| Chapter 8 |

# Slovenia: National Regulations in the Shadow of a Common Past

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**ABSTRACT**

For many years, until the country's independence, Slovenian criminal law developed under the influence of communism. With the new modern Constitution of the Republic of Slovenia, it was necessary for the country to establish its own modern criminal law, which would no longer be tied to past communist patterns. Accordingly, both criminal procedural law and criminal substantive law have been revised. New Slovenian criminal law is based on the general principles, such as the principle of legitimacy and restricted repression in connection with the rule of law, the principle of humanity, the principle of individualization of criminal sanctions, the principle of legality, the principle of fairness of procedure, the principle of formality, the principle of material truth, the debate principal, the principle of free judgement of evidence, the principle of subjective or guilty responsibility, the principle in dubio pro reo, and finally, the assumption of innocence. In addition to these principles, Slovenian criminal law also rests on the general concept of criminal offense, which is formed by three key elements, namely the fulfillment of the nature of the offense, illegality, and guilt. All of the above represent the key pillars of Slovenian criminal law, making it fair, modern, and comparable to other criminal systems in European countries.

**KEYWORDS**

Slovenia, historical overview, criminal legislation, criminal law, practice of criminal justice

## 1. Introduction

Throughout history, criminal law may be understood as a gradual restriction of deviant actions or actions that legislator considers to be reprehensible. They are often considered as such by society, but this is not necessarily related, as a criminal offense has always been conduct that is criminalized by law. The essence of criminal law is to limit and prevent all forms of violence in social relations and in personal relations between individuals, although this has not always been the main motive for establishing positive criminal law in a particular period. Historically, leaders did not always use their repressive power to protect people's human rights and social values

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but, rather, abused it to consolidate their power, achieve their political goals, and persecute their political opponents.[1]

Criminal law is supposed to reflect the rule of law and its implementation in the most sensitive area of state repressive activity. However, the greatest danger lies in the subordination of legislation and its bodies by authorities who enjoy a certain social power. Through the historical review of the change of criminal law in the territory of the former Yugoslavia, it is possible to observe the development of criminal law with the change of the political regime and the realization of the social power of the authorities. This is well illustrated by the example of the principle of legality, the observance of which was very poor during socialism; however, with the development of European criminal law, this began to be consistently observed in Yugoslavia as well.[2]

With Slovenia's independence and, later, Slovenia's accession to the European Union (EU), Slovenian criminal law rose to the level of modern European criminal law and adopted European criminal law frameworks and standards.

## 2. A brief historical overview of the development of criminal law in Yugoslavia and, later, in Slovenia

The history of criminal law reflects the development of human civilization and culture. In this way, it is possible to connect the change and adaptation of criminal law through individual political periods in a certain area, while the criminal law legislation itself strongly reflects the tendencies of the current political system.[3]

### *2.1. Criminal law between World Wars I and II*

With the formation of the Kingdom of Serbs, Croats and Slovenes (Kingdom of SCS) and then Yugoslavia, Yugoslavia inherited six different legal areas. In Serbia, the Serbian Criminal Code of 1860 was in force. In Croatia and Slavonia, the Austrian Criminal Code of Crimes, Offenses, and Misdemeanors of 1852 was in force, which also applied in Slovenia and Dalmatia but with amendments that applied for Austria. In Bosnia, the Austrian Penal Code has been in force since 1879 and was slightly adapted to Muslim religious and legal concepts. In Vojvodina, Medjimurje, and, initially, in Prekmurje, the Hungarian Penal Code of 1880 was in force, with an amendment in 1908. Montenegro had its own Criminal Law on Crimes and Offenses of 1906, modeled on the Serbian Criminal Code. After the formation of Yugoslavia, most of the listed regulations remained in force with individual amendments. The validity of the Military Penal Code was also extended to the entire country. In 1921, a special infamous law on the protection of public security and order in the country (or the law

1 Bavcon and Šelih, 1987, p. 43.
2 Bavcon, 2006, pp. 15–19.
3 Bavcon and Šelih, 1987, pp. 43–44.

on the protection of the state) was enacted, which was aimed primarily against the Communist Party of Yugoslavia.[4]

Due to several different criminal law acts that were in force at the same time in otherwise individual parts of the same country, there were needs and aspirations for a unified criminal law system that would apply to the entire country. In the period between the two world wars, preparations were underway for new Yugoslav criminal legislation, but the new penal code was not adopted until 1929, and it entered into force in 1930. It was drafted under the strong influence of the European legislative reform movement on modern penal codes, which include the principle of legality and other generally accepted European democratic principles of criminal law. However, such a democratically oriented criminal code did not meet the needs of former Yugoslavia.[5]

### *2.2. Criminal law during the national liberation front*

The national liberation war and the people's revolution overthrew the government as well as the current legal order. However, the Yugoslav national liberation front had the peculiarity that it not only overthrew the old legal order but also established new bodies as well as new legal concepts and principles. This marked the beginning of the development of a new substantive criminal law, which initially stemmed primarily from the need to fight the occupiers and traitors, from the needs of revolutionary social transformation, and from the people's sense of justice.[6]

At that time, Slovenia was the leading country in written criminal law sources in Yugoslavia. On September 16, 1941, the Slovene National Liberation Committee issued a special "Decree on the Protection of the Slovene Nation and its Movement for Liberation and Unification"; this was considered the first substantive criminal regulation within the national liberation movement in Yugoslavia and represented an important legal source for post-war Yugoslav criminal law.[7] Otherwise, criminal law in other parts of Yugoslavia was created primarily through the case law of individual partisan detachments and national liberation committees with no special regulations. In 1942, regulations on the tasks and organization of national liberation committees delimited and defined the powers and tasks of military courts, which, accordingly, judged spies, traitors, hostile agents and saboteurs, and national liberation committees to combat

4 Ibid., p. 66.

5 Bavcon and Šelih, 1987, p. 67.

6 Ibid., p. 67.

7 In addition to the Decree on the Protection of the Slovene Nation and its Movement for Liberation and Unification, the Decree of the General Staff of the National Liberation Army and the Armed Forces of Slovenia on Military Criminal Justice of April 20, 1944, is one of the first Slovene and Yugoslav criminal law sources. The definition of criminal offense was established in these documents as acts that are dangerous for the Slovene nation and Yugoslavia, for the National Liberation Army, for the Liberation Front of the Slovene Nation, for the community in general, and, to the greatest extent, for individuals. In addition, the purpose of punishment was determined, namely, to prevent the perpetrator from re-committing criminal offenses, to intimidate the hesitant, and to have an educational effect on the perpetrators of criminal offenses. See more ibid., p. 67.

theft, robbery, and disorder in general. The principle of individual and culpable responsibility of perpetrators and the principle of humanity were included in these regulations.[8] More detailed procedural rules have emerged in the form of instructions for the work of the authorities, which have launched detailed investigations into individual cases and required sufficient evidence to impose a criminal sanction. However, it should be noted that these are not procedural rules in the form of procedural laws as we know today but political orientations in the form of instructions that follow the aspirations of the then ruling class. Furthermore, this was a time of war, which made it impossible to avoid disregarding these instructions. Regarding substantive criminal law, it is also necessary to highlight the Decree of the Supreme Staff on Military Courts of May 24, 1944, which, in addition to regulations on the organization of military courts and criminal procedure, also contained provisions on criminal offenses, penalties, and security measures. This regulation explicitly introduced the principles of guilt-based liability, the principle of the individualization of punishment and conditional sentence.[9]

### *2.3. Criminal law of the new Yugoslavia*

At the end of the war, problems arose in the Yugoslav judiciary, especially regarding criminal law. In this area, only the decree on military courts was in force, which did not cover all socially dangerous acts that were committed by individuals. This situation of a lack of legal rules was regulated by the AVNOJ Decree (February 3, 1945), which, in 1946, became the Act on the Invalidity of Legal Regulations from the Time Before April 6, 1941, and from the Era of Enemy Occupation. This law allowed the application of individual rules of law of the old Yugoslavia, provided that they did not conflict with the Constitution of the Federal People's Republic of Yugoslavia (FRY) and the constitutions of people's republics, laws, and other applicable regulations and principles of the FRY constitutional order. In this sense, the law explicitly stipulates that such rules may only be applied, and state bodies may not base their decisions on them. In 1945, new laws had already been adopted that regulated various areas of criminal law, and in 1946, they were adjusted to the constitutional provisions of the new constitution of the FRY. However, the entire criminal area has still not been regulated. The idea of codifying the entire criminal law emerged and was carried out in 1947 in the form of a general part of the Criminal Code, which entered into force on February 12, 1948. It was based on the Soviet model and thus contained individual provisions that threatened fundamental rights and freedoms. These were, for example, the provisions on analogy and guilt and the provisions on liability for preparatory actions. Another problem was the lack of a special part of the Code including a list of

8 An example of a provision in the spirit of the principle of humanity is a provision according to which the wife and children of a convicted enemy of the people had to be left with enough property to confiscate their property during the confiscation of property.

9 Bavcon and Šelih, 1987, pp. 67–68.

crimes, all of which was reflected in a number of completely unfounded and unjust convictions (for example, the Dachau trials).[10]

Based on lessons learned from practice and experience with the Soviet Union, Yugoslavia began drafting its own penal code as well as a special section including a list of crimes and sanctions. It was important to adhere strictly to the principle of legality, which would prevent the arbitrariness of the authorities and protect the rights of the citizen, thus making it the main object of criminal protection. In the spirit of this, a special part introduced the rule that a citizen may be punished only for that criminal offense which, even before it was committed, was determined by law to be a criminal offense and for which a penalty was provided. In addition, the new law also regulated the issue of criminal liability, in particular the issue of the extent of guilt and the issue of liability for preparatory acts and participation.

The new Criminal Code was adopted by the People's Assembly of the FRY on March 2, 1951, and entered into force on July 1, 1951. An introductory law to the Criminal Code was also adopted, which regulated certain issues related to the transition from the old criminal law provisions to the new code. In addition to the regulation of substantive criminal law, the Code of Criminal Procedure was drafted in 1953 and included important principles of criminal law to protect the legality, freedom, rights, and dignity of man and society.[11]

The new criminal law regime raised the criminal law of Yugoslavia to the level of European criminal law as the appropriate level of development of the society at the time. In the coming years, the Criminal Code also had to be amended several times in accordance with the development of society and the political regime. Thus, the previously rather severe prescribed sentences have been reduced over time, and the general maximum sentence of strict imprisonment has been reduced from the previous 20 years to 15 years. The penalty of life imprisonment and the execution of the death penalty by hanging were also abolished, the possibility of applying a suspended sentence was expanded, a special sanction was imposed – a reprimand that could be imposed under special conditions in place of punishment – and the list of security measures was expanded. The field of criminal law for juvenile offenders was regulated in 1959.[12]

### *2.4. Transition from Yugoslav to Slovenian criminal law*

Slovenia gained its independence after the disintegration from Yugoslavia in 1991. The same year, Slovenia also adopted its own Constitution.[13] Thus, it was also necessary to establish its own modern criminal law, which would no longer be tied to past communist patterns.

10 Ibid., pp. 68–69.
11 Ibid., pp. 68–69.
12 Ibid., pp. 69, 71.
13 Meško and Jere, 2012.

*2.4.1. Criminal procedural law*

In this context, the Slovenian Criminal Procedure Act (ZKP as in Slovene Zakon o kazenskem postopku) was adopted in 1994, but it was not revolutionarily different from the previous Yugoslav one, and it preserved all of the essential solutions of the old system. It was still characterized by the judge's focus on actively discovering the truth as a principle of seeking material truth, with the judge having the power to both propose and present evidence. Slightly more important changes to the first Slovenian ZKP were the mandatory instruction to the suspect upon deprivation of liberty, systemic regulation of covert investigative measures, and the introduction of deterrence mechanisms. With these changes, it is possible to observe a departure from the communist regime, also embedded in criminal law, in the direction of emphasizing the observance and protection of the rights of suspects in criminal proceedings. With the following amendments, Slovenia's criminal procedure has become closer to modern European regulations, as evidenced by the institutions of the pre-trial hearing and the plea bargaining procedure, with the court retaining a duty to discover the material truth in the case. In recent decades, the role of the investigating judge has increasingly taken over the guarantee function, when a defendant's rights and investigative functions are in conflict. An additional change in this regard is that the judicial activity of the investigating judge is increasingly being transferred back to the pre-trial proceedings, which means withdrawal from the adopted Yugoslav scheme.[14]

With time and development of criminal proceedings, systemic changes were undertaken in other bodies involved in criminal proceedings as well, with the role of the public prosecutor changing from a predominantly passive body to an active facilitator and the role of the police shifting, with their power reduced in the pre-trial proceedings and who are now subordinate to the public prosecutor's office.[15]

Regarding the structural changes in the criminal procedure, the trend of eliminating the investigation phase stands out, which, similar to Slovenia, is the case in all of Europe. In this context, the possibility of filing a direct indictment without an investigation has been considerably extended, allowing the prosecutor to move directly to the prosecution phase in many more pre-trial cases. This change in the nature of the investigating judge and the strengthening of their guarantee function also shows the loss of the importance of the investigation. In addition to the above, a major systemic change is the introduction of the pre-trial hearing, which is considered the first point of the procedure and in which the classic criminal law triangle of the main procedural subjects is established.[16]

The constant supplementation and amendment of criminal legislation without a comprehensive assessment has led to a great deal of criticism from legal experts, who believe that after many years of supplementing the law, it was time to prepare thorough research of the positive and negative results of Slovenian criminal law from a

14 Šugman, 2015, p. 123.
15 Gorkič, 2012.
16 Šugman, 2015.

professional as well as a practical perspective. According to some critics, the criminal procedure at the beginning of the 20th century contained too many obstacles, which made it slow and inefficient. Thus, criticisms arose that the law did not work at all and there was a tendency to rewrite the ZKP in full.[17]

### *2.4.2. Criminal substantive law*

With independence, in addition to criminal proceedings, Slovenia also had to regulate criminal substantive law. Most crimes have remained the same with improvements to legal texts, as changing them would be unnecessary. Most of the criminal offenses covered by the Slovenian Criminal Code from 1977 and in the amendments to this Act were designed in a high-quality and modern manner, comparable to the criminal law regimes of the countries of Western Europe.[18] However, the new Criminal Code (KZ as in Slovene Kazenski zakonik) introduced many changes. It thus placed emphasis on man and his goods and introduced a reduction in the level of repression out of a desire to break the old communist patterns. In this context, the reduction of threatened penalties followed, and some criminal offenses were eliminated, especially those against the state, social property, and self-government. The new social situation and the new democratic parliamentary system in independent Slovenia also required the introduction of new crimes. A radical change in the content and scope of political and military crimes and the new economic market system set a new starting point for the introduction of economic crimes in KZ. Accordingly, it was necessary to take a new approach to the liability of legal persons for criminal offenses, with Slovenia following the example of recent European regulations and decided to regulate this topic in a special law.[19]

Regarding Slovenian substantive criminal law, it has been established over time that the KZ gives judges very broad powers, especially in deciding on sanctions, that is, in choosing, imposing, mitigating, and remitting sentences, which could be questionable from the fundamental principle of equality before the law. It was also necessary to introduce some classic European institutions of criminal law in the Slovenian Criminal Code that were previously not even mentioned in the Criminal Code. These include, for example, continuing crime, error of facts, and causation. However, the definition of the general concept of crime raised the greatest concerns in comparison with foreign European substantive criminal law regimes. The latter still contained an element of danger, which modern criminal law theory did not advocate, as well as the institution of acts of minor importance and the application of the principle of failed instigation.[20]

17 Fišer, 2000, p. 8.

18 It should be noted that as early as 1977, the Criminal Code of the Socialist Republic of Slovenia was quite different from other republican and provincial laws of the former Socialist Federal Republic of Yugoslavia, which made it easier to adapt to the new substantive criminal law framework by deviating from the old system. For more, see Deisinger, 1994.

19 Deisinger, 1994.

20 Fišer, 1998, pp. 30–31.

## 3. Criminal law in relation to the standards of the democratic rule of law and the impact of politics

The link between politics and criminal law is always a topical issue that adapts to the existing social regime. This connection can be seen in the amendments to criminal laws, which are sometimes highly politically motivated and pursue a tendency toward greater repression, as well as in the form of pressure on individual state bodies that directly or indirectly carry out repression. Criminal law is among the pillars of stability and legal security of any democratic state governed by the rule of law; thus, changes in criminal law must be carefully studied and supported by professional research, and ultimately, an accepted decision must be supported by sufficiently thorough explanations based on previous research and statutory procedure. It is certainly inappropriate and irresponsible to rush novelties and changes. Neither substantive nor procedural criminal law should be changed under the "halo effect" or political pressure. This is in sharp contrast to the democratic state governed by the rule of law, which Slovenes advocated at the time of independence. However, in the early years of Slovene independence and the building of its own legal system by the ruling party, there have been tendencies and attempts to take over the country's criminal law and repressive apparatus, which is unacceptable in a democratic state governed by the rule of law.[21]

On the other hand, in addition to following the principle of the rule of law, criminal law should respect human rights, which are essentially the result of the protection of the fundamental rights of the individual. In the past, these have often been adapted into political slogans to gain the affiliation of the public as well as to gain social power. The reflection of this power is shown in the case of the disintegration of the system of Eastern European real socialism, which was previously considered unbreakable. The fall of the totalitarian regime created the conditions for the implementation of the new human rights law. However, although individual revolutionaries were likely in favor of their actual implementation, it soon became apparent that the new rulers were as obstructive as they were for the revolutionaries' predecessors. At this point, it is necessary to emphasize the awareness that human rights are not designed to be used by revolutionaries as political slogans to gain support in the desire for regime change; their real assertion and protection should be guaranteed in positive law and in practice. They are a supra-ideological, supra-political, and supra-national legal category that has slowly emerged throughout history as a reflection of ideological, political, national, or other tolerance and intolerance on the one hand and the principle of the rule of law and the eternal tendency of those in power to apply it arbitrarily on the other.[22] However, even today in the time of modern democracy, such conflicts are not overcome in many regions, where the rule of law as a fundamental principle

21 Bavcon, 1999.
22 Bavcon, 1994.

of democratic order should be the undisputed awareness of authorities. Although the EU is strongly committed to this principle, constantly reminding Member States to respect it as a pillar of every modern constitutional democracy as well as human rights, the covert arbitrary decision-making of political elites and the disregard for the democratic states governed by the rule of law is still not overcome. In this context, the EU is constantly debating compliance with this topic in Poland and Hungary, and the Commission has recently expressed concern regarding compliance with this principle in Slovenia.[23]

The rule of law is an EU standard, although in recent times and situations in some European countries, this can may be debatable. The criminal law of a democratic state governed by the rule of law should follow ideas that have also been recognized at the international level.[24] Accordingly, it is important to be aware that no country is completely safe from crime; thus, the main goal of crime policy is to keep it within controllable limits rather than to eradicate it, as the former is likely not possible. Subsequently, more anti-crime measures should be in line with the fundamental principles of democratic states, subjected to the rule of law and subordinated to human rights; in no way should criminal law be based on ideological and political motives and, in this sense, be clearly instrumental and repressive.[25] Measures to combat crime that do not respect democratic values, the rule of law, and human rights are thus not acceptable under any circumstances or in any situation in which the country may find itself.[26]

Therefore, respect for human rights and fundamental freedoms is among the fundamental preconditions of a democratic state governed by the rule of law, but this has often been disregarded in the history of other established political regimes. In the context of the above, full respect for the principles of constitutionality and legality is particularly important in the field of criminal law, especially when these principles appear to be acting against the interests of the ruling authorities, and there is an additional danger of presenting their partial interests as national interest.[27] Criminal

23 See, for example, European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, further strengthening the Rule of Law within the Union State of play and possible next steps. See also Herszenhorn and Von der Burchard, 2021.

24 In 1996, on behalf of the leading members of the Council of Europe, the Committee of Ministers issued special Recommendation number R/96/8 on Europe in a time of change: crime policy and criminal law, which includes guidelines for countries on regulating the relationship between general and criminal policy and criminal law.

25 Bavcon, 2008.

26 Korošec, 1999.

27 The fact that the ruling elite presents its interest as a national one is evident from the case of the crime of terrorism, where, due to widespread social fear, people take for granted the most severe form of repression and inconsistent respect for human rights, which skilled politicians know how to use to consolidate their power and increase their social power. The support of society in disregarding human rights is dangerous, as individuals are usually unaware that the status of their rights is also at a crucial stage, which should be respected always and everywhere in a democratic society. For more, see Bavcon, 2006, p. 18.

law and science also have an important influence on this, as rules and warnings help limit the arbitrariness of the authorities, and all of this can only be ensured with the guaranteed independence of judges and the judiciary in general.[28]

The independence of the judiciary is a fundamental postulate of the rule of law, which, in the past, politics has attempted to affect by abolishing the permanent term of office of a judge, although this is an essential condition for a judge's independence. Individuals often do not understand this and are, therefore (and due to ignorance of judicial procedures), susceptible to political manipulation, which, through the media, blames courts for everything that goes wrong, thereby attacking and destroying the social institution that is most important for the rule of law. By doing so, they win over the people and increase the risk of subjugation of the judiciary, which can have far-reaching consequences that the lay population does not consider or understand. With a politically guided judiciary, not only is the principle of legality threatened, but all of the rights that belong to the individual are threatened as well. This is particularly dangerous in criminal law. The abuses of criminal law to prosecute and sanction political opponents, as we have witnessed throughout history, should be a sufficient lesson in the dangers to the independence and impartiality of the judge and of the judiciary as a third branch of government in general. Overall, it was on the experience of attempts at political incursions into the independence of the judiciary[29] that the human right to a fair trial was formed, which, in addition to the right to an independent and impartial judge, also includes the right to the presumption of innocence, the principle that, when in doubt, one should rule in favor of the accused *(in dubio pro reo*), as well as other rules and principles indispensable for fair criminal proceedings.[30]

Regardless of the completeness of the legal framework and legislation, it is impossible to prevent abuses and gross violations of human rights. This has historically always been the case, even in the most developed countries, which we consider to be models of democracy. We can reduce this mainly by limiting and balancing political power.[31] However, this does not mean that it is necessary to remove politics from the law, as criminal law is an instrument of society for the prevention and suppression of crime. Nonetheless, fundamental principles of criminal law and basic human right should always be respected.

The aforementioned principles and other core principles that are of exceptional importance for criminal law in its enforcement in practice are briefly presented in the next chapter.

28 Bavcon, 2006, pp. 18–19.

29 Such as the previously mentioned criminal prosecution of political opponents of the ruling party, attempts to establish a police state, and violations of the rights of individuals during war.

30 Bavcon, 2006, pp. 127–130.

31 Bavcon, 1992.

## 4. Analysis of the general principles of criminal law, the general concept of crime, and system of penalties and sanctions

The essence of understanding criminal law as a system in a particular country is understanding the fundamental principles that guide that criminal law. Both the principles of criminal procedure and the principles of substantive criminal law are important. For the latter, knowledge of the general concept of an act of crime is also crucial.

### *4.1. Principles of criminal law in Slovenia*

The principles of criminal law are of exceptionally conceptual as well as great substantive importance. They reflect the postulates of a democratic state governed by the rule of law and, in this context, set the basic legal standards for criminal law. The following subsections present the key principles of Slovenian criminal law.

#### *4.1.1. Principle of legitimacy and restricted repression in connection with the rule of law*

The principle of legitimacy and limited repression is the overarching principle of criminal law in a democracy, as it requires the moral, ethical, and legal justification of any repressive encroachment on human rights and freedoms at the legislative level and in practice. This principle is essentially a question of the legitimacy of the political system, individual repressive bodies, procedure, and individual repressive measures. As such, it applies primarily to the legislature, which must assess whether each criminal prohibition and order constitutes a possible violation of human rights and freedoms and, in such a case, assess the urgency of the measure. It also applies to repressive state bodies that enforce legislative provisions. Accordingly, the state may use coercion only in those cases when it is necessary and only to the extent necessary to ensure the protection of man and other fundamental values, assuming that this cannot be ensured without coercion. Moreover, although this principle is not explicitly defined anywhere in the Constitution of the Republic of Slovenia (Constitution), it is evident from many provisions, especially those defining the Republic of Slovenia as a democratic state governed by the rule of law based on protection and respect for human rights as well as from provisions for the protection of constitutionality and legality and those on the independence of the judiciary.[32]

The issue of legitimacy and repression is always a topical issue adapted in time and space. The modern criminal justice system of the Republic of Slovenia had to abandon past totalitarian patterns of excessive repression, but the limit of repressive activities of individual state bodies has not been exceeded entirely. Modern repression manifests itself not only in the form of physical violence in the sense of the police and army suppressing riots but, in the postmodern sense, in the form of

32 Bavcon et al., 2003, pp. 136–138.

actual or potential economic coercion as well, which, in practice, manifests itself as bankruptcy, loss of property, flight capital, suspension or relocation of production or operations to another, more economically advantageous country, unemployment, relative or absolute poverty, trade blockade, attacks on the national currency, extortion of necessary loans, and other similar cases. However, regardless of the form of repression, in terms of the principle of legitimacy and limited coercion, the question arises as to where the line is between a sanction that benefits the community and one that is already a priori repressive as well as where the limits of permissible or appropriate repression are. The answer may be that repression is only appropriate in a form that is not only necessary to achieve the goal it pursues but also fair and, for most individuals in the community concerned, perfectly legitimate.[33]

In criminal proceedings, the use of repressive force against the perpetrator can only be justified by reacting quickly to alleged crimes; therefore, it can be argued that the effectiveness of criminal proceedings is one element of the legitimacy of repression and a necessary rule of law.[34] However, it must be ensured that the speed of proceedings does not prevail over efficiency, that is, that the efficiency of criminal proceedings and the principle of material truth come before the principle of economy in terms of accelerating criminal proceedings. This is important to maintain democratic criminal procedure.[35]

Limiting repression in all areas within the limits of what is permissible in criminal law means the progress of society for a better future as well as an important step toward recognizing the importance of setting boundaries for political oversight, preventing the "police state" and a return to old Yugoslav patterns of repression, thereby ensuring respect for the rule of law. The modern rule of law expresses the values of modern society and is organically linked to the concept of liberal democracy, all based on ensuring the secularity of law, capitalism, private property, and equal protection of individual personal freedoms and human rights. These concepts that have been introduced in the modern legal system must be protected from centuries of abuse in terms of the subordination of the legal order to political power or politicized religion.[36]

#### *4.1.2. Principle of humanity and principle of individualization of criminal sanctions*

In the field of criminal repression, it is important to emphasize the principle of humanity, which is associated primarily with the principle of the legitimacy of repression. In accordance with this principle, the entire legal and political system, and criminal law in particular, must be based on respect for and the effective protection of human rights. This stems from the value of human dignity, which negates any

33 Kanduč, 2016.
34 Deisinger, 1991.
35 Razdrih and Mihael, 2011, p. 36.
36 Cerar, 2008.

inhumanity. This principle is not explicitly stated in the Slovenian Constitution, but it is contained in many provisions, for example in Article 17, which excludes the death penalty, Article 18, which prohibits torture, Article 21, which guarantees respect for human personality and dignity in criminal proceedings as well as during deprivation of liberty and the execution of sentences, and in Article 34, which recognizes the right of every individual to personal dignity and security.[37]

In criminal procedural law, the principle of humanity is primarily related to the issue of treatment of people, especially defendants, in pre-trial and criminal proceedings or in all phases of law enforcement, while in substantive criminal law, the principle of humanity is primarily related to punishment. This is reflected in the prohibition of the death penalty in Slovenia and in the limitation of life imprisonment. It is also reflected in the view that a milder criminal sanction should always be used when imposing a sentence in criminal proceedings unless there are special reasons or circumstances for imposing a more severe sanction.[38] Accordingly, in criminal cases, defendants who are prosecuted for minor crimes and found guilty are, in practice, initially sentenced to probation.

In the context of the above, it can be concluded that the principle of humanity contributes to the fair conduct of law enforcement agencies and to fairness and efficiency in criminal proceedings in general. This aspect of the principle of humanity is also linked to the principle of individualization of criminal sanctions, which requires the adjustment of the imposed criminal sanction to the danger of a specific crime and the perpetrator's personality so that the purposes of criminal sanctions are achieved. This principle is not explicitly defined anywhere in criminal law, as in the case of the principle of humanity; however, in many provisions, it is shown as a guide of the legislator in establishing criminal law. This is evident, for example, from the provisions on sentencing in Article 49 KZ-1,[39] on mitigation of punishment in Article 50 KZ-1, on conditional sentence and reprimand in Articles 57, 58, and 68 KZ-1, and on security measures in Articles 69-73 KZ-1. Based on the above provisions, we can understand that the above mentioned provisions contain two guidelines for individualization: fairness and expediency, with fairness taking precedence. Thus, by individualizing criminal sanctions for each case and each perpetrator, criminal justice must impose a criminal sanction that strikes a balance between the principle of fairness and efficiency, while considering the protection of society and the re-socialization purpose of criminal sanctions.[40]

#### *4.1.3. Principle of legality*

The principle of legality is the basic and most important principle of criminal law, on which the entire criminal justice system is built. This is already stipulated in Article

37 Bavcon et al., 2013, p. 133.
38 Ibid., pp. 133–135.
39 Kazenski zakonik, Uradni list RS, št. 50/12, 6/16, 54/15, 38/16, 27/17, 23/20, 91/20, 95/21, and 186/21.
40 Bavcon et al., 2013, pp. 137–140.

28 of the Constitution of the Republic of Slovenia, which stipulates that no one may be punished for an act for which the law has not determined that it is criminal and has not prescribed punishment for it before the act was committed. Article 2 of KZ-1 stipulates the same. Accordingly, the provisions must be consistent, clear, specific, and made public in advance so that the individuals to whom these provisions apply are aware of them, and no one should be sanctioned for a crime for which, as such, the sentence was not specified by law. It is also important to emphasize that criminal offenses can only be determined by law and not by bylaws.[41]

In criminal law, the principle of legality has also become known under the Latin saying "*nullum crimen, nulla poena sine lege praevia,*" which means that there is no crime and no punishment without the law. Crimes must be clearly and precisely defined so that there is no doubt, and what is criminal and what is not is clearly delineated. It represents the basic and most important principle of the criminal law of modern states, which, with its guarantee function, provides protection against the arbitrariness of the ruling party or even the judiciary. As such, it is closely linked to the principle of legal certainty, which provides individuals with security against arbitrary and illegal interference by repressive authorities.[42]

According to *Feurbach,* the principle of legality could be divided into four individual principles, which together compose the principle of legality: the principle of written form (*nullum crimen sine lege scripta*), the principle of certainty (*nullum crimen sine lege certa*), the prohibition of retroactivity (*nullum crimen sine lege praevia*), and the prohibition of analogy (*nullum crimen sine lege stricta*). The principle of certainty and the principle of retroactivity apply to the legislature and limit it in the adoption of criminal law, and all four principles bind the judge in criminal trials and limit them in the application and interpretation of the law, especially how to interpret criminal law provisions. In this criminal law context, Šepec developed two concepts of interpretation of criminal law provisions. The first is the concept of maximum certainty, which is based on the claim that criminal law encroaches on fundamental human goods, so the provisions must be exact, clear, and precise and their interpretation linguistically accurate. The second is the concept of supremacy of teleological interpretation, in which, unlike the first, teleological interpretation predominates. What is important here is the meaning or *ratio legis* of the provision from the point of view of the legislator. In the case of several possible interpretations, according to this concept, it is necessary to choose the interpretation that best suits the intention of the legislator. Both concepts are present in Slovenia, with some theorists approaching one and others approaching the other, the key question being which concept of interpretation of criminal law provisions is better or more appropriate. Roughly speaking, the concept of maximum certainty is more appropriate for strict positivist systems of continental criminal law, while the concept of supremacy of teleological interpretation is more appropriate for Anglo-Saxon criminal law doctrine. In the case of continental criminal law regarding

41 Judgement of the Higher Court in Ljubljana, VSL Sodba VII Kp 27863/2013 of 4.10.2016.
42 Bavcon et al., 2003, pp. 138–141.

the interpretation of criminal law provisions, it is necessary to draw special attention to the dilemma of the interpretation of the provisions of the general and the special parts of the Criminal Code. The interpretation of the institutes of the general part of the Criminal Code can broaden or narrow the scope of criminal incrimination in the special part as well. As theoretical institutions of the general part (e.g., self-defense, duress, error, attempt) are usually very vaguely described in the law, it is up to the court practice in legal theory to develop the meaning of these institutes, so the concept of the supremacy of teleological interpretation could be used to interpret criminal law provisions in this part. Conversely, the consistency of linguistic interpretation is crucial in the provisions of the special part (containing definitions of crimes) due to the more strictly established *lex certa principle*, which makes it more appropriate to use the concept of maximum certainty in this part.[43]

#### *4.1.4. Principle of a fair trial*

The principle of a fair trial is the dominating principle of criminal procedural law derived from several rights of subjects in criminal proceedings. In practice, it is reflected primarily in the right to equality of arms and, in this sense, the right to counsel and the right to defense, full equality of the parties in criminal proceedings, and the court's obligation to examine all of the factual and legal aspects of the current case.[44] Fair procedure, which should be the standard of a democratic system, is ensured by the constitutional principle of legal guarantees in criminal proceedings from Article 29 of the Constitution and equal protection of rights or the requirement of equality of arms from Article 22 of the Constitution. In addition, the principle of fairness also includes the impartiality of the court, which is determined in Article 23 of the Constitution.[45]

The principle of a fair trial is defined in Article 6 of the European Convention on Human Rights (ECHR) and Article 14 of the International Covenant on Civil and Political Rights and is a key guideline in criminal proceedings in Slovenia. The main starting points for fair criminal proceedings are the objectivity of the court and full disclosure of information and decisive facts to both parties. This is also reflected in other principles of criminal law, such as the principle of immediacy and the principle of material truth, to which the principle of orality also contributes.[46]

In addition to the rights of the accused, the principle of a fair trial has another side, namely effective prosecution. The Public Prosecutor's Office makes an important contribution to this as a law enforcement agency, which helps ensure the rule of law

43 For more on the principle of legality see Šepec, 2019.

44 Conclusion of the Higher Court in Maribor, VSM Sklep II Kp 2474/2019 of 29. 5. 2019.

45 Conclusion of the Higher Court in Maribor, VSM Sklep II Kp 12533/2012 of 20.2.2019.

46 Comparing the principle of material truth and the principle of fair trial, we can see that recently the principle of a fair trial has prevailed over the principle of material truth because of awareness that the truth established in criminal proceedings can only be relative, as the crime is historically unique. The closer we get to the standard of certainty, the more legitimate the decision that was made. See more Vavken, 2019, p. 29.

through fair, impartial, and effective prosecution of perpetrators of criminal offenses.[47] Another aspect of a fair trial is the exclusion of evidence obtained illegally or by breach of constitutional rights of the accused. The basic exclusion rule stipulates that a court may base a court decision only on evidence obtained lawfully, as provided for in Article 18 of the Slovenian Criminal Procedure Act (ZKP).[48]

*4.1.5. Principle of formality*

The principle of formality in a broader sense means an ex officio procedure. The state, in principle, initiates and conducts criminal proceedings against the accused in the public interest through the competent authorities. The principle of formality is thus a criterion for dividing criminal offenses according to the eligible prosecutor into two groups, namely criminal offenses prosecuted ex officio and a smaller group of criminal offenses prosecuted on private action. The latter constitute an exception to the principle of formality in the basic sense of the principle, except that there is no such private action in special proceedings against minors. At the beginning of the criminal proceedings, in accordance with the principle of formality, the prosecutor is competent to initiate and carry out criminal prosecution at their own discretion, that is, ex officio, as in principle, they are not bound by the victim's consent or demand.[49]

In addition to the above, the principle of formality is also important in relation to the above-mentioned law of evidence. In accordance with one of the narrower aspects of the principle of formality, the investigating judge is obliged to collect ex officio the evidence and information that is relevant to the decision to file an indictment. Therefore, the official maxim in criminal proceedings obliges the judge to obtain and present all evidence on their own initiative, regardless of the parties' proposals.[50]

The principle officially originates from the inquisition procedures, but today, it is an important principle that helps discover the material truth in criminal proceedings to achieve a legitimate and lawful court decision.

*4.1.6. Principle of material truth and the debate principle*

The principle of material truth and the principle of investigation and debate are principles that are primarily related to the acquisition and presentation of evidence in all stages of criminal proceedings.

The principle of material truth is defined by Article 17 of the ZKP, which stipulates that courts and state bodies participating in criminal proceedings must completely establish the facts relevant to the issuance of a lawful decision. They must equally and carefully establish and test all of the facts opposed to the defendant as well as those

47 Opinion no. 9 (2014) of the Consultative Council of European Prosecutors for the Committee of Ministers of the Council of Europe on European rules and principles for prosecutors, Strasbourg, 17.12.2014.

48 Zakon o kazenskem postopku, Uradni list RS, št. 176/21.

49 Judgement of the Supreme Court of Slovenia, VSRS Sodba I Ips 25224/2012-104 of 12.5.2016.

50 Šorli, 2003.

in their favor. It is necessary to be aware that in criminal law, the concept of truth does not mean the same as truth in philosophical or ideological terms; it is a relative truth regarding a historical event that is the subject of consideration in criminal proceedings. This is established by means of evidence, such as DNA analysis, and the level of certainty of the established material truth is also increased by technological developments in the field of proof. The primary importance of establishing material truth is to make fair and lawful decisions, as the truth of the proven facts regarding the historical event is the basis for establishing the criminal responsibility of the accused and for the imposition of a criminal sanction. In addition to this main purpose, establishing material truth also serves to ensure the legitimacy of the legal resolution of disputes, which, in turn, empowers court decisions in public, namely that the public generally trust the judgments of the court insofar as people believe that the convicted person committed the crime, and consequently, such a judgment enjoys the approval and trust of the public.[51]

In the search for material truth, contradiction is also of great importance as a means of establishing the truth of information. The principle of debate is an expression of justice and a fair trial, and at the same time, it represents an opportunity for the defendant to acquaint themselves with the incriminating facts against them, the evidence and the opposing party's legal views, and the opportunity to assert their view of the truth.[52]

The forthcoming reforms of the Slovenian criminal procedure are moving in the direction of abolishing the judicial investigation, which is widely believed to be ineffective. In doing so, it would likely be appropriate to change the entire concept of criminal procedure, as the judicial investigation has its purpose, which can be replaced only by a comprehensive systemic change and not merely the abolition of this phase of the procedure. In the context of this change, it can, therefore, be expected that the parties will be given a greater role in providing evidence and proving their version of events in criminal proceedings, and the court will become slightly more passive, which also means abandoning the search for material truth. With the court and the prosecutor's office no longer obliged to search for and implement both the facts that burden the defendant and the facts that benefit them, greater differentiation of procedural functions is likely to lead to greater care for their work and, consequently, reduced care for general justice. It is also important to note that the greater the probative value of information from the beginning of criminal proceedings, the greater the focus of the police and the prosecution on this phase, and very few defendants will be able to afford effective defense at an early stage of criminal proceedings. This will result in easier access to the burdensome statement of the less educated, less well-off, and socially weaker by the police and the prosecution.[53]

51 Bavcon, 2015.
52 Radonjić, 2020.
53 Hren, 2021, p. 51.

*4.1.7. Principle of immediacy and principle of free judgement of evidence*

In the context of the law of evidence and the discovery of material truth, the principle of immediacy and the principle of free judgement of evidence are also important. These two principles are, to some extent, interconnected, complementary, and limit each other. In accordance with the principle of immediacy, a judge may oppose the decision only on the facts and evidence that they perceive with their senses at the trial. Thus, in criminal proceedings, this principle extends not only to the procedure until the pronouncement of the judgment but also to the preparation or writing of the reasons based on which the judge made the decision.[54]

In addition to the principle of immediacy, Slovenian law also enshrines the principle of free assessment of evidence, according to which the court's right to assess whether a fact is proven is not bound or limited by any special rules of evidence (Article 18 ZKP). Therefore, the assessment and selection of evidence is a matter of judicial discretion, with the subject of free discretion being each piece of evidence separately and in comparison with other evidence as well as all evidence together as a whole. Despite the principle of free assessment of evidence, judges are not absolutely free to assess evidence, as the findings and conclusions must be consistent with objective facts in reality and must also follow real and logical reasoning. The principles discussed in this paragraph ensures a rational and economical procedure.[55]

*4.1.8. Assumption of innocence and the principle in dubio pro reo*

The defendant is a weaker party in a criminal procedure against state authorities and is, therefore, entitled to a number of rights and guarantees in an effort to ensure that no one is found guilty unlawfully. The presumption of innocence is the basic guarantee of the accused in criminal proceedings, which protects them from the state apparatus[56] and is one of the most important guidelines in criminal proceedings. It is defined in the Constitution in Article 27, which stipulates that whoever is accused of criminal conduct is considered innocent until their guilt is established by a final court judgment. This principle is in effect from the beginning of a criminal prosecution and until proven otherwise. Article 3 of the ZKP stipulates the same. Therefore, it follows that the presumption of innocence disappears only with the finality of a court judgment that finds the defendant guilty.[57]

In addition to the above, an important aspect of the presumption of innocence is the rule that, in criminal proceedings, all decisive facts to the detriment of the accused must be established with certainty. When in doubt, facts must be considered unproven. From this aspect of the presumption of innocence also follows one of the most important criminal law principles, namely the *in dubio pro reo* principle,

54 Judgement of the Supreme Court in Slovenia, VSRS Sodba I Ips 6676/2010 of 19.10.2017.
55 Merc, 2000.
56 Šutanovac, 2015.
57 Šinkovec, 1995.

according to which the court must decide in favor of the accused in case of doubt. In doing so, the doubt must be serious or at a certain, albeit low, level of probability.[58]

Regarding the *in dubio pro reo* principle, however, there are also individual dilemmas and different points of view in legal doctrine, namely whether the rule in question can be applied only in relation to facts or also in terms of interpretation of the law. Particularly in the older legal literature, the majority opinion was that by applying the rule *in dubio mitius*, or in doubt, it is necessary to interpret a vague law in favor of the accused.[59]

#### *4.1.9. Principle of subjective or guilty responsibility*

The principle of subjective or culpable responsibility became a general principle in the late Roman period, around the beginning of our count. This means that causing a prohibited and harmful consequence does not in itself constitute a criminal offense and is, therefore, not sufficient to punish the perpetrator; the perpetrator may be punished only when it is proven that the accused is indeed the perpetrator of the crime for which they are prosecuted and only when found guilty. In this case, the perpetrator's guilt means that at the time of the commission of the criminal offense, the perpetrator acted with a psychological attitude toward the act due to which the act can also be blamed on them. Slovenian Criminal Code KZ-1 pursues and enforces the principle of subjective criminal responsibility as responsibility for guilt.[60] Thus, criminal responsibility can only be attributed to the perpetrator of the crime by linking their physical activity with their mental ability.[61]

### *4.2. General concept of a criminal offense*

In addition to the general principles presented in the previous subchapters, a precise and clear theoretical breakdown of the general concept of a criminal offense is of key importance in criminal law theory and in practice.

The general notion of a criminal offense refers to the criteria that must be met such that conduct will be classified as a crime. These are criteria of general common features that are considered common to all crimes.[62]

As these criteria depend on society, the influence of the political system on the perception of the concept of a criminal offense cannot be neglected. With independence and the desire to join the EU, it was necessary to modernize the national legal framework and bring it closer to European standards. This was also necessary in the case of substantive criminal law. With the adoption of the new Slovenian Criminal Code (KZ-1), radical changes took place within the general concept of a criminal offense. In this context, there were changes in the basic assumptions of criminality,

58 Horvat, 2004.
59 Ibid.
60 Bavcon et al., 2013, pp. 135–136.
61 For more on the concept of criminal liability and guilt under Criminal Code KZ-1, see Ferlinc, 2004.
62 Bavcon et al., 2013, p. 148.

which constitute the structure of a criminal offense, and in the spirit of the principle of legality, the very definition of the criminal offense has changed. In accordance with Article 16 of KZ-1, a criminal offense is unlawful human conduct, which the law defines as such due to the urgent protection of legal values and, at the same time, determines its signs and punishment for the guilty perpetrator. Compared to the previous definition, this requires a more consistent justification of the notion of criminal offense in terms of the perpetrator's conduct and no longer in terms of the notion of danger, which was excluded from the definition of a criminal offense in the 1994 Criminal Code, as the reason for the assessment of illegality is the threat to criminally protected values.[63]

Therefore, according to KZ-1, a criminal offense is a voluntary act of a person, and this act or its consequence means opposition to the norms of criminal law in the absence of circumstances that would consider such an act in accordance with the law. Therefore, the individual guilt of the perpetrator of the criminal offense or the fact that the perpetrator can be attributed a subjective reflection of the act is important. In individual cases, where so provided by law, other special preconditions of criminality must be met, such as the objective condition of criminality. Modern Eurocontinental criminal law is based on the general definition of a criminal offense, which originates from the German tradition. Therefore, it is shaped by three key elements, namely the fulfillment of the nature of the offense ('Tatbestandsmäßigkeit'), illegality ('Rechtswidrigkeit'), and guilt ('Schuld'). It is a three-level general concept of a criminal offense, the main objectives of which are the clarity, predictability, and stability of criminal law as well as the simplification and acceleration of decision-making in practice. This three-stage analysis also enables the most systematic assessment of the criminality of the participants, as any instigation or aiding and abetting of an act is only possible if the main act in itself is at least illegal.[64]

#### *4.2.1. Activity that fulfills the essence of a criminal offense*

Fulfilling the first presumption of the general concept of a criminal offense means that the perpetrator's conduct or the consequence of the perpetrator's conduct must be contrary to the criminal law norm. In accordance with modern criminal law theory, conduct is any behavior of the perpetrator with an objectively predictable social effect (the social theory of behavior) or external expression of the perpetrator's personality (the personality theory of behavior), which is reflected in the perpetrator's actions and omissions, threats and injuries, and attempted and completed crimes. It should be noted, however, that fulfilling only this first presumption of the general notion of a criminal offense is in itself only an indication that an individual has committed a criminal offense for which may be found guilty and even punished if other presumptions are fulfilled.[65]

63 Dežman, 2009.
64 Bavcon et al., 2013, pp. 149–157.
65 Ibid., pp. 152–153.

#### *4.2.2. Illegality*

Illegality means that the perpetrator's conduct is contrary to the law or that it violates it. In the context of the general concept of a criminal offense, this is particularly important in assessing the reasons as to whether the perpetrator's voluntary conduct, despite its compliance with the nature of the criminal offense, may nevertheless be in accordance with the law, that is, not unlawful. If the essence of the criminal offense is fulfilled, the illegality is presumed. However, illegality will be excluded if criminal law justifies the conduct. The most typical example of this is self-defense.[66]

#### *4.2.3. Guilt*

Insofar as the individual perpetrator's conduct is in accordance with the nature of the incrimination of the crime, and illegality is not excluded, the third premise of the general concept of criminal offense is always the perpetrator's guilt, which may occur in the form of intent or negligence. Unlike wrongdoing, guilt is not presumed; it must always be proven. An important element of the concept of guilt was established with the hypothesis of criminality at the level of the essence of incrimination, within the first element of the general concept of crime. In this sense, we refer to the dual position of intent, as the perpetrator's intent must be considered and judged as soon as the essence of the crime is established and again as a form of guilt. Guilt can also be excluded by legal norms, and the conduct of the accused can be excused. This is primarily a matter of the statutory institutes of the general part of criminal law as well (for example, various forms of unavoidable error, justifiable extreme force, and, in some cases, acting on the orders of a superior).[67]

According to the elaborated general principles that guide Slovenian criminal law in theory and practice, and according to the defined general concept of a criminal offense, it makes sense to briefly discuss the system of punishment and sanctions in Slovenia.

### *4.3. Brief overview of the punishment and sanction system in Slovenia*

Slovenia has faced certain problems in the past regarding the system of punishment and sanctions. At the same time, problems at the general level have manifested themselves in the purpose of punishment, which is also reflected in the lack of regulation. The question of the purpose of punishment is the basic norm on which the entire penal system should be based, followed by the imposition of sanctions as well as their enforcement. Punishment in the Slovenian system follows several theories regarding the purpose of punishment, but these purposes are not clearly defined, nor is there a clear relationship established among them on an abstract level. Until a few years ago, the purpose of punishment could be defined as proportional expression of justice that acts restrictively, and within its borders, the criterion of expediency takes

66 Ibid., pp. 153–154.
67 Ibid., pp. 154–155.

precedence, which, in Slovenian criminal law, is strongly linked to the rehabilitative function of punishment.[68]

Today, at the global level, it is possible to discuss abandoning the rehabilitation paradigm, which, in light of the universally emphasized individualism, tends toward stricter punishment. This global trend of tougher penalties is also followed by the Slovenian criminal system, which has not completely abandoned the rehabilitation function of punishment; thus, in this sense, it can be compared with some Scandinavian models. As part of this, the punishment of perpetrators with alternative sanctions has been increasing in recent years. Alternative sanctions are a form of punishment that is presented as an alternative to imprisonment with the fundamental aim of replacing short-term imprisonment and reducing imprisonment in general, but only if the judge considers that such a sanction will have a sufficient deterrent effect on the perpetrator and that they will not commit another crime again.[69]

The system of punishment in the Slovenian criminal legislation consistently implements the principle of legality, within which it is possible to impose only the criminal sanction that was prescribed for an individual criminal offense before it was committed. The system of criminal sanctions in the Slovenian legal system is based on a pluralistic starting point, with the Criminal Code classifying criminal sanctions into three groups. The first includes the penalties, the second group consists of warning sanctions, which include a suspended sentence, a suspended sentence with medical supervision, and a court reprimand, and the third group covers security measures. In the Slovenian legal system, penalties can be further divided into main penalties that are imposed independently (for example, imprisonment), ancillary penalties that can be imposed in addition to the main penalty (for example, prohibition of driving a motor vehicle), and penalties which may be imposed as a principal or side penalty (for example, a monetary fine). Regardless of the punishment imposed on the perpetrator, it must meet certain requirements. It must be personal, as it must affect only the perpetrator and not their environment, ignoring the fact that in principle, at least indirectly, the punishment also affects the perpetrator's immediate environment, such as their family. In addition, the sentence must be humane, so according to its basic content, it must not cause suffering to the convict. The sentence imposed must also be proportionate to the degree and form of the perpetrator's guilt as well as to the degree of the crime while satisfying a sense of justice. Proportionality must be understood in relation to each individual crime and perpetrator. In principle, the sentence must also be reversible in the sense that, once the sentence has been unjustifiably imposed, its effect and consequences can be remedied, which is somewhat more difficult or even impossible to achieve in practice. Due to the latter requirement, there can be no death penalty in the Slovenian legal system, as it is irreparable. The requirement of remediability of penalties is important in practice primarily

68 Mihelj, 2012.
69 Mihelj and Drobnjak, 2019.

due to miscarriages of justice, wherein the effect of penalties can be remedied at least to some extent.[70]

## 5. Slovenian criminal law in relation to the legal framework of the European Union

Slovenia gained independence from Yugoslavia in 1991, and the former Yugoslav federation was finally abolished in 2003, with the rest of its Serbo-Montenegrin portion no longer bearing that name. Immediately after independence, Slovenia began to adjust its legislation to become as close as possible to European trends, and in 2003, when Slovenians decided to join the EU by an overwhelming majority in a referendum, it took a step forward toward a progressive European federation and officially joined on May 1, 2004. Slovenia, as an equal member of the EU, gained, among other things, a commitment to respect the EU legal framework and the duty to adapt national legislation to European requirements. Thus, many changes were introduced into Slovenian legal acts. Among others, the criminal law, which is continues to evolve following modern European trends, had to be adjusted to a certain extent. Respected Slovenian legal expert Ljubo Bavcon pointed out that in certain situations, European requirements do not always follow the goals and values that criminal law should protect and, instead, excessively encroach on human rights. These include demands to increase repression, increase police powers, toughen intimidating penalties, and restrict rights.[71] In this context, he gave the example of the European demand for incrimination of the promise made and acceptance of bribery in itself, without the alleged acceptable harmful consequences. He noted that such a case was an encroachment on the so-called subfield of the crime of corruption, an encroachment that Western criminal law science strongly criticized as illegitimate, as long as it referred to the tort (*Unternehmensdelikt*) from the criminal codes of Western European countries.[72]

### *5.1. Slovenian criminal law in respect to EU law*

Due to Slovenia's accession to the EU, the Slovenian National Assembly, as a legislative body, amended the Constitution of the Republic of Slovenia with Article 3.a, by which Slovenia, as a member state, transferred the exercise of a portion of its sovereignty to the EU. Within the framework of criminal law, these implications of Article 3.a of the Slovenian Constitution relate primarily to the repressive authority and jurisdiction of the state. The status of criminal law in the EU acquis has changed significantly since the Maastricht Treaty (Treaty on European Union or the TEU, which placed criminal law in the third pillar of the three-pillar structure) and, in particular, since the Amsterdam Treaty. Since then, there has been a tendency to transfer the formulation

70 Bavcon et al., 2013, pp. 371–384.
71 Ribičič, 2003, pp. 44–45.
72 Bavcon, Zakonjšek and Razdrih, 2013, p. 35.

of criminal policy and criminal law to supranational bodies of the EU, which would further unify the criminal law of the EU Member States. The decision to expand the EU's criminal jurisdiction has been strongly influenced by terrorist attacks as a political crime, with experts noting that, notwithstanding the fear, the horror of the crime, and the urgent need to protect in the context of such offenses, the repressive authorities must not forget human rights, the fundamental principle of the rule of law, and legitimacy in criminal law, whether acting at a national or supranational level.[73]

The EU is working intensely to ensure security in its territory, with the protection of the freedom and privacy of the population sometimes being overlooked, although it has recently taken a step forward in this direction as well. From the outset, it has been extremely difficult to reach a consensus among Member States in the field of criminal law, as the repression of national authority, which no Member State wants to lose, is most pronounced in this area. The EU's main concern in the field of criminal justice has always been the protection of the Union's financial interests in relation to organized crime issues as a common interest of all EU Member States. However, following the terrorist attacks, political priorities changed significantly due to the sense of danger, and Member States were quicker to agree on measures that they could not have taken before the terrorist attacks. Thus, the tendency to act quickly, efficiently, and repressively emerged as a trend that the Member States should follow in drafting or amending their legislation. In the trend of spreading European criminal law standardization under the impression that it is necessary to prevent the most serious crimes, Slovenia, as a member state, has adopted the European Arrest Warrant and the European Investigation Order and adjusted the legislation to enable the implementation of these EU institutions.[74]

Slovenia's accession to the EU required certain changes in criminal legislation that were regarding criminal procedure as well as substantive criminal law.[75] The ZKP has been revised many times since its adoption in 1994, and many revisions were made to comply with EU legislation. Therefore, as a member state of the EU, Slovenia accepted the Act on the European Arrest Warrant and Surrender Procedure in 2004. Slovenia has also simplified extradition according to membership in the EU, where the phase in front of a judicial panel was left out (now referred to as the surrender procedure). In 2006, Slovenia adopted the Witness Protection Act, and in the same year, the country was under the Council Framework Decision on the standing of victims in criminal proceedings, obligated to provide for adequate instruments for the protection of prisoners who take part in witness protection programs. Changes have been implemented in Schengen-related issues as well, expressed as external border protection, discreet surveillance, and specific checks. It can be said that the Slovenian legislature has closely followed EU legislation in every change in purpose, spirit, and wording.[76]

73 Bavcon, 2005.
74 Šugman, 2005.
75 See also Zgaga, 2014.
76 Zgaga and Ambrož, 2007.

Most changes in Slovenian substantive criminal law, especially in the field of international crimes and some changes of the general part of KZ-1, are regarded as a step toward the European criminal law area. One of the most intriguing modern topics of substantive criminal law in Europe is medical penal law. Slovenian criminal law expert Damjan Korošec wrote that in Slovenia, traditionally, the legitimacy of the existence of medical penal law as a special branch of substantive criminal law is seen in the fact that the nature of medical science and activity is different from all other known sciences and activities to such a degree that it calls for special treatment within criminal law. It is widely believed that the immanent human nature of medicine as such was special grounds for justification or even a more basic obstacle for the subsumption of medical activity under incriminating norms (hindering the so called "Tatbestandsmäßigkeit," as Germans call it), initially "naturally" neutralizing incriminations against life and body and bodily injuries of different degrees. The only legitimate role of medical penal law would be the task of delivering special institutes of the general part that guarantee proper milder substantive legal treatment of medical personnel, such as a physician as a perpetrator of criminal conduct during their medical work. In Slovenia, the technical correctness of the medical activity (procedure) together with the will of the medical personnel to heal or to prevent illness or degradation of health was developed as the central self-sufficient special ground of justification. This was referred to as "medical activity." Changes were also made in the special part of KZ-1. There were changes in the definitions of sexual crimes and of crimes against humanity and international law. Because of its entry into the EU, Slovenia also changed the definition of crimes against intellectual property, industrial property, and some minor changes of definitions of crimes in the field of corruption and insider trading.[77]

Slovenian criminal law is constantly changing while attempting to maintain the stability of the Criminal Code, which is necessary primarily for the protection of the rule of law. In this context, changes are being adopted in the direction of abolishing the judicial investigation, although the Slovenian legislature has been advocating this for years. Changes in criminal procedure are also reflected in the tracking of technological developments, most notably in increasing digitalization, which facilitates and accelerates criminal proceedings. Changes are also reflected in substantive criminal law, where Slovenia adopted the Yes means Yes theory in the field of sexual offenses in 2021. Changes can also be expected in other areas of criminal law, such as whistleblowing, in the near future.[78]

### *5.2. Slovenia's criminal law and practice in the trend of Europe*

The Slovenian court system is built on three instances: regional or district courts, higher courts, and the Supreme Court. Slovenian courts, similar to many others around the EU, reach their decision in a case by applying legal norms to the facts of an individual case; thus, they are not obligated to follow the precedent of previous

77 Korošec, 2007.
78 Hren, 2021, p. 51.

cases. The main problem in the Slovenian criminal court system in relation to the operation of courts consists in excessive delays in the adjudication of cases, primarily due to crowded court dockets. This problem was also brought to the attention of the European Court of Human Rights in 2005 in the case of *Lukenda v. Slovenia*.[79]

In Slovenian criminal courts, liberal progress can be observed in connection to sentencing patterns. Recently, there has been an overall increase in the use of alternative sanctions other than custody or prison, such as suspended sentences and fines, especially when the offender has not previously committed a crime. For example, there was a 9.8 percent rise in the use of mentioned alternative sanctions compared with 2009.[80]

The Slovenian legislature is aware that the sanction has a reintegration and resocialization function in addition to its penal one. To reach a conviction, judges judge according to the committed crime, the record of past convictions, and the perpetrator's personal characteristics when assessing mitigating and aggravating circumstances and then decide which sanction would be most appropriate for an individual perpetrator to prevent re-offending. Short imprisonment of a duration of several months, which, in the case of a criminal sanction of imprisonment, is, in principle, imposed for less serious criminal offenses in court practice, sometimes has a worse resocialization and preventive effect than if such a sanction is executed through community service or if the perpetrator is punished with a fine. The incarceration rate has also followed the trends of other EU member states. Between 2008 and 2020, the incarceration rate in Slovenia reached the lowest point in 2011 but then peaked in 2014.[81] Slovenia has increased its prison population, for which it is now possible to make a comparison with the rest of the Europe. Moreover, since 2011, there has been a trend of an increase in the prison population in Slovenia, while in the rest of Europe, this population is decreasing. Despite this, Slovenia still has one of the lowest prison population rates in Europe, primarily because the average length of imprisonment in Slovenia is lower than in the rest of Europe.[82]

## 6. Conclusion

It is reasonable to conclude that criminal law is an independent branch of law, though it is largely related to politics, more precisely to the political system in force. This is clearly seen in the case of Slovenia, where criminal law established on socialist Yugoslav foundations has been applied for many years. With independence, Slovenia established its own criminal law, in which it was still possible to detect socialist patterns. By updating criminal legislation over the years and following European trends,

79 Meško and Jere, 2012.
80 Ibid.
81 Clark, 2021. For additional information and statistics about prison brief data see World Prison Brief, no date.
82 Aebi et al., 2016.

Slovenian criminal law has shifted closer to modern European criminal law. This was also accelerated due to the Slovenia's accession to the EU, which forced it, as a Member State, to situate national legislation in the European legal framework and adopt EU legal rules, including in the field of criminal law, while maintaining the rule of law and legal security, stability of its legislation, and transparency. With the changes in criminal law, Slovenian criminal law, in accordance with modern European criminal law, revised the general concept of a crime based on the German theoretical model.

Slovenian criminal law is based on the principles of continental criminal law, which serve as a guide for substantive and procedural criminal law in the application of legal provisions, in which they are also reflected. In addition to the rule of law, as one of the most important principles highlighted by the EU, the basic umbrella principles of criminal law are the principle of legitimacy and limited repression; the principle of humanity; the principle of legality; the principle of individualization of criminal sanctions; the principle of fairness of proceedings; the principle of formality, directness, and free assessment of evidence; the principle of material truth; the principle of debate; the presumption of innocence; the *in dubio pro reo* principle; and the principle of subjective or culpable liability.

Finally, it is important to note that Slovenian criminal law follows European trends, which, in practice, can be seen in the increased use of alternative criminal sanctions for perpetrators. These are fines and suspended sentences, which are mostly used in Slovenian case law for lesser crimes and when the perpetrator has not previously committed a crime. However, Slovenia faces various problems. The most pronounced are reflected in various inappropriate attempts by politicians and the ruling elite to break into criminal law. In practice, the problems are mostly observable in the duration of open criminal cases or excessive delays in trials. Regardless, Slovenia is among the countries with the lowest prison population rate in Europe in general. This is primarily due to the lower average length of imprisonment than is typical for Europe, and Slovenia can also boast that the majority of its population still considers it a safe country.

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