Alternative sanctions of imprisonment sentences and their contemporary tendencies

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Abstract

Alternative punishments represent a mirror of the spirit based on which both foundations of the criminal justice and sentence system was built. The later come as a result of the implementation of contemporary trends in penal rights and constitute a very important qualitative reform in the concept and system of penal sanctions. Their scope can be considered as broadly diverse and very resourceful.
The adoption of alternatives to imprisonment in the last decades did not cause a significant dent in the reduction of imprisonment sentences. Precisely for this reason in western countries a new trend has been emerging, mainly focusing on finding new alternatives to punishments by prison. Nevertheless alternative sanctions were considered as an opportunity by contemporary legislation's to resolve the ineffectiveness and unnecessary severity of traditional criminal sanctions. This humanitarian trend brought forth by the penal justice systems is also envisioned and fully adopted by the Penal Code of the Republic of Albania.

Keywords: sanctions, tendencies, rehabilitation, actuarial justice, system.

Introduction

The concept of intermediate, community or alternative sanctions should also be seen and understood also from the prospective of changes in the penal procedure tendency towards a simplified and partly consensual summary of the determination and imposition of criminal penalties (Albrecht, 1980, 33).
All systems strive to develop procedural mechanisms which enable criminal justice systems to cope with the increasing number of complex criminal cases (in particular economic crimes), and to improve system performance related to achieving goals. However, while through the 60' until the 70' the goals pursued by resolving out-of-court proceedings were focused on mainly reducing the high rate of crime, recent decades have been dominated by the arguments and theories debating and mainly focusing on the costs and economic justification of criminal sanctions.[1]
Strong arguments have been set out in favor of the alternative sentences, which are mainly based in mix of positive characteristics of the alternative programs and the negatives of imprisonment. Said reason revolve around the humanitarianism, financial and practical spectre (William & Mary, 1994, 709).
At the very least, alternatives to imprisonment can release financial and human resources, which therefore can be fully used and implemented in other public interest departments. Even if the idea of reducing criminal behavior through rehabilitation in favor of an approach aimed at limiting criminals is relinquished, it is impossible

[1] Can be particularly noted that the victim of the crime has become an important factor in the penal process.

to ignore the possibility of achieving said goal by using less resources. Recently less costly alternatives seem to do a much better job than imprisonment in lowering rates of recidivism.

The alternatives of punishment by conviction sentenced to imprisonment aim at avoiding harmful and irreparable consequences not only for the convict but also for the community in which he lives, the release of the convicted person from serving the sentence can be achieved if certain circumstances are established or met, most of which are already envisioned by the law such as education and rehabilitation of prisoners, prevention of loss of educational and preventive qualities of punishment, education of society, prevention of criminality.

The alternative forms in regard to imprisonment are specifically set out in the law, yet they do not constitute a must for the Courts. It always falls up to the court, while being the authority with the specific responsibility, to determine whether the convicted person should serve a prison sentence not in its classical form (isolation from the society) but in another form.

The route of taking alternative substitute measures and the replacement of the imprisonment sanctions, is a progressive trend in the contemporary penal procedures while introducing an important form in the concepts of criminal sanctions.

It's undeniable role of penology, as a science focused in the study of penal sanctions and treatment of other sanctions such as i.e. alternative sanctions, which for a category of criminals are more efficient and reasonably achieve the whole purpose of said punishment, which is, however, the re statement into society and not the punishment as an end in itself.

Alternative punishments coexist in full harmony with the tendencies and principles of the penal law on rehabilitative justice, as well as the main principles of criminal legislation. In doctrine, punishments or alternative measures refer to criminal judicial decisions, which set alternatives to imprisonment, as well as rehabilitation programs of convicts which consequently aim to establish a balance between the interests of society to be protected from criminality, such as the decision of their assignment (based on the type of obligations the court imposes), as well as the method by which they are realized by the programs provided by the Probation Service.

Main alternative systems to imprisonment sentences

Up until the end of the XIX Century the main commonly known types of punishments have been the only kind of sanctions that could have been imposed on criminal offenders based in the criminal legislation in force at the time (Salihu, 1995, 366).

Punishment alternatives, especially conditional punishments, for the very first time were introduced in the US and England also commonly known with the term "Probation". The XXI Century is visualized and commonly held as a new stage in the development of criminal law, consolidating and improving upon sentences and alternative measures while approaching and taking the most effective measures in the fight against criminality, and a more humane concept of dealing with delinquents. Surely, this orientation in the future will be accepted and will be expanded even more in all countries of the world (Salihu, Zhitija & Hasani, 2014, 206). Most prominent

and distinguished in predicting sanctions and alternative measure are mainly the Western European countries, England, Sweden, Denmark, France and Italy which put a high emphasis on the work made for the public interest.

In penal legislation there are three known alternative measures such as:

i. The British-American system also known as "Probation". As a main characteristic of this system is that the the criminal proceeding takes place against the accused, his guilt is found and proved, but the punishment is not pronounced. Such a criminal during the time-frame in which the sanction is yet to be pronounced shall be placed under the special supervision of a person appointed by the court. The United States has a dual judicial system, one at a national level and the other at the State level. As in the federal government system, any judicial system is legally supreme within its jurisdiction. However, there is also division or overlapping of responsibilities. For example, possession of narcotics may violate both federal and state law (William & Mary, 1994, 703). In practice, courts of a single State, with an average size, can handle more cases than the entire federal judiciary (Neubauer, 1992, 64).

Regardless, certain States have envisioned directives for sentences which limit juridical discretion. In certain States, the legislature has given the jury full rights to rule a verdict. If the defendant has committed a criminal offense that is the subject of federal jurisdiction, he will be tried in a federal court and the sentence will be decided by a district federal judge who will use the designated guidelines for the conviction of the defendant. Federal courts have jurisdiction to hear all the cases regarding the US Constitution and laws (U.S. Constitution. III/2).

This system of authorities in the US, federal and state based, is easy to grasp and define. Several critics to the system, especially those connected to penal sanctions, are far more complex and unsettling. Hence before reviewing innovative alternatives to criminal sanctions, an overview of the latter is needed (United States v. Eaton, 144 U.S. 677 (1892).

Even though streamlining guidelines such as federal and state systems can reduce inequality and uncertainty in punishment, other problems have emerged failing to provide the needed solutions. A major concern has been the long-term punishments, without the possibility of bail resulting in an increase of the number of prisoners. The United States has a high percentage of prisoners in regard to their population, more than any other country. By 1990, more than 750,000 people were sentenced in state or federal prisons. If more than 400,000 citizens are involved in local prisons are to be included the total prison population shall go beyond the one million mark (Jankowski, 1992, 78).

ii. The continental European system, whose main characteristic in regard to alternative sentences and measures among others state that the accused for the criminal offense not only is convicted by the court, but the later also pronounces the punishment. Said punishment is not directly executed, but it is suspended for a certain period, provided that the accused during this time does not commit a new criminal offense and fulfills the other conditions that the court may have imposed bin its decision. There is no official escort officer assigned to this system, but in case of non-compliance it may be replaced by another harsher sentence by the court.

iii. The mixed system contains elements of both European and British-US systems.

Based on this system, criminal proceedings are conducted against the accused, the punishment is pronounced but and its execution is suspended. Also the court may also impose a special measure of supervision for a certain period of time.

Each year prison population increases with a much higher rhythm than the worlds overall population. The financial costs of this prison over-population trend can be seen everywhere (Jankowski, 1992, 78). Based on the majority of experts opinion, prisons have already reached a 50%/60% population number over their envisioned capacity (Prison Bureau, 1988, 105), while yet the problem is not solely confined in the selected punishment system. No State shall be immune to the over-population. Two states that started alternative punishment programs, Oregon and Delaware, did so only when their prisons were almost at a critical point (Bogan, 1991, 36).[2] Prison construction costs now reach an average of 70,000$ per bed in the US (Klein, 1988, 37). The costs do not only limit themselves to construction fees. With almost every rating, prisons are far from the perfect form of retribution (Weinstein, Symposium, 1988, 96, 98).

The standard approach of the penal system against offenders has been to isolate them and expect their behavior to change, and do almost nothing with them (Weinstein, Symposium, 1988, 96, 98). There have been very few attempts to alternative ways up until now. For some the failure of the penal system can be accredited to the criminals being educated in the "schools of crime".

The Director of the United Nations Crime Prevention and Crime Justice, Gerhard O.W. Mueller wrote: *"The particular direction of the motives and the path is taught by the legal code definitions as favorable or unfavorable. A person becomes a criminal because of an excess of favorable determinants of the violation of the law and in the absence of unfavorable definitions of violation of the law"*(Mueller. 1977. 112)

Prisons offer many of these "favorable defenses for violating the law." Prisoners see the most violent gain power, respect, and fame through illicit means. In fact, prison may be the perfect environment to reinforce any encouragement of the violation than the law that exists in a prisoners' external life.

Contemporary tendencies to the alternatives of imprisonment sentences

Alternative punishments are a mirror of the spirit with which the criminal law and sanction system was conceived. They are a result of contemporary trends in criminal law and present a significant qualitative reform in the concept and system of penal sanctions (Kambovski, 2007, 527). Their range is quite broad and diverse. These punishments within their nature can be considered as preliminary sanctions and they aim to impose alternative punishments, which do not consist in imprisonment nor isolation, in all possible cases provided for by law. This trend of the humanization of criminal law is also expressed in the Criminal Code (Salihu, Zhitija & Hasani, 2014, 205).

[2] When the Punishment Commission was appointed in 1984, only two states imprisoned more people per capita than Delaware. The state had 274 prisoners per 100,000 citizens. du Pont, IV, "Expanding Sentencing Options: A Governor's Perspective," NIJ Reports, Jan. 1985, at 2. Oregon developed its own punishment instructions facing 18 of its 33 prisons under federal court orders over the population.

The enforcement of imprisonment sentences in the last decades did not help much in reducing the number prisoners. For this reason, in western countries, there is a growing trend of finding new alternative options to imprisonment. However alternative sentences were also seen as an opportunity by contemporary legislation to resolve the ineffectiveness and unnecessary severity of traditional criminal sanctions (Nikolli, 2015, 135).

In the criminal system, there is an international development with two opposite tendencies as of lately. Both of these have important but contradictory implications for the current position and future rehabilitation perspectives based on a penal punishment strategy. The first tendency, which is supported in common law countries, tends towards avoiding punitive sentences and increasing the application of imprisonment as a punishment to satisfy a high public demand for severity in the treatment of criminal, which ultimately has proven ineffective (Raynor and Robinson, 2009, 3).

This trend has been commonly identified as a "populist punishment" (Bottoms, A.E. 1995), "new-found honesty" (Pratt., Brown, Brown, Hallsworth. and Morrison, 2005) or even "control culture" (Garland. 2001), but very inapplicable in regard to rehabilitation needs. Data regarding the personal lives of offenders have been considered useful for determining the "level of control" exercised, similar to the theory of "actuarial justice" (Simon, 1992, 449).

Actuarial justice refers to a theoretical system in the criminal law area, bringing concepts and methods similar to actuarial mathematics. Actuars evaluate future risks such as unemployment, sickness, and death. Their projections are the backbone of insurance, finance, industry and security. In these areas, actuarial techniques are used to produce the rate of insurance necessary rates to set premiums to cover expected losses and expenses. In the justice system, followers of this theory support it to assess the criminal risk and perils for the design of treatment programs. Actuarial justice also relies on crime prevention strategies and the role of law enforcement authorities (Robert, 2011). Actuarial justice is almost an utopia in regard to the theories of the criminal character simply by considering it as natural and the deviation as normal (Feeley, M. and Simon, J. 1994, 173).

At the same time, the second approach was a powerful move towards the internationalization of "evidence" through the creation of probation services or equivalent agencies by placing rehabilitation at the heart of modern criminal justice systems. This trend has been particularly related to the enlargement of the European Union, but also includes other non-European countries, such as China. In addition, the European Council has promoted less punitive criminal policies, based on giving priority to human rights (Snacken, 2006, 143). Expanding the use of probation service implies a commitment to the rehabilitation of criminals (Raynor and Gwen Robinson, 2009, 3).

The rehabilitation of criminals can be understood and interpreted in many different ways. At different moments in the history of modern criminal systems, various models of rehabilitation have been promoted. Each model sets out, explicitly or implicitly, a set of arguments for its advantages and disadvantages.

The theory or rehabilitation holds medicine at its core, explicitly used to cure physical

illness. Thus, like illness, crime is not seen as being chosen by the practice of free will of a person. Rather, choices are influenced by factors that are referred to as "risk factors". Said factors can stay dormant within the individual (biological or psychological) or express themselves outside the individual (social). Thus if these factors are not correctly diagnosed, then criminal shall not recover and his conduct will continue. By contrast, rehabilitation is possible when the causes are identified and then treated appropriately.

Punishment by imprisonment, also known as deprivation of liberty, was widely applied to most of the criminals found guilty by courts for more than two centuries in all countries of the world. This type of punishment in the last thirty years has been subjected to a serious criticism in the science of criminal law (Salihu, Zhitija & Hasani, 2014, 205). Firstly such methods have not contributed in lowering crime rates. Contrary, criminality in many European countries and the world is currently growing. Organized crime is increasing and new and very dangerous forms of it such as trafficking in persons, drug trafficking, money laundering, cybercrime etc. are being introduced. Increasingly, children and young people are involved in criminality, and criminality is also increasing among young women. A number of those who have served a prison sentence are again committing criminal offenses.

While rehabilitation, especially the one based on the theory of social learning through "programs strives to achieve a regain of control upon their life and social standing of convicts while helping them learn the necessary skills such as hearing, communication, critical thinking, creativity, problem solving, self-management, and self-control " (McGuire, 2002).

Rehabilitation relies heavily on the argument that it is better for the author of the crime, the victim and society because it can reduce victimization and further continuation of a crime chain. This overall is quite more useful to the common good of society (McGuire, 1995).

Traditionally, judges have always held a wide discretion when it comes up to giving a sentence under the minimum required by the law (Burns, 1993, 527, 537). These sentences could be based on any factor that the judge would consider as important, there was no need to provide an explanation for the judge's decision, and the decision was virtually undisputable if it was within the legal limits. This was a matter of high concern in the US before guidelines came into force, Congress passed statutes to determine the boundaries of punishment for various offenses in federal courts (William & Mary, 1994, 704).

Regardless, these statutes almost always gave a wide discretion to the judge in taking the right sentence for a special case. Based on this system, the judge should evaluate each case separately and take a decision which from his interpretation would serve as appropriate to both the criminal and society.

Sentence given to an individual might depend from any factor "in regard to life and characteristics of the defendant". However, there are several problems with this traditional sentencing process. By allowing judges to make sentences based on their political philosophies and their concepts of justice, it might result in dealing with different treatment of defendants in similar situations. The punishment given to an individual could have depended more on the personality and background of the

judge than on the characteristics of the defendant (Lee, 1990, 681).
Different sentences were, for the most part a result of various judicial philosophies regarding the purpose of the punishment. A judge could impose a longer prison sentence while another may have decided on probation because the judge believes that the main purpose of the sentence in itself is rehabilitation (Weigel, 1988, 98) (Grim. L. 1989, 1813).
Another problem eventually came to light. The sanction given to a defendant rarely reflected the actual time of the act. Groups of victims highly ignited a public awareness by criticizing that while sentences given to convicted persons may have reflected the seriousness of their crimes, the length of the latter did not actually coincide with the gravity in itself (Polito, 1990, 241).
It should be emphasized that at the time we live in, despite criticisms and the negatives of imprisonment, this type of punishment cannot be immediately ceased for many criminals that have an indispensable need for such measures. Determining the negative aspects of imprisonment, in criminal law and practice on one hand, as well as efforts to find more effective measures to combat criminality and the concept of humanizing criminal law and effectively reeducating criminals, on the other hand, contributes to the foreseeable sanctions and alternative measures in the criminal law of Europe, the United States of America and some other parts of the world in the last thirty years, as substitutes for imprisonment.
Awareness that the majority of criminals shall not go back to crime and the fact that first time violators have remained as such, only committing a crime once, encourages pursuing a double criminal policy, if we refer to and keep track of repeating criminals (Figlio and Sellin, 1972, 34).
Imprisonment was considered as a sentence for criminals who have high probability to go back on committing severe crimes and would consequently be in need for therapeutic interventions (long term); for criminals with relatively low danger (first time offenders), community sanctions or non-punishment policies should be applied (Albrecht, 1980, 30).
The need for alternative sanctions and imprisonment in the 60' and 70' in Europe was characterized by an extensive increase in crime rates, which in its own was surely a consequence of a modernization process which influences the social structure, integration mechanisms and control. In particular, increasing property crimes imposed a heavy burden on criminal justice systems. New forms of crime have emerged based on technological, economic and social developments.
A debate referring to criminality and penalties shad a light particularly on the dangers regarding the functionality of criminal law, prevention, resulting from the imposition of many penalties (Popitz, 1968, 39).
In Austria and Germany, the debate on prison alternatives was particularly focused on short-term imprisonment. This was followed by a profound discourse about the negative effects of short-term imprisonment which began with Franz vs. Liszt (representing the modern school of criminal law) at the end of the 19th century. Franz against Liszt expressed distrust in the concept of prisons and short-term imprisonment. In the case of short-term prison sentences, he argued that the treatment programs could not be implemented, so the negative impact of prisons

would undoubtedly prevail. In 1969, when the "General Criminal Law Reform" in Germany was introduced the legislation set forth almost a full prohibition of short-term sentences (up to six months). Instead of short-term imprisonment, a fine was to be applied under certain conditions (Albrecht, 1980, 40).

While Germany and Austria pursued a policy of "monetary fines instead of short imprisonment sentences", other European countries, also implementing prison alternatives, continued to use short-term imprisonment. The issue of short-term prison sentences shows that there was no uniformity in the European criminal policy which did not even create the likelihood that such alternatives would be favored. Criminal policies have been mainly characterized national priorities, as well as specific (historical) features regarding criminal sanction systems and punishment practices (Albrecht, 1980, 31).

Today more than ever the modern theory of just sentencing *just desrts* is emerging, the considers the punitive punishment of criminal sanctions as the most sensible purpose while taking in consideration the principle of proportionality (Starkweather, 1992, 855). This theory seeks to defend the human dignity throughout sanctioning of a crime while guarding a balance with the behavior of the defendant.

Such theory has been widely debated by philosophers, most notably Mr. Andrew Von Hirsch who highly opposes the utilitarian theories of prevention, but also differs from the Kantian proposal "An eye for an eye a tooth for a tooth".

During the last two decades the retribution theory of punishment has been revitalized mainly due to the inability of other theories, such as rehabilitation and prevention, to make a change in the reduction of crime, philosophers and scholars have turned to punishment as a practical justification for retribution (Lewts, 1976, 287). Regardless, even though punishment is considered to be the oldest theory on crime sentencing (Lafave, 1972, 24), there has never been a universal agreement on its definition.

Traditionally the main notion concerning punishment is that the criminal behavior constitutes an infringement of moral and natural order, and defying such order requires a payback of some sort (Christian, 1986, 11). Hence, a criminal, is punished because him/her deserves it. This interpretation of punishment is based on the "just deserts" principle (to get what you deserve).

The concept of just desert seeks to safeguard the human dignity through punishment. Such concept states that a person is a rational entity with free will to make a moral choice whether to partake or not in behaviors commonly known as a forbidden. The punishment under the principle of "getting what you deserve" addresses a defendant as a dignified human being by responding to his or her behavior in a way that respects his or her choice of engaging in misconduct (Von Hirsch, 1976).

Such concept fundamentally changes from the utilitarian and rehabilitation theories (Lewis, 1970, 298). The moral order that supporters of such theory seek is to restore the existence of "fair" relationships between individuals and the community (Van Ness, 1986, 117).

"Fair relationships" are regulated by the highest authorities (Benn & Peters, 1969, 28), being it God (Van Ness, 1986, 23), natural law, or social contracts (Gittler, 1984, 117). In other words, "moral order" is the ideal state in which society can function. Thus, according to this definition of punishment, crime is a behavior that hinders

"fair" relationships in a community: relations between the offender and the victim, the offender and the community, and the victim and the community (Van Ness, 1986, 117).

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