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ROMAN LAW AS AN IDEA BASIS FOR PUNISHING IN THE CONDITIONS OF THE SLOVAK REPUBLIC*

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Abstract. In the presented paper, the author focuses on the study and description of the influence of Roman law, or its ideological bases, on the legal regulation of punishment through the Criminal Code in the conditions of the Slovak Republic. Author then pays special attention to the legacy of Roman law and its identification in the institutes which form the basis of the punishment mechanism, as well as the importance of this legal system for the individual basic principles on which punishment is subject in the conditions of the Slovak Republic. Finally, the author also deals with the method of punishing the so-called concurrence of criminal offenses (as a form of multiple crime), in comparison with the basic approaches that were created in the given sphere by the legal system of Roman law.

Keywords: Roman law, punishment, basic principles of punishment, Criminal law of the Slovak Republic

INTRODUCTION

Among all branches of law, criminal law is perceived as having the most severe sanctions, or one that interferes with the rights of individuals by perhaps the most. This is conditioned and caused precisely by the fact that criminal law undoubtedly protects the most important interests in society, whether we are talking about the interests of individuals, legal entities, the state or the European Communities.

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It is then indisputable that if such a system is to work, it is important that the penal framework itself is set up properly. Although we have no doubt that it is the criminal policy of a state (and thus the approach of the legislator to sanctioning) that reflects the living conditions of a given society as well as the historical memory of which state, it would be wrong for us to look at these in the way that we would not consider the importance of Roman law for the given sphere of criminal law.

We believe that what we perceive as the basic research goal of the presented paper, that it is the significance of Roman law for the system of punishment in the conditions of the Slovak Republic that is observable, both within the individual institutes and within the ideological basis itself. In the following text, we will therefore address the specific areas in which aspects of Roman law could be identifiable.

1. GENERAL ON THE IMPORTANCE OF ROMAN LAW FOR THE REGULATION OF SANCTIONING IN THE SLOVAK REPUBLIC

If we are to characterize the basic pillars on which punishment has been imposed under the conditions of the Roman law system, such pillars would undoubtedly be an emphasis on the punishment itself and its deterrent function [Aláč 2020, 137]. In this way, the punishment affected not only the person who committed the violation of objective law, but also to other persons, whereby the imposition of punishment undoubtedly fulfilled not only the repressive function but also the preventive function (both individual and general). Already within the given framework, it is then possible to perceive certain parallels that have become part of the regulation under Act no. 300/2005 Coll. Criminal Code as amended[1] – especially in relation to the preventive function, but with the intentions of the rule of law.

The approach of the Roman law system is then linked to the fact that the imposition of the punishment (as well as the court proceedings themselves) was relatively rapid, whereas the same effectiveness is also seen in relation to the execution of such a punishment. The preventive function in terms of general prevention was fulfilled not only by the public serving a punishment,[2] but also the cruelty of punishment itself (which is not possible in the conditions of a democratic state with regard to the prohibition of torture, cruel and inhuman treatment, or with regard to the acceptance of the principle of humanism – as the perpetrator must also be treated as a human being with a framework of

[1] Hereinafter: Criminal Code or CC.

[2] However, a certain exception, which, of course, has not been reflected in the legal systems of states based on the Roman law system, is that members of the upper classes have been allowed to commit suicide in private instead of serving their punishment in public.

fundamental rights and freedoms). The type of punishment itself then depended on the person's social status, with the lower the person's status, the stricter the penalties [ibid., 138]. Looking at the time of Ancient Rome, "[...] the basic punishments were execution, exile, corporal punishment, imprisonment and fine" [Ivor et al. 2006, 341].

A primary insight into modern legal systems (with emphasis on the legal system of the Slovak Republic) gives us a certain basic answer regarding the influence of Roman law on their very content. The effect itself can be differentiated into two lines. On the one hand, it is above all the basic principles of punishment, abstractable from Roman criminal law, which still apply today (or whose derivatives are identifiable), on the other hand, it is an absolute departure from the differentiation of the type of punishment (penalty) from the social status of the person. In this context, it can be stated that while the types of penalties are determined in general[3] (in an exhaustive manner, considering the framework of the principle *nulla poena sine lege*), the actual choice of the type of punishment (and its imposition) depends on the judicial individualisation (taking into account the circumstances of the particular case). On the other hand, legal individualization expresses a certain framework, practically the lower and upper limit of the rate within which a given punishment can be imposed. Such an approach avoids the arbitrariness of the court (if the punishments are set to be absolutely indeterminate), on the other hand, it is possible to take into account the seriousness of the conduct of a person and impose an appropriate punishment (taking into account its type and degree).

Principles of imposition of punishments (penalties) in the conditions of the Slovak Republic. The principles governing the imposition of punishments are, by their very nature, categories which, in the circumstances of substantive criminal law, do not act as institutes *sui generis*, however, rather than aspects that influence and create the sentencing process as certain limits in the implementation of the work of courts and judges. From a practical point of view, they represent a concrete reflection of the protective function of criminal law in the legislative text. The link between theory and practice is extremely important, as principles, if we perceive them as rules of punishment, will only be applicable in application practice if they will be sufficiently abstract, which

[3] In the conditions of the Slovak Republic, a certain exception is the sphere of punishment of juvenile offenders (i.e. persons who have reached the age of 14 but have not exceeded the age of 18), as the legislator narrows the range of types of penalties that can be imposed in relation to them. This is mainly due to the fact that in the case of juveniles, the basic intention is not to punish the perpetrator himself, not at all to make the punishment defamatory, but to have an interest in resocializing such a person. In the above, it is then possible to observe the importance of the fact that a imprisonment can be imposed on a juvenile offender only in the most serious cases, if the imposition of another type of punishment is not relevant with regard to the criminal activity.

in our opinion is met in the conditions of calculation of Section 34 of the Criminal Code.

The first of the principles of punishing under Section 34(1) is, in essence, the purpose of the punishment, it encompasses several sub-principles, the specific combination of which undoubtedly depends on the committed act. From the text "A penalty serves the purpose of protecting the society from the perpetrator of crime by preventing him from continuing to commit crime, and creating conditions for his re-education with a view to making him lead a regular life and, at the same time, discouraging other persons from committing crime; moreover, a penalty expresses moral condemnation of the offender by the society." It is possible to derive not only individual repression (which has its limits in our view also in the principle of personality), as well as individual and general prevention. In a democratic society, repression of the perpetrator cannot be perceived as the only purpose of the imposed punishment (based on the starting points of restorative justice), this goes "hand in hand" with an interest in protecting society, or with the education of the perpetrator. It is under the elements of the offender's education that the legislator's interest in the implementation of the resocialization process is noticeable, although from our point of view, it is the line of combination of individual repression and prevention that represents perhaps the most demanding effect of punishment [Mencerová, Tobiášová, Turayová, et al. 2015, 294], with the most questionable result of the implementation. Unlike protective measures (in comparison with the provisions of Section 35(1) CC), punishment is a category of sanctions that expresses the moral condemnation of the perpetrator by society. However, it is the principle mentioned above that states that, in the end, the condemnation is not absolute but relative to the act committed.

Another of the principles of punishing is the so-called the principle of the lawfulness of punishment, which ultimately constitutes a fundamental principle of substantive criminal law. It expresses one of the lines of generally perceived legality in the conditions of the Criminal Code (as a reflection of the principle of legality contained in Article 49[4] Constitutional Act no. 460/1992 Coll. Constitution of the Slovak Republic as amended), and that the type of punishment and the sentence may be based only on the definition set by the legislator (*nulla poena sine lege*). The principle of individualization of punishment is immanently connected with the principle of legality, while in the literature [ibid., 296] we find the opinion that a punishment that is not individualized is not legal. We dare to disagree with the above in such a general definition (without further specification), as the legality of the punishment (in the intentions of paragraph 2) does not have to be conditioned by the principle of

[4] The provision: "Only the law shall lay down which conduct constitutes a criminal act, and what punishment, or other forms of deprivation of rights, or property, may be imposed for its commitment."

individualisation of the punishment.[5] However, this does not deny that these are not interacting sets, whose correct definition can be a more demanding process in practice than the decision about the guilt of the perpetrator alone [Jelínek et al. 2019, 452]. It is the principle of individualisation of the punishment (together with the personality of the punishment) that represents the category which is perhaps most reflected in the application practice and which influences the type and scope of the punishment imposed. We encounter primarily the level of judicial individualization of punishment, as the line of legal individualization (which follows from the legislative text, including mechanisms affecting the movement of the upper and lower limits of the penalty of imprisonment, primarily with the intentions of Section 38(2) CC, the institute of extraordinary punishment reduction or the application of the principle of sharpening the criminal rate may also be included here) has a more general character, as it is affected by the wording of the Criminal Code. Peculiarities of the case (with regard to the manner of committing the act and its consequence, fault, motivation, perpetrator, his circumstances and the possibility of his correction) come into consideration precisely in the process of judicial individualisation. We see the purpose of judicial individualisation not only in terms of setting the basis of proportionality of punishment, but e.g. also with regard to whether any of the alternative punishments is possible (and we do not consider this to be a marginal question). Within the above, the meaning of provisions of Section 34(5) CC cannot by overlooked, for the individualization of punishment in relation to the developmental stages of crime, or to forms of criminal cooperation.

From our point of view, personality of punishment (in accordance with the provisions of Section 34(3) CC) represents one of the most problematic principles of imposing punishments. We believe that, although it is of undeniable importance also with regard to the formation of individualisation of punishment (also an impact on the very legality of punishment), the very formulation of the given principle in the Criminal Code has a certain logical inaccuracy. While the first part of the provision "Punishment should only punish the offender [...]" is to be a rule, according to which the punishment should punish only the person of the perpetrator (while from a practical point of view it is absolutely impossible in most cases), a visible problem from the point of view of implementation, the legislator tried to suppress by the second part of the provision "[…] so as to ensure the least possible impact on his family and those close to him." We see the problem precisely in the vagueness of the

[5] Based on a kind of legality in the narrower sense, in line with the principle of *nulla poena sine lege*, on the contrary, legality in the broadest sense may, in the event of non-compliance with the individualisation of the punishment, constitute an element of disproportionate punishment, which may ultimately constitute a ground in the appeal proceedings for annulling all or part of the decision (in connection with the punishment).

connection "the least possible impact." In our opinion, this should be seen as a starting point for the sentencing process, but not an absolute limit from which there is no possibility of deviation.[6] It is indisputable that in a specific situation the punishment imposed (practically regardless of the chosen type and degree) will in some way, whether explicit or implicit, affect other persons in the environment of the offender (as defined by the legislator). However, the interest of the legislator is clearly stated, so that such an impact is as small as possible, although the assessment of the above is in the hands of the subjective opinion of the judge (or court).

Practically the last, but no less important, principle of imposing punishments in the sense of the Criminal Code is the principle of independence (paragraph 6) and the principle of exclusion of mutual applicability (paragraph 7). This is a relatively clear rule in which the court's discretion is weakened, the exception is the process of imposing several types of punishment side by side, especially in circumstances where several offenses have been committed (for example, in parallel), whereas the imposition of several types of punishment next to each other (respecting the exceptions within the meaning of paragraph 7) is the most addressive in terms of the purpose of the punishment and best reflects all areas of the offender (with regard to the wording of Section 31(2) CC). From the practical point of view, all types of punishments in terms of the wording of Section 32 CC must be perceived as separate punishments, with the exception of the penalty of loss of honorary titles and decorations and the penalty of loss of military and other rank (however, this does not follow from the principles of imposing penalties in the sense of Section 34 CC, but from the own conditions and preconditions under which the given penalties can be imposed, practically as secondary punishments). In terms of positive regulation of the principles of imposing penalties, we would like to draw attention to the wording of Section 34(4) CC, second sentence, as this was amended with the wording "[…] unless this Act provides otherwise" with effect from 1st August 2019, in connection with the adjustment of the conditions under which a punishment of house arrest may be imposed.[7]

As part of the acceptance of direct criminal liability of legal persons into the legal order of the Slovak Republic, the legislator amended (among other things) under Act no. 91/2016 Coll. on Criminal Liability of Legal Persons and on Amendments to Certain Acts, as amended[8] not only some different

[6] The above is a frequent ground of appeal in application, but in the incorrect perception of the principle as an absolute criterion, not as a basis for the discretion of the court.

[7] According to the *de lege lata legislation*, a house arrest punishment may be imposed in accordance with Section 53(2) CC "[...] for an offense with an upper limit of the penalty provided by [...] Criminal Code not exceeding ten years, but at least at the lower limit of the penalty of imprisonment established by [...] Criminal Code [...]."

[8] Hereinafter: CLLP Act.

types of penalties (with regard to Section 10 CLLP Act), as well as some principles concerning the punishment of legal entities, in the sense of Section 11 CLLP Act. Given the fact that the purpose of this paper is to focus on the impact of Roman law on these institutes, we will not go into detail on the level of penalties in relation to legal persons.

2. PUNISHMENT OF CONCURRENCE OF CRIMINAL OFFENSES

The second basic line that will be addressed in the present paper is the issue of punishing concurrence of crimes, as concurrence is punished on the basis of principles based on Roman law (at least with regard to connotations). The punishment of concurrence of crimes can be perceived as a fundamental substantive effect. As criminal law is based on the premise that in relation to the question of the offender's guilt and punishment, all provisions of the Criminal Code should be based on, the offender's criminal liability is inferred in relation to all converging crimes. In this case, however, a separate penalty is not imposed for each of the converging crimes, but a cumulative penalty or an accumulative penalty, depending on the circumstances of the particular case. In the context of concurrence punishment, certain basic principles generally apply (cumulative, absorption and sharpening principles), the specific use of which depends on the certain legislation.

First of all, with regard to the principles relating to the punishment of concurrence, criminal law theory distinguishes between three basic principles – the cumulative principle, the absorption principle and the sharpening principle. The specific concept of their use and their application framework is then determined by the Criminal Code (supplemented by constant application practice). In the case of the cumulative principle (or the addition principle), it is practically the case that the offender is punished separately for each of the crimes he has committed (in parallel), subsequently, the individual penalties imposed are added up (in the context of which this is a manifestation of the rule of Roman law *quot delicta tot poenae*). This principle primarily pursues the preventive side and the primary consideration is retribution against the offender. However, the penalties imposed in this way (usually disproportionate penalties) lose their real meaning due to their length, whereas even a correction by the maximum length of the punishment which may result from the application of the addition principle does not solve the fundamental problem of that principle. The second basic principle is the absorption principle (*poena maior absorbet minorem*), through which the emphasis is expressed not on the seriousness of the offenses but on the person of the offender. In essence, it is a procedure in which the most severe of the punishments absorbs the punishments more leniently (which would be possible if the offender were punished for each of the offenses separately). It takes three forms in legislation – the

absorption of criminal offenses, the absorption of criminal rates and the absorption of penalties [Mencerová, Tobiášová, Turayová, et al. 2015, 261]. The last of the principles of punishment of concurrence is the so-called sharpening principle (*poena maior cum exasperation*), which is a certain complementary to the cumulation and absorption principle (as it removes the excessive rigidity of the cumulative principle and, conversely, tightens the application framework of the absorption principle). In essence, in the case of the application of the sharpening principle, the most severe punishment (relating to one of the converging offenses) is further tightened, precisely because it is a crime committed in parallel. In applying the principle of sharpening, it is possible for the punishment to be imposed above the upper limit of the most severe punishment.[9]

The Criminal Code in cases of concurrence punishment is governed primarily by the principle of absorption (as it is based on the penalty rate of the converging crime, the most severe criminal offense), this is complemented in certain aspects by elements of the principle of cumulation and sharpening.

The principle of absorption manifests itself in the context of the punishment of concurrence in the sense that the punishment (whether cumulated or accumulated) is imposed according to the provision that applies to the most serious criminal offense. The most serious criminal offense is considered to be the one with the highest rate of imprisonment (or a criminal offense that alternatively allows the imposition of a life sentence), if the upper limits of the converging offenses are the same, the more severe offense is the one whose lower limit of the imprisonment is higher. However, if both the upper and lower limits of the imprisonment are the same, a more severe offense is considered to be one in which the imposition of alternative types of punishment is not possible (where a smaller number of such alternative sanctions is possible). At the same time, the Criminal Code stipulates that if the lower limits of the penalties of imprisonment are different, is the lower limit of the punishment (both cumulated and accumulated) the highest of them. From the point of view of determining the punishment, it is then true that the upper and lower limits of the imprisonment are the highest for converging offenses (in line with the principle that stricter penalty limits absorb more lenient).[10]

The elements of the cumulative principle are manifested primarily on a horizontal level, as the imposition of several types of penalties is possible in the context of concurrent penalties. As follows from Section 41(1) CC, in

[9] With regard to the application of the principle of sharpening there is only one case in which a punishment may be imposed even above the upper limit of the penalty of imprisonment.

[10] This means that in the case of concurrence of offenses with a penalty of 2 to 10 years and 3 to 8 years, the penalty for imposing a cumulative or accumulative penalty will be a penalty of 3 to 10 years. However, a new rate is not created in this way, this provides a framework for concurrence penalties.

addition to the punishment admissible in the sense of the most severe criminal offense "[…] possibly as part of a cumulative punishment [note of the author – but also in the context of a accumulative punishment, as it is imposed according to the principles for the imposition of a cumulative punishment] to impose another type of punishment, if its imposition would be justified by one of the converging offenses […]," while it is necessary to take into account the wording of Section 34(7) CC, which provides for penalties that cannot be imposed side by side. It must also be observed that, as far as possible, if only a imprisonment is imposed in respect of one of the converging offenses, the offender cannot be punished as the only punishment other than imprisonment. If there is a cumulation of types of penalties, this fact should be taken into account in relation to the imposition of such several types of penalties.

As mentioned, the absorption principle is in some cases modified by the sharpening principle in the case of concurrence penalties. The conditions for the application of the sharpening principle in relation to the imposition of a cumulative or acumulative penalty are cumulatively defined within Section 41(3) CC, the basic premise is that the use of the principle of sharpening is only possible in the case of concurrence of criminal offenses committed by several offenses (which is expressed by the legislator as "committed by two or more acts"). The principle of sharpening applies in the case of multiple concurrence, provided that the court imposes a cumulative or accumulative punishment for two or more intentional offenses, at least one of which is a crime (more serious than the offense). Applying the principle of sharpening, the upper limit of the punishment of imprisonment of the most severe criminal offense is increased by one third[11] (the basis for the calculation is the very upper limit of the most severe criminal offense, not the difference between the upper and lower limits of the imprisonment, as is the case with the calculation of the ratio of aggravating and mitigating circumstances within the meaning of Section 38 CC), while, provided that the conditions for the application of the principle of sharpening set out above are met, this is a mandatory court procedure.

CONCLUSIONS

Conclusions can be drawn both at the general level and at the specific level. First of all, within the general level, it can be stated that the influence of Roman law is undoubtedly noticeable in the sphere of punishment, even with regard to the legal order of the Slovak Republic. This is then linked to specific

[11] Assuming that the upper limit of the imprisonment of the most severe criminal offense would be 10 years, after applying the sharpening principle (an increase of one third), the new rate would be 13 years and 4 months.

conclusions, where it can be stated that the influence of Roman law is observable in the creation of the basic principles of punishing (within the meaning of Section 34 CC), however, it should also be noted that not in relation to all of them. It is precisely some of the principles (such as the principle of humanism) that are more the result of the democratic establishment of states or the democratization of criminal law in the legal systems of modern European states.

The second specific conclusion is the statement in relation to the punishment of concurrence. It is undeniable that punishing concurrence of offenses only through the principle of cumulation (where a separate penalty would be imposed for each offense committed) would be unsustainable, it is precisely the drafting of the principle of absorption or sharpening (which represents a certain compromise in relation to the punishment of concurrence) that completes the overall framework of this question. We believe that without the foundations laid down by Roman law, it would not have been possible to conceive the starting points properly in relation to this issue.

It can then be comprehensively stated that, after a basic view, it is indisputable that the setting of punishment in the conditions of the Slovak Republic is influenced by the starting points of the legal system of Roman law, primarily as an ideological basis, although in some issues it is possible to identify a broader impact (such an issue is undoubtedly the fundamental principle of criminal law *nulla poena sine lege*, which limits the issue of punishment itself in practically all legal systems of modern European states).

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