitation, and may not involve forced labour*". These alternative sanctions try to avoid the serious consequences caused by the imprisonment to all human beings in their personal, familiar, and social spheres. Both institutions (suspension and substitution) were regulated in the Spanish Criminal Code separately: suspension in the Articles 80 – 87 and substitution in the Article 88. In 2015, the Spanish Criminal Code was modified (which suppressed the Article 88 about substitution) and the regulations of suspension and substitution of the penalties of deprivation of liberty were changed. Now, both institutions are regulated in the same chapter and section (Title II, Chapter III, Section 1). By this way, the regulation of suspension and the regulation of substitution of imprisonment were unified.

Arguments about the resocialization of prisoners make more sense when talking about short custodial sentences. Articles 13 and 33 of the Spanish Criminal Code about the definition and sanctions for crimes provide a classification for crimes according to their severity. Thereby, we can distinguish serious, less serious, and minor offenses.

Trying to avoid an effective compliance of short custodial sentences we have to take into account two fundamental reasons:

- ✚ short custodial sentences are provided for minor offences for which less traumatic sanctions would be enough;
- ✚ these short sentences carry, in many cases, an opposite effect to resocialization, as they permit the contact of the "minor offender" with other more serious criminals, while creating a risk of "contagion".

In this context, at the European level, a process guided to the promotion of alternative sanctions for short custodial sentences has been developed. Therefore, the Council of Europe in its Resolution (65) 1, dated on January 22<sup>nd</sup>, 1965, pointed that the *"custodial sentences should only be inflicted on the offender to the extent that meets the purposes of punishment"*, while recommending all the Member States:

- ✚ to have in their legislations provisions to let the judicial authority the possibility to suspend the execution of a deprivation of liberty sanction or to substitute that sanction for a conditional measure for the first offenders who had not committed a serious crime;
- ✚ to adopt provisions needed to ensure and to develop the application of *probation* or other measures which have the advantage to submit

- offenders during the probation to an assistance and vigilance to stimulate his/her reinsertion and to control his/her behaviour;
- ✚ to introduce in their legislations any measure to avoid imprisonment of the first offenders.

Some of the most important mechanisms applied in the legal systems in the European context to avoid imprisonment of offenders with short custodial sentences are: suspension of execution of the sanction (Articles 80 and following of the Spanish Criminal Code), work for the benefit of the community (Articles 39 and 49 of the Spanish Criminal Code), and the “diversion programs”.<sup>9</sup> “Diversion programs” present an important tool to avoid negative effects of the imprisonment. They are also known as the “third way”.<sup>10</sup>

The word “diversion” is used to express that the State renounces to a formal criminal proceeding and to a formal penalty. Instead of it, the process is derived to an alternative way which is characterised by its informal solutions, without stigmatising effects for the offender. These “diversion programs” mean an alternative for short custodial sentences. In Spain, the “diversion programs” are not included in the adults’ Criminal Code; they are included only in the youth justice system and incorporated in the Organic Law Regulating the Criminal Responsibility of Minors.<sup>11</sup>

## Suspension

According to the Article 80 of the Spanish Criminal Code, suspension of the execution of imprisonment consists in excluding, provisionally and under specific conditions, the imprisonment for the first offenders of a crime punishable by imprisonment for less than two years. It should be noted that the decision of suspension is a power of the judge or court; they can decide about the suspension (or not) considering whether it is

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<sup>9</sup> See CANO PAÑOS, M. Á. Las medidas alternativas a la pena de prisión en el ámbito del derecho comparado. *Revista Internacional de Doctrina y Jurisprudencia*. 2014, vol. 8, pp. 4-5. ISSN 2255-1824.

<sup>10</sup> The “third way” is considered with regard to genuine penalties on the one hand as well as with regard to precautionary or preventive measures on the other hand. See more LÓPEZ BARJA de QUIROGA, J. La tercera vía. In: *La Mediación Penal*. 1<sup>a</sup> ed. Barcelona: Generalitat de Catalunya, Departament de Justícia, Centre d’Estudis Jurídics i Formació Especialitzada, 1999, pp. 109-122. ISBN 84-393-4767-7.

<sup>11</sup> See *Ley Orgánica 5/2000 reguladora de la responsabilidad penal de los menores* [2000-01-12] [online]. 2000 [cit. 2017-03-06]. Available at: <https://www.boe.es/buscar/doc.php?id=BOE-A-2000-641>.

not likely that the person of the offender will commit new crimes. If the offender complies with the conditions during the fixed term, the punishment expires (and it is given as accomplished). If the offender does not fulfil the conditions, the suspension is revoked and the accomplishment is demanded.

### *Characteristics of the suspension*

Suspension:

- ✚ is discretionary and not mandatory. Article 80.1.1 of the Spanish Criminal Code states that *“Judges or courts can suspend...”*. Then, although the requirements are fulfilled, it is the judge who has to decide in each case;
- ✚ seeks to avoid dissocializing effects of the imprisonment (tension between security and dignity). For that reason, suspension is only referred to punishment (of deprivation of liberty) and not to liability, the payment obligation of which subsists;
- ✚ is conditional, with the imposition of obligations and duties. Article 83 of the Spanish Criminal Code states that if the offender commits any crime during a certain period of time, the suspension has no effect;
- ✚ duration: according to the Article 81 of the Spanish Criminal Code, the period of suspension will be from two years to five years for imprisonments under two years and from three months to one year for light sentences. The period will be fixed by the judge or court.

In order to avoid the danger of the commitment of new crimes, the judge or court can condition the suspension to the accomplishment of the following prohibitions and duties:

- ✚ prohibition of approaching the victim or his/her relatives: it includes the prohibition to be close to their residence, workplace, or places frequented by them;
- ✚ prohibition to keep in touch with certain persons or groups when there are evidences that they can facilitate the offender to the commitment of new crimes;
- ✚ prohibition to change residence or to leave temporarily without authorisation of the judge or court;
- ✚ personal appearance in the court with the periodicity indicated by the judge or court. This appearance can be made before the judge or court, at the police station, or before the determined authority;

- ✚ participation in training, labour, or cultural programs and in other similar programs;
- ✚ participation in detox programs (because of alcohol or drugs addictions);
- ✚ performing other duties that the judge considers as appropriate.

### **Substitution (recent suspension by accomplishment of certain benefits)**

The old Article 88 (recent Article 84) of the Spanish Criminal Code gave the possibility to the judge or court to substitute the imprisonment of those whose custodial sentence did not exceed one year of imprisonment. The imprisonment could be substituted by a *weekend arrest* (each week of imprisonment was substituted by two weekends of arrest) or by a *financial penalty* (two penalty fees per day of imprisonment). Besides, the weekend arrest could be also substituted by a financial penalty or by *works for the benefit of the community*.

There were two kinds of substitution:

- ✚ ordinary substitution: duration of the penalty to replace cannot exceed one year, for the permanent location may not exceed 6 months. There is also one necessary requirement – the offender cannot be habitual offender.<sup>12</sup> Considered are also personal circumstances of the offender, the nature of the event, his/her conduct, and the attempt to repair the damage;
- ✚ extraordinary substitution: duration of the penalty must be more than one year and less than two years. The extraordinary substitution requires the same requirements as stated above by the ordinary substitution.

The recent Article 84 of the Spanish Criminal Code gives the possibility to the judge to condition the suspension of the execution of the penalty to some measures or benefits, such as:

- ✚ accomplishment of the agreement reached by the parties by means of mediation;
- ✚ payment of fine;

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<sup>12</sup> Article 94 of the Spanish Criminal Code states that “habitual offenders” are “people who have committed three or more crimes within the term of five years”. See *Ley Orgánica 10/1995 del Código Penal* [1995-11-23] [online]. 1995 [cit. 2017-03-06]. Available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>.

✚ works for the benefit of the community.

It means that the new regulation is referred to substitution as a way of suspension.

### *Works for the benefit of the community*

Under the Article 39 of the Spanish Criminal Code, works for the benefit of the community are penalties of deprivation of rights, not penalties of deprivation of liberty. They consist of performance of several cooperation activities realised by the offender without retribution. These activities must have public benefit, social interest, or educational value and they cannot consist in forced labour.

#### *a) Regulatory developments*

The first attempted act to introduce the works for the benefit of the community in the Spanish legal system was in 1980. In fact, it was in the Draft of the Criminal Code in 1994 when the works for the benefit of the community were set up for the first time. Finally, on November 23<sup>rd</sup>, 1995, they were introduced in the Spanish Criminal Code of 1995 by the Act No. 10/1995 as a substitute penalty for the weekend arrests (Article 88.2) and as a subsidiary penalty for failure to pay fine (Article 53.1).

The exposition of reasons of the Spanish Criminal Code of 1995 established the reform of penalties. The reason for the Criminal Code to establish the works for the benefit of the community was to adopt any possible measures to achieve the objectives of the resocialization determined by the Spanish Constitution (Article 25).

#### *Permanent location*

The penalty of permanent location is regulated in the Article 37 of the Spanish Criminal Code as a penalty of deprivation of liberty. It consists in the permanence of the offender in his/her residence or in a determined place fixed by the judge in the sentence.

The scope of the penalty of permanent location covers its application as a main penalty and as a way of accomplishment of personal liability (subsidiary personal responsibility) for unpaid fine. The Act No. 5/2010, dated on June 22<sup>nd</sup>, 2010, incorporated the permanent location in the catalogue of the substitute penalties of imprisonment up to six months.



We can point out that the application of permanent location is reduced to the scope of light sentences.

One of the most problematic aspects regarding to the accomplishment of the penalties in the community is the way to guarantee effective implementation of the penalty. In relation to the permanent location, it consists in guarantee of the permanence of the offender in his/her residence or in the certain place determined by the judge. This kind of penalty needs the implementation of control strategies, including human or technological resources.<sup>13</sup>

Thereby, nowadays the control of the accomplishment of the permanent location can be done by two ways: by means of supervision by the police agents or by electronic devices. The control by police officers consists in regularly visits to control the permanent location. However, it can cause an overload for police officers. The possibility to control the execution of the permanent location by electronic devices was introduced by the Act No. 5/2010. Under the Article 37 of the Spanish Criminal Code, the judge can order the use of electronic or mechanical devices to supervise the accomplishment of the mentioned penalty.<sup>14</sup>

## Conclusions

The Spanish legal system (and most of legal systems) allows that some sanctions of deprivation of liberty can be suspended or substituted by other sanctions that prevent entry in prison if the offender fulfils the requirements. The legal basis for alternative sanctions instead of imprisonment creates the Article 25 paragraph 2 of the Spanish Constitution which highlights the final aim of punishments: *“The custodial sentences and security measures will be aimed at re-education and social rehabilitation, and may not involve forced labour”*. These alternative sanctions try to avoid the serious consequences caused by the imprisonment to all human beings in their personal, familiar, and social spheres.

Electronic devices are used by penitentiary institutions to control the presence of the offenders within the scope of their powers. Article 86.4 of the Spanish Criminal Code enables a kind to serve the sentence. It con-

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<sup>13</sup> See TORRES ROSSEL, N. Contenido y fines de la pena de localización permanente. *InDret*. 2012, n° 1, pp. 20-22. ISSN 1698-739X.

<sup>14</sup> See IGLESIAS RÍO, M. Á. and J. A. PÉREZ PARENTE. La pena de localización permanente y su seguimiento con medios de control electrónico. *Anuario de Derecho Constitucional Latinoamericano 2006: Tomo II*. 2006, vol. 12, pp. 1071-1107. ISSN 1510-4974.

sists in the substitution of the minimum time stay by electronic devices.<sup>15</sup> The Spanish General Secretary of Penal Institutions provides following kinds of vigilance systems: electronic bracelets, voice verification system, and global positioning system known as GPS.

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<sup>15</sup> See the official webpage of the Ministry of Interior of the Spanish Government, General Secretary of Penal Institutions: *Secretaría General de Instituciones Penitenciarias (Ministerio del Interior)* [online]. 2017 [cit. 2017-03-06]. Available at: <http://www.institucionpenitenciaria.es/>.

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