



ARCHIWUM KRYMINOLOGII

Archives of Criminology

Kathrin Stiebellehner ■

Short-term detention in Austria

Krótkoterminowe pozbawienie wolności w Austrii

Abstract: One of the main concerns of the 1975 Austrian criminal law reform was to largely avoid the execution of short prison sentences. Due to their predominant disadvantages, they were to be replaced with fines wherever possible, and the execution of short custodial sentences was to be suspended as a subsidiary measure. Under Section 37 of the Austrian Criminal Code, a short custodial sentence for an offence that carries a maximum term of imprisonment of ten years is to be replaced by a monetary penalty if the court deems it justifiable for preventive reasons.

Keywords: short-term detention, resocialisation, preventive prognosis, negative effects of imprisonment, alternatives to imprisonment

Abstrakt: Jednym z głównych celów austriackiej reformy prawa karnego z 1975 roku i późniejszego rozwoju prawa sankcji było w dużej mierze uniknięcie wykonywania krótkoterminowych kar pozbawienia wolności. Ze względu na ich przeważające wady, w miarę możliwości miały być one zastępowane grzywnami, a wykonanie krótkoterminowych kar pozbawienia wolności miało zostać zawieszane jako środek pomocniczy. Zgodnie z paragrafem 37 austriackiego kodeksu karnego, krótkoterminowa kara izolacyjna za popełnienie przestępstwa zagrożonego karą pozbawienia wolności do lat dziesięciu, ma zostać zastąpiona karą pieniężną, jeżeli sąd uzna to za uzasadnione względami prewencyjnymi.

Słowa kluczowe: krótkoterminowe pozbawienie wolności, resocjalizacja, prognoza prewencyjna, negatywne skutki pozbawienia wolności, alternatywy dla pozbawienia wolności

Introduction

Austria's current Criminal Code (*Strafgesetzbuch*, hereinafter "ACC") went into force on 1 January 1975. One of its main aims was to prevent the execution of short prison sentences. Because of their various known disadvantages, short-term sentences have primarily been superseded by fines, or the courts should at least suspend the execution of the punishment. According to Section 37 ACC, a short-term sentence of imprisonment – up to six months, and since 2015 up to one year – shall be replaced by a fine if the criminal act was punishable by a term of imprisonment of ten years at most and the court decides that a fine would have a sufficient preventive effect.

1. History of short-term detention in Austrian criminal law

The adoption of Section 37 ACC was hailed as one of the most significant achievements of the Austrian criminal law reform of 1975 (Pallin 1996: sec. 37 para. 1; Flora 2021: sec. 37 para. 1). Pursuant to Section 261 of the Austrian Criminal Code 1852, which was re-enacted in 1945 and thus remained in force until the 1975 Criminal Code, the court could in some circumstances replace detention with a fine commensurate with the convicted person's income. Common offences against the property of others could therefore be punished by a fine. However, this required circumstances that were particularly worthy of consideration, so that the change in the type of punishment was to be seen as a form of extraordinary mitigation of punishment (Nowakowski 1973: 2).

Interestingly, Section 260(a) of the 1945 Criminal Code even provided for the reverse: changing a fine into a custodial sentence. The court had to impose a proportionate sentence of imprisonment if a fine would cause serious damage to the financial situation of the convicted person or their family. For every five guilders, one day's detention was to be imposed.

Section 262 of the 1945 Criminal Code – according to which house arrest could be imposed instead of first-degree detention if the person to be punished was of good reputation and if removing them from their home would prevent them from pursuing their office, business or professional activity – seems very progressive. This created an essential instrument for preventing desocialisation.

1.1. The original version of the 1975 Austrian Criminal Code

The prioritisation of fines over short prison sentences is summarised in the explanatory material with the programmatic sentence: "The necessity of avoiding short prison sentences wherever possible has been recognised ... in all its urgency" (EM ACC 1974: 94). And this was acted upon with the introduction of Section 37 ACC.

The years-long reform process in the run-up to the 1975 Criminal Code centred around the question of the conditions under which a custodial sentence could be “converted” (EM ACC 1974: 129) into a monetary penalty, among other questions. The preliminary drafts provided for the imposition of a fine in lieu of a custodial sentence only in the context of extraordinary mitigating circumstances. Thus, according to the 1964 Ministerial Draft, the criminal offence must not be punishable by more than one year and no prison sentence exceeding six months could be assessed in any individual case. According to the 1966 Ministerial Draft and the 1968 Government Bill, the penalty of imprisonment could not exceed six months. In addition, the 1966 Ministerial Draft stated that the imposition of a custodial sentence must not be indispensable to the legal system and to influence the offender. The Government Bill of 1968 allowed a fine instead of a prison sentence if the latter was not necessary to deter the offender from committing further criminal acts and to prevent others committing criminal acts.

It was not until the Government Bill of 1971 that the imposition of fines in lieu of custodial sentences was established as a separate sentencing provision, independent of mitigating circumstances. If general and special preventive considerations did not militate against it, under the proposed provision a fine could be imposed instead of a mandatory custodial sentence of no more than six months, provided that the offence was not punishable by more than ten years’ imprisonment. The six-month limit was in line with Austrian tradition, for example, equal to the maximum duration of the arrest penalty under Section 247 of the 1945 Criminal Code (Nowakowski 1973: 3). Later in the legislative process, the Judiciary Committee considered it necessary to further differentiate the application requirements of Section 37 ACC, therefore proposing a distinction depending on the penalty, as was finally adopted (JC Report ACC 1974: 10). The imposed fine must not exceed 360 daily rates. Therefore, Article 37 ACC was in line with the general Austrian system of fining: In Austria, a fine is calculated by multiplying the number of daily rates corresponding to the amount of the offender’s guilt by the amount of the daily rate (between 4 and 5.000 Euro), which is determined according to the offender’s income.

According to the original version of Section 37(1) ACC, which was in force until 31 December 2015, instead of a custodial sentence no longer than six months, a fine of no more than 360 daily rates was to be imposed if the offence was not punishable by a more severe penalty than imprisonment for up to five years – even in combination with a monetary penalty – and if a custodial sentence was not required in order to deter the offender from committing further criminal offences or to prevent others committing criminal offences. General and special preventive aspects were thus to be taken into account equally in the case of threats of imprisonment of up to five years.

Section 37(2) ACC stipulated stricter requirements for the general preventive prognosis for threatened prison sentences of more than five but no more than ten years. The imposition of a fine had to be sufficient to counteract the commission of criminal acts by others for special reasons, for example, because the circumstances of the case were borderline for justifying or excusing the unlawful act. Thus, the fine for offences with a threatened term of imprisonment of more than five years was limited to exceptional cases under general prevention aspects.

1.2. The criminal law reform of 2015

The Criminal Law Amendment Act 2015 (Federal Law Gazette I 2015/112) extended the applicability of Section 37 ACC in several ways. On the one hand, the maximum hypothetical prison sentence was increased from six months to one year for both paras. 1 and 2; correspondingly, the maximum number of daily rates was increased from 360 to 720. On the other hand, the general prevention requirement for a threatened custodial sentence of a maximum of five years was deleted (Section 37(1) ACC). Since then, the only prognostic requirement is that the fine suitably deters the offender from committing further criminal acts. The legislature justified the omission of this requirement with the goal of avoiding short prison sentences in favour of a fine and promoting a uniform application of Section 37 ACC. Moreover, in para. 2, the requirement of general prevention was retained due to the fact that these are more serious offences with a penalty of up to ten years. However, the “special reasons”, such as “circumstances [which] come close to a circumstance of justification or excuse” were deleted in order to extend the applicability of the norm (EM Criminal Law Amendment Act 2015: 11).

At the same time, the Criminal Law Amendment Act 2015 added an alternative fine as part of standardised penalties for all offences of the Criminal Code with a custodial sentence of up to one year in order to emphasise the principle of prioritising fines. This did de facto limit the application of Section 37 ACC, because recourse to Section 37 ACC became obsolete for minor crimes. As a result, however, this could lead to an extended pushback on short custodial sentences.

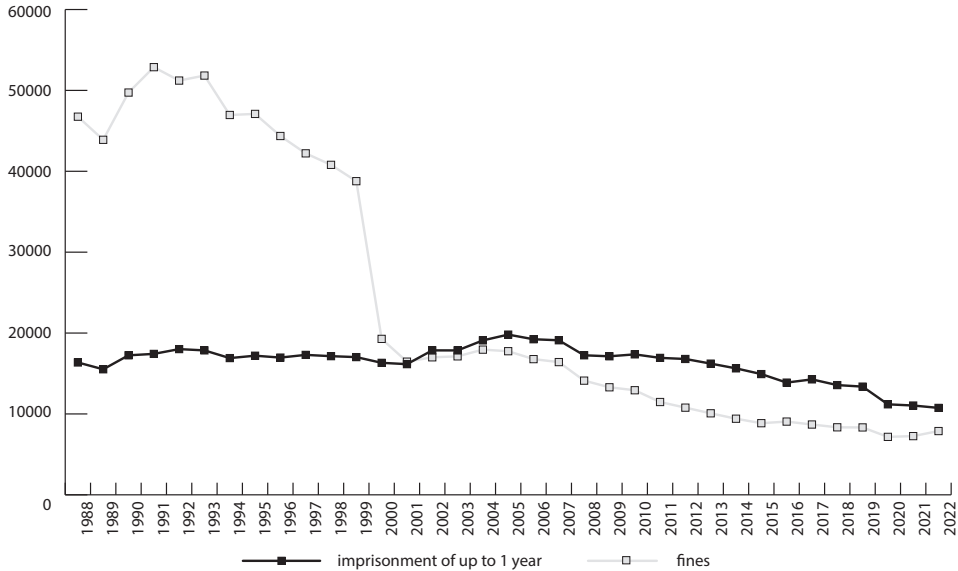
2. Practical significance of Section 37 ACC

The reduction of short-term detention has not been very successful so far. In 2021, 953 prison sentences of no more than one month were imposed, corresponding to seven per cent of all prison terms in that year. However, the number of custodial sentences in this category (the shortest recorded in the statistics) has been declining with fluctuations (3,799 in 1988, 4,482 in 1992, 2,962 in 2000 and 1,957 in 2013; Statistik Austria 2014). Although the absolute amount of short-term custodial sentences has been declining since 2004 – just as longer terms of imprisonment have been – the percentage of prison sentences of up to one year has only fallen from 91% of all prison sentences in 1988 to 79% in 2021. Therefore, four out of five terms of imprisonment should be considered “harmful” according to the unanimous expertise of criminologists (see section 3 below) and could be replaced by a fine if the only requirement for this was the extent of the prison sentence. Thus, there must be mostly special preventive reasons that would allow the courts to refrain from imposing fines. The statistical data on convictions in Austria reveal that the special

preventive reasons which speak against a fine are diverse. The criminal record of the convict is not the only factor that leads the courts to opt for imprisonment for special preventive reasons. In fact, almost half of all short prison sentences in the last ten years have been imposed on first offenders. Consequently, there must be other substantial preventive causes which call for short-term detention. In the absence of research in that respect, it can only be speculated what these reasons may be.

Furthermore, the developments in fines is noteworthy. In 1988, more than 46,000 fines were imposed, with the maximum of nearly 53,000 fines being reached in 1991. In recent decades, this number has decreased rapidly. In 2020, only 7,165 criminal acts were punished by a fine, the lowest so far. Even considering the fact that the number of convictions has decreased sharply from 67,756 (1988) to 25,626 (2021) over time, the percentage of fines on all penalties fell disproportionately in this period, from 68% to 30%. The explanation for this development can presumably be found in the implementation of a legal instrument called “diversion” (Sections 198 et seq. Criminal Procedure Act), which the criminal justice system can use to react to petty and medium criminality. These criminal acts used to be punished with fines, so the massive reduction of more than 20,000 fines can plausibly be attributed to this alternative method of reacting to delinquency. This can be seen in Figure 1: diversion went into force in 2000. Therefore, the decrease in fines does not necessarily lead to an increase in short-term imprisonment.

Figure 1. Statistical development of short-term imprisonment and fines



Source: Own elaboration.

3. Negative aspects of short-term detention

Generally, Austrian criminal law allows terms of imprisonment as short as one day and as long as 20 years, as well as imprisonment for life (Section 18 ACC). By way of comparison to similar legal systems, in Germany the statutory minimum term of imprisonment is one month (Section 38(2) German Criminal Code), and in Switzerland it is three days (Section 40(1) Swiss Criminal Code).

For a perpetrator who has committed a serious criminal act, imprisonment is widely undisputed as the necessary and most suitable method of sanctioning. Even though prison sentences of any length undoubtedly carry unwanted drawbacks, no better alternative to them has been created so far. However, if it is deemed sufficient to react to a criminal offence with short-term detention, these disadvantages will gain weight, and it must be carefully evaluated whether the prison sentence is more useful than harmful.

Generally, the harmfulness of short-term detention has been a much-discussed issue since the beginning of the 20th century. Franz von Liszt rejected short-term imprisonment out of the consideration that it lacks usefulness. It is not an appropriate way to convince those convicted of living in accordance with the law in future. Therefore, Liszt called for a “crusade against short-term imprisonment” (Liszt 1905: 347).

The preparatory works of the Austrian Criminal Code see the restriction of short-term detention as a requirement of good criminal policy. Furthermore, it is in the public interest to reduce short prison sentences (EM ACC 1974: 129). Reasons for this assessment include the desocialisation of the prisoner, the lack of a positive influence on them and the risk of “criminal infection” in prisons. The concept of the interchangeability of punishments declares that less severe sanctions can have the same preventive impact as harsher ones. In light of this thesis and the principle of *ultima ratio*, imprisonment must only be a last resort.

3.1. Desocialisation, lack of positive influence and risk of criminal infection

Short-term detention risks desocialising the prisoner. To avoid this the courts ruled as early as the 1970s that imprisonment should only be imposed in exceptionally serious cases where the law responds to a criminal act with a fine or a prison term (Austrian Supreme Court [“*Oberster Gerichtshof*”] 9 Os 70/75). Fines are more beneficial to the resocialisation of the perpetrator than imprisonment as a “drastic rupture of the convict’s existence harms his/her social integration” (Austrian Supreme Court 13 Os 125/75). The enforcement of a custodial sentence not only disrupts relationships and social ties, but also has negative professional and financial effects – often the loss of one’s job and the risk of unemployment and poverty. Thus, detention must be considered antagonistic to resocialisation (Weigend 1986: 263; Birklbauer 1998: 76; Fuchs, Zerbes 2021: para. 2/13; Seiler 2022: para. 90).

Additionally, there is the known risk of criminal infection by fellow inmates. The prison could become a school of crime for prisoners, providing them with new ideas for criminal acts and more effective ways of committing them (Nowakowski 1973: 1; Zipf 1976: 166; Kunz 1986: 187; Weigend 1986: 263; Birklbauer 1998: 76). The lack of occupation and daily routines, the shared experience of being convicted and stigmatised for it and the general conditions of living in an institution encourage exchanges between like-minded people and facilitate mutual interaction. That must be particularly avoided for petty and medium criminals who could leave the prison with “upgraded” ideas for more serious crimes.

In addition to that, a first brief experience of imprisonment could diminish or remove completely the deterrent effect which a penitentiary normally has (EM ACC 1974: 129). In this respect, short-term detention could even have crime-enhancing effects. The psychological barrier of a prison sentence could be lowered by the experience of incarceration (Nowakowski 1973: 1; Zipf 1976: 166; Kunz 1986: 187).

Furthermore, a positive, behaviour-changing influence can only be exerted on people under exceptionally good conditions. In most cases, the above-mentioned facts of prison life do not provide a good setting for preventively meaningful support and treatment (Mayerhofer 2009: sec. 37 para. 1; Kunz 1986: 187). As stated in Section 20 of the Austrian Penitentiary System Act (*Strafvollzugsgesetz*, hereinafter “APSA”), enforcing a prison sentence is meant to assist the convicted person in obtaining an honest approach to life that is adapted to the needs of life in a community, as well as to prevent them acting on criminal leanings. A great number of short-term prison sentences would likely interfere with these purposes, as financial, spatial and human resources must be divided amongst all inmates, whilst they would better be distributed primarily to long-term detainees. If the penitentiary system lacks resources, this would therefore multiply its negative aspects (Nowakowski 1973: 1; Kunz 1986: 187; Birklbauer 1998: 76).

Additionally, it is stigmatising to be known as someone with a criminal record – even more so if one has served time in prison. This stigma may hinder the successful resocialisation of the convicted person and may produce a negative self-image. The enforcement of a prison sentence states clearly and publicly that the crime in question was a serious one (Birklbauer 1998: 76). For these reasons, courts must deliberate thoroughly whether imprisoning the convicted person is necessary or if a fine would be the more useful sanction, especially with a view to successful resocialisation.

3.2. Alternatives to short-term detention

Empirical research regarding the effectiveness of various criminal sanctions in terms of future legal conduct led to the concept of the interchangeability of punishments (Kunz 1986: 192; Weigend 1986: 266; Bommer 2017: 380; Singelstein, Kunz 2021: sec. 20 para. 39). According to this thesis, on average, short-term imprisonment does not have a greater special preventive impact than alternative, non-custodial sanctions. Even if selection effects are considered, meaning that

prison sentences are more often imposed on convicted people with a poorer preventive prognosis, the data clearly suggest that incarcerated people are more likely to reoffend than those who are fined (Mazzucchelli 2018: sec. 41 para. 10). There is no scholarly research as to which cases may hold more preventive promise given a short prison sentence (Bommer 2017: 380). The only argument for this sanction can be the evident ineffectiveness of previous fines on recidivists. Considering the concept of the interchangeability of punishment, the principle of *ultima ratio* demands a sanction that interferes in the most minimal way with the fundamental rights of the convicted person. This must be honoured by legislators as well as the judiciary (Mazzucchelli 2018: sec. 41 para. 11).

Austrian lawmakers have drawn up various alternatives to short prison sentences. Firstly, there is the possibility of suspending the execution of imprisonment for up to two years and granting probation, if it can be expected that the sentence will serve the convicted person as a warning and that they will commit no further crimes in future – even without the influence exerted by serving the sentence (Section 43 ACC). Secondly, there is the combination of paying a fine and suspending the execution of the punishment (Section 43a(2) ACC). A provision for extraordinary mitigation of punishment (Section 41(3) ACC) and special regulations for juveniles and young adults (people under the age of 21) allow more leeway for granting parole (Sections 5(9), 19(2) AJCA). Although electronically monitored house arrest (Sections 157 et seq. APSA) is formally a method for executing a custodial sentence, it prevents most of the disadvantages of front-door sentencing. Finally, diversion (Sections 198 et seq. Austrian Criminal Procedure Act) should also be mentioned in this context, because it is an alternative form of sentencing that extends into the medium range of criminality and to a large extent also avoids short custodial sentences.

3.3. Special designs for the execution of a prison sentence

A complete abolition of short prison sentences has not been on the political agenda in Austria so far. The legislature continues to believe in a certain special preventive need for short-term detention and imposes this sanction to a considerable extent, as shown above. In the juridical literature strong commitments can be found for short prison sentences, as well. The motives for this viewpoint vary.

One of the advantages of short-term detention is seen in a sort of shock therapy (a “short, sharp shock”), at least for certain groups of offenders, such as economic, juvenile or first-time offenders (Jescheck 1977: 261; Kunz 1986: 201; Mayerhofer 2009: sec. 37 para. 7). A general preventive need for the short prison sentence has also repeatedly been cited (EM ACC 1974: 129). It is sometimes argued on the grounds of social equality that financially weaker offenders would benefit far less from the primacy of the monetary penalty than wealthier offenders (Killias 1994: 124; Killias 2011: 632). However, this egalitarian claim is rejected by the majority due to the overwhelming disadvantages of the short custodial sentence (Birklbauer 1998: 79; Mazzucchelli 2018: sec. 41 para. 11).

In order to avoid the danger of desocialisation, proponents of short prison sentences are also considering alternative models such as imprisonment for employed persons during statutory recreational leave (Kohlmann 1996: 614) or imprisonment in instalments at weekends or during free time only (Kunz 1986: 200; Weigend 1986: 263; Laun 2002: 273). This would turn the short custodial sentence into a “leisure sentence” (Dolde, Rössner 1987: 424). The above-mentioned electronically monitored house arrest is a front-door form of imprisonment also intended to protect convicted persons from these disadvantages, and is thus also used as an argument for leaving the short custodial sentence in place. In Switzerland, there is the institution of so-called semi-detention (“*Halbgefängenschaft*”, Art 77b Swiss Criminal Code) in order to keep short prison sentences acceptable (Kunz 1986: 189).

3.4. Community service instead of default imprisonment

If a fine is uncollectible, a substitute term of imprisonment is imposed. One day of default imprisonment corresponds to two daily rates (Section 19(3) ACC). Since a fine can currently amount to a maximum of 720 daily rates and given the two-to-one ratio, a substitute term of imprisonment is necessarily short (up to 360 days). Only the application of Section 39 ACC (penalty aggravation for recidivism) and Section 313 ACC (exploitation of an official position) may result in a fine of up to 1,080 daily rates and thus the possibility that the default imprisonment exceeds one year (up to 540 days, i.e. almost 18 months). Since there is no difference in the execution of primary and substitute custodial sentences, both are to be judged as equally harmful. For societal reasons and in order to prevent the negative effects of imprisonment, in 2008 the legislature created the possibility for convicted persons to escape the execution of a substitute custodial sentence by performing community service (Sections 3 third sentence and 3a APSA, Federal Law Gazette I 109/2007): Execution of a substitute term of imprisonment of less than nine months shall not be carried out if the offender performs community service. This possibility is missing for primary prison sentences in Austrian criminal law, in order to ultimately avoid the creation of a new primary sanction (in contrast to Section 79a Swiss Criminal Code). The extent to which the introduction of community service as a primary sanction could be a way forward is a controversial topic of discussion.

4. Section 37 ACC in detail

If a criminal act is punishable by a fine as an alternative punishment to imprisonment, there is no need to revert to Section 37 ACC and its restrictive requirements for the imposition of a fine. An explicit legal priority of a fine in the case of an alternative threat of a fine and imprisonment as proposed by the 1971 govern-

ment bill did not enter into force. However, this does not change the principle of giving priority to fines over imprisonment. A custodial sentence is only justified in exceptional cases if the law gives the court the choice between the two (Supreme Court 12 Os 137/90; Venier 2016: 818; Flora 2021: sec. 37 para. 30; Fabrizio, Michel-Kwapinski, Oshidari 2022: sec. 37 para. 6).

4.1. Conditions for the application of Section 37(1) ACC

Section 37(1) ACC cumulatively requires a criminal act punishable by no more than five years of imprisonment, a hypothetically imposed custodial sentence of up to and including one year and a positive special preventive prognosis. These three prerequisites are sufficient; there is no need, for example, for special mitigating reasons in order to be able to impose a fine instead of a prison sentence, because Section 37 ACC classifies fines and custodial sentences as equivalent sanctions. Besides, imposing a fine due to the fact that the offender is unfit for detention is inadmissible (Pallin 1996: sec. 37 para. 15).

Furthermore, for the application of Section 37 ACC it is irrelevant whether the defendant is able to (legally) raise the funds required to pay a fine (EM ACC 1974: 130; Supreme Court 9 Os 19/81; Pallin 1982: para. 135; Pallin 1996: sec. 37 para. 15; Flora 2021: sec. 37 para. 27). The (limited) financial means of the offender are to be taken into account only when assessing the daily rate's amount at the second stage of assessing a fine (Supreme Court 9 Os 148/86) and not at the first stage, when determining the number of daily sentences appropriate to the offender's guilt. Moreover, the legislature's aim in setting a minimum daily fine of €4.00 (Section 19(2) ACC) is to ensure that there are no unaffordable fines.

It is also irrelevant whether the convicted person will pay the fine themselves or whether someone else is likely to pay it for them. This circumstance was generally accepted by the legislature when regulating fines (Pallin 1982: para. 135; Flora 2021: sec. 37 para. 27). Otherwise, the imposition of a fine on an offender who has a particularly good financial situation or an extraordinarily high income, so that even the maximum daily fine of €5,000 would not amount to a noticeable loss for them, would also have to be inadmissible.

4.1.1. Imprisonment of up to five years

To determine the maximum penalty of imprisonment as the first prerequisite, it is necessary to examine not only the upper limit of the penalty provided for in the offence to be sentenced, but also whether other sentencing provisions are to be applied. When it comes to the Criminal Code, cases of imposing an additional penalty (Sections 31, 40 ACC) and increasing the penalty range according to Sections 39 and 313 ACC come into consideration for this. Section 5(4) of the Austrian Juvenile Court Act (*Jugendgerichtsgesetz*, hereinafter "AJCA") is relevant to juvenile offenders.

4.1.2. Hypothetical prison sentence of up to one year

As a second prerequisite, the court must carry out a hypothetical assessment of the custodial sentence and determine whether a custodial sentence of more than one year would be appropriate for the offence and the culpability of the offender, weighing the mitigating and aggravating circumstances. If the court concludes that a prison sentence of no more than one year would be appropriate for the punishable act, Section 37 ACC is indicated. The extent of this hypothetical term of imprisonment does not have to be included in the reasons for the judgment (Tipold 2020: sec. 37 para. 8), nor does the court have to determine it exactly. It is only necessary to assess whether a custodial sentence of a maximum of one year is appropriate in terms of the crime and the offender's guilt. Any credit for prior imprisonment pursuant to Section 38 ACC is not to be taken into account here.

4.1.3. Positive special preventive prognosis

The imposition of a fine in accordance with Section 37 ACC is mandatory if the first two conditions outlined above are met, unless a custodial sentence is indispensable for special preventive reasons and is thus the last resort (Supreme Court 13 Os 32/79). This provision reflects the legislature's assessment that in some cases a fine is not as effective as a prison sentence in deterring an offender from committing further criminal acts. In this respect, suspending the execution of a prison sentence could be necessary as a special preventive measure, for example, if a resocialising effect on the offender during the probationary period can be assumed (EM ACC 1974: 130; Tipold 2020: sec. 37 para. 12). Of course, this effect can also be achieved by a partially suspended execution of a fine (Section 43a (1) ACC). The objection to a short, executed prison sentence is that it can hardly have a resocialisation effect in terms of special prevention and that it only has a security effect in those months in which the convicted person is in prison. The deterring and warning function – which has not been empirically proven – cannot legitimise a short prison sentence for special preventive reasons (Kunz 1986: 188; Pallin 1996: sec. 37 para. 11; Flora 2021: sec. 37 para. 12). Thus, in the end, the prevention requirement remains very case-specific and it is difficult to determine the line.

Numerous published decisions on the prevention requirement under Section 37 ACC concern alcohol-related road traffic accidents, with a particular emphasis on the influence of alcohol and previous criminal offences. For example, the Higher Regional Court of Innsbruck (7 Bs 207/89) ruled that Section 37 ACC should not be applied to a traffic offender who had a particularly high blood alcohol level at the time of the accident and a history of traffic fines. In another case, the requirement of a short prison sentence was negated in the case of a motor vehicle driver with multiple administrative convictions who had already caused a serious traffic accident once in the past (Higher Regional Court of Innsbruck, 8 Bs 444/89).

However, the perpetrator's alcohol use, being the cause of a traffic accident resulting in injury or death, does not generally prevent the application of Section 37 ACC (Higher Regional Court of Innsbruck 4 Bs 666/85). The Higher Regional Court of Graz (10 Bs 168/81), for example, ruled that the imposition of a fine may be considered in extremely exceptional cases where the intoxicated driver of a vehicle causes death or serious injury to a person. Such an exception would be if the injured person was a good acquaintance of the perpetrator, had consumed alcohol with the latter before starting the journey, was not wearing a seat belt during the journey (having a great influence on the degree of injury) and knew the road conditions, whilst the driver could only be blamed for a minor fault (skidding when downshifting on an icy road). The Higher Regional Court of Vienna (25 Bs 97/92) also ruled in this direction when it exceptionally refrained from imposing a custodial sentence on a 66-year-old intoxicated motor vehicle driver who had not been at fault up to that point and who had surrendered his driving licence after a traffic accident for which he was responsible, because the severity of the victim's injury (whiplash) was based only on her inability to work for the duration of 24 days. The imposition of a fine was also not precluded by the heavy alcohol consumption (2.5 per mille), as the perpetrator "took refuge in alcohol" due to a serious illness.

Irrespective of alcohol-related accidents, both case law and the literature emphasise that previous convictions, even if they are for similar offences, do not prevent the application of Section 37 ACC in principle and that the execution of a fine after previous convictions with suspended punishment is suitable for resocialisation (Supreme Court 9 Os 83/76; 9 Os 178/76; 12 Os 65/79). In addition, a previously orderly lifestyle (Supreme Court 11 Os 93/77) or a long period of good conduct following an offence are explicitly cited as characteristics for a positive prevention prognosis (Supreme Court 13 Os 118/76).

4.2. Conditions for the application of Section 37(2) ACC

Section 37(2) ACC differs from subsection (1) in the requirement for an abstract threat of punishment and in the requirements for the prevention prognosis. The requirement of a hypothetical custodial sentence of up to one year is identical for both provisions. For juvenile offences, the application of section 37(2) ACC is excluded by section 5(8) AJCA. This is in line with the general principle of section 5(1) AJCA, which states that the application of juvenile criminal law primarily serves the purpose of deterring an offender from committing criminal acts. Therefore, the consideration of general preventive aspects, as allowed by section 37(2) ACC, cannot be reconciled with this principle. For young adults, on the other hand, section 37(2) ACC is applicable, although the emphasis on special prevention also applies to this age group (cf. section 19(2) AJCA).

4.2.1. Imprisonment of up to ten years

The first criterion for Section 37(2) ACC is the threat of a custodial sentence of more than five but no more than ten years for committing a criminal offence. It seems doubtful that the criterion of a maximum term of imprisonment makes sense in this context, especially since for an offence punishable by more than ten years' imprisonment it is hardly conceivable to have cases in which a hypothetical term of imprisonment of no more than one year seems appropriate. The threatened minimum term of imprisonment for such serious offences usually already exceeds one year, meaning that without a considerable preponderance of the mitigating over the aggravating circumstances (extraordinary mitigation of punishment as defined in Section 41(1) ACC), the second criterion required for Section 37 ACC cannot be met. However, the legislature expressly intended to exclude imposing fines for the most serious offences due to their abstract threat of punishment, even if the individual case is to be assessed as extraordinarily low in guilt (EM ACC 1974: 131). For example, in the case of a conviction for murder (Section 75 ACC), a fine is excluded even in the least serious cases which are punished by the absolute minimum of imprisonment of one year. This exposes the offender to the disadvantages of a short prison sentence. The drawbacks of short-term detention can be avoided only by suspending execution (Section 43 ACC) of the punishment or using electronically monitored house arrest.

4.2.2. Positive special and general preventive prognosis

Section 37(2) ACC requires a positive special preventive prognosis to the effect that a fine will deter the offender from committing further criminal acts and that the imposition of a custodial sentence is not necessary to achieve this purpose. Furthermore, the imposition of a fine must be sufficient to deter others from committing criminal acts. Since the Criminal Law Amendment Act 2015, there no longer have to be any special reasons for this general preventive requirement that would indicate that a fine would also deter other potential offenders from committing criminal acts. In this respect, the requirements for the general preventive requirement for a custodial sentence have been lowered, ultimately leaving few cases for non-application of Section 37(2) ACC on general prevention grounds.

According to the jurisprudence, general preventive reasons prevent the application of Section 37 ACC in the case of a robbery offence (Supreme Court 11 Os 14/77). This case law must be rejected and its generality criticised, not only because of the lack of empirical evidence of a general preventive effect from stricter penalties (see e.g. Delle-Karth 1985: 146). For the court, the possibility must remain open to sanction a robbery offender (Section 142 ACC) with a fine appropriate for their guilt in atypically light cases. Serious robbery offences (Section 143 ACC) are outside the scope of Section 37 ACC in any case due to the threat of punishment.

Moreover, general prevention considerations preclude the application of Section 37 ACC even in the case of less atypically light attacks against the integrity of justice (Section 302 ACC; Supreme Court 14 Os 148/88). According to the jurisprudence, general prevention requires the imposition of a custodial sentence in the case of drink drivers who are at fault for a traffic accident, due to the frequency and dangerousness of drink driving (Supreme Court 12 Os 122/76; 12 Os 88/81). However, all these cases now fall under Section 37(1) ACC due to the penalty, which means that since the Criminal Law Amendment Act 2015, general preventive aspects are no longer relevant for these offences. This case law is therefore obsolete.

4.3. Legal consequences

4.3.1. Original imposition of a fine

If the conditions of Section 37(1) or (2) ACC are met, a fine is imposed in accordance with the rules of Section 19 ACC. The number of daily sentences under Section 37 ACC is determined originally and not by a mathematical conversion of the custodial sentence assessed as appropriate to the offence and the defendant's guilt (EM ACC 1974: 130; Supreme Court 13 Os 74/05i; 14 Os 60/91; Zipf 1976: 176; Mayerhofer 2009: sec. 37 para. 43; Tipold 2020: sec. 37 para. 9; Flora 2021: sec. 37 para. 10; Fabrizy, Michel-Kwapinski, Oshidari 2022: sec. 37 para. 5). This results from the fact that the legislature deliberately refrained from first having a concrete custodial sentence visibly measured and then converting it into a monetary penalty according to Section 19(3) second sentence ACC (Supreme Court 14 Os 60/91). The two types of punishment are too different in their preventive effect for such an approach (EM ACC 1974: 130). In any case, the waiver of the more severe prison sentence may not lead to a higher number of daily sentences of the fine in return. Despite the original assessment of the fine, the conversion rate of Section 19 (3) ACC must serve as a guideline (EM ACC 1974: 131; Mayerhofer 2009: sec. 37 para. 5). The upper limit of no more than 720 daily sentences provided for in Section 37 ACC also suggests bearing the conversion rate in mind; it results from the hypothetical custodial sentence of up to one year and the legislature's assessment in relation to the substitute custodial sentence, which equates one day's deprivation of liberty with two daily sentences of a fine.

In the original fine assessment of Section 37 ACC, the multi-part approach of the daily rate system must be taken particularly seriously. The personal financial means of the offender must not influence the determination of the number of daily sentences in such a way that a low expected daily rate is compensated for by a higher number of daily sentences in order to achieve a considerable total amount of the fine. In such an approach, an unaffordable fine would result in the execution of an unreasonably high substitute term of imprisonment, which would undermine the objective of Section 37 ACC.

As a result of the original assessment of fines according to Section 37 ACC, there is no need to apply the provision of extraordinary mitigation of punishment (Section 41 ACC). The court may impose a fine even if the requirements stated therein are not met (Supreme Court 14 Os 60/91; Mayerhofer 2009: sec. 37 para. 43; Medigovic, Reindl-Krauskopf, Luef-Kölbl 2016: 100; Flora 2021: sec. 37 para. 34). Thus, the mandatory imposition of a prison sentence in the case of death as provided for in Section 41(2) ACC does not preclude its application due to the independence of Section 37 ACC (Pallin 1983: para. 133; Tipold 2020: sec. 37 para. 10; Flora 2021: sec. 37 para. 35). This also corresponds to the criminal policy intention of Section 37 ACC, which not only provides for prioritising fines in particularly mild cases, but is also to be understood as a separate sentencing rule. Whether the substitute term of imprisonment specified for a fine is below the minimum penalty for the convicted offence is thus irrelevant (Tipold 2020: sec. 37 para. 10).

4.3.2. Fine of up to 720 daily sentences

Section 37 ACC provides for an upper limit of 720 daily sentences for the fine. Partial suspension of the execution of a fine imposed under Section 37 ACC is permissible in the same way as for any other fine. Section 43a(1) ACC does not make any distinction here (Higher Regional Court of Vienna, 23 Bs 317/88). However, the preventive considerations for the imposition of a fine under Section 37 ACC and for its (partial) suspension under Sections 43 and 43a ACC may lead to different results due to the different points of reference (Pallin 1982: para. 137). For example, a fine under Section 37(1) ACC could be ruled out because of special preventive concerns, but suspending the execution of a custodial sentence imposed under Section 43 ACC could be regarded as sufficient to deter the offender from committing further criminal acts. However, there are no tangible criteria for one or the other option, especially since the preventive prognosis cannot truly be empirically substantiated, but is rather a “question of faith”. The relevant case law, which regularly does not find its way to the Supreme Court, has not been published either.

Conclusions

Due to the grave negative effects of brief prison sentences, the legislature has striven to avoid short-term detention of offenders, or at least its execution. There are various possibilities to sanction criminal acts without putting the perpetrator in prison. The most important one in Austrian criminal law is likely the application of Section 37 ACC, which states that a short imprisonment term for committing an offence that is punished by a maximum of ten years' imprisonment shall be replaced by a fine if the court deems it justifiable for preventive reasons. A distinction is made according to whether the threatened penalty is only a custodial

sentence of up to a maximum of five years (para. 1). Here, it is exclusively a matter of special preventive requirements. In the case of offences punished by more than five and up to ten years' imprisonment, general prevention aspects must also be taken into account (para. 2). Consequently, short custodial sentences are only permissible if the requirements of Section 37 are not met (*ultima ratio* principle). Even if short-term detention is modified to mitigate its negative impact, it must be a last resort for sanctioning petty or medium criminality. However, in recent years a policy push towards a more severe approach against criminality can be observed. According to the empirical evidence (see Figure 1), however, the courts have so far not allowed themselves to be pressurised into giving in to these punitive efforts.

It is therefore gratifying to note that in Austria, since the 2015 criminal law reform, short custodial sentences under Section 37 ACC have been for up to one year, whereas previously this only applied to those of up to six months. In order to further promote this welcome legal development, it is proposed to abandon the criterion that the criminal act must not be punishable by more than ten years. In addition, the general prevention requirement could be removed. There are no reliable empirical studies concluding that stricter penalties have a better preventive effect (cf. the thesis of the interchangeability of punishments). It would be sufficient to standardise the hypothetical imposition of a custodial sentence of no more than one year (and a positive special preventive prognosis) as a prerequisite for the application of Section 37 ACC. Although the abstract threat of punishment indicates the legislature's assessment of the seriousness of a crime, the concrete crime and the culpability of the offender should ultimately be decisive for the sanction. Lastly, it must be recommended to raise the general minimum term of imprisonment from one day (Section 18(2) ACC) to at least one month.

Declaration of Conflict Interests

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author received no specific funding for this work.

References

- Birklbauer A. (1998). *Die teilbedingte Strafnachsicht. Ein Weg moderner Kriminalpolitik* [The partial suspension of execution of punishment. A way of modern criminal policy]. Wien: Verlag Österreich.
- Bommer F. (2017). 'Neuerungen im Sanktionenrecht: Geldstrafe und Freiheitsstrafe' [Innovations in the law on sanctions: Fines and imprisonment]. *Schweizerische Zeitschrift für Strafrecht* 135(4), pp. 365–388.
- Delle-Karth G. (1985). 'Die Fiktion der Generalprävention' [The fiction of general prevention]. *Österreichische Richterzeitung*, pp. 146–152.
- Dolde G. and Rössner D. (1987). 'Auf dem Wege zu einer neuen Sanktion: Vollzug der Freiheitsstrafe als Freizeitstrafe' [Towards a new sanction: Execution of the prison sentence as a leisure sentence]. *Zeitschrift für die gesamte Strafrechtswissenschaft* 99(3), pp. 424–452.
- Fabrizy E.E., Michel-Kwapinski A., and Oshidari B. (2022). *StGB und ausgewählte Nebengesetze* [Criminal Code and selected supplementary laws]. Wien: Manz.
- Flora M. (2021). '§ 37 StGB' [Section 37 of the Criminal Code]. In F. Höpfel and E. Ratz (eds.) *Wiener Kommentar zum Strafgesetzbuch* [Vienna commentary on the Criminal Code]. Wien: Manz.
- Fuchs H. and Zerbes I. (2021). *Strafrecht Allgemeiner Teil I* [Criminal law general part I]. Wien: Verlag Österreich.
- Jeschek H.-H. (1977). 'Die Geldstrafe als Mittel moderner Kriminalpolitik in rechtsvergleichender Sicht' [The fine as a means of modern criminal policy in a comparative law perspective]. In R. Herren and T. Würtenberger (eds.) *Kultur, Kriminalität, Strafrecht. Festschrift für Thomas Würtenberger zum 70. Geburtstag* [Culture, criminality, criminal law. Commemorative publication for Thomas Würtenberger on the occasion of his 70th birthday]. Berlin: Duncker & Humblot, pp. 257–276.
- Killias M. (1994). 'Der Kreuzzug gegen kurze Freiheitsstrafen. Historische Hintergründe, neue Erwartungen – und die verdrängten Folgen' [The crusade against short prison sentences. Historical background, new expectations – and the suppressed consequences]. In S. Bauhofer and P.-H. Bolle (eds.) *Reform der strafrechtlichen Sanktionen* [Reform of criminal sanctions]. Glarus-Chur: Rüegger, pp. 111–139.
- Killias M. (2011). 'Korrektur einer verunglückten Gesetzgebung: Zur erneuten Revision des AT-StGB' [Correction of an unsuccessful legislation: On the renewed revision of the general part of the Criminal Code]. *Zeitschrift für Schweizerisches Recht*, pp. 627–640.
- Kohlmann G. (1996). 'Vollstreckung kurzfristiger Freiheitsstrafen – wirksames Mittel zur Bekämpfung von Kriminalität?' [Enforcement of short-term custodial sentences – effective means of combating crime]. In K. Schmoller (ed.) *Festschrift für Otto Triffterer zum 65. Geburtstag* [Commemorative publication for Otto Triffterer on the occasion of his 65th birthday]. Wien: Springer, pp. 603–616.
- Kunz K.-L. (1986). 'Die kurzfristige Freiheitsstrafe und die Möglichkeit ihres Ersatzes' [The short-term imprisonment and the possibility of its replacement]. *Schweizerische Zeitschrift für Strafrecht* 103(2), pp. 182–214.

- Laun S. (2002). *Alternative Sanktionen zum Freiheitsentzug und die Reform des Sanktionensystems* [Alternative sanctions to the deprivation of freedom and the reform of the sanction system]. Frankfurt am Mai: Peter Lang.
- Liszt F. (1905). *Strafrechtliche Aufsätze und Vorträge* [Criminal law essays and lectures]. Berlin: J. Guttentag.
- Mayerhofer C. (2009). *Strafgesetzbuch* [Criminal Code]. Wien: Verlag Österreich.
- Mazzucchelli G. (2018). 'Art 41 StGB' [Section 41 of the Criminal Code]. In A. M. Niggli and H. Wiprächtiger (eds.) *Basler Kommentar zum Strafrecht* [Basel commentary on criminal law]. Basel: Helbing Lichtenhahn.
- Medigovic U., Reindl-Krauskopf S., and Luef-Kölbl H. (2016). *Strafrecht Allgemeiner Teil II* [Criminal law general part II]. Wien: NWV.
- Nowakowski F. (1973). 'Die Zurückdrängung der kurzen Freiheitsstrafe in der RV 1971' [The push back of the short term of imprisonment in the 1971 Government Bill]. *Österreichische Juristenzeitung* 28, pp. 1–4.
- Pallin F. (1982). *Die Strafzumessung in rechtlicher Sicht* [The penalty assessment from a legal point of view]. Wien: Manz.
- Pallin F. (1996). '§ 37 StGB' [Section 37 of the Criminal Code]. In E. Foregger and F. Nowakowski (eds.) *Wiener Kommentar zum Strafgesetzbuch* [Vienna commentary on the Criminal Code]. Wien: Manz.
- Seiler S. (2022). *Strafrecht Allgemeiner Teil II* [Criminal law general part II]. Wien: Verlag Österreich.
- Singelstein T. and Kunz K.-L. (2021). *Kriminologie* [Criminology]. Stuttgart: utb.
- Statistik Austria (2021). *Verurteilungsstatistik* [Conviction statistics]. Wien: Statistik Austria.
- Tipold A. (2020). '§ 37 StGB' [Section 37 of the Criminal Code]. In O. Leukauf and H. Steininger (eds.) *Kommentar zum Strafgesetzbuch* [Commentary on the Criminal Code]. Wien: Linde.
- Venier A. (2016). 'Ausgewählte Probleme des StRÄG 2015' [Selected problems of the Criminal Law Amendment Act 2015]. *Österreichische Juristenzeitung* 71, pp. 814–820.
- Weigend T. (1986). 'Die kurze Freiheitsstrafe – eine Sanktion mit Zukunft?' [Short-term imprisonment – a sanction with a future?]. *Juristenzeitung* 41(6), pp. 260–269.
- Zipf H. (1976). 'Die Geldstrafe und ihr Verhältnis zur Freiheitsstrafe' [The fine and its relation to the custodial sentence]. *Strafrechtliche Probleme der Gegenwart* 4, pp. 164–178.