EXEGETICAL AND DOCTRINAL PERSPECTIVES ON PUNISHMENT

Cristina Ilie Goga

University of Craiova, Romania

At the beginning of the article we will define the concepts of “punishment” and “the right to punish” (ius puniendi) from different doctrinal perspectives and afterwards we will focus on making an overview of the theories formulated over time regarding punishment. Also, the paper aims to analyze the evolution of punishment over time and to investigate the foundation of punishment, taking into account that it constantly varied throughout history.

Keywords: Punishment, Ius puniendi, Theories of punishment.

Introduction

We considered essential, for the beginning of the paper, an overview of the concept of punishment, from sociological, philosophical and legal perspective. In this context, with the definition of the concept of “punishment” and for its optimal understanding, we appreciated that it is very important to expose the concepts of ius puniendi (the right “to punish”) and the right “to be punished”.

Throughout the paper we will analyze the basis of punishment taking into account that historically, it has constantly varied. The foundation of the right to punish is very important because the nature and justification of this right are always related to the purpose and functions of punishment, the conditions and limits of repression (Papadopol 1965: XL).

What is the foundation of punishment? The syntagma “foundation of punishment” is generally used as the term “the state’s right to punish”.

We will use alternative expressions “foundation of punishment”, “the state’s right to punish” and “ius puniendi”, but they all represent the same concept.

I then resorted to making a brief history of punishment, followed by a presentation of the theories formulated over time on punishment.

The analysis of the punishment issue from historical perspective, highlighting its characteristics in primitive, medieval and present societies is fundamental for understanding the central concept of the paper.

At the same time, identifying the issues of legality, morality and punishment objectives could have been fully clarified only by evaluating the theories of punishment. In this context, I considered relevant an emphasis of the theories formulated in the philosophy of law, such as retributivist and utilitarian theories.

Definition of Punishment

From the point of view of the philosophy of law we can identify a variety of definitions given to punishment, dating from the Roman period from Mommsen, to Grotius (one of the founders of the theory
of natural law) and then the model Flew-Benn-Hart, which was accepted by most theorists (Flew, 1954: 291; Benn 1958: 325-326; Hart, 1968: 4-5).

In the doctrine we often find restricted definitions, treating punishment from the point of view of some less developed theories, such as Jean Hampton’s definition, regarding punishment as a response to the faults interfering with freedom of the perpetrator to fulfill his desires (Hampton, 1995: 129) or Herbert Morris’s definition, indicating the fact that punishment involves a deprivation of what people seek to avoid, resulting thus in a conflict between what people want and what they get (Morris, 1981: 263-271).

Hart identified five elements that are common for punishment, analyzing the models proposed by Flew and Benn. Thus, he considers that it is imperative for punishment to:

1. involve pain, or other elements that are considered to be unpleasant;
2. be applied for breaking the legal norms;
3. be intentionally applied by a person other than the perpetrator;
4. be imposed and administered by a legal institution constituted in the legal system that is violated by committing the action (Hart, 1968: 4-5).

Examining Hart’s definition and bringing amendments to its elements, Alf Ross, in the book “On guilt, responsibility and punishment”, considers that punishment is the social answer that:

1. Occurs when legal norms are violated;
2. Is imposed and implemented by authorized persons, representing legal order which the violated rules belong to;
3. Implies suffering or at least other consequences that are normally considered to be unpleasant;

David Boonin, after a detailed analysis of all aspects of punishment, in the book “The problem of punishment”, develops a definition very similar to that of A. Ross, establishing that the definition of a “legal punishment” involves the following elements:

1. The punishment is applied by an institution / person that is officially authorized and does so in its / his official capacity;
2. The institution / person that is officially authorized applies the punishment because correctly believes that a person has committed an act that violates the norms;
3. The institution / person that is officially authorized, applies the punishment with the intent to injure the person who committed the act;
4. Applying the punishment by the institution / person officially authorized, manages to really hurt the person who has violated the norms;
5. Applying the punishment by the institution / person officially authorized expressed the official disapproval of the perpetrator, because he is guilty of violating the norms (Boonin, 2008: 24).

Analyzing the five common elements identified in the Flew-Benn-Hart model, Cristina Rotaru formulated a definition of punishment thus: “Punishment is that harmful action, aimed against a person and applied by an authority, because that person is found guilty of offense against the legal criminal norms, provided that such an attitude may have been previously standardized in the norm” (Rotaru, 2006: 31).

From the point of view of Catholic theology, punishment must have three qualities: respect the dignity, be useful and be necessary (Beristáin, 1990: 169).

- There are thus identifies the three elements characteristic to punishment:
- Dignity (punishment must be human, worthy, must exclude atrocities);
- Utility (punishment must have a preventive function, to be useful to community and serve towards the reintegration of the person who committed the offense);
- Necessity (punishment is necessary when legally a fee is required, as inevitable reaction to an injurious act affecting a person or legal order. Repression is necessary to prevent further offenses) (Rotaru, 2006: 13-15).
In time, most authors concluded that repression is a painful necessity that cannot be avoided (Dongoroz 1939: 42). Historical experience has shown, despite the utopian (Moro, Campanella, Tommaso) anarchist (Girardin, Tolstoy) or sociological (Montero, Ferri) theories, that punishment is an indispensable means to avoid evil - the disaggregation of human society, the weakening of legal order (Coraș 2009: 6).

From the legal point of view, punishment is part of any theory of criminal law. Thus, Jerome Hall believes that punishment is seen as the element causing suffering for the perpetrator of the crime, but only when suffering appears as a social response to the commission of the criminal act (Hall, 2005: 296-324). This point of view is the one based on the retributive function of punishment, but in the doctrine we can identify other functions, such as rehabilitation, deterrence and incapacitation.

Applying punishment is used as a last resort (ultima ratio) in response to the committed offenses and to maintain social order. For Gariel Hallevy, punishment, as an instrument of criminal law, is the “extreme expression of social control, especially legal social control, as a result of the failure of all other mechanisms” (Hallevy, 2013: 1).

Punishment, in modern conception is an instrument of law, because it is based on justice, and no purpose can replace justice (Antolisei, 1994: 631). The right to punish (*ius puniendi*), an essential element in forming the punishment, was debated over time from different perspectives: the theological, philosophical, sociological and legal one.

In the book of Aaron X. Fellmeth and Maurice Horwitz, “Guide to Latin in international law”, we find the expression “*ius puniendi*” as meaning “the right to punish” namely “the state’s right to impose punishments for the offenses committed under its law...” (Fellmeth & Horwitz, 2011).

The right to punish “*ius puniendi*” is the society’s right to create legal punishable rules (Dongoroz 1939: 24-36).

Theologically, *ius puniendi* was analyzed by a number of theologians and philosophers such as Castro, Thomas Aquinas, Lessico, Molina etc., and most of them considered as grounded the application of this right. There are also identified punitive messages in the Old and New Testament and *ius puniendi* is considered, by theologians, to be the right for social defense and is seen as distinct from the sum of the individual rights to defense (Rotaru, 2006: 8-13).

For some authors, this right was born with the state and is the predecessor of law norms, for others, *ius puniendi* was formed before the creation of the state, serving to develop the rights of state power and for another category of analysts, this right could have been created only after the time of creation of the state, as it is strictly related to the legal norms (Rotaru, 2006: 34).

Although in the doctrine we find the concept that “the state’s right to punish” was originally a power subsequently transformed into law, professor V. Dongoroz contradicts it, stating that this right of the state to create norms and sanction has no limits and thus we can talk about a “state power”, not a right (Dongoroz 1939: 24-26).

Collaterally with the “right to punish” is found the “right to be punished”, which is a fundamental right of all people, according to which any perpetrator of a crime that was found guilty for his actions, has the right to be punished honestly, fairly and decently, this including also the right not to be punished excessively (Hallevy, 2013: 211).

A Short History of Punishment

In the book “The right to be punished. Modern doctrinal sentencing”, Gabriel Hallevy makes a very interesting insight on the origin of punishment, so the author identifies its roots in the prehistoric, the Paleolithic, Mesolithic, Neolithic and Chalcolithic eras. He then follows the route of punishment in Mesopotamian law, in ancient Greece and in the Roman law.

In the Paleolithic there are identified punishments such as ostracism or expulsion from a group, being imposed by the group leader. On the other hand we find the punishments imposed by the religious beliefs of the communities’ humanoids and applying corporal punishments using stone weapons or
poisons. The Mesolithic era, in which the small villages and rural communities are formed, determine the creation of some social institutions and norms, and violating those norms led to the first formal sanctions. In the Neolithic period, when there are developed more urban and social organizations, legal order appears and the large number of people who tend to move in these cities must follow the imposed rules and punishments. In the Chalcolithic era the big cities are developed, and in this period the rules of criminal law coincide with the ones imposed by religion. Perpetrators were considered impure, breaking divine rules and were relegated from the cities or had to undergo a series of punishments meant to bring their purity (Hallevy, 2013: 2-3).

In Mesopotamian law there were introduced numerous criminal punishments such as drowning, burning, mutilation, death penalty, flagellation, economic sanctions, exile etc. (Hallevy, 2013: 3-4). In the criminal law of ancient Greece there were accepted economic punishments (confiscation of assets and properties) and physical punishments (deprivation of certain civil rights, slavery, expulsion, poisoning, death penalty etc) (Hallevy, 2013: 4-5). Roman law used mostly material punishments (fines, confiscation of property) but also combining them with other punishments such as (exile, death penalty, annulment of marriage, etc.). After the codification of Roman Law, in the sixth century AD, the punishment provided by the Justinian Code became the legal basis for the sentences applied in Europe of the Middle Ages (Hallevy, 2013: 5-6).

Michael Foucault, makes in the book "Discipline and Punish. The birth of the prison" a historical analysis of the penalties applied by the state, from medieval society, when they resorted to true public performances in which punishments were applied to humiliate, torture, maim and kill in the most monstrous ways, to the second half of the eighteenth and early nineteenth centuries when there appeared the social requirements to mitigate bloody punishments, until today’s society, where penalties are more “humanized”, thus speaking of electrocution, lethal injection or incarceration in prison (Foucault, 1995: 3-131).

For Foucault, the “presumption of innocence” is the one that made the distinction between the two eras, the classical one, where there is no such presumption and penalties were tangible, finding cruel application ways, the punishment affecting the body of the person, and the modern one, when the presumption of innocence arises and is prohibited to apply barbaric punishments, the penalty concentrating on affecting the individual’s character (Gill, 2003: 24).

Such an insight into the types of penalties applied in society illustrates us the evolution of civil and state society in terms of attitude towards illegality and towards “fair punishment”. Changing the attitude towards the “fair punishment” resulted in a change in the types of punishments, laws and ways to enforce laws (Hamblet, 2005: 88).

Fustel de Coulanges in the book “La cité antique”, presents us his theological perspective on punishment, saying that law it did not come out of an abstract idea of justice but derived from religion, thus explaining that the activity of judging and punishing has long been the monopoly of priests (Rousselet & Aubouin 1976: 3).

**Exegetical and Doctrinal Perspectives on Punishment**


The extremist version of the punishment abolitionism theory, denies that punishment is a legitimate form to answer for deviant acts. For this theory we find two justifications. One justification is that the best answer for a crime is to apply methods of rehabilitation not some “barbaric” sentences and another justification is supported by Karl Marx, who considers that people who break the norms do not act in a context of total freedom, so that they can be held accountable for their delinquent activities (Corlett, 2009: 29-33). In “Capital punishment” Marx justifies that in a capitalist system there is not enough freedom, so
that institutions can punish the offender, concluding that these people should not be punished, as they commit wrong deeds without having full freedom (Feuer, 1959: 87-88).

Methiensien is the author linking tactical abolitionism theory to the Marxist scheme, connecting the structure of penal system to capitalist productive structure and wanting the abolition of all social repressive institutions (Zaffaroni, 1989: 103).

Max Stiner is one of the creators of the most extreme abolitionist theory, supporting the unconditional delegitimation of coercion, whether it is a criminal or social coercion (Rotaru, 2006: 65).

In this version of abolitionism punishment, the action to “punish” is morally incorrect.

Another version of the punishment abolitionism theory, a more moderate one, states that the action of institutions to punish, under certain conditions can be justified, and in others it cannot be justified.

Vengeance theories of punishments must be distinguished from some aspects of retributivist doctrines. These theories justify punishment as being the state’s attribute applied to perpetrators, because society must be given satisfaction in that the guilty ones pay for their deeds and because socially accumulated negative feelings must be eliminated by their reflection on the culprits, otherwise, the citizens’ satisfaction should be covered by other activities, socially disruptive (Feinberg, 1989: 348).

Moral education theory of punishment is found in some dialogues of Plato and also is supported by a number of philosophers, however we can identify it as part of the utilitarian and retributivist doctrines. Moral education theory argues that penalty is applied to the violator because it aims towards the moral education of the perpetrator, but also has the role to give a lesson in morality to the entire society (Corlett, 2009: 33).

In analyzing this doctrine, there are observed two common elements of punishment, indispensable in order to fulfill the purpose of moral education: the punished act must involve the infringement of a norm of fair law and the need for the offender to be a rational person.

Although authors such as Hampton, Duff and Nozick consider that moral education is sufficient to justify the usefulness of punishment, France E. Gill believes that this doctrine is not complete, because it focuses on the benefit of moral education and neglects the benefit of satisfying the person / society affected by the criminal activity (Gill, 2003: 17).

We also find, at M. Foucault, in the book ”Discipline and Punish. The birth of the prison”, a nihilistic version of the punishment theory based on moral education. The author believes that punishment cannot be morally justified in any historical period. He speaks of the “power relations” between those who lead and those who are led and sees in punishments, either modern or classical, the same thing, namely control means of illegality by people who hold the power in different periods of history. For Foucault, power “produces reality, it produce domains of objects and rituals of truth” (Foucault, 1995: 194). From the author’s point of view, punishment fulfills its purpose if it manages to keep order in the state by preventing anarchy and revolution (Gill, 2003: 25).

Plato, in Protagoras defines the purpose of the sentence as follows: “He who undertakes to punish with reason does not avenge himself for the past offences, since he cannot make what was done as though it had not come to pass; he looks rather to the future, and aims at preventing that particular person and others who see him punished from doing wrong again... he punish to deter”) (Plato 1952: 139).

Roman philosopher Lucius Annaeus Seneca, also refers to the purpose of punishment, stating that: "No reasonable man punishes because there has been a wrong-doing, but in order that there should be no wrong-doing” (Nemo prudens punit quia peccatum est, sed ne peccetur) (Seneca, Chap. 1XI).

Theories supported by Protagoras, Seneca and many modern authors (J. S. Mill, G. E. Moore, A. C. Ewing etc.) sustain the thesis of applying punishment to deter the commission of other illegal or anti-social acts (by the perpetrator or others) and fit in the series of utilitarian (preventive) theories, which are seen as relative theories. In brief, the explanation of utilitarian theory is found in the Latin expression “punitur ut ne pecetur” (He is punished not to mistake again).

This doctrine argues that the punishment institution maximizes social utility under the form of rehabilitation and / or discouragement. Looking to the future benefits of penalty, it should minimize the commitment of acts that violate the norms, in order to be considered fully effective.
On the other hand, we can identify retributivist theories, that are considered absolute theories and they support the thesis that punishment is justified through guilt, that it is deserved by those who violate social and moral order (Ross, 1975: 33). Although some authors consider that these theories are rooted in the law of retaliation, they were adapted and reinterpreted in modern society, and among the best known advocates of this doctrine we find Immanuel Kant, GW Friedrich Hegel and even the Catholic Church.

Retributivist theory is the one fundamentally justifying punishment, being supported by three principles, namely: the main function of punishment is the compensation of the harm; punishment must be proportionate to the offense committed; the need to treat offenders as individuals responsible for their actions, they must be treated as purpose, not as means (Kant) and their punishment should be seen as a right for those who have committed acts (Hegel) (Mureșan, 2006: 115).

In brief, the essence of retributivist theory is found in the phrase “Punitur peccatum quia est” (He is punished because he made a mistake).

We can find authors who consider that Thomas Hobbes is the father of the modern theory of punishment, by describing the social contract theory. The philosopher is seen either as a proponent of the retributist doctrine, either of the utilitarian theory (Norrie, 1991:15).

Another category of doctrines, justifying both the foundation and purpose of punishment, are the eclectic theories, which are a mixed system that reconcile concepts supported by the utilitarian theories and the retributivist ones, compensating ideological gaps occurring in the two doctrines by building a functional system of foundation of ius puniendi (Dune 2011: 82).

Eclectic theory has its origins in the Latin expression “Punitur quia peccatum est et ut ne peccetur” (He is punished because he made a mistake and in order to not do wrong again).

John Rawls is one of the most prestigious authors, who supported the reconciliation of the two doctrines for grounding punishment, although his opinion on the concepts of utilitarianism and retributivism was considered by some writers as incomplete (Corlett, 2009: 36).

Although is unoriginal, eclecticism is appreciated in practical terms, for bringing the necessary moderation to reconcile the relative theories with the absolute ones. Eclectic theories give a just satisfaction both to the demands of justice, that means moral elements, as well as the interests of society, namely utility elements. There are thus reconciled moral requirement, to punish for the negative committed act, with the utility and necessity of society to punish so the act will not be committed in the future (Pop, 1928: 221-222).

We notice that, over time permanent changes have occurred on the types of punishment, on the institutions/ people formally entitled to apply those penalties, also on the manner to look at punishment from the point of view of its foundation, purpose and functions. The conflict occurred between these perspective to apply and interpret punishment is a natural consequence of the diversity (Nîță: 2014, 174) occurred between the different stages of social development, but for the present time, like most theorists, we consider the fact that the eclectic system is the most capable doctrine to allow the development of an explanatory comprehensive theory on punishment.

Acknowledgment

This work was supported by the strategic grant POSDRU/159/1.5/S/133255, Project ID 133255 (2014), co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013.

References