

**CRIMINAL AND TECHNICAL ASPECTS
OF THE IMPOSITION AND EXECUTION
OF A HOME PRISON PENALTY IN THE SLOVAK REPUBLIC ***

SIMONA FERENČÍKOVÁ–LUKÁŠ MICHALOV

Department of criminal law, Faculty of law

Pavol Jozef Šafárik University in Košice

simona.ferencikova@upjs.sk, lukas.michalov@upjs.sk

1. Introduction

In 2006, the penal system in the Criminal Code was enriched by previously unused types of punishments, including the home prison penalty. So called alternative sentences, which should be a significant competition against real imprisonment in the case of minor offenses. The incorporation of new types of alternative sanctions into our legislation reflects the period of the second half of the 20th century, which can be described not only as a period of revolutionary political-economic changes but also in terms of criminal justice, as a period of seeking new forms of justice to replace some inflexible institutes in criminal law. The use of these alternatives is based on the concept of restorative justice, which is in contrast to the repressive concept of retributive criminal justice.¹ Alternative penalties may include those who do not entail the imposition of imprisonment connected with the isolation of the convicted person. The advantage of alternative punishments is that the criminal is spared the damaging consequences of imprisonment. He is not exposed to the negative aspects of this punishment and remains integrated into society, being able to continue to maintain social, family and work relationships, which can significantly improve the remedy of criminal.

The home prison penalty like any other kind of punishment, has also gone through its gradual development. This institute has been used for many centuries, especially in the private sector, as a tool to restrict movement. It was used to people who were too strong or too influential to be placed in a real prison. For example, hereditary rulers, prominent political figures, religious leaders whose imprisonment

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¹ Jaroslav KLÁTIK: Odklon v trestnom konaní ako prostriedok racionalizácie trestnej spravodlivosti. *Právny obzor*, roč. 90, č. 1, 2007 p. 53.

could cause rebellion, political unrest. The first mention of the institution of home prison is the detention of the Apostle Paul. There is also a story in which a man was granted home prison for his faith in Kopernik's theory. He remained in home prison until 1642, when he died. Many former presidents have been sentenced to home prison for crimes against their countries, for example, Pol Pot (Cambodia), Rafael Videla (Argentina), Habib Bourgiba (Tunisia), Aung San Suu Kyi (Burma). Former dictator Augusto Pinochet was placed in home prison upon order; a former leader had been placed in home prison for the last 16 years of his life. Former Prime Minister of the Soviet Union Nikita Khrushchev was placed in a home prison for seven years before his death after being overthrown in 1964.²

Even in the historical development of the home prison, it was clear that without technical control, this sentence will be ineffective, unless home prison is just a 'less severe form of imprisonment' where the convicted person has no access to the means of communication or, if he has access, he is most likely to be watched, and the home prison is connected to strict isolation. In the mid-1960s, the first electronic monitoring device was developed by Harvard psychologist Dr. Ralph Schwitzgebel, who worked on the Science Committee in Psychological Experiments at Harvard University. In 1964 he developed a one-kilogram weighing radio telemetry device, which consisted of a battery and a transmitter and transmitted signals that could be traced to a distance of 400 meters and determine the whereabouts of the wearer. Dr. Schwitzgebel hypothesized that his invention could provide a more humane and cheaper alternative to detention for many people involved in the justice process. This device was patented in 1969. However, this device came into practice only in 1977 when Judge Jack Love from Albuquerque, New Mexico, inspired by an episode from the cartoon series Spiderman, discovered the possible use of electronic monitoring. Judge Love convinced Michael Goss, an electronics specialist, to manufacture and construct an electronic control device. In 1983, Judge Love sentenced the perpetrator to a home prison with electronic monitoring for the first time. Subsequently, other states began to use this institute. Electronic surveillance systems grew at the fastest rate in the United States of America, and by 1988 they were already in place in 32 countries, with a total of 2300 offenders monitored electronically.

However, the home prison is not a completely new institute even in our conditions (Slovak Republic) and has its historical roots. It was already anchored in the Criminal Code No. 117/1852 Coll. Home prison was essentially an alternative to the first-instance prison and could be imposed if the offender had no criminal records. He had to undertake not to leave the house under any excuse. Otherwise, he had to execute the remainder of his sentence in prison because of a breach of the obligation. Sometimes the vow of the convict was sufficient; sometimes, the guard was present.

² M. RAJNÍČ: Trest domáceho väzenia v systéme trestov. *Justičná revue*, 61, 2009, č. 6–7.

2. Current legislation

The home prison penalty was re-enacted in the Slovak legislation upon recodification of the Criminal Code with effect from January 01, 2006. The legislator stated the “Front-end” type of home prison, which means that the criminal could spend all time of penalty in home prison.³ The second option, “Back-end” type, means that criminals firstly go to a real prison and if the behavior is acceptable, criminals can spend the final stage of penalty in home prison. This option is in Criminal code since 2016, as we mention lower. Home prison can be considered as an alternative sanction to sanction of imprisonment for less serious criminal acts, as resulting from the law diction expressed in § 53 clause 1 of Criminal Code, to which the home prison penalty can be imposed on the criminal in duration up to four years. Till 2019 home prison could be imposed only up to two years.

Provision of § 53 clauses 2 of Criminal Code regulates that the court may impose a home prison penalty for a crime where the upper limit of penalty rate of imprisonment is a maximum of ten years. Till 2019 home prison could be imposed only for the crime with an upper limit of penalty rate maximum of 5 years.

Provision of § 53 clauses 1 of the Criminal Code regulates the terms of home prison penalty awarding that must be fulfilled cumulatively. The home prison penalty may be imposed by the court to the offender if:

- (a) in view of the nature of the crime committed by offender imprisonment is not necessary due to criminal personality circumstances of the crime,
- (b) the offender has given a written statement to reside in the dwelling at the specified address at a specified time and to provide the necessary assistance in carrying out the inspection and control,
- (c) the conditions for carrying out control by technical means are fulfilled.

By imposing the home prison penalty, the court must take into account evaluation criteria related to the nature and importance of the offense committed, and also the offender.⁴ In the case of offences, the court of justice makes an assessment of the criminal act commitment method, its consequences, circumstances of the act committed, the blame rate and the offender’s motive. Primarily, the court should consider the nature of criminal activity since imposing the home prison penalty was probably undesirable in certain cases of home violence and criminal acts against family and youth, as constituted in the III. head of the special section of the Criminal Code. Evaluating an offender, the court takes into account especially personal and family conditions but proprietary conditions of the offender should be neither neglected and, last but not least, future perpetrator’s prognosis and re-socialization possibilities – correction possibilities should be considered. The third condition

³ L. TOBIÁŠOVÁ: Domáce väzenie – nový trest v rekodifikovanom Trestnom zákone. *Justičná revue*, 58, 2006, č. 10.

⁴ L. MICHAĽOV: Trest domáceho väzenia – súčasnosť a perspektívy. In: *Trestná politika štátu-história, súčasnosť a perspektívy: zborník vedeckých príspevkov z interdisciplinárnej celoštátej vedeckej konferencie s medzinárodnou účasťou*. 4–5 November 2015, Košice, Košice Univerzita Pavla Jozefa Šafárika v Košiciach, 2015.

representing the essence of the home prison penalty corresponds to the written statement of the offender declaring that criminals will stay in the determined address and provide required cooperation during control. The fourth requirement of such sanction imposing represents fulfillment of conditions for control by technical means. Control of sanction execution by technical means is stipulated in a special law dealing with the control of certain sanction execution by technical means mentioned lower. Control of home prison penalty execution by technical means can be undoubtedly considered an innovation in relation to control of sanction execution in general.⁵

Sentenced criminal is obliged to stay in his residence, including adjacent premises, to live a respectful life and to withstand control by technical means during the period of home prison penalty execution during the time period determined by the court. Speaking of the uncertainty of legislation, the court deciding on home prison penalty should specify the exact place of home prison penalty in the verdict where the sentenced person shall stay, since currently, it is a common praxis that a sentenced person can have permanent stay in the place other than he stays in. The judge should also specify the exact time in the verdict when the sentenced person shall stay in residence. Judicial praxis demonstrated that obligation to stay in residence applies to the weekly working days and out of the working time within approx. 7:30 p.m.–06:00 a.m. To ensure that the sentenced person runs a proper working and family life during the home prison penalty execution. The court of justice is also authorized to inflict restrictions or obligations stated in § 51 clauses 3 and clause 4 of the Criminal Code.

For the duration of the home prison penalty, the person may leave his or her dwelling only with the prior consent of the probation and mediation officer, and only on imperative grounds and for the necessary time. This time counts towards the sentence.

As it was mentioned above, the maximum length of sanction that a criminal can be sentenced by the court to the home prison penalty refers currently to four years. If the sentenced person fails to fulfill obligations imposed by the court of justice, and restrictions resulting from the home prison penalty, the court shall change the home prison penalty or a part of it to imprisonment. § 53, clause 6 of Criminal Code stipulates the way of changing the home prison penalty to unconditional imprisonment in proportion 1 : 1, following the prior hearing of the sentenced person, in the form of a resolution passed by the court at public proceedings. It means that one pending day of the home prison penalty shall correspond to one day of imprisonment and the court of justice shall decide on the way of such imprisonment.

Amendment of Criminal Code that became effective on January 01, 2016, introduced the institute of change of the remaining sentence to imprisonment in § 65a of Criminal Code to home prison penalty also called “Back-end” as another type of

⁵ V. TÓTHOVÁ–S. FERENČÍKOVÁ: Innovation in criminal policy of imposing alterantive sanctions in slovak republic. In: P. HÁJEK–O. VÍT (eds.): *CBU International Conference Proceedings*. 2019, 7, pp. 661–670. Prague: CBU Research Institute, doi:<https://doi.org/10.12955/cbup.v7.1435>

home prison penalty, an alternative to parole. The essence of the “Back-end” type of the home prison penalty lies in unconditional sentencing to imprisonment that will change to parole in the form of home prison penalty after passed certain parts of the imprisonment.

3. Electronic monitoring

Electronic monitoring represents a substantial part of penal systems worldwide, applied across all criminal proceedings stages from the preparation proceeding, including proceedings in front of the Court, and also in execution proceedings. Electronic monitoring is a technical mean used by the law enforcement bodies, aimed at increasing the effectiveness in the area of offenders movement monitoring for purposes of criminal proceedings and instant check of his/her restricted movement, and also monitoring of all bans imposed.⁶

Influenced by the penal policy development trends especially in the area of punishment and by penal proceedings modernization, the electronic system of person monitoring has been enacted in the Slovak legislation and law order. While the system had been considered already in re-codifications, in particular, in case of technical check in relation to established home imprisonment sanction, the system was implemented much later. It was enacted in the legislation upon adopted Act No. 78/2015 Coll. on Control of Certain Decisions Execution by Technical Means as amended (hereinafter “Act No. 78/2015 Coll.”). The Act became effective on January 01, 2016, and the Electronic System of Persons Monitoring was established in Slovakia on the same date.⁷ Act No. 78/2015 Coll. Regulates technical means, their terms of use and the course of control.

Electronic monitoring represents the system of monitoring the observance of certain bans, restrictions, and orders, as well as sanctions and certain protection measures as the forms of penal law sanctions. Pursuant to regulation in effect, we distinguish six types of monitoring where different types of technical means are used in each type of monitoring.⁸ Technical means operating cost is borne by the state and partly by the monitored person. The amount of its share is determined in the executive command. Technical means are the state property connected to a so-called central monitoring system. It is this that allows for the check of the detain-

⁶ V. TÓTHOVÁ–S. FERENČÍKOVÁ: Innovation in criminal policy of imposing alterantive sanctions in slovak republic. In: P. HÁJEK–O. VÍT (eds.): *CBU International Conference Proceedings*. 2019, 7, pp. 661–670. Prague, CBU Research Institute, doi: <https://doi.org/10.12955/cbup.v7.1435>.

⁷ A. JECKOVÁ: *Elektronický systém monitorovania osôb. I. Košické dni trestného práva – Perspektívny vývoja európskeho trestného práva*. Univerzita Pavla Jozefa Šafárika v Košiciach, Košice, 2018.

⁸ M. TITTOVÁ: *Trestnoprávne sankcie ukladané fyzickým osobám*. Wolters Kluwer, Bratislava, 2018.

ment regime observance through signals transmitted by technical means, and the record of security and operating incidents.⁹

Technical means can be used in relation to proprietary law institutes (home imprisonment sanction; change of imprisonment sanction to home imprisonment sanction; sanction of restricted stay; sanction of restricted attendance of public events; protection supervision; probation supervision in case of conditional postponing of imprisonment sanction; probation supervision in case of parole), and in relation to procedural law institutes (conditionally suspended criminal prosecution; detention replacement by probation and mediation officer). Despite the broad application of technical means in the area of the penal law, possibilities of their further use have been still identified.¹⁰

Legislations of Austria, Switzerland, the Czech Republic, Norway, Scotland, Great Britain, Belgium, the Netherlands, Canada, USA, Australia, New Zealand, South Africa, Singapore, and Brazil allow the same or similar control system by technical means¹¹. Active and passive monitoring systems represent two basic types of electronic monitoring of the sentenced people. Active monitoring systems allow for non-stop monitoring of a sentenced person and passive monitoring systems require the sentenced person to call in to report themselves on pre-determined intervals.¹² Different technical means are used in various world countries.

Effective control of sentences without deprivation of liberty can be ensured through technical means and electronic monitoring. The project of the electronic system for monitoring accused and sentenced persons (ESMO), co-funded by the European Union from the European Regional Development Fund through the Operational Program Informatization of the Company, was launched by the Ministry of Justice of the Slovak republic in 2013.¹³

The Act on the control of the enforcement of certain decisions by technical means distinguishes more types of technical means. For home prison penalty execution, it is necessary to use

- (1) personal identification device,
- (2) a device for checking presence at the place of the sentence,
- (3) the Probationary and Mediation officer's device.

⁹ J. KLÁTIK: Uplatňovanie restoratívnej justície a elektronického monitoringu na Slovensku a vo vybraných štátach Európskej únie. In: *Košické dni trestného práva – Perspektívy vývoja európskeho trestného práva*. Univerzita Pavla Jozefa Šafárika v Košiciach, Košice, 2018.

¹⁰ V. TÓTHOVÁ–S. FERENČÍKOVÁ: Innovation in criminal policy of imposing alterantive sanctions in slovak republic. In: P. HÁJEK–O. VÍT (eds.): *CBU International Conference Proceedings*. 2019, 7, pp. 661–670. Prague: CBU Research Institute, doi: <https://doi.org/10.12955/cbup.v7.1435>.

¹¹ See more: A. NAGY: Release from prison in hungary and european court of human rights. *Zeitschrift für Internationale Strafrechtsdogmatik*, 2016/3., pp. 199–206, release from prison in Hungary, Zborník radova pravni fakultat, 49:4, pp. 2011–2021.

¹² T. STRÉMY–J. KLÁTIK: *Alternatívne tresty*. C. H. Beck, Bratislava, 2018.

¹³ L. MICHAĽOV–M. ŠTRKOLEC: Hmotnoprávne a procesnoprávne aspekty kontroly niektorých trestných rozhodnutí prostredníctvom technických prostriedkov. In: Alternativní řešení trestních věcí (trestněprávní, trestněprocesní a kriminologické aspekty): sborník z mezinárodní vědecké konference Olomoucké právnické dny, May 2015, Olomouc–Praha, Leges, 2015.

The basic element of the electronic monitoring and technical means is the personal identification device – currently in the form of a bracelet, which is set on the body of the monitored person, usually on his/her ankle. The monitored person is obliged to tolerate the attachment of this device to his/her body throughout the enforcement of the decision by technical means. Any attempts to interfere with this device or to damage or destroy it are evaluated as security incidents. This general device is used in the execution of a home prison penalty, by the imposition of various appropriate limitations and obligations.

A device for checking presence at the place of sentence used in home prison penalty is located in the dwelling (house, apartment, residence) of the monitored person and based on communication with the personal identification device, it is possible to check the presence of the monitored person at a specified time in the specific place. At present, this device is in the form of the home monitoring station. This device communicates with a personal identification device whose radio frequency signal receives and evaluates the presence and the absence of the monitored person at a specified place and at a specified time in accordance with a court decision. In the event of a violation of the conditions, this device will signal this fact to the Operations Center, which will pass this information to the relevant Probationary and Mediation Officer.

The probationary and mediation officer's device is used by a probationary and a mediation officer. This technical device enables a probationary and a mediation officer to carry out a control of prohibition, limitation, or obligation "on-site" (on place) by identifying the presence of a personal identification device within a range of approximately 300 m in its geographic conditions and thereby detect the presence of people who have this device connected to the body. In a particular case, for example, it will be possible to verify whether the controlled person is at a specified time in the designated place or, on the other hand, is not in the specified place at a specified time.

4. Application problems

The home prison penalty is aimed at pointing to offender's correction since the sanction execution is associated with various re-socialization programs focused on offenders' personality, the sentenced person is not deprived of social and emotional bonds.

Despite all positive aspects of the home prison penalty enlisted herein, we should state that it is least imposed sanction as resulting from the statistics of the Slovak Ministry of Justice. In 2015, the home prison penalty was imposed 18 times and 23 times in 2016. The average frequency has been affected by only 14 home prison penalty awards in 2017 but again 20 awards in 2018, which, however, is hard to define as a satisfactory number.

There are a few reasons for such rarely awarded type of sanction. As stated above, the possibility to check the sanction execution with technical means represents one of the terms of the home prison penalty awarding. The court must obligatorily examine the terms of sanction execution when awarding the home prison

penalty. Thus the court must primarily examine the availability of required technical means (limited availability), technical equipment (GPS signal availability), power supply connection, fixed phone connection and location of the home monitoring station. Such examination of the conditions is very demanding for the court of justice and hence the tendency to award more comfortable sanction (for the court). It would be more appropriate when probation and mediation officers examined the technical background and report to the court of justice on possibilities of the home prison penalty award to a particular accused person.

Here we encounter further application problems: only 98 persons perform as probation and mediation officers at particular courts of justice in the Slovak Republic. These officers have to monitor fulfillment of duties and restrictions under § 51 clauses 3, 4 of Criminal Code that can be ordered to a sentenced person in relation to the home prison penalty, along with other competences, but what is of utmost importance, probation and mediation officers check the technical means and this duty is called electronic monitoring, which is obligatory within the home prison penalty. Accordingly, a person sentenced to the home prison penalty should enter the process of re-socialization upon very close collaboration with probation officers. For illustration purposes only, we have to state that the justice system has current capacities to concurrently monitor 2,000 persons subject to electronic monitoring but the capacity can be increased. Thus, if the electronic monitoring is used exclusively for monitoring of the awarded home prison penalty, a single officer would be in charge of approx. 20 person monitoring, taking into account such a demanding work comprising of installation and uninstalling the technical means, recording, reporting and attending the incidents within control execution, checking of accessibility and proper operation of technical equipment.

5. Closing Thoughts

This scientific paper aimed to point out the historical aspects, the current legislation and also the enforcement and control of the home prison penalty through electronic monitoring. The aim of this scientific paper was also to point out application problems connected with this penalty. The home prison penalty should have a privileged position in the system of penalties in the Slovak Republic, as it is a penalty competing with imprisonment and is associated with more beneficial consequences not only for the offender but also for society. However, there are still many unresolved problems, especially of the technical and operational nature that we have to face. In recent days The Ministry of Justice is also trying to solve the low number of home prison penalties imposed, even with specific legislative changes. The last ones in 2019 expanded the possibilities of imposing this penalty. We believe that, as a result of recent legislative changes, the home prison penalty will become a significant pillar of the system of penalties in the Slovak Republic

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