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The Legal Boundaries and Implications of Civil Death

ABSTRACT

Present paper attempts to conduct a thorough examination concerning the issue of civil death, that can be classified within the category of moral punishments. The category of moral punishments is a complex area that requires not only an understanding of legal systems but also a comprehensive grasp of moral norms and societal expectations. Civil death as a punishment raises extremely serious legal and moral dilemmas that can extend from human rights to punitive objectives to international law. The aim of the study is to outline the category of moral punishments, attempt to define and interpret civil death as a punishment, and contemplate the relevant elements of the current Hungarian regulation on this topic, mainly in terms of punitive objectives and certain forms of restrictive and deprivation sanctions. Furthermore, the study aims to provide a historical overview of the development and application of civil death as a punishment, considering its legal and societal context. The analysis also seeks to assess how these aspects continue to shape contemporary attitudes towards civil death and its potential implications for modern legal systems.

KEYWORDS: *moral penalties, civil death, punishment objectives, mort civile, attainder*

Introduction – moral penalties

„The path and framework of the assimilation into criminal law are provided by the ancient distinction that morality pertains to inner feelings, while law pertains to external actions.”[1]

The category of moral penalties represents a scientific abstraction that can be aptly encapsulated through the description provided by Ferenc Finkey.[2] Finkey describes moral penalties as "punitive measures distinct from capital punishment and the various forms of imprisonment, including security and rehabilitative interventions similar to them, as well as monetary fines." Finkey further adds that moral penalties are typically "less severe" than the aforementioned punitive measures.[3] This statement hints at Finkey's conception of a "sanction hierarchy," which could raise intriguing questions regarding specific sanctions that fit within the realm of certain moral penalties. One such query pertains to discerning whether life imprisonment, the death penalty, or civil death constitutes the gravest penalty. Moreover, reflecting on the interplay between moral penalties and other sanctions garners interest because, as Finkey notes, they are diverse and have been known in criminal law for millennia. Even before the development of formal state institutions, societies with no state apparatus had „sanctions” resembling the characteristics of those that fall within the realm of moral penalties. Examples include exile, varied forms of debasing and corrective penalties (such as corporal chastisement, public shaming), diverse manifestations of dishonor, or the aforementioned civil death penalty. Lastly, reflecting on legal disabilities that fit within the realm of moral penalties can be an intriguing task, considering the extent and scope of the connections between ethics and law, particularly ethics and criminal law. It involves examining to what extent any given punishment can be considered a moral penalty, in the sense that the imposition of a sanction typically triggers automatic societal moral disapproval. Additionally, individuals with criminal records are also ineligible for an official moral certificate, further illustrating the connection between ethics and criminal law.

The term "moral penalties" is sometimes interchangeably referred to as "honour penalties" because they strip the offender, either partially or fully, of their rights, legal status, and honour.[4] It is worth noting, however, that the law can only indirectly deprive an individual of their honour. Honour is always a result of societal judgment, shaped by ethical norms, customs, and traditions. Just as the law does not create honour, it cannot take it away; only the society that created it can revoke it. Nonetheless, the creation of criminal law is done indirectly by society, so the application of sanctions that strip an individual of their honour is possible based on legal grounds. However, the law alone is insufficient for depriving someone of their honour; if society does not agree, the law will eventually yield to public pressure.[5] The underlying concept of sanctions falling under the category of moral penalties involves varying degrees of deprivation of rights due to unworthiness. These sanctions can be imposed on offenders who were not sentenced to death[6] but whose actions, due to their severity, warrant deprivation

[1]István, Bibó: *Válogatott tanulmányok*. Magvető Könyvkiadó, Budapest, 1986. p. első kötet, 164.
Own translation: „a büntetőjoggá hasonulás útját és kereteit az az ősi megkülönböztetés adja, mely szerint az erkölcs *belső* érzelemre, a jog *külső* cselekedetre vonatkozik.”
István Bibó was a Doctor of Law, university professor, corresponding member of the Hungarian Academy of Sciences, and vice president of the Eastern European Institute. He also worked as a librarian and was a political prisoner. Internationally renowned, Bibó is regarded as the greatest democratic political thinker in Hungary during the 20th century. His works on democracy, political philosophy, and his critique of authoritarianism have left a lasting legacy in both Hungarian and global intellectual history.
[2]Ferenc Finkey was a Hungarian legal scholar, university professor, crown prosecutor, and a member of the Hungarian Academy of Sciences at the turn of the 19th and 20th centuries.
[3]Ferenc, Finkey: *Büntetéstani problémák*. Sylvester Irodalmi és Nyomdai Kt., Budapest, 1933. p. 253.
[4]Finkey: op.cit. p. 253.
[5]*A becsület/erkölcsi büntetések fajai és jogosultsága a magyar büntetőjogban.* (Debreceni Magyar Királyi Tisza István Tudományegyetem Állam- és Jogtudományi Kar) 1939. https://dea.lib.unideb.hu/server/api/core/bitstreams/9e03124d-3fc3-464e-bba2-54bb89ec8145/content (23.12.01.)
[6]Thus, they could not be subjected to the most severe forms of punishment, which, of course, is not limited to the death penalty.

of certain rights temporarily or permanently, such as rights related to participation in public affairs, either in addition to or independently of imprisonment. Furthermore, the function of moral penalties includes stigmatizing the offender in the eyes of citizens to make them more cautious and serve as a deterrent example,[7] aligning with modern penal objectives. The moral content of moral penalties perhaps most prominently manifests based on the idea that the imposition of legal disadvantages in this category stems from some form of unworthiness, which is purely an ethical question.

It is worth noting that in this study, when referring to moral penalties, we are specifically discussing legal sanctions within the framework of social norm systems that carry distinct moral content. Therefore, moral penalties do not refer to responses to violations of ethical norms prescribed by the ethical norm system, which typically entail permanent or temporary exclusion from the community. It is important to emphasize, however, that the imposition of moral penalties can stem from engaging in behavior prohibited by both the ethical norm system and legal norms, thereby constituting a violation of both. Indeed, it is not uncommon, and often evident, that certain actions are condemned by both legal and ethical norm systems. Thus, as Tamás Földesi[8] also noted, in the context of the relationship between law and ethics, we can perhaps speak more confidently about "legal" and "non-legal" ethics, as a significant portion of ethical norms becomes (or is already) part of legal norms.[9] István Bibó nuances the relationship between ethics and criminal law when he states that a requirement with a criminal law flavor is the demand for the universality of the moral law, as expressed in Kant's classic definition: act as if the maxim of your action were to become through your will a universal law of nature.[10] Bibó presents two views on the relationship between ethics and law. The first suggests that every legal norm is implicitly contained within the rules of ethics, and law, in its descent from the realm of universal validity of ethics to the realm of actual human behaviors, concretizes ethics. The second view is the positivist view, asserting that the possible immorality a law does not affect its validity and obligation and the law and ethics are completely independent of each other. Bibó argues against the untenability of these extreme positions and asserts that, on one hand, due to the varied functions of law in society, it cannot be entirely part of the order of ethical norms, and on the other hand, despite its differences, law represents a domain of societal rules that particularly falls under the judgment of ethics.[11]

I. Civil death

„Anyone attempting to find the roots of civil death will find that he has to grope his way along paths marked by obscure, flickering and sometimes misleading lights.*"*[12]

As previously mentioned, civil death is a legal disadvantage that falls within the category of moral penalties, with its roots tracing back to communities operating without formal state organizations. Its essence lies in complete legal incapacitation, [13] where the law deprives an individual of legal capacity, declares them dishonorable, and thus effectively excludes them from society. [14] It is a legal fiction through which a person is deprived of all civil rights and is treated as if they were dead. [15]

[7]Finkey: op.cit. p. 253.
[8]Tamás Földesi was a professor of law and political sciences, and has also served as a department head and dean at one of the most prestigious faculties of law and political sciences in Hungary.
[9]With the differentiation of society and social needs, there also occurred a specific differentiation of norms. Therefore, the most significant new institution, the state, highlighted certain norms, thereby creating the category of law. See: Földesi, Tamás: *Jog, erkölcs, igazság.* p. 2. In Iskolakultúra, Az Országos Közoktatási Intézet folyóirata, 1994/18., p. 2-11.
[10]Bibó: op. cit. p. 165.
[11]Ibid. p. 166.
[12]Tanya M., Monforte: *A Theory of Civil Death: Legal Status and Security Under Neoliberalism*. p. 103. https://escholarship.mcgill.ca/concern/theses/8623j413z (2023.11.30.)
[13]Finkey: op.cit. p. 254.
[14]*A becsület/erkölcsi büntetések fajai és jogosultsága a magyar büntetőjogban.* (Debreceni Magyar Királyi Tisza István Tudományegyetem Állam- és Jogtudományi Kar) 1939. https://dea.lib.unideb.hu/server/api/core/bitstreams/9e03124d-3fc3-464e-bba2-54bb89ec8145/content (23.12.01.)
[15]*Civil Death Statutes. Medieval Fiction in a Modern World.* (Harvard Law Review) p. 968. https://www.jstor.org/stable/1332815 (2023.11.06.)

Civil death lacks a unified definition. Yet various analogies in legal history can be referenced, it has been codified in various legal systems to some extent, and its different manifestations often share similar or even identical features. The diverse forms of civil death as a legal category partly result from the contexts from which they have repeatedly emerged. Contemporary definitions of civil death sometimes appear as legal innovations, while others instinctively resemble certain older legal institutions. Understanding the concept of civil death today requires understanding how the concept was used and shaped in the past.[16] The history of civil death can also be interpreted as an organic, logical, and legally continuous phenomenon. However, it is worth distinguishing when examining such processes, and a clever example that Kevin Kelly revives could be relevant. The text reports that the British railway was sized to a width of 4'8.5", which coincided with the width of the roads left behind by the Romans in Great Britain. These roads were built to fit the tracks of Roman chariots, which in turn matched the width of Roman war chariots, roughly equivalent to the width of two horses side by side. Nowadays, spacecraft are built in various locations across the United States and then transported by rail. The width of rocket engines is approximately 4'8.5" to fit through railway tunnels.[17] Tanya M. Monforte further extended the analogy in her doctoral dissertation on law,[18] arguing that it would be absurd to claim that a spacecraft is the contemporary form of a Roman chariot, even though both are modes of transportation and the chariot, in some sense, influenced certain aspects of the development of spacecraft. History requires more than a simple functional explanation; it demands both functional and social analyses to help define both the constant and random factors. Certainly, those examining contemporary expressions of civil death today reach back into history to bring forth various aspects for defining or redefining the concept.[19]

I.1. Throughout history

In ancient times, when the basic social unit was the family, the head of the family not only had disciplinary rights but also could apply family sanctions. This always involved dishonor, and depending on the seriousness of the act, it could mean a one-time or temporary humiliation, or lifelong internal ostracism, where the sanctioned individual essentially lived as a „tolerated outcast" within the community. It's worth noting that families typically did not seek to destroy the wrongdoer but rather to humiliate them and express that they had lost the respect of the other family members.[20] These characteristics bear resemblance to earlier attempts to outline the features of civil death and moral punishments.

The next step after the family is the kin, representing a larger community where blood ties have become less prominent. Here, reactions to "bad" deeds were categorized into two groups: actions against the entire community and behaviors that offended specific members of the community. In both cases, possible sanctions included death penalty, exile/banishment, loss of status, and humiliation. Therefore, communities operating without a formal state structure, whose basic unit was initially the family and then the kin based on less close blood ties, prominently applied sanctions falling into the realm of moral punishments. These sanctions share similarities with civil death penalties, as exile, for example, is meant (among other things) to completely and permanently sever the individual's ties with the community, depriving them of the opportunities available to other members. Loss of status, on the other hand, directly implements "disenfranchisement," such as turning a free person into a slave, which inherently signifies significant restrictions in opportunities.[21]

The factors bearing the characteristics of moral punishments or honor penalties also emerged in ancient societies. The ancient Greeks highly valued political rights and equated their loss with loss of

[16] Monforte: op.cit. p. 103. https://escholarship.mcgill.ca/concern/theses/8623j413z (2023.11.30.)
[17]Kelly, Kevin: *What technology wants*. Viking. 2010. p. 179–180.
[18]Monforte: op.cit. https://escholarship.mcgill.ca/concern/theses/8623j413z (2023.11.30.)
[19]Ibid. p. 104–105.
[20]Csaba, Kabódi – József, Lőrincz – Barna, Mezey: *Büntetéstani alapfogalmak*. Rejtjel Kiadó, Budapest, 2005. p. 20.
[21]Ibid.

honor or civil status within society.[22] In ancient Greek (Attic) law, the term "atimia" was used to signify the complete or partial loss of civil rights. The word "atimia" derives from the Greek "timé," meaning honor, respect, or value, combined with the prefix "a," which carries a negative connotation or denotes some kind of lack. Complete "atimia" equated to civil death. An individual subjected to complete "atimia" could not litigate, appear publicly, and in certain cases, their property could be confiscated. If they attempted to exercise a right reserved for those fully participating in civil rights and duties, they faced death as punishment. Complete "atimia" primarily served as a sanction for bribery, embezzlement, perjury, or neglect of filial duties. While complete, it was not necessarily permanent, as a vote of 6,000 citizens could overturn "atimia.".[23] In ancient Athens, they also knew of "infamy," later mentioned by the Romans, which served as a consequence for severe crimes and entailed the loss of all rights enabling a citizen to influence public affairs. Athenian "infamy" revoked the right to participate in assemblies, voting rights, and the right to hold various offices. Additionally, a person subjected to "infamy" could not serve in the military or appear in court.[24]

Regarding Roman law, Charles Phineas Sherman writes that modern law only recognizes natural death, however, Roman law asserted that a person's legal capacity can be extinguished by civil death.[25] Carlo Calisse, an Italian professor, also noted that neo-Roman law includes the expression "quod omnia pro mortuo habetur," referring to the persecuted, meaning "in all respects as if dead," which he classified as part of civil death. Calisse further believes that Roman law "supported" contemporary concepts of civil death, fundamentally linking it to capitis deminutio.[26] In the context of Roman law, two factors relating to legal capacity are noteworthy for our topic: infamy and, exemplified by Finkey[27] and Francois Richer[28], capitis deminutio.[29] Etymologically, "infamy" derives from the Latin word "fama," meaning reputation or fame. The prefix "in" denotes opposition or absence.[30] Infamy fell into the category of diminution of esteem (minutio existimationis), and over time, it manifested in various forms, but its fundamental essence was the deprivation of rights due to disgraceful behavior. Of these, the infamy applied by the censor is notable, where the censor would reprimand individuals who violated moral rules (mos), resulting, for instance, in their removal from the Senate. Also significant one of the praetorian infamy, the sententia condemnatoria, a condemning judgment that triggered infamia for perpetrators of crimes.[31] The legal effects of infamy included the loss of political rights, incapacity for legal representation, marriage prohibition in certain cases, and loss of senatorial status. It was generally lifelong, but restoration of "good reputation" (bonae famae restitutio) was possible by the emperor or the Senate. Apart from infamy, another form of diminished honor, turpitudo, gained prominence later on. Turpitudo was not limited to specific cases but could be broadly applied based on public perception, resulting in dishonor. Its consequence was the impossibility of holding public office and a general loss of trust. [32] Etymologically, "turpitudo" relates to the Latin term "turpis," meaning ugly, disgraceful, or shameful.[33] It is worth noting that perhaps the Hungarian word "turpisság" (meaning disgracefulness) originates from turpitudo, as in Hungarian, it denotes reprehensible or morally bad behavior. Just as the

[22]Grady, Sarah C.: *Civil Death Is Different: An Examination of a Post-Graham Challenge to Felon Disenfranchisement Under the EighthAmendment*. p. 443. In Journal of Criminal Law & Criminology, 2013., p. 441-470.
https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7427&context=jclc (2023.11.15.)
[23]Vilmos, Pecz (ed.): *Ókori lexikon*. Franklin-Társulat Magyar Irod. Intézet és Könyvnyomda, 1902. https://mek.oszk.hu/03400/03410/html/ (2023.11.06.)
[24]Damaska, Mirjan R.: A*dverse Legal Consequences of Conviction and Their Removal: A Comparative Study (Part 1).* p. 351. In The Journal of Criminal Law, Criminology, and Police Science, Vol. 59, No.3., 1968., p. 347-360.
[25]Charles, Phineas Sherman: *Roman Law in the Modern World.* The Boston Book Company, Boston, U.S.A., 1917. p. 40.
[26]Calisse, Carlo: A *History of Italian Law.* BeardBooks, Washington DC, 1928. p. 423.
[27]Finkey: op.cit. p. 253.
[28]Richer, Francois: *Traite de la Mort Civile.* Paris, 1755. p. 55.
[29]Monforte: op.cit. p. 103-109. https://escholarship.mcgill.ca/concern/theses/8623j413z (2023.11.30.)
[30]https://www.etymonline.com/word/infamy (2023.12.05.)
[31]Thus, a conviction for committing a crime automatically elicited moral disapproval.
[32]András, Földi – Gábor, Hamza: *A római jog története és institúciói. Huszonkettedik átdolgozott és bővített kiadás*. Eszterházy Károly Egyetem Oktatáskutató és Fejlesztő Intézete, 2018. p. 223–224.
[33]https://www.etymonline.com/word/turpitude (2023.12.05.)

Hungarian term for morality ("morál") comes from the Latin "mos," so too does the saying "móresre tanítani" ("to teach manners") likely stem from Latin influence.

In the context of the roots of civil death in Roman law, another significant factor influencing legal capacity was capitis deminutio, which in general Roman usage denoted a change in status. The term "caput" referred to the legal concept of a person or legal personality and legal capacity. Additionally, "caput" corresponds to the meanings of "head" or "person," which also aligns with the concept of capitis deminutio in terms of a change in status indicating a decrease in a community by one "person." However, the precise meaning of the concept and its various forms is not devoid of ambiguities or contradictions.[34] Cases of capitis deminutio were fundamentally of two types: those arising due to changes in life circumstances and those imposed as punishments.[35] It is noteworthy, however, that the Romans did not apply capitis deminutio as a separate punishment.[36] Additionally, capitis deminutio had three forms: "maxima," "media," and "minima". Capitis deminutio maxima denoted the most extreme form of status change, namely the loss of freedom, such as when a free person became a slave. Similar consequences were encountered in communities functioning without a formal state structure, as discussed earlier. Capitis deminutio media signified the loss of Roman citizenship. In the context of our topic, relevant cases included status changes due to exile, which again recalls the "sanctions" applied in ancient communities, often appearing as the most severe punishment alongside death penalty in ancient times. It is worth noting that capitis deminutio media serves as a bridge among factors influencing legal capacity in Roman law since the previously discussed diminution of esteem (minutio existimationis) automatically occurred with the loss of civil status, a fundamental aspect tied to capitis deminutio media by the Romans. From our standpoint, capitis deminutio minima, the third and "smallest" type, is a bit of an oddity among factors influencing legal capacity in Roman law because while the two earlier types generally resulted in a relatively worse, more disadvantageous, or restricted state, minima, in certain cases, could place the individual in a relatively better position. Therefore, we cannot comfortably equate it with the legal disadvantages classified under moral penalties.[37]

I.2. 19th century Europe

The moral judgment of civil death as a punishment was a controversial issue in Europe. One significant reason for this can be found at the level of concepts, as the legal content, framework, and consequences of civil death as a punishment varied over time and place. In Tanya M. Monforte's doctoral dissertation, she writes that the use of the concept of civil death is not entirely consistent because various sources outline different meanings and manifestations over the centuries. Summarizing and tracking these divergent meanings and manifestations would provide enough material for a book in itself. In some cases, civil death was viewed as a punishment transformed by a reformist program, a kind of "purified" punishment compared to violent, bloody executions, providing a trained alternative.[38] According to Savigny, although civil death was a severe punishment, it was not stricter than any other serious sanction, nor was it morally unacceptable. Savigny mentions two significant legal codes in connection with civil death that represented key examples on the European continent: the French and Russian legal codes.[39] However, not everyone shared Savigny's viewpoint; many viewed civil death as a barbaric punishment. Charles Brocher, a Swiss academic and judge, considered civil death an act of barbarism condemned by both common sense and morals.[40] Francis Wharton believed that civil death evoked disgust, seen as barbarism condemned by truth, reason, and morality.[41]

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[34]Földi – Hamza: op.cit. p. 220–221.
[35]https://romaikor.hu/kislexikon/kislexikon_(jogrendszer)/cikk/capitis_deminutio. (2023.12.01.)
[36]https://romaikor.hu/romai_jog_es_jogrendszer/romai_jogrendszer/romai_buntetojog/buntetesek_/cikk/capitis_deminutio_ (2023.12.01.)
[37]See: Földi – Hamza: op.cit. p. 220–221.
[38] Monforte: op.cit. p. 114–115. https://escholarship.mcgill.ca/concern/theses/8623j413z (2023.11.30.)
[39]Friedrich Carl, Savigny: *Private International Law: A Treatise on the Conflict of Laws and the Limits of Operation in Respect of Place and Time*. Stevens & Sons, London, 1869. p. 36–37.
[40]Monforte: op.cit. p. 115. https://escholarship.mcgill.ca/concern/theses/8623j413z (2023.11.30.)
[41]Francis, Wharton: *A Treatise on the Conflict of Laws: Private International Law.* Kay and Brother, 1905. p. 252.

Summarizing, it is a fact that complete legal incapacitation manifested in various ways throughout antiquity, the Middle Ages, and modern times alike, serving as a highly popular form of punishment. As Finkey writes, the punishment of civil death led to inhumanity and legal chaos, which might have been understandable in the anarchic legal states of the ancient world but was a glaring anachronism amidst the high standards of private and criminal law relations of the 19th century, which European legal systems systematically abolished during that century. However, its vestiges naturally remained, and thus, the abolition of the punishment of complete legal incapacitation can also be interpreted as a form of legal development since penalties involving partial legal incapacitation reminiscent of certain elements of civil death continue to exist both in the 19th century and in present-day legal systems.[42]

Given the available framework, the following subsection will delve more deeply into the regulation of civil death in 19th-century French and English legal systems.

I.2.1. French mort civil

An important milestone in thinking about civil death is found in modern French law. In 1755, François Richer, a French legal scholar, wrote a comprehensive work on the punishment of civil death. Richer fundamentally considers Roman law as the legal source regarding civil death and draws an analogy with capitis deminutio. According to Roman law, if a man is a free Roman citizen and also the head of a family, he is called a "caput." This person can participate in public affairs. If someone loses any of the three "statuses" mentioned, namely his freedom, citizenship, or position as head of the family, he can also lose his right to participate in public affairs, which is termed capitis deminutio. Richer asserts that the concept of caput in Roman law and the statuses appearing in French law naturally differ. First and foremost, he emphasizes that there is no slavery in France, and anyone born in France is a French citizen. Therefore, in France, it is conceptually impossible for someone to lose any of their "statuses" as in the various cases of capitis deminutio in Roman law. Thus, in France, legal loss of status can only mean loss of citizenship, which specifically entails the loss of all civil rights of the individual. The loss of citizenship equates to the "civil death," as Richer puts it: "la mort civile.".[43]

It is believed that France has a long history of civil death; [44] however, it was not codified in the revolutionary constitutions but first appeared in a law in 1793. Subsequently, the Napoleonic Code Civil reintroduced provisions regarding civil death, which remained in the legal system until 1854.[45] In the French Civil Code, civil death was considered more severe in some aspects than in other legal systems, yet it was claimed that codification helped curb previous cruel practices. The appearance of civil death in the Civil Code was seen as a kind of moderation compared to earlier French legal customs. According to the definition in the Code Civil, civil death is the "deprivation of civil rights as a consequence of a judicial proceeding." According to the code, "condemnation to natural death results in civil death. Other perpetual penalties result in civil death only to the extent provided by law,"[46] and "the condemned person loses ownership of all property; their succession is opened in favor of their heirs, to whom the property is attributed as if the person died naturally and intestate."[47] Additionally, they cannot dispose of or partake in their wealth, act as a guardian, serve as a witness, enter into marriage that triggers civil rights, or have any rights from a previous marriage. Mort civil also terminates usufruct, associations, and opens succession and inheritance.[48] Therefore, delving into a wide range of civil entitlements, the Code Civil extensively regulated the institution of civil death until its definitive abolition in 1854.

[42]Finkey: op.cit. p. 254.
[43]See: Richer: op.cit.
[44]Monforte: op.cit. p. 114. https://escholarship.mcgill.ca/concern/theses/8623j413z (2023.11.30.)
[45] Damaska: op.cit. p. 352.
[46]Code Civil 23-24.
https://fr.wikisource.org/wiki/Code_civil_des_Fran%C3%A7ais_1804/Texte_entier (2023.11.10)
[47] Code Civil 25.
https://fr.wikisource.org/wiki/Code_civil_des_Fran%C3%A7ais_1804/Texte_entier (2023.11.10)
[48]See: Code Civil.
https://fr.wikisource.org/wiki/Code_civil_des_Fran%C3%A7ais_1804/Texte_entier (2023.11.10)

According to the Code Pénal, civil death acts as an ancillary penalty, and here too, there is the possibility for the government to grant mitigation (as seen in Roman law and often in subsequent, modern legal systems' milder cases): "Sentences of life imprisonment with forced labor and deportation entail civil death. However, the government can grant deportees the exercise of citizenship rights at the place of deportation or some of these rights."[49]

The codified civil death was relatively quickly abolished in 1854, the same year when F. Genaudet argued for the abolition of civil death, stating that "civil death dissolves all social ties that bind man to society, leaving only his natural state and physical existence."[50]

I.2.2. The English "attainder"

The institution of civil death primarily originates from the english common law: "there is real death, and there is civil or legal death."[51] Additionally, the legal application of civil death in 19th-century North America can also be traced back to England.[52] The English civil death, with its attributes that most closely resembled the legal consequences of natural death, fell into three categories. The legal consequences of civil death occurred firstly with entry into certain religious orders, secondly when someone fled the country to avoid punishment, and thirdly in cases of exile, where an individual was banished from the realm through parliamentary measures.[53]

Sir William Blackstone also confirms this when he writes that civil death begins when someone is exiled from the realm during a public legal procedure or enters a religious order. According to Blackstone, in both cases, the individual is "cut off" from society. Blackstone argues that the reason why monks also fall under complete legal disability is that English law cannot tolerate those who enjoy the benefits of society but choose to shut themselves away from it and refuse to submit to its rules. Therefore, monks are civilis mortus, or civilly dead.[54] This also illustrates well the complex nature of civil death because it shows that the change in legal capacity does not necessarily qualify as a moral punishment, as was evident, for example, in the presentation of the Roman legal concept of capitis deminutio minima.

In addition to exile, an interesting relationship can also be outlined with moral punishments. According to Blackstone's interpretation, exile is less of a punishment than a parliamentary act, because otherwise it would be an alternative to or mitigation of the death penalty or imprisonment: 'but there is no power on earth, except the English parliament, that can banish an English subject against his will; even if guilty. For exile, or banishment, is an unknown punishment in the English legal system, and where it is applied today, it is either based on the guilty party's own choice to escape the death penalty, or according to the express provision of some modern parliamentary decision."[55] Therefore, according to Blackstone, courts cannot exile anyone, but can only apply exile if it serves to mitigate the death penalty or imprisonment, so in English law, civil death also carries a kind of grace, as it can offer an alternative to the killing of the convict.[56] It is worth noting that Blackstone examined the scope of civil death more extensively, discussing legal entities, associations, and even the civil death of parliament, which he mainly categorized as various modes of dissolution."[57]

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[49]Code Pénal 18. https://ledroitcriminel.fr/la_legislation_criminelle/anciens_textes/code_penal_1810/code_penal_1810_1.htm (2023.11.10)
[50]Monforte: op.cit. p. 115. https://escholarship.mcgill.ca/concern/theses/8623j413z (2023.11.30.)
[51]*Civil Death Statutes. Medieval Fiction in a Modern World.* (Harvard Law Review) p. 968. https://www.jstor.org/stable/1332815 (2023.11.06.)
[52]Monforte: op.cit. p. 110. https://escholarship.mcgill.ca/concern/theses/8623j413z (2023.11.30.)
[53]*Civil Death Statutes. Medieval Fiction in a Modern World.* (Harvard Law Review) p. 969. https://www.jstor.org/stable/1332815 (2023.11.06.)
[54]William, Blackstone: *Commentries on the Laws of England. A Facsimile of the First Edition of 1765-1769. Volume 1 of the Rights of Persons.* The University of Chicago Press, 1765. p. 128.
[55]Blackstone: op.cit. p. 133.
[56]Monforte: op.cit. p. 112. https://escholarship.mcgill.ca/concern/theses/8623j413z (2023.11.30.)
[57]Blackstone: op.cit. p. 472.

In England, practically two terms were used for complete deprivation of rights, or it can be said that there exists an English term that encompasses the legal consequences of civil death. This English term is the so-called 'attainder'. It is worth noting that there were sources already in the 18th century regarding the intertwining of attainder and civil death, namely in Mathew Bacon's work 'New Abridgement of the Law', in which he states, 'all customary property falls under this rule, unless there is some special custom to the contrary, ..., because the person is civilly dead by attainder, and therefore incapable of disposing of or possessing any property. The person is civilly dead by attainder, and therefore cannot dispose of property.”[58]

The term "attainder" originates from the Latin expression "attinctus," meaning "tainted”. In English law, attainder encompassed most of the legal consequences associated with a death sentence, including the inability to testify, initiate legal actions, and make a will. As Mirjan R. Damaska writes, "attainder was the mandatory legal consequence of a death sentence.”[59] Additionally, as the Harvard Law Review puts it, the characteristics of civil death in attainder primarily extended to the loss of civil rights, particularly the ability to testify and initiate lawsuits.[60] In cases of attainder, a person was seen as legally dead. Interestingly, although the person subject to attainder could not initiate lawsuits, citizens could still initiate lawsuits and even enforce judgments against them. Therefore, while they were considered civilly dead, this status did not "protect" them from potential opposing parties.[61]

In summary, Blackstone approached civil death with a kind of normative neutrality, as he wrote about the complete loss of rights for various institutions, monks, and exiles alike. He based his perspective on the social contract theory, viewing civil death in connection with the withdrawal from this contract, akin to the dissolution of a legal relationship. Around the same time, Mathew Bacon identified civil death as a consequence of attainder, thus perhaps bringing it closer to its narrower, criminal law meaning.[62] The English attainder was abolished relatively late in 1870.[63]

II. Civil death today

As previously noted, based on the reviewed sources, it is less accurate to claim that civil death has been completely abolished. Instead, it has gradually evolved into sanctions that involve partial restrictions of rights. This viewpoint may align with the developmental path of criminal sanctions, illustrating how initially chaotic and unregulated acts of vengeance transformed into legally imposed disadvantages by the state, applied strictly as a last resort.

Within the existing legal frameworks, the factors that make it difficult to imagine the permanent deprivation of all rights in today's European legal systems can be categorized into at least three categories. Firstly, it would contradict the purpose of punishment, that have been evolving for centuries. Secondly, it cannot be reconciled with the steadily evolving rules of human rights. Thirdly, it raises complex international legal questions and issues that are not easily achievable even in "simpler" criminal justice tasks. Within the available frameworks, the study elaborates more on the purpose of punishment among those listed.

II.1 Punishment objectives

As Bibó puts it: the unique moral phenomenon of criminal law is defined by a single central question, which encompasses all other ethical aspects. This question is the issue of the meaning and

[58]Monforte: op.cit. p. 111. https://escholarship.mcgill.ca/concern/theses/8623j413z (2023.11.30.)
[59]Damaska: op.cit. p. 351.
[60]*Civil Death Statutes. Medieval Fiction in a Modern World.* (Harvard Law Review) p. 969. https://www.jstor.org/stable/1332815 (2023.11.06.)

[61]Joseph, Chitty: *A Practical Treatise on the Criminal Law with Comprehensive Notes on Each Particular Offence*. G. and C. Merriam, Springfield, 1836. p. 725.
[62]Monforte: op.cit. p. 114. https://escholarship.mcgill.ca/concern/theses/8623j413z (2023.11.30.)
[63]Damaska: op.cit. p. 352.

nature of punishment. [64] When we speak of the purposes of punishment, we cannot omit a historical overview and a brief review of the various theories of punishment in order to place the concept of complete deprivation of rights within the framework of punishment.

According to the theory of absolute punishment, punishment serves as just retribution, balancing the harm caused by the crime with the harm inherent in the punishment. This theory is grounded in the principle of justice, with retribution as its primary aim. The severity of punishment is determined by distributive justice, which bases the proportion of punishment on the degree of guilt and the seriousness of the offense, without considering the personal circumstances of the offender. The philosophical foundation of this theory is indeterminism, positing that crimes are the result of the offender's free will. This approach is characterized by a retrospective focus and an emphasis on the criminal act itself in legal judgment.

The other major theoretical approach to punishment is the relative theory, which can be encapsulated by the maxim: "*nemo prudens punit, quia peccatum est, sed ne peccetur*" (a wise person does not punish because a crime has been committed, but to prevent future crimes). Under this theory, the primary objective of punishment is utility, aimed at preventing future criminal behavior. Its philosophical foundation is determinism, which asserts that there is a causal relationship between the punishment given and the future behavior of the offender. Prevention is classified into two primary categories: general prevention and special prevention.[65]

The third significant school of thought, known as the intermediary school, considers retribution as the theoretical aim and societal protection as the practical aim of punishment. This distinction highlights an important point: it is worth differentiating between the purpose, content, and form of punishment. The content of punishment refers to its main characteristics and attributes, while the purpose of punishment concerns the practical function of the sanction system, including the state and societal tasks it aims to achieve. Lastly, the form of punishment pertains to its external manifestation. Therefore, when referring to the purpose of punishment, we mean the practical realization of the content of punishment.[66]

According to the current Hungarian Penal Code, the primary objective of punishment is the protection of society by preventing the commission of further crimes by either the perpetrator or others. This primary objective is achieved through two subsidiary objectives: special prevention and general prevention. Special prevention can be realized in three ways, the foremost and most ideal of which is resocialization. Resocialization entails the moral re-education and reintegration of the offender into society. This rehabilitative process aims to positively transform the offender’s character, fostering an understanding of the wrongful nature of their actions, eliciting genuine remorse, leading them to repudiate their previous conduct, and ultimately shaping them into lawful citizens. The second, less ideal but still aligned with the objective of protecting society, is deterrence. In this case, the offender does not undergo an internal moral transformation and does not perceive their actions as morally wrong. However, the fear of sanctions prevents them from reoffending. The third method, in descending order of ideal implementation, is the incapacitation of the offender.

Three methods can be listed in relation to achieving general prevention. First, the threat of punishment, which involves the prospect of being punished. Second, the actual imposition of punishments. Third, the actual execution of imposed punishments. All three steps can be traced back to "deterrence," which makes general prevention similar to the second method of realizing special prevention.[67]

Let's examine the concept of complete disenfranchisement from the perspective of the specific and general preventive objectives of the current Hungarian regulations. The first and most ideal form of special prevention, resocialization, is immediately excluded in the case of civil death, as it is conceptually impossible for a person deemed "dead" to be reintegrated into society and morally rehabilitated. Resocialization is conceivable only if the complete disenfranchisement is not permanent,

[64]Bibó: op.cit. p. 170.
[65]Tibor, Horváth – Miklós, Lévay (ed.): *Magyar Büntetőjog, Általános Rész*. Wolters Kluwer Kft, Budapest, 2014. p. 308-316.
[66]Finkey: op.cit. p. 12.
[67]Zoltán, Tóth J.: *Halálbüntetés: pro és kontra*. In *Jogelméleti Szemle*, 2003/2. szám, https://jesz.ajk.elte.hu/toth14.htm (2023.10.04.)

as evidenced by historical examples from ancient Greece and Rome, as well as modern France. However, what form of resocialization can be considered when the perpetrator lacks legal capacity? How can an individual participate in any resocialization or rehabilitation program without legal capacity? This underscores the incompatibility of complete disenfranchisement with the regulations of modern legal systems.

The situation is similar with deterrence, as it also implies that the perpetrator will eventually reintegrate into society. This expectation of their return to society is incompatible with the objectives and essence of civil death penalties. The most viable approach concerning the relationship between civil death and specific prevention appears to be the neutralization of the perpetrator, which in this context is achieved through their isolation from society. There are perhaps two ways to accomplish this. One is the complete loss of rights accompanied by exile, as known from ancient times. The other is the loss of rights without exile, where the perpetrator merely subsists as a living dead within society, [68] existing as a tolerated pariah.

Regarding general prevention, which aims to deter other members of society from committing criminal acts through the imposition of punishment, the following observations can be made. In the early 20th century, Finkey asserted that general prevention is a legitimate objective and possesses undeniable deterrent power. However, he also warned of the dangers of overvaluing general prevention. If prevention were the sole objective, then Feuerbach's theory of psychological coercion and the principle of deterrence would prevail. Should the primary aim of punishment be to dissuade as many individuals as possible from committing criminal acts, it would pose a real threat of introducing increasingly severe and inhumane forms of punishment and methods of execution.[69]

What is important to note regarding the deterrent effect is that a significant spectrum of criminal acts can already be excluded, namely those committed in a narrowed state of consciousness (such as sudden emotional outburst, intense stress, the influence of alcohol or drugs, mental illness, etc.). In such cases, the perpetrator's state of consciousness is narrowed, and they are temporarily unable to control their impulses or fully regulate their behavior. When discussing sudden emotional outbursts, it is crucial to understand the significance of the term "sudden," which implies that the perpetrator reacts to an external stimulus with an immediate impulsive action, meaning the behavior is spontaneous, driven by emotion, and devoid of prior deliberation or consideration of potential consequences.[70] According to Beccaria, a smaller but unavoidable punishment has a greater deterrent effect than a larger but potentially escapable one. Albert Camus contended that the deterrent effect primarily influences the timid, those who would not commit a crime punishable by death in the first place. [71]

According to Finkey, there is no need for deterrence in the case of intelligent individuals with a higher moral standing, while the threat of the strictest punishment is entirely ineffective and futile against those prone to crime or "professional" criminals. [72] Argumentum a minore ad maius: those who have committed themselves to carrying out a punishable act and are not deterred by lesser punishments will not be deterred by much harsher ones either. Simply put, the application of civil death as an exceptionally severe punishment would likely not enhance general prevention, as it is highly probable that someone who plans and intends to commit a serious act, potentially punishable by civil death, after considering the possibilities, will still attempt to carry it out.[73]

After summarizing the objectives of punishment, it is possible to briefly highlight the moral dimension of criminal law related to penology, which Bibó emphasized. Acknowledging that both retribution, with its emotional component, and societal protection, which includes general and specific prevention, are goals of punishment, Bibó argues that the function of punishment should be nothing other than the sublimation and channeling of society's outrage, making it institutionalized, abstract, objective, and just. The evolution of criminal law followed the path of the community appropriating

[68]See: *Civil Death Statutes. Medieval Fiction in a Modern World.* (Harvard Law Review) p. 969. https://www.jstor.org/stable/1332815 (2023.11.06.)
[69]Finkey: op.cit. p. 2.
[70]Tóth J.: op.cit., https://jesz.ajk.elte.hu/toth14.html (2023.10.04.)
[71]Albert, Camus: *Gondolatok a halálbüntetésről*. In A halálbüntetésről. Medvetánc füzetek, Magvető Könyvkiadó, Budapest, 1990, p. 7-74.
[72]Finkey: op.cit. p. 18.
[73]Tóth J.: op.cit., https://jesz.ajk.elte.hu/toth14.html (2023.10.04.)

private acts of vengeance. It wasn't the victims who first sought public protection against offenders, but rather the defendants who sought protection against vengeful relatives and lynching mobs. At the forefront of every criminal law doctrine is the historical legal observation that criminal law was established by gradually taking the right of retribution out of the hands of individuals. Thus the original function of criminal law was not to protect society. Undoubtedly, today, it is also an indisputable goal, but perhaps partly because a significant part of civilized humanity has become accustomed to refraining from self-justice in many areas of life. Criminal law protects society from criminals just as much as it protects those accused of crimes from the immediate indignation of society. According to Bibó, there is nothing unusual about a social institution, such as criminal law, being developed to fulfill a particular social function and then, once it has grown into an established institutional system, being used to serve another social purpose. Evidence of this can be seen in the less severe areas of criminal law, which serve purely to protect society. As Bibó illustrates, society uses the regulatory and deterrent apparatus of criminal law for various practical purposes. There is no doubt that a fine imposed on a jaywalking pedestrian is not to protect the fined individual from the danger of being lynched. However, the larger and more characteristic part of criminal law still fulfills the function of sublimating society's retaliatory indignation, and this area is clearly distinct from the purely defensive aspect of criminal law. The retributive nature of the penal system can only be reduced where and to the extent that society's readiness for outrage and retribution has diminished. Undoubtedly, as throughout history society's capacity for outrage towards the mentally ill and those accused of witchcraft has been minimized, so too can society's understanding increase significantly in the vast area of modern crimes. Where moral outrage would otherwise lead to self-administered retribution and revenge in the absence of criminal law, criminal law intervenes to mitigate the not less harmful consequences of moral wrong. This distinguishes it from other areas of law that also serve to reduce the dangers of vigilante justice but deal with less emotional and less morally charged situations.[74]

II.2. Civil death in present-day Hungary

The application of restrictive "sanctions" resembling civil death is not unknown in the history of Hungarian law, manifesting concretely, for example, in the form of dishonour based on public perception, exclusion, and humiliation. Ákos Szendrey, gathering scattered data on legal customs, draws attention to the fact that village communities, independently of institutions responsible for justice, effectively enforced their own traditional "punitive customs," which served to shame the individual who violated the community's moral norms. When applied in extreme cases, these punishments were even more severe than the death penalty, equating to the offender's "moral death."

Those condemned by their community had to endure ritualized punishments, which were not necessarily proportionate to the gravity of their offense, as well as temporary or permanent removal from the community, public degradation, and retaliation.[75] The most significant characteristic of the so-called public opinion punishment is that the "accused" is not formally condemned, as there is no "court" and no legal procedure.[76]

When it comes to present Hungarian criminal law, the whole array of penalties resembling civil death, restricting rights, or depriving of rights is lined up in the current Criminal Code, both sides in the dualistic system.

The criteria for categorization will be the following: is it a restriction of rights or not? Is it temporary or permanent in effect? To what extent does it diminish the scale of rights?

A restrictive punishment that cannot be permanent in effect and represents a minimal level of rights limitation is a ban from attending sporting events. This is a significant example for our topic in that social processes and legal policy, relying on the ultima ratio function of criminal law, are able to invoke sanctions that limit freedom of action from unexpected and non-traditional directions. It should also be noted that at the European level, there have been serious precedents for this punishment,

[74]Bibó: op.cit. p. 176.
[75]http://mek.niif.hu/02100/02152/html/08/347.html (2023.11.10.)
[76]This bears a resemblance to the atimia in ancient Greek (Attic) law, where, similarly without any further proceedings, the wrongful act automatically resulted in a state of disenfranchisement.

beginning with a convention adopted by the Council of Europe in Strasbourg on August 19, 1985, followed by a series of relevant regulations.[77]

Another restrictive penalty that cannot be applied permanently is exclusion, which limits the right to freely choose one's place of residence. In the context of our topic, it is relevant because it slightly resembles the ancient sanction of exile, though only in terms of restricting freedom of residence.

The punishment of expulsion is more significant than the first two in that it can be applied with permanent effect, involving the restriction or deprivation of rights. It is similar to exile in its relation to civil death. Additionally, it is noteworthy in that it resembles the provisions of the previously discussed Code Civil, which allow for the possibility of requesting a waiver from the permanent effect, granted by the court in deserving cases. Another punishment that can be applied with permanent effect is the prohibition from driving, although from the perspective of our topic, this can be considered an outlier.

According to the Comprehensive Commentary on the Criminal Code, perhaps the disqualification from profession is particularly interesting from our perspective, as it can have permanent effect due to unworthiness, thereby claiming an undisputed place within the realm of moral penalties. It should be noted, however, that under certain circumstances, the offender may be exempt from the permanent effect through becoming "deserving," which once again entails a moral consideration obligation.[78]

The only measure to be mentioned among the sanctions is the reprimand, which may not have significant legal consequences (in relation to other sanctions), yet it shows similarities to moral punishments, as it can inflict a form of honor degradation and stigma through the “reproach” of the penal authority.

In relation to our topic, the strongest connection to civil death may be found in the only ancillary punishment within the Hungarian legal system: disqualification from public affairs. The nature of this ancillary punishment means that it cannot be applied independently but only in conjunction with imprisonment, which shows similarities to the previously discussed capitis deminutio and Finkey's views on moral punishments. Its severity also aligns with its distant relative, as it can only be imposed for intentional crimes or in cases of enforced imprisonment.

An undeniable evidence of fitting into the realm of moral punishments is that its imposition conjunctively requires unworthiness. According to the Comprehensive Commentary on the Criminal Code, among the criteria for unworthiness, factors such as the gravity and nature of the committed crime, the personality and lifestyle of the perpetrator may be significant. Thus, based on judicial practice, its application is generally justified, for example, in cases of intentional acts against life, violent crimes, offenses against public integrity, and against perpetrators of corruption crimes.[79] Although it cannot have permanent effect, it imposes restrictions on a wide range of entitlements related to public affairs, thereby showing significant similarities with its ancient Greek and Roman, as well as modern French and English counterparts.

[77]Krisztina, Karsai (ed.): *Nagykommentár a Büntető Törvénykönyvről szóló 2012. évi C. törvényhez.* Wolters Kluwer Hungary, Budapest, 2022. p. 175.
[78]Ibid. p. 164.
[79]However, in the case of homicide committed in a strong emotional state, if the degree and nature of the reasonable excuse support moral excusability, the prohibition from public affairs for a perpetrator with no prior criminal record is usually unnecessary (BH2004. 46.). One decision of the Budapest Metropolitan Court also indicated that in the case of foreign offenders, the justification for imposing this ancillary punishment should be carefully examined, as it may restrict the exercise of rights that non-Hungarian citizens are entitled to. In the specific case, the court omitted the prohibition from public affairs for a Romanian citizen who committed a particularly serious crime against life, considering that their temporary stay in Hungary did not confer citizenship rights that would be deprived by the prohibition from public affairs (ÍH2007. 94., cf. BH2001. 205.).
See: Karsai: op.cit. p. 184-185.

Conclusion

The study aimed to offer a comprehensive overview of the historical background of punishments resembling civil death, which fall under the category of moral penalties, their application in specific legal systems, their subtle links to current Hungarian legislation, and their connection to various punishment objectives and theories. Based on the reviewed sources, it can be concluded that moral punishments, particularly the punishment resembling civil death, along with various legal disabilities resembling it, have permeated, continue to permeate, and accompany the development of criminal law.

The development of criminal law and the imposition of penalties are directly proportional to the effective development of the state and society. Within the realm of law, criminal law plays a crucial role in ensuring social coexistence and the effective functioning of the state. To achieve this, it is inevitable to establish refined, well-defined punishment objectives, principles of punishment imposition, and penalties, constantly reviewing them through a moral magnifying glass, and executing them through a moral filter.

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