

The punishment's purpose

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Abstract

The repressive reaction involves, as any human action, a certain finality. As the punishment's essence is the suffering, then, in the course of time it has been arisen the question regarding the goal for which the society utilizes the suffering and for what the society punishes. According to the classic penal doctrine that bases on the idea of retribution, the repressive reaction was limited to a simple revenge and it didn't existed any concern in order to influence the doer's future behaviour. In the positivist conception, the punishment's purpose was to shelter the society against the offender's new attacks. Going up to an extreme point with this idea, the positivists equated the punishment with the curative treatment at which the patients in the hospitals were submitted and which it was adequate to each category of offender. For the positivists, the penal sanction, it was meant to combat the organic or the psychological anomalies or the dysfunctions of the social environment that have influenced the offender and that determined him to commit antisocial deeds. In the modern vision, the punishment cannot have a goal on its own and that is to answer to bad with bad because it doesn't come from an abstract desire for revenge, but from a concrete necessity of hindering the repetition of the antisocial deeds and of defending the fundamental social values.

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As any human action that usually involves the existence of a purpose, the repressive reaction has a certain finality, too. If the punishment's essence is the suffering, then, in the course of time it has been arisen the question regarding the goal for which the society utilizes the suffering and for what the society punishes².

In the *classic penal conception* which is based on the idea of retribution, of rewarding the bad with bad (of an irrational bad that leads to the guilty person's suppression, the evil gives the expression of discontent and of the society's disapproval concerning the doer's conduct), the punishment couldn't have another goal than the rewarding of the bad by suffering. This fact expressed the very limits of the retributive system. If the punishment took into consideration only the evil caused by the offence, the repressive reaction was reduced to a simple revenge which was juridically disciplined. It didn't exist any preoccupation in order to influence doer's future behaviour or the people around him. Only indirectly and outside the penal law's concern, it was admitted that the punishment would probably serve for the collectivity to whom the punished person belonged.

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² I. Tanoviceanu, *Tratat de drept penal și procedură penală*, third volume, Bucharest, 1924, p. 197.

In the positivist conception, the punishment's goal was to shelter the society against the offender's other new attacks. Going up to an extreme point with this idea, the positivist equated the punishment with the curative treatment at which the patients in the hospitals or in other places of treatment were submitted and which it was adequate to each category of offenders³. For the positivists, the penal sanction conceived as punishment and as safety measure, it was meant to combat rather the organic or the psychological anomalies or the dysfunctions of the social environment that have influenced the offender and that determined him to commit antisocial deeds. The fact which was decisive in the sanctions' enforcement was the identification of the doer's state of danger in order to decide over the most proper social defence measure which could be even the convict's physical elimination or his life exile. It didn't exist the concern to analyse the deed's gravity and the doer's guilt but only his state of danger, the deed was considered as a symptom of the danger state. The state's role was to prevent the doer's criminal impulse by the punishment; the culpable action wasn't the punishment's basis but it was its occasion⁴.

In *the modern vision*, the punishment cannot have a goal on its own and that is to answer to bad with bad because it doesn't come from an abstract desire for revenge or for rewarding the evil with evil, but from a concrete necessity of hindering the repetition of the antisocial deeds and of defending the fundamental social values. The punishment has no other basis than the social defence, its finality or its goal it's mainly the prevention. The punishment interferes in order to protect the society by preventing that the offender shouldn't repeat his deeds, that other persons shouldn't follow his example and also in order that the feeling of revolt in the society's member consciences shouldn't degenerate into fateful consequences up to manifestations of injustice.

In the Romanian penal doctrine it is admitted too that the punishment is the principal mean in order to achieve the penal law's purpose, in the sense of article 1 of the Penal Code; in this way, the punishment's purpose coincides with the penal law's purpose. Thus, for instance, article 52 paragraph 1 of the Penal Code stipulates that the punishment's purpose is „the prevention of committing new offences”. The defence of the fundamental social values involves the idea of prevention against any injury which is brought over these values⁵.

Therefore, the punishment's goal is to hinder the offender from causing prejudices to the other members of the society and at the same time to drive him away from the perpetration of similar deeds. Although the punishment refers to a past deed, it can aim nothing else but the fact that no more offences should be committed in the future.

According to an opinion, the punishment exercises the action of general prevention in three directions: for the persons with a latent criminality that are unknown yet, by preventing them from taking the convict's behaviour; for the

³ E. Altavilla, *Legamenti della parte generale di un codice penale in Rivista de diritto e procedure penale*, 1920, p. 92.

⁴ Jesbech, *Lehrbuch, Des strarfrecht, Allgemeiner Teil*, Berlin, 1988, p. 63.

⁵ C. Bulai, *Manual de drept penal, Partea generală*, All Publishing house, 1997, p. 285.

offence's victim, by preventing her from making her own justice by breaking the law; for the entire collectivity, by giving satisfaction to the moral conscience and to the feeling of justice, thus preventing the perpetration of other penal deeds that could result from the general discontent⁶.

According to some other authors' opinions, as the punishment represents a bad, a suffering, its effect couldn't be anything else than a bad. Such a reasoning doesn't take into consideration the fact that although the punishment represents an individual physical and moral suffering, it doesn't represent an evil concerning the character of the action developed by the state in order to ensure the triumph of the justice and to reestablish the juridical order and to protect the social values; concerning this aspect, the punishment is good, it has a positive value⁷. Actually, the bad, the suffering, besides it's good in comparison with the general interest, it helps the offender and determines him not to commit mistakes again and it avoids a new constraint. Therefore, the punishment is a bad utilized in the convict's favour too, beside the good brought to the society.

On the other hand, if we consider the punishment as an immoral evil, then it wouldn't have to be enforced even if a benefic goal had been aimed because the purpose doesn't excuse the means⁸. In fact, the punishment regarded only from an individual point of view is a bad, but in the light of the general interest which it reflects later on over the person too, the punishment has a positive value⁹.

The preventing from committing other new offences – it was acknowledged as a remote purpose of the punishment and by this acknowledgement it's realised a more efficient protection of the society against the offences. The preventive conduct is imposed both to the collectivity (the general prevention) and to the individual person who is submitted to the penal sanction (the special prevention). Both forms of prevention represent the very purpose of the punishment.

A. The general prevention

The general prevention involves the influence of the collectivity not only by the threatening with the punishment since the moment of the penal law's entering into force, but also by its enforcement and execution, in relation with a certain person. In this way, the punishment exercises a strong psychological influence over the citizens' mind and determines them not to commit offences. The general prevention is realised in each of the three moments of the penal repression: in the moment of the penal norm's issue; in the moment of the punishment's enforcement; in the moment of the punishment's execution.

Ante delictum, the general prevention is realised by the simple description of the incriminated deed and by the stipulation of the punishment within the norm of incrimination. This effect is produced from the very moment of the penal law's

⁶ V. Dongoroz, *Drept penal. Tratat*, Bucharest, 1939, p. 583.

⁷ G. Antoniu, *Contribuții la studiul esenței, scopului și funcțiilor pedepsei*, „Revista de drept penal” no. 2/1998, p. 19.

⁸ G. Bettiol, *Diritto penale. Parte generale*, Padova, 1973, p. 666.

⁹ F. Antolisei, *Manuale di diritto penale, Parte generale*, Giuffrè, Milano, 1991, p. 623.

coming into force; the emphasis of the fundamental social values that are protected, of the society's exigences in relation with the person's behaviours and also the showing of the consequences of the prejudices caused to the values which are protected by law, all these are meant to determine the norm's addressees to adopt a conduct in accordance with the law; thus, the positive side of the general prevention is achieved¹⁰. At the same time, by the limits of the punishment that are established for breaking the norm of incrimination, the ones that are threatened are those addressees of the norm that are hesitating; thus they are intimidated in order to abstain from committing offences and to avoid the punishment's enforcement; in this way, the negative side of the general prevention is realised¹¹. But, in order to exercise efficiently the intimidation, the penal norm has to be clear¹² and the punishment has to be corresponding to the degree of social danger which is presented by the injuries caused to the fundamental social values. Thus, the persons should not understand a discord between the legal evaluation of a deed considered as dangerous and the society's moral degree education. At the same time, the threatening has to be real and it has to create the conscience of the punishment's inevitability and promptness, in case of breaking the penal law.

Post delictum, the general prevention is realised in two different moments: the moment when the punishment is enforced by the court and the punishment's execution moment.

In both cases, the punishment has influence not only over the conduct for the persons that are obliged to stand the consequences of the conviction sentence, but also it influences the behaviour for those that learn the lessons for their own behaviours from the convict's example¹³.

The sufferings and the privations that are inherently involved by the punishment, they create disturbance not only in the punished offender's conscience, but also in the other persons' conscience that take knowledge of the committed offence and of the punishment which was enforced¹⁴. The general prevention is easier realised if the persons' conscience adhere to the penal law's exigences by their own accord and in a conscious mode; by their own principles, they abstain from breaking the law and they are aware of the fact that the law means order and that the society needs order; „the disorder is the mother of all misfortunes”, as Aristotel said. But, there are people that abstain from the perpetration of offences not because they feel a repulsion for such deeds, but because they are afraid of the punishment. This fear becomes real when these persons notice that the one who breaks the law is immediately punished and in a proper measure.

¹⁰ G. Antoniu, *Sanțiunea penală – Concept și caracterizare*, „Revista Română de Drept” no. 10/1981, p. 7.

¹¹ V. Dongoroz, work cited, p. 585.

¹² C. Bulai, work cited, p. 373.

¹³ I. Tanoviceanu, work cited, p. 205.

¹⁴ C. Stegăroiu, *Drept penal. Partea generală*, second part, University Babeș Bolyai, Cluj, 1958, p. 253.

The moment of the punishment's execution also generates effects not only over the offender's conduct but also over other persons that see the constraint at which the convict is submitted; thus they can reflect over their future behaviour and they abstain from the perpetration of offences.

According to an opinion, the repression and the prevention are not different ideas because by repression is realised the prevention; by operating over the past, it can be operated over the future¹⁵. Another author emphasized that the retribution and the prevention are not principles that cannot be reconciled; their unity is possible because the punishment is enforced not for itself, but it's enforced with the purpose of the social defence against the future offences and it serves to this goal as far as it is retributive¹⁶.

The idea according to which the punishment is enforced and executed has influence over the other persons' behaviours mustn't be taken to an extreme point; the person who was punished mustn't become the instrument for reeducation for the other persons, meaning an instrument utilized with purposes of penal policy; this would mean that he is not punished for what he deserves but he would be punished in order to frighten the others¹⁷. By this fact, it wouldn't be aimed the justice reflected in the punishment, but the effect that could be realised by the punishment – the collectivity's intimidation regarding the committing of some antisocial deeds. As a consequence, the idea of the general prevention which is broken from the idea of a just and retributive punishment, it leads to a criminal terrorism¹⁸.

B. The special prevention

The direct purpose of the enforced punishment is the special prevention and that means the prevention of committing new offences by the convict. First of all, the punishment has to prevent the offender from committing again an offence. The concrete punishment is meant to influence the offender's person and to determine his behaviour's modification. Therefore, the special prevention is exercised only in the moment of the punishment's enforcement and execution and not in the moment when the penal law comes into force. The functions of compulsion and reeducation that the punishment has to fulfill, they mainly serve for the special prevention achievement; by them, the punishment acts on the convict's person.

According to some authors, the punishment's roles would be just the offenders' influence, their social recuperation and their transformation into active members of the society. But, in order to generate such an effect, the punishment has to be just, retributive, it has to educate the convict in the idea of justice and honesty because only in this way the penal law becomes an instrument for the citizens' prophylaxis and moral education¹⁹.

¹⁵ F. Antolisei, work cited, p. 638 și Jeschbech, work cited, p. 61.

¹⁶ G. Bettiol, work cited, p. 670.

¹⁷ G. Fiandaca, E. Musco, *Diritto penale. Parte generale*, third edition, Zanichelli Publishing house, Bologna, 1995, p. 647.

¹⁸ Idem, p. 648.

¹⁹ F. Grispiigni, *Expiatione e difesa del nuovo codice penale*, Padova, 1939, p. 12.

In the classic conception over the punishment, it was admitted that the punishment exercise a certain psychological influence over the offender, but this is an indirect consequence of the punishment. In the modern vision, the punishment has to be well thought by the society in order to become a real medicine of the soul (as Platon stated) and to contribute to the offender's behaviour improvement. This fact involves the enforcement of a right punishment which is the only susceptible to make him regret the deed and it also makes him not to repeat the offence. The punishment can be corrective only if it's retributive, if it takes into consideration the person's moral side, his moral liberty, his capacity to analyse his deeds and to decide for a behaviour which is compatible with the society's interests; such a human transformation is not possible without suffering, without remorse for the committed deed, „*non fit redemptio sine effusione sanguinis*” (There is no redemption – recovery – without blood-shed)²⁰.

To this result can contribute the human mode of the punishment's execution, without excluding a suffering which is inherent to the punishment. In the majority of the cases, at the same time with the execution, it is produced the offender's reeducation by forming some habits which are compatible with the elementary rules of social companionship, by creating a correct attitude concerning the work, the order, the discipline and the fundamental social values. During the punishment's execution, the offender is submitted to an entire complex of obligations concerning the work, the order and the discipline. All these develop, of course, on the ground and under the conditions of the constraint which is involved by a retributive and well proportioned punishment. Thus, the convict's transformation is realised and also his antisocial conceptions and habits are annihilated.

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²⁰ G. Antoniu, *Contribuții ...*, work cited, p. 16.