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The Right Not to Punish

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ABSTRACT: No common reasons can be identified for the fundaments of the right to punish, the right not to punish or the right to decriminalize, although, at first sight, the three rights seem to have similar origins. As the right to impose a punishment derives from the law, so a law must also reflect the right to defer a punishment, to waive its application, or to decriminalize a certain conduct. A brief analysis of the right not to punish can also reflect the reason, the conditions, and, possibly, its limits. These can often be arbitrarily interpreted in practice due to reasons that must be identified. An arbitrary exercise of the right to amnesty or to grace, or poor implementation in the Romanian-German law of restorative justice, may have adverse consequences in terms of the safety of social values. To prevent arbitrariness and to ensure social security, the functions of the public authorities play an essential role. At present, only the legislative function generates the law, and the judicial function ensures that the law is implemented or it may order a punishment to be enforced if the law is violated.

KEYWORDS: Criminology, Criminal Law, Law, right, punishment

Introduction

Since the ancient times (Beccaria 2007, 4) and so far (Rotaru 2006) the criminal doctrine has approached the place and the role of punishment and the fundaments of the right to punish, starting most often from the virtues or from the functions on the punishment. Especially in the late period, the humanization of the repression and the non-custodial means seem to gain ground as part of the criminal policies. In summing up the main aspects that have contributed to the change of the paradigm in the mentioned sense, we will summarize the fundaments of the right to punish (1), the circumstances that may sometimes confer the right not to punish (2) and the restorative justice in the context of crime prevention and control (3).

Fundaments of the right to punish

Any contemporary society recognizes certain values that it naturally tends to protect through penal laws that criminalize any conduct that may prejudice the said values. The main intrinsic feature of the law is coercion, and the coercion force always belongs to the State. The offense is the sole basis for criminal liability, as the incriminated act is committed with unjustified guilt and is imputable on the author. The ground of the right to punish, of the right not to punish under certain circumstances and the responsibility are matters on which we will make certain general theoretical considerations.

The right to punish belonged to and belongs to the power. The power, seen as a force in favor of an idea born of social consciousness in order to lead the group in the search of the "common welfare", but also able to impose the attitude that it commands, is immanent and specific to any human community (Burdeau 1966, 13-14). Such power may become a political power when the community becomes a society, namely when the individuals that make up the said community have the awareness of belonging to that community. Once this evolutionary stage has been reached, the social power manifests itself as political power.

Looking from an evolutionary perspective, we could classify the forms of power in pre-state powers and state powers. In the first case, either the power belongs to the group - anonymous and diffused, or it belongs to a chief or to a minority group - individualized, often divine origins being attributed to it in order to compensate for the impossibility of a rational understanding of power. In the second case, given the fact that the authority of the power could not legitimize itself

any more based on customs or religious beliefs and as a result of the need to ensure the establishment and the streamlining of the said authority, the appearance of an institutional framework was necessary, namely the state was necessary to be created. The entirety of the institutions and rules set up to achieve the effectiveness of the power designate the state, and the power thus institutionalized is a state power, namely a public power, the state being also called in the literature "he juridical formula of the existence of a society, people or nation" (Muraru 1997, 10), or disincentive legal order as a command power and as a distinct will of the individuals (Kelsen 1928).

The individual's security in relation to power and especially their protection against abuses of power are guaranteed by the exercise of power according to the ideas that can be deducted from the works related to the principle of separation of powers in the state (Eisenmann 1984-1985, 3). Whether the paternity of this principle is attributed to Monstesquieu in Europe or to John Luck in England, it should be noted that empirical sources of this idea can be found since the ancient times at Herodotus, Plato, or especially Aristotle. The theory of separation of powers reflects in fact three essential functions: the legislative function (law-making), the executive function (law enforcement) and the judicial function (solving litigation that arise in law observance and law enforcement process). These are not powers as such, but they are functions of the same public power, which in their turn have their strength. Other interpretation would be contrary to the status of the power, which is unique, indivisible and belongs to the people.

It can be noticed from the foregoing that the task to solve the disputes that may arise between the society and the individual or a group of individuals as a result of the violation of the law is incumbent on the judicial function, which takes place through the law courts. The fundament of the right to punish lies, after the moment of the *desacralization* of power, exclusively with the institutions habilitated by the public power to ensure the legal order, as part of the social order, for the purpose of ensuring the citizens' safety and the progress generating social balance.

By virtue of these desiderata, the courts apply sanctions when required in the process of justice. Recourse to punishment on account of its virtues - primarily the amount and certainty - was nuanced since the advent of positivist ideas and it needs some reassessment.

The circumstances that may give the right not to punish

On the legal-criminal plan, the right to punish is related to the preventive function of the sanction, which aspect should be considered whenever the courts decide not to apply a punishment provided by the criminal law. Coming out of the sphere of the courts' activity, we will refer to the entities that under certain circumstances can establish the legal framework for not applying a punishment. In this context, the amnesty and the pardoning seems to us the most relevant entities because these establish themselves as a reason of removal or modification of the criminal responsibility and respectively as a reason for the removal of the service of the punishment, although the ground of the criminal liability (the offence) exists and no unjustified or non-imputability causes have been signaled. Through these legal institutions the very principle of inevitability of punishment and full implementation of the sentence might be defeated, in the case when the defendant's guilt has been established and the case of absence of the causes that make the act not to be a crime.

Amnesty is a word with its origin in ancient Greece (amnesia), which means forgetfulness. The legislator used at that time this leniency act, marking the importance of lapse of time from the moment of committing the facts that disappeared from the common memory of society. In relation to the constitutional provisions and the norms of today's criminal law, amnesty is a political and

legal act, namely a leniency act of the Parliament that has the effect of removing the criminal liability, or the execution of the punishment, if the said act was issued after conviction, for a pardoned crime.

It should be emphasized that the amnesty is not a question of removing the criminal nature of the act, so that the person who has been granted amnesty will be further on considered an offender, a situation which entails a series of legal consequences. Also, amnesty can not be considered a decriminalization because the existence of the act, as it is legally classified, is maintained, with all the consequences resulting from this.

It seems to us that is of great utility the clarifications regarding the normative acts by which an amnesty act can be objectified, as well as the explanations regarding the limits of the leniency act itself.

As regards the first aspect, given that the amnesty is an act of leniency of the Parliament, it can be found only in an organic law and not in an emergency ordinance. As regards the second aspect, it should be borne in mind that the legal rules aim at ordering and disciplining the social relations, guaranteeing legal certainty, removing potential conflicts, making peace and stability to be instituted (Popa 1996, 223).

Legal security, in turn, designates the safety of individuals and society as conferred by legal normality by the observance if its prescriptions (Dongoroz 1987, 334).

Pardoning is a cause of the removal of the execution of the punishment, which must be seen as a leniency act of the state power, respectively of Parliament when it is collective, or of the President when this act is individual. Pardoning consists of the forgiveness of a convict or a class of convicts to serve in whole or in part the punishment, or of the switching of this punishment to an easier punishment. By this institution a renunciation of the exercise of the right to impose the execution of the sentence is achieved, which may not seek the denial of the activity of justice, but aims to consolidate it.

Like amnesty, pardoning is both a constitutional and a penal institution. The fundamental law mentions the bodies which are assigned the right to pardon and the provisions of the Penal Code provide the legal-penal effects of this institution.

It should be noted that, from the point of view of its legal nature, the individual pardoning is a personal cause of removal or modification of the sentence imposed on a person, but also a mean of individualization of criminal legal constraint (Dongoroz 1987, 335). We emphasize that this institution has effects *in person* and does not extend to potential participants in the crime.

Restorative justice in the context of crime prevention and control. Prevention of crime and even of recidivism, but also the crime control, as we will show, have always been based on punishment. Aiming to streamline the justice, they started from the concepts of retributive justice and distributive justice and they reached the newer concept of restorative justice, which seems to respond more adequately to prevent crime, especially prevention of recidivism.

Crime prevention is a concept that has its roots in ancient philosophy (Killias 1991, 443), Plato and Aristotle being among those who outlined the general aspects of prevention, based on the virtues of punishment. The principles have been strengthened since the second half of the 18th century, when C. Beccaria claimed that prevention can also be done indirectly through the way in which laws are made and how they are observed, mainly by the magistrates. Laws must defend classes of people rather than individuals, be clear and good, be unambiguous, and they must not

defend the interests and privileges of the few. Under these circumstances, people would be in a position to be afraid of laws and not of other people (Beccaria 2001).

In accordance with the positivist opinions, punishment is a mean of social defense of a curative nature, aiming at healing the offender. In this regard, E. Ferri says that crime is primarily a natural and social phenomenon which must be prevented and then a legal entity. Through the legal instrument, repression is reached if necessary *(Ibidem)*.

The concept of crime prevention has not yet been fully elucidated by specialists and is still not universally accepted. In Criminology, the analysis of prevention is addressed from two perspectives. In the broad sense, it is based on the idea that everything is prevention, including within the concept both criminal penalties and the compensation, assistance and protection of victims, etc. In a narrow sense, the notion is analyzed, making a distinction between prevention and repression.

After the emergence of the concept of criminal personality (Pinatel 1963), criminology provides a broader space for researches regarding the recidivist offender, the favorising criminogenic factors, as well as the preventive measures, including recidivism. From this period, the concept of prevention begins to take on an approach that tends to depart from criminal law, being less related to punishment and more to the means of resocialization of offenders who had already begun to apply in the United States and the Nordic countries.

The criminology of the social reaction went further and the main directions of thinking focused on the partial or even total separation of criminological prevention from the criminal system, as well as the concentration of prevention not on the offense and the delinquency, but on the *"criminal issue"* (Stănoiu 1994, 205).

The separation of the definition of prevention from the traditional solutions was also marked by R. Gassin's opinion on this issue, in the view of whom by prevention is meant "*any criminal policy activity having the exclusive or partial finality to limit the possibilities for the emergence of an ensemble of criminal acts, by rendering them either impossible or more difficult to achieve, with the exclusion of the threat of punishment or its application"* (Gassin 1998, 613).

The quoted author emphasizes the exclusion from the prevention of the idea of punishment (intimidation) or the exclusion of individual prevention of recidivism, if the possibility is provided for measures to be passed prior to the perpetration of the offence (*ante delictum).* Moreover, the author supports the collective nature of prevention in criminology, speaking in the definition about *"criminal actions assembly"* rather than about *"individual criminal actions"*.

We appreciate that preventing crime is the prevention of committing those actions or inactions, which society considers at some point harmful to its values, which is why these behaviors have been sanctioned by criminal law.

Crime prevention can thus be perceived as a multilateral system of measures aiming at identifying the groups of persons with a higher risk of passing on to act and identifying situations in certain geographic areas or in a particular environment that motivate the criminogenic environment, as well as identifying people with predisposing behavior. Removing or reducing or neutralizing the causes of crime, as well as the factors that at some point are favoring it, is of decisive importance in prevention.

These ideas are the basis for the new trends in contemporary criminology, as the said trends are found in the Recommendation (83) 7 of the Council of Europe where prevention is defined as *"the instrument used by the state for better control of crime by eliminating or limiting the*

criminogenic factors and by adequate management of physical and social factors that provide opportunities for committing the offense" (Recommendation (83) 7 of the Council of Europe).

The social control must be delimited both of the concept of prevention and the concept of social reaction. Analyzing social control, E. A Ross believes that social order can never be instinctual and cannot have a spontaneous character. This is a result of direct psychological pressures, of suggestions and actions of various social forces, as well as of the directed actions of institutions playing a role in the regulation of human behaviors. In the opinion of the mentioned author, the law is a specialized and perfect social control mechanism; although not the only mechanism of control within a society, the law is the foundation or cornerstone of social order (Basiliade 2006, 545).

In a narrow sense, social control means all actions aimed at limiting the probability of committing a crime (Cusson 1993). Some criminologists confer on this concept a broader meaning, including the sanctions as such (of the police, the public ministry, the courts), the social sanctions (reactions and pressures of the individual's conformist entourage that aim to make him to respect values such as probity or respect for others) and the self-protection actions of citizens or organizations as victims or potential victims (Friday 1993). It follows from the foregoing that social control is not part of the preventive actions, since, unlike the prevention, which has a proactive nature, intervening to overcome the committing of the the crime, the social control has a reactive character, it intervening after the fact has been committed (*Colloque Eeuropean du Groupe europeen de recherche sur les normativites,* 1993). The lower or higher deficiencies of the classical criminal system have generated a particular interest in restorative justice. The analysis carried out by Jeff Latimer and his collaborators on the model of restorative justice has highlighted the fact that some concepts of restorative justice originated in traditional practices of settling conflicts specific to indigenous cultures, while others take over religious precepts (forgiveness and reparation) shared by some religious and confessional groups that have developed some of the first restorative justice programs (Kleinknecht 2000, 6).

The study conducted in 2005 (*Programs of Restorative Justice in the Contemporary World,* 2005) at the Institute of Criminology in Romania is in our opinion a solid argument for the promotion of practices of restorative justice in Romania, especially since the international organizations recommend in their turn the model of restorative justice to be used when this is possible. In this regard, it may be recalled at European level Recommendation R (99) 19 of the Council of Europe on mediation in criminal matters and basic principles on the use of restorative justice programs in criminal matters adopted by the United Nations in 2002.

The substance of restorative justice is based, according to the quoted study, on the offender's responsibility raising and on his effective participation, sometimes alongside with the victim, in the process of awareness of the effects of the offense.

We limit ourselves to adding that responsibility is a concept on which we are to carefully reflect. Educational deficiencies bring some people in the position to be unable to choose an alternative to engaging in committing a crime. Education, as a result of the level of school and professional education, but also as a level of education received and settled on a family and social plane, is the factor of forming the responsibility, not necessarily understood as assuming a specific obligation or adopting a conduct conforming to the social norms of the moment, but in the sense of a lucid, realistic capacity of reference to the complex of circumstances that are succeeding themselves in the personal life and in which the professional alternatives are decisively included (Bălan 2008, 100-101).

Raising the responsibility of the author through restorative justice programs is all the more necessary where education is deficient. We sustain on this line of thinking the raising of the efficiency of the justice system, not by applying a punishment, but by choosing together with the members of society the way of alternative dispute resolution where possible. In this way, the right not to apply punishment has a profound social fundament, but with more beneficial effects for the society, who chose alone the most appropriate defense variant, detached of rationale of the right to punish.

Conclusions

The right to punish and the right to forgive always belongs to the society that can assess how and to what extent the said rights may be exercised by its representatives who are contributing to justice and its proper administration.

The right not to punish, in the form of amnesty and pardon, is of a constitutional and criminal nature. The fundamental law refers to the state bodies to which this right is assigned, and the provisions of the Criminal Code provide for the legal-criminal effects of these legal institutions. In relation to the constitutional provisions and the rules of today's criminal law, amnesty is a political and legal act, a leniency act of the Parliament, which has the effect of removing criminal liability or the execution of the punishment. It is not a cause of removal of the criminal nature of the offense, so that the person who benefits from it will be further on considered an offender, a situation that results in a series of legal consequences. Also the two legal institutions may not be considered a crime decriminalization because the existence of the fact, as it is classified by law, remains, with all the consequences resulting from it.

Amnesty or pardon must not be confused with the change of the amount of the punishment or of the constitutive elements of certain offenses, on criteria and by means of legal instruments of a questionable constitutionality. It is possible that these changes, more or less constitutional in their turn, be likely to generate some ricochet effects. Thus, some cases can closed, but as a result of application of the more favorable criminal law or by virtue of observance of the principle of legality of the investigation and enforcement of penalty, which is not equivalent to an amnesty or pardon, although the effects may be similar.

Restorative justice, as an alternative way to resolve the conflict and enforce the penalty, where it can use it, allows active participation of society, the author and he victim in the raising of the responsibility and the awareness of the author of the effects of the offense, in his integration into society, in helping the victim to repair the damages of any kind, the victim having an important role and not a marginal one as in the common law procedure.

The right not to punish must not be exercised in ways that might jeopardize the work of the judicial bodies. A discretionary or deficient exercise of this right may open the door to abuse.

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