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## COMMUNICATING CONFIDENCE: SUSPENDED SENTENCES AS COMMUNICATIVE PUNISHMENT

**Abstract:** *The article identifies a distinctive model of suspended sentences that exists in contemporary Serbia and Slovenia. By employing Antony Duff's notion of 'communicative punishment', the article suggests that suspended sentences are a robust and comprehensive penal instrument which promotes an inclusive, dialogic, and non-stigmatizing approach to criminal offenders. To demonstrate this, the article contrasts Duff's theory with three key domains of suspended sentences in the two countries: (a) philosophical and theoretical commitments, (b) substantive and procedural law and (c) execution of sanctions. The article concludes by emphasizing the pronounced capacity of these sentences to communicate confidence and trust of the state that the convicted person will not reoffend – despite a non-custodial sanction. Finally, the article proposes modest legal modifications which pertain to the court's ability to determine relevant facts and communicate better with the offender.*

**Key words:** Suspended sentence, Communicative punishment, Probation, Crime, Punishment, Sentencing, Criminal law, Antony Duff, Serbia, Slovenia.

### 1. DEVELOPMENT OF THE 'YUGOSLAV' MODEL OF SUSPENDED SENTENCES

The suspended sentence (*uslovna osuda* in Serbian, *pogojna obsodba* in Slovenian)<sup>1</sup> first became part of the Serbian and Slovenian system of

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1 In this article, we use the term "suspended sentence", because this term is used in the official translations of both the Serbian and Slovenian criminal codes ([https://www.mpravde.gov.rs/files/Criminal%20%20%20Code\\_2019.pdf](https://www.mpravde.gov.rs/files/Criminal%20%20%20Code_2019.pdf) and <https://www.policija.si/images/stories/Legislation/pdf/CriminalCode2009.pdf>, respectively). The more

penal sanctions nearly a century ago, when it was introduced by the 1929 Criminal Code of the Kingdom of Serbs, Croats and Slovenes.<sup>2</sup> The introduction of suspended sentences – which, in general, entails a suspension of the prison sentence for a determined period of time (“operational period”) and which is recalled if the convicted person reoffends during that time – followed a European trend of similar non-custodial sanctions that were first introduced in Belgium (1888) and France (1891). From there, suspended sentences spread to other countries, initially those in Western Europe, but after the end of the First World War to the Central and Eastern European countries as well.<sup>3</sup> In all these countries, suspended sentences initially sought to expand the catalogue of penal sanctions available to the court, which, at that time, mostly consisted of imprisonment and fines: its primary aim was to substitute the ineffective and criminogenic short prison sentences and, furthermore, to keep the number of prisoners under control.<sup>4</sup> The sanction was notably premised on ideas of special prevention: by threatening the offender with a determined sanction whose execution was temporarily suspended, an expectation was created that they would in the future align their behavior with social expectations and norms. The very presumption that this could be achieved by a mere threat of punishment was grounded in the “exceptional” nature of the sentence,<sup>5</sup> which could only be imposed on a cherrypicked group of offenders whose crimes and characters were such as to provide a reasonable expectation that nothing more than a mere warning sufficed to achieve the aims of punishment.

All this resonated with the first Yugoslav legal provisions on suspended sentences: under the 1929 Criminal Code, a suspended sentence could substitute (alternatively) a fine, less than six months of imprisonment under strict conditions, or less than one year of (regular) imprisonment, with

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appropriate term to use in English would be “conditional sentence”, as it is more accurate in a linguistic sense. In addition, it is more apposite because it describes correctly that the sentence is based on the *condition* that the convicted person will not reoffend, and is not merely *suspended* until a later point in time, as could be inferred from its name. To avoid the confusion, and given that the term “suspended sentence” is standardly used in translations of laws into English, we will use it in this article, aware of its inaccuracy.

- 2 This was the first penal code that pertained to the unified territory of a country that was formed after the First World War – the country changed its name to Yugoslavia in 1929. The Criminal Code itself was modelled after the 1871 German Penal Code. For an expansive account, see Mirković, Z., 2017, *Srpska pravna istorija*, Belgrade, Univerzitet u Beogradu.
- 3 See Drápal, J., 2023, The (chaotic) nature of suspended prison sentences, unpublished report, (on file with authors).
- 4 Stojanović, Z., 2003, *Krivično pravo, opšti deo*, 8<sup>th</sup> ed., Belgrade, Službeni glasnik.
- 5 Ancel, M., 1971, *Suspended Sentence*, London, Heinemann.

the length of operational period being between one and five years. The sanction was retained with some modifications in all subsequent criminal laws (1947, 1951, 1977), but the new provisions did not substantively modify the place or purpose of the sanction within the penal system.<sup>6</sup>

The sanction also proved resilient against the social, political, and economic changes of the past century, most notably those that took place during the transition from monarchy to communism in the 1940s, and from communism to democracy in the 1990s. In this sense, even though many other post-communist countries eventually lost sight of the original conception of the sentence,<sup>7</sup> in Serbia and Slovenia it remained consistent with the dominant penal ideals, which emphasize rehabilitation and reintegration of offenders. It is then not surprising that the first criminal codes adopted by the two countries after Yugoslavia's dissolution – Serbia's 2005 Criminal Code and Slovenia's 1994 Criminal Code – maintained a similar approach to previous penal legislation, a matter that will be further discussed in Part 3 of this article. Therefore, for nearly a century, the 'Yugoslav' model of suspended sentences has developed into a distinctive and widely used penal instrument, distinct from punishment, and premised on a non-custodial, non-hostile and inclusive approach toward criminal offenders. The model demonstrates strong determination toward keeping a significant group of criminally convicted persons out of prison, and communicates confidence that this group will not reoffend despite not being imprisoned, and despite lacking any form of supervision or obligations.

The article consequently suggests that the "Yugoslav" model exhibits notable specificities when compared to both the Anglo-Saxon system of probation, which entails supervision and obligations, and the more proximate Central and Eastern European models of suspended sentences, which, although similar in the lack of supervision and obligations that would be imposed on the offenders, do not clearly divorce suspended sentences from punishment and tend to use the sanction in ways that undermine

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6 When the unitary prison sanction was introduced in 1951, suspended sentence could replace either a fine or imprisonment of less than two years, and this provision was also retained in the 1977 Criminal Code. During this whole period, the operational period was always between one and five years. For a more detailed historical overview and analysis of suspended sentence, see Bejatović, S., 1986, *Uslovna osuda*, Belgrade, Poslovna politika. For a more nuanced account of the relevant theoretical perspectives and practical implications of different provisions, see Bavcon, Lj., 1980, *Pogojna obsodba in pogojna obsodba z varstvenim nadzorstvom v novi jugoslovanski zakonodaji*, *Pravosodni bilten*, 3/4; and Stojanović, Z., 1977, *Odnos uslovne osude i kazne u Krivičnom zakonu SFRJ i pitanje samostalnosti uslovne osude*, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 11.

7 See for more details Gazal-Ayal, O., Roberts, J., 2019, *Alternatives to Imprisonment: Recent International Developments*, *Law and Contemporary Problems*, Vol. 82, No. 1.

the articulated penal aims.<sup>8</sup> For these reasons, the key trait of the “Yugoslav” model is that it constitutes the primary penal instrument used toward “accidental delinquents”:<sup>9</sup> while this group might be free from substantial character flaws, they nevertheless deserve formal censure on account of their criminal act. For these reasons, the article suggest that the Yugoslav model of suspended sentences is almost the ideal example of “communicative” punishment: it acknowledges the convicted person’s agency, upholds their status of belonging to a community, increases dialogue and reduces stigma, and is geared toward promoting personal responsibility and desistance from crime. The aims sought through the use of suspended sentences are especially important given their notable contrast to the current penal climate, which is oftentimes premised on control, punitiveness, populism, exclusion, stigmatization, mass incarceration, and the like.<sup>10</sup> While this climate is mostly present in jurisdictions featuring a distinctive set of social, political-economic and cultural traits that are not necessarily features in countries such as Serbia and Slovenia,<sup>11</sup> there is nevertheless a constant need to promote and uphold penal instruments that pull toward opposite and positive commitments.

The article develops in the following way. First, we outline the key properties of the communicative theory of punishment as developed by Antony Duff, identifying its main benefits and the potential for application in practice. Then, we briefly describe the Serbian and Slovenian model of suspended sentences, in order to assess its coherence with the communicative theory in three respects: (a) philosophical and theoretical commitments, (b) substantive and procedural law provisions, and (c) execution of sanctions. The last part of the article resolves some outstanding tensions, but also identifies two key flaws of the current system that concern the issues of “criminal infection” and communicative capacities of the

8 Drápal, J., 2023.

9 Lazarević, D., 1967, Uslovna osuda i kratkotrajna kazna zatvora, *Jugoslovenska revija za kriminologiju i krivično pravo*, 17, p. 26.

10 See for example Garland, D., 2001, *The Culture of Control*, New York, Oxford University Press; Simon, J., 2007, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*, New York, Oxford University Press; Wacquant, L., 2009, *Punishing the Poor: The Neoliberal Government of Social Insecurity*, Durham, Duke University Press; Pattillo, M. et al., (eds.), 2004, *Imprisoning America: The Social Effects of Mass Incarceration*, New York, Russell Sage.

11 On this, see Tripkovic, M., 2016, Beyond punitiveness? Governance of Crime and Authoritarian Heritage in Serbia, *Punishment and Society*, Vol. 18, No. 3; Flander, B. et al., 2022, Punishment in Slovenia: Seventy Years of Penal Policy Development, *European Journal of Criminal Policy Research*, 29. On similarities across Eastern and Central Europe, see Krajewski, K. P., 2023, Penal Exceptionalism in Countries of Central Europe: Why Is the Region Different? *Archives of Criminology*, XLV/2.

court. We conclude by identifying the wider relevance of the “Yugoslav” model of suspended sentences for thinking about the ways to construct penal instruments that resist punitiveness and limit the intrusion of the criminal justice system into the lives of non-incarcerated offenders.

## 2. COMMUNICATIVE THEORY OF PUNISHMENT: PHILOSOPHICAL COMMITMENTS AND PRACTICAL APPLICATION

The communicative theory of punishment was developed by Antony Duff, to a large degree, as a response to the perceived limitations, and the potential solution to the conflict between the retributive and utilitarian theories of punishment.<sup>12</sup> The theory is grounded in an intricate normative understanding of the desirable features of contemporary political communities, which should be made up of citizens who treat each other as “fellows”: such citizens respect and care about one another in a sufficient degree to make them (among other things) interested and invested in the practices of punishment. Duff’s account is considered a “minimalist” theory of punishment because it recognizes the limited propensity of criminal law to inspire positive conduct and therefore considers legitimate only those incriminations that encapsulate “public” (and not private) wrongs.<sup>13</sup>

In such a political setting, the main purpose of criminal law is to remind citizens that certain actions are not only prohibited but also considered wrong by fellow citizens. The law of the community “is the law that embodies values shared by the community [as] it flows from the traditions and practices of the community” and is one of the mediums through which citizens communicate.<sup>14</sup> Consequently, punishment should aim to “communicate to offenders the censure they deserve for their crimes and should aim through that communicative process to persuade them to repent those crimes, to try to reform themselves, and thus to reconcile themselves with those whom they wronged.”<sup>15</sup>

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12 The fullest exposition of his theory can be found in Duff, R. A. A., 2001, *Punishment, communication, and community*, New York, Oxford University Press. But see also Duff, R. A., 2018, *The Realm of Criminal Law*, Oxford, Oxford University Press. The most recent account, which responds to some of the previous criticism, can be found in Duff, R. A. Punishment as Communication, in: Ryberg, J., (ed.), forthcoming, *Oxford Handbook of the Philosophy of Punishment*, Oxford, Oxford University Press.

13 Marshall, S., Duff, R. A., 1998, Criminalization and Sharing Wrongs, *Canadian Journal of Law and Jurisprudence*, 7.

14 Duff, R. A. A., 2001, pp. 59–60.

15 Duff, R. A. A., 2001, p. xvii.

When and how does the process of communication occur? While communicative ideas should underly the very notion of criminal law and the dominant penal aims, particular phases of the criminal process must also be premised on ideas of communication. Duff puts a particular emphasis on the trial and conviction phases, which constitute “communicative enterprises that address the citizens, as rational moral agents, in the normative language of the community’s values.”<sup>16</sup> However, one should be careful not to ascribe too much value to the passive acceptance expressed though offenders’ conforming behavior: communication should aim to “bring citizens to recognize and to accept not just that certain kinds of conduct are ‘prohibited’ by the law [...] but [also] why such conduct is wrong.”<sup>17</sup>

One of the main appeals of Duff’s theory is that it articulates clearly at least two benefits of the “inclusive” model of punishment. On the one hand, such punishment perpetuates important normative commitments of liberal political communities, which should be minimally intrusive into the lives of their members, even when they have broken the law. Inclusive punishment, therefore, promotes key liberal commitments such as rights, equality, non-discrimination, freedom, autonomy, etc. The notion of punishment as moral communication recognizes offenders as equals, accentuates their perpetual citizenship status, and promotes their dignity.<sup>18</sup> On the other hand, inclusive punishment serves the strategic and practical goals of the criminal justice system, including the demand that such punishment promote desistance. In this regard, the two-way communication between criminal justice agencies and offenders, which ideally also includes members of the community in some form, might pave the way toward a more general reflection on the causes and consequences of crime, and motivate offenders to assume a prosocial role.<sup>19</sup>

While Duff recognizes many practical obstacles to achieving the ideal version of his theory in the contemporary world, he nevertheless considers this to be a moral compass that is worthy of pursuit.<sup>20</sup> Recent accounts have used the theory in an even wider sense to designate communication

16 *Ibid.*, p. 80.

17 *Ibid.*, p. 81.

18 In this, Duff’s theory somewhat resembles, but is not as demanding toward offenders as are the theories of moral education and paternalism. See Morris, H., 1981, A Paternalistic Theory of Punishment, *American Philosophical Quarterly*, Vol. 18, No. 4; Hampton, J., 1984, The Moral Education Theory of Punishment, *Philosophy & Public Affairs*, Vol. 13, No. 3.

19 Weaver, B., 2009, Communicative Punishment as a Penal Approach to Supporting Desistance, *Theoretical Criminology*, Vol. 13, No. 1.

20 Duff, R. A. A., 2001, p. xviii.

as central to seeking to achieve legitimacy of sentencing, which results in imprisonment, particularly in the context of overcrowded or otherwise harmful prison conditions.<sup>21</sup> Expressing censure through communication should also entail shifting “the gaze to the state’s role in the creation of excess harms relating to prison conditions.”<sup>22</sup> Additionally, communication represents the central tenet of restorative justice, which is premised on providing the environment for active communication between the offender and victim (and sometimes also the wider community).<sup>23</sup>

Even if the goal of transforming the whole penal system in line with these ideas seems unattainable, it seems reasonable to try to implement such practices in particular segments of the system whenever this is possible. Duff’s general theory of communicative punishment has, consequently, been applied to specific segments of the penal system, with the aim of establishing their communicative capacities. For example, drug courts have been commended for their ability to clearly recognize and communicate the harm caused and suggest concrete solutions for identified problems: however, they have also been criticized on the account that they use a great deal of coercion that is obtrusive to communication.<sup>24</sup> Parole boards can also be used to achieve communicative purpose because ‘the conditions set by the parole board hold a communicative message for the offender by the very act of imposing them’: this message gradually weakens, becoming softer and quieter, as the end of the supervision period approaches.<sup>25</sup> Conversely, imprisonment does not fare well in communicative terms: it does not treat offenders as responsible moral agents, it impedes repentance, and it does not facilitate an important moral dialogue.<sup>26</sup> In addition, real-life experiences of long-term prisoners were found to deviate from expectations set by the theory, both at sentencing and during the sentence, with moral communication severely limited due to the context of both of these phases; however, the theory nevertheless

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21 Manikis, M., Matheson, A., 2023, Communicating Censure: The Relevance of Conditions of Imprisonment at Sentencing and During the Administration of the Sentence, *Modern Law Review*, Vol. 87, No. 3.

22 *Ibid.*, p. 24.

23 See, for example Zehr, H., 1991, *Changing Lenses: A New Focus for Crime and Justice*, Glasgow, Herald Press; Braithwaite, J., 1989, *Crime, Shame and Reintegration*, Cambridge, Cambridge University Press.

24 O’Hear, M., Drug Treatment Courts as Communicative Punishment, in: Tonry, M., (ed.), 2011, *Retributivism Has a Past: Has It a Future?*, New York, Oxford University Press.

25 Dagan, N., Segev, D., 2015, Retributive Whisper: Communicative Elements in Parole, *Law and Social Inquiry*, Vol. 40, No. 3, p. 618.

26 Cochrane, A., 2017, Prison on Appeal: The Idea of Communicative Incarceration, *Criminal Law and Philosophy*, 11.

provides a clear identification of a need for a more straightforward focus on the crime perpetrated if communication is to be achieved.<sup>27</sup>

Duff himself suggests that the approach is best suited to noncustodial responses to crime, such as mediation, community sentences and probation, even if these responses are still formally conceived of as punishment.<sup>28</sup> Duff considers probation as a “constructive punishment” that has a solid propensity to enable communication, principally through probation officers who can mediate between offenders, victims, and the community.<sup>29</sup> Studies involving probation officers and probationers have indeed confirmed that an “active and participatory” form of supervision, which “negotiates” and “engages with” offenders, is most conducive to putting them on a pathway of desistance.<sup>30</sup> In addition, such encounters were also understood as more positive when the probation officer was deemed a moral authority who could provide proper guidance and instill a sense of trust and confidence that the offender can maintain a prosocial attitude: many supervisees developed a sense of commitment, personal obligation and loyalty to probation officers.<sup>31</sup>

Viewed within this theoretical context, the following part of the article develops an original thesis that argues that the Serbian and Slovenian model of suspended sentences arguably represents the most developed application of the notion of communicative punishment: in other words, it is as close to the “ideal” of communicative punishment as a penal law instrument could be. Particularly compared to its closest comparative sanction of probation, this model appears better especially because it is (for the most part) not premised on supervision or the imposition of obligations on the offender during the probationary period. Instead, the “model” seeks to communicate censure not by imposing harsh treatment with the expectation that the offender will somehow respond positively to it and change their behavior, but by abstaining from punishment when it is deemed appropriate, which promotes the offender’s dignity and upholds their enduring status of belonging. The rest of this article, therefore, argues that it is the calm, rational and non-judgmental nature of this model of suspended sentences that is most appropriate to communicate positively to the offender. Instead of censure through harsh treatment, the model

27 Schinkel, M., 2014, Punishment as Moral Communication: The Experiences of Long-Term Prisoners, *Punishment and Society*, Vol. 16, No. 5.

28 Duff, R. A. A., 2001.

29 Duff, R. A., 2003, Probation, Punishment and Restorative Justice: Should AI Turism be Engaged in Punishment? *Howard Journal of Criminal Justice*, Vol. 42, No. 2.

30 Rex, S., 1999, Desistance from Offending: Experiences of Probation, *Howard Journal of Criminal Justice*, 38, p. 370.

31 *Ibid.*



“communicates confidence” of the political community that the offender will abstain from future crime despite the lack of punishment. It is thus the message of non-exclusion and trust, and the decision to remove the offender from the penal system that reaffirms the offender’s dignity and moral agency: the “trust” is especially evident in the sense that the offender is left entirely to themselves, to continue their life as before.

The following part begins by outlining the key traits of the “Yugoslav” model, as it currently functions in Serbia and Slovenia. As will be shown, despite some differences, the two countries retain key principles and approaches inherited from the former Yugoslavia, which makes the rules pertaining to suspended sentences broadly similar. The evidence of a communicative approach of the model, as the subsequent analysis shows, can be found in three domains: (1) within the scope of the philosophical and theoretical approaches, (2) through the analysis of substantive and procedural law, and (3) in the domain of the execution of the sanction.

### 3. COMMUNICATIVE TRAITS OF SUSPENDED SENTENCES

After the dissolution of Yugoslavia, which began in the early 1990s, the newly formed states went on to develop their penal legislation autonomously, continuing, therefore, the process of relative independence in this domain, which had already begun with the adoption of the last Constitution of Yugoslavia of 1974.<sup>32</sup> After the dissolution, all the countries initially amended and subsequently adopted new criminal codes. Currently,

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32 With regard to criminal legislation, the post-1974 constitutional framework meant that the Yugoslav Federation still regulated the basic principles of criminal law and criminal sanctions (the so-called “general part”) as well as particular groups of crimes of specific interests for the country as a whole (for instance, crimes against the constitutional order, international crimes, crimes against the military, etc.). A new Yugoslav criminal code was adopted in 1976 (going into force in 1977), which allowed for the “unity of conceptual-political foundations of the society” in respect of criminal legislation (Franko, I., 1977, *Pristupna izlaganja – pozdravni govori, Jugoslovenska revija za kriminologiju i krivično pravo*, 2, p. 7, translated by authors). However, the division of regulatory authority also meant that countries could now adopt more context-specific criminal laws (Đorđević, M., 1977, *Osnovne karakteristike novog krivičnog zakona SFRJ sa stanovišta primene u praksi, Jugoslovenska revija za kriminologiju i krivično pravo* 2, p. 16) which occurred through the adoption of eight criminal codes in 1976, one for each of the republics and autonomous provinces. The differences between the different regions were not only mirrored in distinctive legislation (which, in reality, was not that prominent since the criminal codes of six republics and two autonomous provinces were very similar), but also through different sentencing practices that accounted for specificities of different regions (Aćimović, M., 1969, *Proučavanje kriminoloških problema Jugoslavije, Zbornik radova Pravno-ekonomskog fakulteta*, Niš, 8).

the substantive rules in Serbia are outlined in the Criminal Code, initially adopted in 2005,<sup>33</sup> while the Slovenian legal provisions are located in the Criminal Code, initially adopted in 2008 (which substituted the first post-independence criminal code adopted in 1994).<sup>34</sup>

With respect to the system of sanctions, and particularly so in respect of the suspended sentence, Serbian and Slovenian legislations are very similar – almost identical.<sup>35</sup> Suspended sentences belong to a group of sanctions called “cautionary measures” (*mere upozorenja* in Serbian, and *opozorilne sankcije* in Slovenian),<sup>36</sup> which are, by their nature, “warning” sanctions and forms of admonition, and are therefore clearly distinguished from punishment in a formal and substantive way.<sup>37</sup> The nature of such measures is well captured by the Serbian Criminal Code, which designates the purpose of cautionary measures as seeking to “*abstain* from imposing punishment on a perpetrator of a non-serious criminal offence when it can be expected that the *warning* accompanied by a threat of punishment [...] will be sufficient to influence the perpetrator to refrain from reoffending.”<sup>38</sup> A parallel provision does not exist in the Slovenian Criminal Code, but the same sentiment is echoed in commentaries and scholarly texts: cautionary measures exist in the system to respond to cases in which “the legislator wished to avoid the application of punishment, when this is justified in terms of the purpose of punishment, and at the same time in line with criminal policy considerations.”<sup>39</sup> The sanction is, therefore, explicitly postulated as an attempt to avoid punishment where and when it is decided that penal coercion is not necessary (perhaps paradoxically, as discussed below) to achieve the penal goals.

Nevertheless, even if a suspended sentence is not a punishment, it is accompanied by a threat of punishment, the exact length of which is

33 Serbian Criminal Code (*Krivični zakonik*), *Official Gazette of the Republic of Serbia*, Nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

34 Slovenian Criminal Code (*Kazenski zakonik*), *Official Journal of the Republic of Slovenia*, Nos. 50/12 (officially redacted text), 54/15, 6/16, 38/16, 27/17, 23/20, 91/20, 95/21, 186/21, 105/22 – ZZNSPP and 16/23.

35 In the further text, the two systems will be treated as a single “model” if the relevant legal provisions are the same, but differences will be accentuated when they appear. Less important differences, which are not decisive for grasping the key traits of the system, will not be presented or analyzed.

36 In both countries, an even more lenient form of warning measures exists called judicial admonition (*sudsko upozorenje* in Serbian, and *sodni opomin* in Slovenian).

37 Stojanović, Z., 2003, p. 331.

38 Serbian Criminal Code, Art. 64.2, translated by authors, emphasis added.

39 Verdel Kokol, V., *Opozorilne sankcije*, in: Šepec, M., (ed.), 2021, *Kazenski zakonik (KZ-1) s komentarjem*, p. 793, Ljubljana, Lexpera, translated by authors.

determined at the moment of sentencing.<sup>40</sup> The court, therefore, first decides that imprisonment of a particular length – which can generally only be less than two years (or a fine, in Slovenia)<sup>41</sup> – is warranted but also decides to suspend its imposition if the offender does not perpetrate a new crime during a period determined by the court (the so-called “operational period”), which can be from one to five years.<sup>42</sup> Deciding on whether a suspended sentence is a justified sanction in a specific case is left to the discretion of the court, but when making the decision, the court should be guided by evidence pertaining to both the offender’s crime and the offender themselves, as well as other potentially relevant circumstance: the combination of all of these must warrant a “positive prognosis” that no future crime will be committed.

A breach occurs when the conditionally sentenced offender commits another offence during the operational period, despite the court’s prediction to the contrary.<sup>43</sup> In some cases, the revocation is automatic; this occurs when the sentence for a new crime is imprisonment of two years or more. If the new sentence is to imprisonment of less than two years or a fine, the revocation is optional.<sup>44</sup>

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40 See Arts. 65–66. of the Serbian Criminal Code and Arts. 57–58. of the Slovenian Criminal Code.

41 The possibility to suspend a fine existed in Serbia until 2005 when it was abolished through the adoption of the new Criminal Code. The justifiability of the previous legal solution was always a matter of fervent debate (see Dragojlović, J., 2017, *Uslovna osuda i novčana kazna, Kultura polisa*, 32).

42 There are two limitations to this in Serbia. First, a suspended sentence cannot be imposed if the crime in question carries a prison sentence longer than eight years (signaling thus that the crime can obtain a particularly serious form). Second, a suspended sentence cannot be imposed in the case of repeat offenders unless at least five years has passed since the previous sentence (to imprisonment or suspended sentence) for an intentional crime became final (see Art. 66. of the Serbian Criminal Code). Similarly, in Slovenia, a suspended sentence may only be passed for crimes with a sentencing minimum of up to three years of imprisonment (see Art. 58.2 of the Slovenian Criminal Code). A notable exception to this has been in force since 2012, when plea-bargaining was introduced: in the case of a formal plea of guilty, a suspended sentences may be used for crimes for which the sentencing minimum is lower than five years of imprisonment (see Art. 58.5 of the Slovenian Criminal Code). Although the Serbian and Slovenian provisions differ in this respect, both are aimed at reducing the scope of application of suspended sentence for crimes that are not too serious.

43 A special case of breach, which exists in both the Serbian and Slovenian law, exists when the court discovers that the offender had perpetrated an offence before the suspended sentence was imposed. Whether the court will revoke the suspended sentence in this case depends on whether it decides that the offence is such that imposing a suspended sentence would not have been justified, had the court been aware at the time (see Art. 68. of the Serbian Penal Code and Art. 60. of the Slovenian Penal Code).

44 See Art. 67. of the Serbian Penal Code and Art. 59. of the Slovenian Penal Code.

A caveat is in order here: the account developed in the rest of the article considers only the “standard” form of suspended sentence, imposed without any conditions or supervision. In addition to this form of suspended sentences, both countries provide for a separate type of sanction called “suspended sentence with protective supervision”, which was initially introduced by the last Yugoslav Criminal Code (1977) and which, rather than leaving the offender entirely free from supervision, provides for a number of “measures” that are added on top of the sentence and which seek to provide “help, care, supervision and protection”, in order for the purpose of the sentence to be achieved more “completely”.<sup>45</sup> These measures concern contact with probation officer, engaging in education, work, or family obligations, undergoing medical treatment, etc.; in addition to the general purpose of the suspended sentence, they also seek to achieve special prevention in individual cases.

The key reason for not including the discussion of this sanction in the article is that due to its key features, this special form of suspended sentences resembles sanctions such as probation that are used in foreign jurisdictions, and is therefore much less atypical or specific than the “conventional” suspended sentences.<sup>46</sup> As was indicated above, the capacity of probation to achieve communicative aims has already been examined: the suspended sentence (without supervision) is therefore a more interesting case to explore, precisely because its features make it unique in comparative practice. In addition to this, despite the existence of this special form of suspended sentence, we consider that the “regular” suspended sentence deserves to bear the title of the “model” suspended sentence, because it is long-standing, more developed, and more frequently used. When it was introduced, it was intended to be exceptional and used in a small number of “borderline” cases,<sup>47</sup> and this has been the court practice ever since. While this was mostly due to the long-standing lack of conditions to secure its use, at least in Serbia,<sup>48</sup> the fact is that the sentence was not used at all from its introduction in 1977 to 2005,<sup>49</sup> and since then its use has

45 See Art. 71.2 of the Serbian Penal Code.

46 Also, there is a degree of skepticism toward this sanction (at least in Serbia) because it imports elements of probation which are alien to the Serbian system (Dragoјlović, J., 2017).

47 Stojanović, Z., 2012.

48 Stevanović, I., Vijičić, N., 2018, Rad u javnom interesu i uslovna osuda sa zaštitnim nadzorom u Republici Srbiji i povrat (analiza uspešnosti primene iz ugla istraživača), *Crimen*, 3.

49 Đuričić, N. 2022, *Uslovna osuda sa zaštitnim nadzorom u pravu Srbije*, doctoral dissertation, Novi Sad, Pravni fakultet za privredu i pravosuđe u Novom Sadu.

been “neglectable”<sup>50</sup> and dwarfed by the use of regular suspended sentences. For example, between 2007 and 2016 in Serbia, the number of suspended sentences per year ranged from 12,833 to 24,131, while during the same period the number of suspended sentences with protective supervision ranged from 53 to 108 – the combined numbers show that protective supervision was imposed in only 0.3% of the cases.<sup>51</sup> Anecdotal information obtained in Slovenia also indicates that it has been used in a negligible number of cases.

### 3.1. PHILOSOPHICAL AND THEORETICAL APPROACHES

A notable indication of the coherence between the “Yugoslav” model of suspended sentences and the communicative theory of punishment stems from the legal status of this sanction and its deeper underlying philosophical commitments. As explained above, according to both criminal codes, the suspended sentence is an independent type of sanction clearly separate from punishment. It is a warning or admonition, which reprimands the offender but avoids doing so by using repressive measures and causing harmful consequences. In that, the suspended sentence deviates from the standard definitions of punishment, whose key component is the imposition of unpleasant consequences,<sup>52</sup> which is why the suspended sentence has been dubbed a “para-penal” measure.<sup>53</sup>

Behind this notion stands an enduring commitment of the penal system to the *ultima ratio* principle, as it pertains to both the use of criminal law and of imprisonment. Thus, criminal law is used to react to only the

50 Kolarić, D., *Uslovna osuda sa zaštitnim nadzorom i druge alternativne krivične sankcije u Krivičnom zakoniku Srbije*, in: Bejatović, S., Jovanović, I., (eds.), 2018, *Alternativne krivične sankcije (regionalna krivična zakonodavstva, iskustva u primeni i mere unapređenja*, Belgrade, OSCE. On the uneven regional use of the sanction, see also Kolaković-Bojović, M. et al., 2022, *Impact Assessment of the Application of Alternative Sanctions and Measures in Serbia, 2015–2020*, Belgrade, Institut za kriminološka i sociološka istraživanja.

51 Kolarić, D., 2018. This data does not match data from another source suggesting that an even smaller number of suspended sentences with protective supervision was imposed – between 10 and 33 per year between 2014 and 2021. See: Đuričić, N., 2022, p. 248. Even with this inconsistency, it is evident that the sanction is exceptionally rare.

52 “Unpleasant consequences” are one of the five key elements of the most influential definition of punishment that was developed by H. L. A. Hart. Hart’s definition of punishment entails: (a) something with unpleasant consequences, (b) prescribed for an illegal act, (c) directed toward the offender, (d) delivered by someone other than the offender, and (e) imposed by the authority of the legal system against which the offence was committed. See Hart, H. L. A., 1968, *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford, Clarendon Press, p. 5.

53 Bačić, F., 1998, *Kazneno pravo, opći dio*, 5<sup>th</sup> ed., Zagreb, Informator.

most serious social infractions; similarly, more serious forms of punishment are only used if less serious restrictions are not considered to have the capacity to achieve the purpose of punishment.<sup>54</sup> Suspended sentences are, therefore, a clear indication that, despite criminal offenders constituting a separate group of persons, since they have all broken the law, not all of them require penal control and supervision. Perhaps paradoxically, in the case of specific groups of offenders, it seems like the general penal aims can be achieved not through but rather by avoiding punishment: the purpose of punishment is achieved by the criminal justice system omitting to pursue any penal aims in cases in which suspended sentence is used. Through this very process, the court modifies the very nature of the sanction from what was originally a punishment (imprisonment, or in the case of Slovenia, also fines) into a warning measure.<sup>55</sup>

This approach further indicates that the criminal justice systems of the two countries are comfortable with and committed to diverting substantive (as will be demonstrated below) proportions of the offender population away from the carceral system. Suspended sentences are, therefore a defining feature<sup>56</sup> of the two penal systems and are relevant indicators of the overall (with some exceptions) leniency of the systems that is to a large degree premised on moderation, calmness, and rationality. While it is undeniable that suspended sentences owe their frequent use to the fact that they are cheap and efficient and that they can achieve maximum results with minimum engagement by the state,<sup>57</sup> the outcome of the non-carceral focus of judges, which is obvious from their frequent use, contributes to, on the whole, a humanistic and parsimonious approach to crime and criminal offenders. In addition, the wide discretion given to the courts to decide whether they will impose a suspended sentence in an individual case can play a significant “corrective” role in the overall functioning of the penal system, because it provides an opportunity to tone down the overzealousness toward those who, due to their personal qualities and characteristics, need no penal intervention (as discussed below).

Drawing on the key elements of the communicative theory of punishment, it can be suggested that suspended sentences are a particularly appropriate instrument to achieve communicative aims because they exemplify a minimally intrusive and overarchingly inclusive criminal

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54 Bavcon, Lj. *et al.*, 2013, *Kazensko pravo: Splošni del*, 6<sup>th</sup> ed., Ljubljana, Uradni list Republike Slovenije.

55 We would like to thank Krzysztof Krajewski for drawing our attention to this point.

56 This claim has been made in a wider sense, as pertaining to a number of former communist countries. See Drápal, J., 2023.

57 Stojanović, Z., 2006, *Komentar Krivičnog zakonika*, Belgrade, Službeni glasnik.

law, which gives due respect to the observation that criminal law has a limited capacity to inspire prosocial behavior. By abstaining from incarceration, suspended sentences emphasize the offender's continuing citizenship status, and (for the most part) do not interrupt the offender's personal and professional life. This not only demonstrates a clear attitude toward continuing to view offenders as equal members of the community and upholds their dignity, but also provides a social context that is conducive to desistance.

### 3.2. KEY SUBSTANTIVE AND PROCEDURAL LAW FEATURES

The second area of coherence between the system of suspended sentences used in Serbia and Slovenia, and the communicative theory of punishment, consists in providing a central role to the judge in deciding whether the imposition of the sentence is justified in the specific case. This allows for a significant discretionary space to remove from the carceral system those who do not need penal supervision, and makes suspended sentences, rather than imprisonment, the most commonly used criminal law sanction (as will be further discussed below).

Both systems generally allow for a wide discretion in sentencing: there are very few instructions given to judges when deciding which sanction to use, among those that are legally stipulated for particular offenses, and to furthermore decide which amount of punishment to impose between the minimum and maximum range.<sup>58</sup> In both contexts, this has led to frequent observations that judges are pursuing "mild" sentencing practices,<sup>59</sup> by identifying a discrepancy between the available ranges, postulated by the legal provisions, and the "penal policy" as the sum of individual sentencing decisions.<sup>60</sup>

In the case of suspended sentences, there are virtually no limitations to the judicial discretion and judges are free to impose these sanctions as they see fit (within the scope of formal conditions explained above).

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58 See, for example Drápal, J., Plesničar, M., 2023, Sentencing Elsewhere: Structuring Sentencing Discretion in Post-Communist Europe, *European Journal of Criminal Policy Research*; Plesničar, M. M., 2013, The Individualisation of Punishment: Sentencing in Slovenia, *European Journal of Criminology*, Vol. 10, No. 4.

59 Meško, G. et al., 2011, A Concise Overview of Penology and Penal Practice in Slovenia: The Unchanged Capacity, New Standards, and Prison Overcrowding, *The Prison Journal*, Vol. 91, No. 4, and Plesničar, M. M., Drobnjak, M., 2019, Kaznovanje in kaznovalna politika v Sloveniji: Konceptualni premiki in praktične posledice, *Revija za kriminalistiko in kriminologijo*, Vol. 70, No. 2.

60 Stojanović, Z., Kaznena politika u Srbiji: Sukob zakonodavca i sudske prakse, in: Ignjatović, Đ., (ed.), 2012, *Stanje kriminaliteta u Srbiji i pravna sredstva reagovanja*, Vol. 1, Belgrade, Pravni fakultet.

When deciding whether to impose this sanction instead of imprisonment (or a fine, in Slovenia), judges are merely instructed that they are to reflect on the following issues (the legal provisions on this matter are identical in the two countries): perpetrator's character (personality), previous life, behavior after the perpetration of the crime, and the degree of guilt and other circumstances of the offence.<sup>61</sup>

In essence, the court should, by conducting this analysis, try to assess how the particular crime that is the subject of the proceedings "fits" within the wider context of the offender's life and their more general characteristics. If sufficient evidence is found that the offense was transient, episodic, and an exception that is otherwise inconsistent with who the offender is and how they usually behave, the conclusion can then be made that a suspended sentence can be justifiably imposed. This approach is generally uncommon in criminal law, which – when determining appropriate punishment – is mostly preoccupied with the perpetrated act, and not the traits and characteristics of the offender.<sup>62</sup> The process of deciding on the suspended sentence provides space for personal considerations to bear on the question of the appropriate legal reaction for the perpetrated act.

This approach also aligns with criminological perspectives that recognize the variety and diversity of factors contributing to criminal offending, which consequently requires recognizing the different impact that these factors have on criminal offenders and their acts. In other words, provisions related to suspended sentences seem to indicate that for some offenders, their crimes are more inconsistent with who they "really" are than for other offenders who seem to be – provokingly termed – "criminally infected".<sup>63</sup> Stipulated more in line with the court's possible perception of the offender, suspended sentences are reserved for those who seem to be "accidental" offenders.<sup>64</sup> For such offenders, imprisonment is, therefore, not only unnecessary, but also considered counterproductive, especially having in mind the criminogenic effects of prisons and the negative effects of short prison sentences.<sup>65</sup> In a way, this seems to separate the crime

61 Art. 66. of Serbian Penal Code and Art. 58. of the Slovenian Penal Code.

62 While personal circumstances pertaining to the offender become relevant in the process of individualization of sanction, it is widely accepted that criminal law reacts in order to sanction the offender for what they have done, and not who they are. See generally on this: Hampton, J., 1984; Moore, M. S., 2010, *Placing Blame: A Theory of the Criminal Law*, Oxford, Oxford University Press; Husak, D., 2007, *Overcriminalization: The Limits of the Criminal Law*, Oxford, Oxford University Press.

63 Dragojlović, J., 2017, p. 505.

64 Lazarević, D., 1967, p. 26.

65 See, for example Trebilcock, J., 2011, *No Winners: The Reality of Short Term Prison Sentences*, London, Howard League; Killias, M. et al., 2010, *How Damaging Is*



from the offender: through the use of suspended sentences, offenders are formally censured for what they have done, but punishment is avoided because it is not considered necessary on the account of who they are (incidental criminals).

To accentuate the coherence between this system and the communicative theory of punishment, we should first recognize the extent to which suspended sentences reaffirm the enduring status of belonging of criminal offenders, as well as identify the reasons provided by the system for doing so. On the one hand, such sentences motivate the non-offender population to continue to view offenders as equals (or “fellows”, in Duff’s terms) by providing for the uninterrupted communal engagement and communication due to a lack of nearly any restrictions to their everyday lives. Having been warned against reoffending, under the threat of punishment, offenders remain in their communities and are (in most cases) permitted to lead lives that are identical to the ones they had pre-offense. On the other hand, the rationale behind sentences that recognize that offenders have made a “mistake” but are otherwise not dissimilar to the non-offender population, creates a perception and provides incentives to continue to engage with them on equal terms, without excluding and stigmatizing them in any official way.

### 3.3. EXECUTION OF SENTENCES

Strong evidence of the communicative traits of suspended sentences can also be found with regard to the way such sentences are executed. In contrast to probation, which is carried out under supervision by the probation officer, and which consists in frequent reporting and a host of other obligations that offenders must carry out, suspended sentences are conventionally devoid of any contact, supervision, or obligations. Once the offenders are sentenced, their formal contact with the state ceases, and in furtherance of their desistance, they need to rely on their own capacities and devices. The idea behind this is that, if the decision on which offenders are appropriate targets for this penal instrument has been correctly made, they will need no help or assistance in leading a prosocial life. This shows a great deal of trust in the offender, and it is assumed that they will be very careful not to compromise that trust.

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Imprisonment in the Long-Term? A Controlled Experiment Comparing Long-Term Effects of Community Service and Short Custodial Sentences on Re-offending and Social Integration, *Journal of Experimental Criminology*, 6; Armstrong, S., Weaver, B., 2013, Persistent Punishment: User Views of Short Prison Sentences, *Howard Journal of Crime and Justice*, Vol. 52, No. 3.

The advantage of this system is that it supposedly provides the optimal context for offenders to consider and reflect on their law-breaking: while they are formally convicted and censured, they are at the same time encouraged to assume personal responsibility, increase self-governance, and further develop their collaborative and communal relationship and responsibilities, which should help them abstain from offending in the future. While other accounts, as has previously been shown, put much emphasis on the importance of parole officers in this process for securing communication and providing encouragement, suspended sentences are potentially better equipped to put the offender at the center of their own process of rehabilitation and reintegration. When comparing suspended sentences to probation, we see that the latter is premised on the relationship between the convicted person and the probation officer, which might – despite its benefits – have infantilizing undertones. Conversely, suspended sentences provide encouragement and instill confidence that the offender can achieve the same results on their own, by seeking to resist negative temptations. It is no wonder, then, that the operational period is commonly described as “temptation” or “trial” (*kušnja* in Serbian and *preizkusna doba* in Slovenian):<sup>66</sup> persevering through this period without reoffending shows that offenders deserve to be forgiven.<sup>67</sup> It is therefore exactly the trust that the state system puts in the offender coupled with the sense of liberty that this sanction provides,<sup>68</sup> which make suspended sentences a truly unique type of penal reaction.

Finally, the court’s confidence in the offender’s capacity to lead a prosocial life is not necessarily undermined even in the case of reoffending. As the previously explained rules show, suspended sentences must be compulsorily revoked only if the offender is sentenced to at least two years of imprisonment: in the case of more lenient punishment, however, revocation is optional, and the decision is left entirely to the court’s discretion. Regretfully, statistics on the number of revocations due to breach are not readily available, but anecdotal evidence from Slovenia demonstrates that this is very rare, while small-scale research conducted in Serbia several decades ago showed that in only about 6%–7% of cases the sentence were revoked.<sup>69</sup> At first glance, this seems counterintuitive because the new offence signals that the offender does not in fact have the capacity to desist from reoffending without help or supervision. Anecdotal evidence from Slovenia, which was gained through one of the authors’ long-standing

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66 Dragojlović, J., 2017.

67 Babić, M., Marković, I., 2008, *Krivično pravo – opšti dio*, Banja Luka, Pravni fakultet.

68 Lazarević, D., 1967.

69 Stojanović, Z., 2003, p. 334.

engagement with criminal justice professionals, practitioners and the general public in the country, shows that previous suspended sentences are often not revoked when new ones are imposed, leading to “piling on” of a number of such sentences. One of the key reasons for this is that courts only access judgements made in their own courts, omitting to take into account possibly existing judgments of other courts. However, despite these issues, it can be concluded that both systems are quite keen on keeping as many offenders as possible away from the carceral system, sometimes in opposition to the evidence that the initial sentence might not have been warranted.

#### 4. COMMUNICATING CONFIDENCE: STRENGTHS, WEAKNESSES, AND POSSIBLE IMPROVEMENTS TO THE CURRENT SYSTEM

The previous part of the article indicated three key areas of coherence between the communicative theory of punishment and the system of suspended sentences as used in Serbia and Slovenia. First, suspended sentences strongly affirm the enduring citizenship status of the criminal offenders by reducing the number of those who are excluded from the community; in fact, as will be shown shortly, most offenders in the examined countries remain within their communities due to the use of explicitly non-punitive sanctions.<sup>70</sup> Second, the use of suspended sentences indicates a calm, rational and inclusive stance of the criminal justice system, which has not succumbed to viewing criminal offenders as profoundly “different”, but merely as people who have made a mistake. Apart from this mistake, however, the assumption is that such people can be trusted and should not consequently be excluded or ostracized. Third, the lack of supervision or obligations imposed on such individuals seeks to promote personal responsibility and enhance the self-governing capacities of criminal offenders, who are motivated to use the operational period to demonstrate that the trust put in them was not wasted.

These theoretical and legal inclinations have been coherently translated into sentencing practices and have, with some minor reservations, also been given public approval. In both Serbia and Slovenia, suspended sentences are by far the most widely used criminal sanctions, although there are significant differences between the two countries in terms of the

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70 See more on the relationship of punishment and citizenship in Tripkovic, M., 2019, *Punishment and Citizenship: A Theory of Criminal Disenfranchisement*, Oxford, Oxford University Press.

frequency of the imposition. Post-independence sentencing practices in Slovenia show a notable inclination toward the use of suspended sentences: since 1993 (data for 1992 is not available), the average proportion of suspended sentences among the total number of convictions has been 75% (figures for 1993–2021 range between 66% and 76%).<sup>71</sup> During the same period (1993–2021), in Serbia suspended sentences made up on average 53% of all imposed sentences, ranging from 42% to 61%.<sup>72</sup> The difference is significant, and could be attributed to a number of factors pertaining to the specificities of the two countries, which are beyond the scope of this article: these might related to different forms of criminality, different procedural rules and practices, distinct sentencing approaches, varied use of alternatives to imprisonment (e.g., judicial admonition, community sentences, and house arrest), etc. Furthermore, the reliance on suspended sentences in such a high number of cases in Slovenia has been scrutinized and criticized because suspended sentences seem to be a “default” option, not least because imposing them means little work for the court.<sup>73</sup> While it is difficult to argue, without examining individual cases, that their imposition is not justified, the considerable proportion of these sanctions within the total number of imposed sanctions warrants caution and requires further inquiry to determine the general approach that the courts use when deciding whether they are warranted. Regardless of these issues, both penal systems clearly demonstrate dependence on this sanction and seem to consider that at least half (and up to almost  $\frac{3}{4}$  in Slovenia) of all criminal offenders do not require imprisonment or any form of penal supervision. This is a significant and telling finding, which confirms the penal moderation exhibited in this respect by the two systems.

Furthermore, due to their long-standing presence and frequent use in the two countries, suspended sentences have become widely accepted, even though, since their introduction, they have sporadically encountered criticism that they are an example of the state going “easy” on offenders.<sup>74</sup>

71 Data compiled by the authors, from the Slovenian Statistical Office, (<https://pxweb.stat.si/SiStat/sl>). It should be noted that the data is not disaggregated and therefore the numbers also include suspended prison sentences with protective supervision – but this does not create problems for the interpretation as the number of these sentences is extremely small.

72 Data compiled by the authors, from the Serbian Statistical Office, (<https://www.stat.gov.rs/>). Similarly to Slovenia, the numbers include suspended sentences with protective supervision but these sanctions, as explained, are exceptionally rare.

73 See, for instance, Plesničar, M. M., Drobňak M., 2019, Kaznovanje in kaznovalna politika v Sloveniji: Konceptualni premiki in praktične posledice, *Revija za kriminalistiko in kriminologijo*, Vol. 70, No. 2.

74 Mirković, Z., 2017.

Though evidence from Slovenia is merely anecdotal, in Serbia, suspended sentences have become accepted as an appropriate solution for less serious crimes.<sup>75</sup> Small-scale research conducted in Serbia indicates that more than half of respondents consider suspended sentences as being able to achieve the purpose of punishment while two-thirds of respondents support their use in suitable cases.<sup>76</sup> This, ultimately, is not surprising given the information about the cases in which such sentences are imposed which speak in favor of the conclusion that they predominantly respond to non-serious offences. In Slovenia, the large majority of suspended sentences are short – from 2 to 6 months.<sup>77</sup> In Serbia, data shows that suspended sentences are used most frequently in cases of crimes that are not considered serious or appear in very mild form:<sup>78</sup> these concern possession of illegal drugs, failing to pay child support, endangering public traffic, stealing objects of little value, and non-serious forms of domestic violence.<sup>79</sup>

Taken in their entirety, the traits of the two systems reveal the key communicative feature of the model: through suspended sentences, the penal system communicates confidence and trust that the censure involved in the sentence is sufficient to make the offender understand what was wrong about their act, repent it, and then subsequently reform and reconcile with the community. The systems are intimately bound with the notion of confidence that the penal system has in the offender, and previous research has indicated the importance of demonstrating trust and providing encouragement to criminal offenders in order to achieve desistance.<sup>80</sup> While such encouragement has previously mostly been discussed with regard to the development of a personal relationship between the offender and, for instance, the probation officer, through the process

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75 Tešović, O., 2020, *Priručnik za primenu alternativnih sankcija*, Belgrade, Forum sudi-ja Srbije.

76 Dragojlović, J., 2017.

77 Data compiled by the authors from the Slovenian Statistical Office, (<https://pxweb.stat.si/SiStat/sl>).

78 Data compiled by the authors from the Serbian Statistical Office, (<https://www.stat.gov.rs/>).

79 In judicial practice. suspended sentences are considered appropriate even in the case of domestic violence, but only when violence is not prolonged or related to alcohol abuse (see, further Nikolić-Ristanović, V., 2013, *Praćenje primene zakonskih rešenja o nasilju u porodici u Srbiji: Nalazi pilot istraživanja*, Belgrade, UN Women, (<https://www.vds.rs/File/PraćenjePrimeneZakResONasiljuUPorodiciUSrbiji.pdf>, 24. 5. 2024). The reason for this is that the relevant provisions of the criminal code (Art. 194) include various forms of violence (such as, for instance, acts that undermine “tranquility” or “peace of mind”) which might not manifest themselves in particularly serious forms.

80 Rex, S., 1999.

of supervision, premised on the fact that the offender cannot be trusted to achieve the results on their own, this approach largely depends on the appropriate choice of offenders. In other words, if the candidates for this type of intervention are chosen carefully and with the due scrutiny of all the circumstances pertaining to them and their offences, there is every reason to believe that the message of confidence sent by the system through the imposition of suspended sentences – which ultimately means a failure to impose any conditions or requirements – will be enough to achieve the desired results.

However, contrasting the “Yugoslav” model with another important trait of Duff’s theory, which ascribes importance to the burdensomeness of penal consequences, indicates that suspended sentences might not be sufficiently onerous to indicate the desired level of censure. According to Duff, it is essential that offenders experience burdensome consequences because it is only by doing so that the offender can truly understand the wrongness of their act.<sup>81</sup> This then raises the question of the exact measure of burden<sup>82</sup> that should be used; as previously argued, imprisonment which is obviously burdensome can in some cases also be considered counterproductive as it can be too onerous. For this reason, we believe that the exact quantity of burdensomeness that is necessary to achieve the desired results must be assessed in each individual case, based on the offender’s degree of culpability and the harm caused. In other words, “[i]f formal convictions or purely symbolic punishments can communicate the censure that offenders deserve for their crimes, there would be *no* good reasons to communicate it by way of hard treatment.”<sup>83</sup> Given that suspended sentences are, under the considered model, imposed on a carefully curated group of (non-serious) offenders, such censure can be considered proportional to the level of culpability and the harm caused by them. In other words, they are sufficiently retributive in given cases, and therefore it could be argued that the burdens incurred by that group of offenders are appropriate even if the sanctions seem generally lenient. In addition to proportionality, there are several additional reasons why suspended sentences might be thought of as sufficiently onerous. First, offenders are held to account by the very fact that the state’s penal apparatus is used against them to determine their liability for the perpetrated crime. This carries with it significant consequences that pertain to their personal

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81 Duff, R. A. A., 2001.

82 Hayes, D., 2018, Proximity, Pain, and State Punishment, *Punishment and Society*, 20.

83 Lee, A. Y. K., 2017, Defending a Communicative Theory of Punishment: The Relationship between Hard Treatment and Amends, *Oxford Journal of Legal Studies*, 37, p. 220, emphasis in the original.

and possibly professional lives, and induces social stigma. Second, offenders are prosecuted and exposed to a number of procedural rules which significantly reduce their liberty. Third, offenders are convicted for their act by the state and the conviction itself constitutes formal censure for the act.<sup>84</sup> Even if the result of conviction is not punishment but a warning, the threat of punishment, determined in the exact degree during sentencing, looms in the background, making the threat very palpable. Finally, convicted offenders automatically obtain a criminal record, which might lead to further limitations in the form of collateral consequences, which can target various aspects of the offender's rights.<sup>85</sup> Taken together, the process, conviction, and the aftermath might create a sufficient level of burden to appropriately communicate censure in such cases.

Despite these arguments, which generally corroborate the compatibility between the model used in Serbia and Slovenia and more general theoretical commitments, there are two potential areas where the system could be further strengthened to identify better those for whom a mere warning is sufficient censure and to increase the communicative capacities of the court. Both proposals are modest and cohere with the existing system, but they would nevertheless require some legal modifications, which is why they are presented as avenues for consideration and reflection, as they are not sufficiently concrete and precise instructions on how to change existing law.

#### 4.1. DETERMINING THE DEGREE OF "CRIMINAL INFECTION"

The first problem has to do with the notion of "criminal predisposition" or "criminal infection" of offenders, the existence of which is a key matter that needs to be determined when deciding whether a suspended sentence should be imposed. This issue stems from the previously discussed recognition that all offenders are not the same nor should be punished in the same way – specifically, this means that suspended sentences should be only imposed in cases of offenders who are expected to be inspired by the censure to repent their crime. In Serbia and Slovenia this means adhering closely to the principle of individualized punishment, which is still one of

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84 Duff, R. A., 1986, *Trials and Punishments*, Cambridge, Cambridge University Press.

85 Having a criminal record severely restricts access to important opportunities, most notably those pertaining to employment. See, for example, Jacobs, J., 2015, *The Eternal Criminal Record*, Cambridge, Harvard University Press; Pager, D., 2003, The Mark of a Criminal Record, *American Journal of Sociology*, Vol. 108, No. 5. More widely on collateral consequences that affect various domains of social, political and economic rights, see Hoskins, Z., 2019, *Beyond Punishment: A Normative Account of the Collateral Consequences of Conviction*, New York, Oxford University Press.

the cornerstones of criminal law. Duff himself acknowledges this difference by making a distinction between various groups of offenders, including those who can be morally persuaded by punishment, those who are already repentant before punishment takes place, and defiant offenders on whom punishment does not have desired effects.<sup>86</sup> The aim of the criminal justice system is, therefore, to identify the mildest degree of penal intervention necessary to achieve repentance through punishment, which involves abstaining from reoffending, and this should also be the guiding criterion for determining whether a person is an appropriate candidate for a suspended sentence.

There are two potential concerns that arise here. The first one pertains to the very foundation of the notion of “criminal predisposition” as a theoretical matter, while the second one concerns the court’s ability to determine the relevant circumstances for deciding on appropriate sanction in a given case, as a practical matter. The first issue would label the idea of “criminal predisposition” a fallacy or fiction – something that does not exist and should not be pursued as a criterion for distinguishing between various types of criminal offenders. This approach is certainly supported by contemporary criminology, which long ago abandoned the general biological or psychological explanations of criminality, which sought to explain criminal behavior through innate human traits and characteristics.<sup>87</sup> Instead, in contemporary criminology causes of crime have been sought in the domain of socio-economic factors, inequality, marginalization and discrimination, and this has been confirmed through various empirical studies.<sup>88</sup> In addition, life course studies and studies on desistance have shown that crime is mostly a young-people (and mostly male) phenomenon, which decreases with age, especially in the presence of positive factors such as personal and professional connections and relationships.<sup>89</sup> All this means that we cannot base the justification of a suspended sentence on the offender’s (lack of) criminal predisposition because no such thing exists.

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86 Duff, R. A. A., 2001, p. 124.

87 Such perspectives on the causes of crime have lost their credibility to such an extent that they are no longer even mentioned in the most reputable textbooks and handbooks as theories that have a potential to explain criminality. See, for instance, Liebling, A. *et al.*, 2023, *The Oxford Handbook of Criminology*, Oxford, Oxford University Press.

88 See, for instance, Heimer, K., 2019, Inequalities and Crime, *Criminology*, Vol. 57, No. 3; Jahanshahi, B., 2022, ACEs, Places and Inequality: Understanding the Effects of Adverse Childhood Experiences and Poverty on Offending in Childhood, *British Journal of Criminology*, Vol. 62, No. 3.

89 See, for instance, Piquero, A. R. *et al.*, 2003, The Criminal Career Paradigm, *Crime and Justice*, 30; Laub, J. H., Sampson, R. J., 2001, Understanding Desistance from Crime, *Crime and Justice*, 28.



A more subtle way to frame the problem is to refrain from using the language of criminal “infection” or “predisposition”, and to opt for a more modest language of “reasonable expectations” that the court can formulate as a belief that convicted offenders will desist from further crimes even if suspended sentences are imposed. These expectations would be formed based on the assessment of circumstances pertaining to the offender and their crime (in accordance with the existing legal provisions), based on information available at sentencing. This more modest approach then poses a different question: do courts, under the current system, have sufficient knowledge and information to be able to construct such reasonable expectations? It seems that neither the Serbian nor Slovenian system has adequate provisions making information about the offender’s life routinely available to the judge, due to a lack of a general obligation to provide something akin to a presentence report (PSR), which is standard practice in some foreign jurisdictions. For example, in England and Wales, the role of the PSR, which is prepared by the Probation Service, is to provide “advice to the court to assist in determining the most suitable method of dealing with an offender.”<sup>90</sup> These reports are complex and typically contain information pertaining to: the analysis of the offence and patterns of offending, the defendant’s personal circumstances, the likelihood of reoffending, the appropriate (type) of sentence; the assessment of maturity (for young offenders), the offender’s vulnerabilities, obligations and responsibilities, and the impact of sentencing on dependents.<sup>91</sup> And even though the impact of these reports on judicial decisions depends on the institutional arrangements working in favor or against judicial “ownership” of the sentencing process,<sup>92</sup> they nevertheless remain critical in providing the appropriate degree and quality of information that judges otherwise would not have. Such reports, or similar instruments, would be a valuable and reassuring tool for judges when deciding on whether suspended sentences should be imposed. Although they inevitably require legal amendments and financial resources in both countries, they would further strengthen the robustness of the system, its credibility and commitment to the correct identification of those who do not require penal supervision.<sup>93</sup>

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90 Robinson, G., 2022, *Pre-Sentence Reports: A Review of Policy, Practice and Research*, London, Sentencing Academy, (<https://www.sentencingacademy.org.uk/wp-content/uploads/2023/08/Pre-Sentence-Reports.pdf>, 25. 5. 2024) p. 5.

91 HMPPS, 2021, Determining Pre-sentence Reports, Probation Instruction 04/2016. paragraph 2.4.

92 Tata, C. *et al.*, 2008, Assisting and Advising the Sentencing Decision Process, *British Journal of Criminology*, 48.

93 For example, the Slovenian system introduced a variant of such a report in 2017, with the formalization of its Probation Service: the courts may request something akin to a PSR from the probation service, but only when considering alternatives to impris-

#### 4.2. STRENGTHENING THE COMMUNICATIVE CAPACITIES OF THE COURT

The second issue concerns the appropriateness of the setting in which the suspended sentence is imposed for the purpose of achieving its communicative purpose. In contrast to probation, for example, which implies the supervision of the criminal justice agencies over the offender and thus provides ample opportunities for both censure and communication, censure in the case of suspended sentences is exhausted by the mere imposition of this sanction during the sentencing phase of the process. While judges in Serbia and Slovenia have a duty to publicly state the imposed sanction and explain why they chose it, this is usually done in a brief and formal way, limiting the role of the convicted offender to a passive recipient of the mere “warning” to desist from reoffending.

This criticism aligns with Duff’s thoughts on the importance of active communication which “aims to engage that person as an active participant in the process who will receive and respond to the communication [...] communication thus addresses the other as a rational agent, whereas expression need not.”<sup>94</sup> This emphasizes the nature of communication as a dialogue and a two-way process, which provides the necessary space for the offender to reflect on their behavior, consider its wrongfulness and repercussions, as well as to express their thoughts on how the harm can be repaired and harmful behavior avoided in the future. All this allows the offender to be held to account, which subsequently creates beneficial conditions in which the offender can restore themselves as a responsible agent.<sup>95</sup> Furthermore, this dialogue also allows the offender to add nuances to the court’s account, to try to change the court’s perception of them and explain their behavior, in which sense punishment becomes a process of moral communication, engagement and persuasion (though not about the justifiability of the sentence itself).<sup>96</sup> While the offenders understand that the criminal process will result in state-sponsored censure, the court’s role in demonstrating compassion, support and indicating the offender’s positive side seems to be important for the offenders to accept responsibility for their wrongdoing.<sup>97</sup>

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onment or a suspended sentence with supervision – and not a suspended sentence *per se* (see Art. 19. of the Probation Act (*Zakon o probaciji*), *Official Journal of the Republic of Slovenia*, No. 27/17). An additional issue is the tendency to impose suspended sentences without any intervention of the court, in the plea bargaining process. In such cases, pre-sentence reports could instead be prepared for the prosecutors.

94 Duff, A., 2001, pp. 79–80.

95 Duff, R. A., forthcoming.

96 *Ibid.*, p. 5.

97 Schinkel, M., 2014.

Consequently, what is required is a more thorough and comprehensive approach to communicating the censure for crime but also the confidence in the offender. This is critical for recognizing the offender's agency and emphasizing the trust that the criminal justice system is placing in them. For that reason, modest amendments to the specific court session in which the suspended sentence is imposed might be necessary, in both Serbia and Slovenia, to provide space for this sort of communication. The expansion of this session in both its duration and purpose – perhaps even the provision of an entirely separate court session devoted to this – would allow for extended communication between the court and the offender, which would, on the one hand, allow the court to convey the seriousness of the situation, expectations from the offenders, the consequences of breaching trust, etc., while, on the other hand, it would provide an opportunity to the offender to respond to this and identify any pertinent issues, problems or needs.<sup>98</sup> Of course, the communicative process would not be imposed on the offender should they not wish to participate, nor would the offender be in a position to change the court's sentencing decision: the proposed amendment would merely be about providing an opportunity for a more thorough communication to take place. This is a necessary condition for achieving a proper moral and dialogic communication, which avoids (as much as possible) unequal and hierarchical relations between the court and the convicted person.

Duff himself believes that the trial phase provides the optimal context for achieving these goals because it is the essence of a moral general “process through which a polity calls defendants to answer charges of public wrongdoing (wrongdoing that concerns the whole polity).”<sup>99</sup> The “answering for wrongdoing” can come in different forms depending on the gravity of crime in question – it can range from undergoing hard treatment to simply making amends,<sup>100</sup> and such amends can also include expressing regret, remorse, and providing an apology to the community, the victim, or their family.

## 5. CONCLUSIONS

Although the “Yugoslav” model of suspended sentences was constructed and developed in a specific social context that has characterized the now dissolved Yugoslav federation and its successor states, its coherence with the general communicative theory of punishment, which this

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98 See Plesničar, M., 2017, Postopek odločanja o sankcijah, *Revija za kriminalistiko in kriminologijo*, Vol. 68, No. 3.

99 Duff, forthcoming, page 7.

100 Lee, A. Y. K., 2017.

article has argued for, speaks in favor of its potential for wider applicability in other jurisdictions. While not seeking to directly transplant the model into dissimilar contexts, the question can still be asked what, if anything, can other countries learn from the model discussed in this article.

The model accentuates the desirability of and the potential for imposing less intrusive community-based sanctions, which would convey the message of trust and signal the confidence that the criminal offender enjoys as a perpetual member of the community. This does not only mean that the model offers guidance on how and why we could reduce the use of imprisonment by leaving the offender out of prison (which it certainly does), but, more importantly, it also emphasizes the need to reduce restrictions that convicted offenders experience when their criminal sanctions are executed in the non-carceral setting, through sanctions such as conditional sentences, probation, community sanctions, etc. Despite leaving them out of prison, recent studies have demonstrated that convicted offenders are commonly subjected to a host of unnecessary restrictions, limitations and obstacles to leading fulfilling and productive lives: these consequences have a tendency to “pile on” and create effects that inhibit reintegration and desistance, further spreading to the lives of offenders’ families and communities.<sup>101</sup> While many such restrictions are justified and cannot be removed, for instance, for reasons of public safety, there is every reason to act constructively and imaginatively when considering whether all of them are justified. The “Yugoslav” model provides a bold and refreshing perspective that promotes trust, is premised on the idea of giving second chances, and allows offenders to self-guide their path to desistance. The model additionally offers concrete guidance and decades-long experience, which provides reassurance to countries considering a less intrusive system.

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## IZRAŽAVANJE POVERENJA: USLOVNA OSUDA KAO KOMUNIKATIVNO KAŽNJAVANJE

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### APSTRAKT

Članak identifikuje poseban model uslovne osude koji se trenutno može naći u Srbiji i Sloveniji. Primenom teorije 'komunikativnog kažnjavanja' Antonija Dafa, članak sugerira da pomenuti model predstavlja koherentan i razvijen krivičnopravni instrument koji promovira inkluzivan, dijaloški i neosuđujući pristup učiniocima krivičnih dela. U cilju potkrepljivanja ove tvrdnje, članak poredi Dafovu teoriju sa tri ključna domena uslovne osude u pomenutim zemljama: (a) filozofski i teorijski pristup, (b) materijalne i procesne odredbe i (c) izvršenje sankcija. U zaključku su naglašeni izraženi kapaciteti uslovne osude da prenese poruku države učiniocu krivičnog dela kojom se izražava poverenje i pouzdanje da on neće ponoviti krivično delo, čak i u slučaju izostanka kazne zatvora. Naposljetku, članak predlaže dalje pravne promene koje se tiču sposobnosti suda da utvrdi relevantne činjenice i obezbedi bolju komunikaciju sa osuđenim.

**Ključne reči:** uslovna osuda, komunikativno kažnjavanje, probacija, kriminalitet, kazna, izricanje kazne, krivično pravo, Entoni Daf, Srbija, Slovenija

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