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Punishment as retribution, intimidation and coercion

Abstract: Coercion and punishment, the resistance to manifestations of crime, can and must be justified. Moreover it is necessary precisely in terms of a higher morality but only if coercion and punishment do not become violence against the person but instead oppose violence and evil.

Only through coercion and deterrence, although not permitting physical violence and humiliation, is it possible to achieve the goals set by the state and therefore create grounds for the improvement of society. At the same time, the moral principle requires us to recognise not only the right of the offended, the victim, who not only equitably requires a deserved punishment for the perpetrator but also an appropriate attitude towards that perpetrator. This should not involve humiliation and destruction but punishment for the relevant act committed in view of his personality.

Keywords: crime; punishment; state; retribution; deterrence; coercion; mental impact; legislation; morality; humanism; justice.

In every society, crime, particularly its serious forms, generates resentment and anxiety. And the more deeply society is affected by crime, the more it is immoral and vice versa since crime and immorality are two sides of the same coin. It is therefore clear that the protection of the interests of the whole of society, i.e. of the common good, from the manifestations of crime is a benevolent task. It is therefore natural that for this purpose the state should use, within reasonable limits,

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every means including criminal penalties. What then is this phenomenon of punishment? What is its nature and substance? Is it good or evil, retribution or justice? The extreme complexity of such a measure as a phenomenon requires a systematic approach to the knowledge of the spirit and character, because it is only through these tools that we can obtain a new and profound knowledge of it.

A systematic approach offers us a comprehensive vision of complex phenomena in the context of the diversity of their constituent relationships, both internal and external. When the pre-Socratic philosopher Democritus said, "I shall speak about essence", he meant that essence is constant and that it is stored in a phenomenon according to various options, including time, which i» the core of existence. In philosophy, essence was determined and is still defined as the beginning of understanding things, their eternal principle of being, internal structure, primary sustainable and necessary quality. Essence is not merely the inner meaning "I punishment but it is also properly manifested externally, defining the ways of objectification through its features and capabilities.

The fact that crime is evil is above doubt because it is the subject of moral condemnation and censure. As for punishment, since its inception it has been always used as a means of fighting this evil and therefore it should be logically considered in fact as good. For if not, he who applies punishment is also a villain. In principle good and evil are among the main categories of ethics that are used in the moral assessment of individual phenomena, those acts that motivate a human activity. People may tend not to respond to scientific definitions such as 'moral sense', yet everyone understands when we talk about things such as 'good', 'evil', 'crime' and 'punishment'. This is why some actions are considered as belonging to the concept of' 'good' and others to that of 'evil'. So when we talk about the morality of punishment, we are in fact talking about our understanding of this phenomenon in terms of its quality. In other words, our argument is as follows: punishment is good when it is fair and is permissible only so far as it can eliminate

some greater evil in the form of crime, and punishment that is as bad as the crime itself insults public morality.

If this is so, then this means that ‘good’ punishment is moral and ‘evil’ punishment is immoral, since good punishment is useful, necessary and fair, while evil, on the contrary is useless, unnecessary and unfair. The legislator who thinks about punishment in a moral sense is therefore always striving to move in the direction of easing the nature of punishment. However punishment can be treated with common sense, in this case understanding that 'good' and ‘evil’ are different in an absolute sense. Thus the approach to punishment is based not only on the principle of morality but also on the principle of common sense, which often leads the legislator to apply a more severe punishment.

One of the most important principles of morality is that good should be rewarded with good, and evil rewarded with evil – in other words good must be he rewarded and crime as evil must be punished. It is in this sense that punishment for the criminal is evil, because he endures some suffering for his act, yet for the public benefit it is good. It is illogical to pay a perpetrator good for evil. As the disciple asked the teacher: “Is it right that some say that for evil you must pay with good?” To which the teacher replied: “So how then shall you pay for good? Evil must be paid equally, and good with good” (Confucius). Hence, punishment will be considered good and therefore morally justified if it is adequate to the evil which is expressed in the form of the crime.

Punishment may be considered in different ways: as a reward for evil by evil - punishing retaliation; as a reward for good by good - awarding retaliation; as retribution for good by evil - the idea of retribution in Christian morality; as retribution by evil - rewarding evil by good. What characterises retribution in all these forms is fundamental in defining the concept of retribution in punishment. We can see that retaliation is always manifested in response to any act of perpetration. It is an action forwarded to the person who has committed an act, and

expressed in the assessment of the act committed. Retribution is not a phenomenon that is transitory. It appeared with punishment and will disappear with it.

The history of punishment may be roughly divided into three phases of retribution (vengeance): barbaric, governmental and educational/legal. Barbaric retribution is vendetta - a morally motivated community reaction. Murder or some other injury suffered by one of the members of the group is felt by the whole and causes a general feeling of revenge. Since this includes compassion for the victim, here we must recognise the existence of the moral element, although of course in this reaction to the offence there prevails the instinct of collective self-preservation [1, p. 76].

It is not by chance that this stresses the role and importance of self-preservation, because for adults any hostile personal attack from the outside turns into a reflex action against the attacker as an enemy. Similar to this reflex, the reaction of the individual against any external violation of his immunity is based on revenge which seeks to destroy the perpetrator of such a breach. The natural feeling of revenge knows no other measures except the force of stimulation which has been accumulated in the respective person [2, p. 77].

The state of retribution begins from the moment when the state is not just the observer of the proportionality of punishment but the authority which consigns all retribution, i.e. retribution in response to crimes already committed is not mere action but purposeful action by the state in relationship to the offender, because retribution as a concept cannot itself ‘act’, someone must put it into action in order to achieve a certain target via its subject's action. Aimless like this, the state cannot carry out retaliation. It is necessary therefore to distinguish between the idea of retribution as the essence of punishment and retribution as a state policy, i.e. the doctrine of vengeance.

Retribution as the essence of punishment acts as the link between crime and punishment, but this does not mean that the situation violated by a criminal act is restored accordingly or evenly by the action of the state - for example, a murderer

should be definitely executed. The rejection of corporal punishment as a way to reward the classical liberalism of the eighteenth century is an educational stage in the idea of retribution. As we know, up to that period there existed the preconception that criminal acts will be eradicated more rapidly if there is a more ruthless, painful and harsh punishment.

In principle, it does not matter what form the idea of revenge takes but that it is opposed to the fact that the offender undergoes more evil than that which he otherwise deserves. It follows from this that if the essence of the offence is an attack on the freedom and life of people, then the essence of punishment will be the imprisonment and life of the offender. If the seriousness of the offence is measured by the degree of violation of the freedom of another person, then the severity of punishment is by the term of imprisonment for the offender. This concept of punishment equals retribution, derived from the formula of 'equality in freedom by universal law'. But there is no punishment that exists that is worse than the death penalty and so logically it should be applied only in the case of the most serious crimes, which must be considered as premeditated murder, the only way possible to feel the justice of retribution.

Man has always perceived and continues to psychologically perceive punishment as retribution. The idea of punishment as retribution lies so deep in the consciousness of a human that he simply sees it as nothing more than vengeance - and not even as vengeance in the sense of revenge but as fair retribution, as an expression of the moral and social evaluation of the crime. We must not forget that the psychological basis of punishment – retribution - is the feeling of revenge, the natural tendency of people affected by crime 'to repay pain and suffering' to the villain so that he will undergo similar torments that will make him atone and repent. The idea of retribution is morally justified if it does not follow the idea of talion, of formal, qualitative or only quantitative equality. It is not revenge which is characterised by the crude, instinctive and senseless reaction of the victim - there is no satisfaction for the victim, it does not eradicate harm, and yet moral retribution

is not recognised by the human eye. There is however the idea that the offence as violation of public order must induce in life a position that corresponds to its negative assessment. It is the essence of punishment.

The poet Rupert Owen once said that the state has no right to punish a person because it will be guilty itself in committing a crime. The theory of the divine origin of the law of punishment sees this right under the conditions of the emergence of religion where God himself, in line with the creation of the world, took the trouble to manage all the affairs of life: physical and spiritual, in politics as in religion. Tolstoy in his novel *Resurrection* also sets out to explain that the right of the state to punish is a usurpation of the divine authority of retribution; earthly justice is a pathetic attempt by humans to create the likeness of the heavenly court, where not wanting to see their own shortcomings only leads to a distortion of God's covenants: “Judge not, that ye be not judged!”

However, over the course of historical development in a progressively developing state, the right of punishment is passed from the heads of tribes, clans and other groups to the state because all the members of society will abandon it in favour of that body. But this is not to imply that the state is formed as a result of the arbitrariness of the people, rather it is based on moral necessity as people come to realise that they are by their very nature forced to live in a state that is impossible without legal order. As Pellegrino Rossi puts it: “The right of punishment is legitimate, as is public order and public authority; they represent moral law, which must be borne by humanity. Human justice is natural law, the foundation of the moral system of the world, like the law of gravitation in a physical system, designed to keep all of the bodies in their intended orbit” [3, p. 79].

But how and as a result of what has the state become a body performing the functions that once belonged to the community and private persons? Who gave the state this right? The leaders of the tribes, clans and other groups at first were not only legislators but also judges and executors of their own judgement. This was

natural and necessary because, if there were violations of the rules, then logically there were penalties, which means that there were courts, which of course were the elementary authorities. These initially appeared not as a separate body but as a special function of the existing body, namely the priests, witches, shamans - the specialists in customary law and traditions who existed in so many societies and nations. Therefore the court, in our modern sense, is the oldest institution because it is much older than the state. The legitimate rights of the leaders to punish are questioned by none, because such was the decision of the communities. In principle, we can thus agree that one of the conditions here of the moral principles of punishment was respected by ancient peoples.

As for the law of the state on the formation and use of punishment, it can be contested only as a philosophical theoretical problem and not as one of reality. This is why the question of the right of punishment by the state from a practical point of view is no longer a topic that occupies much debate and research. On the other hand, the philosophical problem of the right of the state to punish has always been a focus for not only philosophers and legalists but also religious and other thinkers. In fact the correct answer to the philosophical question of the right of the stale lo punish allows us to understand more about the role of government in a modern rapidly changing world as well as the role and importance of criminal justice and criminal prevention in building a system of punishment that will be accepted by all and that will, most importantly, work [4, p. 80]. To this we can add that the right of punishment also gives the right to define goals, which the state, as a subject of this right, is going to be achieved by this means. In this sense of course this problem has, in addition to its philosophical reasoning, immense practical importance because the abuse of this right means not the immorality of punishing but the immoral nature of the state itself, in whose hands lie the means of influencing and coercion. Hence today the right to form and establish a system of the practical application of punishment belongs to the state.

Responding to a question about how this right became the right of the state, Beccaria wrote: “This represents the basis of the sovereign right to punish the crime: the need to protect the repository of common good from the encroachments of individuals” [5, p. 80]. If this is correct, then the argument follows that the natural beginning of the basic principle of the right of punishment stems from the need for protection of both the public organism and its separate individual. The state has taken on the duty of the guardian of one's inner world from all sorts of violations. It is the sole owner of the right to ban actions and inaction through the fear of punishment along with the right of appointment and execution of punishment. In short, there came about a voluntary transfer of the right to punish from the tribal leaders, clans and groups to the state, because all members of society abandoned it in favour of the body of the government. Consequently, the legality of such a right is undeniable because people have realised that by their very nature they are forced to live within the state, where the well-being and human development and growth of a culture requires jointly organising the live of people - which is unthinkable without legal older. All this means that the state and its right to punish were not formed as a result of the arbitrariness of the people but were based on moral necessity. In this regard, A. Frank notes that “the right of society to each of its members is a necessary condition for its existence; it is necessary for the implementation of the moral law of mankind and for the development of his abilities, which an assumed by this law” [6, p. 81].

The right of punishment and its legal and moral necessity, which belongs to the state on the basis of a voluntary social contract, combines to imply the indisputable right of enforcement and deterrence. At the same time, moral principles that would act as a guarantor that the state itself does not exceed its powers require it to comply within the limits of the use of coercion of this right, because against excessive coercion can act counter-coercion. But why then cannot people who have joined together in a community by their own free will follow and respect the rights of each individual member of the community without state

coercion? Does the mechanism of state coercion contradict the highest moral conscience and freedom of the individual? In principle, the realm of freedom precludes coercion, which is utterly without justification since it robs the individual of inner freedom. But this was at the beginning of humanity when people were born free and were free and could act only at their own discretion. The time came however when the community of free people had to consider the structure of the relationships between members of their community, because it became clear that if everyone acted only at their sole discretion, it would be impossible to resist evil by force, otherwise the individual would be robbed of their inner freedom. Everyone has the right to defend their freedom by force, everyone has the right to force the offender to respect his duty to observe the rules. However, enforcement had neither the power nor the guarantees of legality, because this was disorganised. Therefore, members of the community were forced to give, or transfer, the right of the right of coercion, i.e. their power and their right to judge, to a third, neutral subject which must be stronger and fairer. This is how there appeared the need for the legal right of subjects to use coercion not given by nature but the product of the conscious deliberate activity of people on a voluntary basis with the aim of ensuring a fair order. This overbearing coercion, which we now refer to as the state, was founded so to speak by the agreement of all the members of the community. It was acceptable to all because if this right was owned before by individual members of the community to exercise coercion, then the offended could easily be in a situation where it would be impossible to implement this right because of his weakness.

Furthermore, the subjects of the law themselves were not able to determine the measure of coercion, meaning that they were not able to judge such factors as whether a right was breached or the extent to which it as violated. As Johann Fichte said: “There is no right of coercion without trial”. The paradox is that a person voluntarily consents to the use of coercion against him by a third party, being aware, or conscious, that he loses some of his freedom in being thus limited.

However if you reach the core of this historical process it becomes clear that on the contrary it is by means of the organised right to coercion that the rights and freedoms of each member of society are protected. For if not, the rights of each person would be constantly violated, where the strong would harm the weak, the healthy the sick and so on. Thus coercion in principle does not permit one person to rule over others. To this end, everyone first of all was forced to restrict their freedom so that by their side there could be space for the freedom of another person. Moreover, this restriction required strict reciprocity: I restrict my freedom only because and only to the extent that the other person limits his. Coercion, of course, is contrary to freedom and violates it, but law enforcement is a resolution of this conflict and an elimination of the offence, since coercion here is destroyed by coercion. Law enforcement is a "second coercion, where duress constitutes the destruction of the first: - it is the negation of the freedom, and therefore the assertion of freedom (Hegel).

The history of the development of mankind shows that it is impossible to fight against evil and criminal behaviour except through sermons and education, because human nature is aggressive and angry, in man still lives cruelty and greed. Any coercion, of course, would be redundant if a person was morally perfect, but this is only an ideal to which humanity moves with great difficulty, following a complicated path. This is the path of the incessant struggle against injustice between good and evil. And in this struggle, coercion of course has its own specific role. Therefore, we should agree that the morality of punishment is impossible without the forced organisation of law. Even though evil cannot be destroyed by evil or coercion, it can be eliminated by self-coercion or inner rebirth, although resistance to evil by punishment can and must be justified from the point of view of a higher morality. As we know, non-resistance to evil is identical to doing evil because in ethics any omission is an action of some kind and criminal omission is therefore a crime. For the most part, nothing in our social environment can exist without individuals included in it who do not comply with the established

rules of behaviour that are accepted by all, even if they are contrary to the will of some or there is doubt surrounding their necessity. These rules can be found in primitive peoples, nomadic tribes and even criminals. The) are not enforced by the rules of morality but by coercion, punishment for their violation. And yet even this coercion is based on a morn I basis from the level of development of these communities.

Basically, there are three forms of expression of the will of society: agreement between the members of society; custom which receives tacit expression of the members of society; and the law, where will is the expression of a particular organ. In all these forms of society there clearly exists coercion. Hence punishment/coercion contains nothing that is directly contrary to the principle of the highest morality - it is justified as coercion only when it is proven that punishment and the right to punish is made by the state with the necessary conditions for the possibility of a higher morality.

The principles of morality teach us how to achieve our goals through punishment without the prejudice of the interests and freedoms of members of society, respecting the rules of ethics of relationships between the state and members of society. However, in addition to these principles, there are beginnings for other social relationships, the sources of which are found not in the individual but in the stale's society. These are the laws and rules of conduct by which we must live.

These essential features are not an indication of freedom, as with the rules of morality, but of coercion, the outer obligatoriness for one and all. Failure to comply with the state cannot fail to incur punishment, because otherwise there would be no other way to ensure the preservation and further development of society. Nevertheless this compulsion is beneficial only if it is based on the principles of morality in the relationships between the state and members of society. Thus, coercion and punishment, the resistance to manifestations of crime, can and must be justified. Moreover it is necessary precisely in terms of a higher

morality but only if coercion and punishment do not become violence against the person but instead oppose violence and evil.

The psychological effect of punishment has an impact through prevention and deterrence on the mental state of the population as well as the specific individual who committed the crime. In fact, to begin with this was directed at the citizens by means of persuasion and then threat, bringing to bear a logically persuasive effect on the rational sphere of consciousness of the people. It should be emphasized that the psychological effects of punishment have a social impact, since they are directed not only at the individual but at the whole population.

This function of punishment is carried out in the first stage of the punishment process, in other words from the moment when punishment comes into force. It is difficult therefore to accept the view that in the first stages of development penalty acting as a criminal legal sanction works as a faceless threat [11, p. 157]. In fact, from the moment of entry into force of the law, if the population is aware of this then begins the realization of the psychological deterrence of punishment, a process that moves in two directions. Firstly, it has an overall impact on the consciousness of the population, acting as a preventive measure as if reminding people of their existence, of the beginning of their ‘work’. At the same time, it informs members of society what they will face in the event of disobedience or committing crimes. In this case, does there exist it mechanism for the psychological interaction between members of society and criminal punishment? The realisation of the psychological impact of criminal punishment from the moment of its adoption comes in the form of a psychological counteraction to crime and not in a physical retention of criminal intent. It affects the human psyche, i.e. it excites in person feelings or fear that cause him to conform his behaviour to the requirements of society. Through deterrence we actually confront the qualities, needs and desires that push a person to commit a crime, warning him of the unfavourable consequences. At the heart of psychological deterrence lies the fear of physical and mental suffering. Being conscious of blameworthiness,

suffering and material deprivation is an essential part of psychological detention, a willful process that acts as a countermeasure to antisocial behaviour. Thus it can be argued that the objective of deterrence is to initiate precisely such a motive which, arrayed against other motives, has to overcome them and persuade its subject to observe the required lawful behaviour.

Today, most psychologists are inclined to assume that the starting point of mental regulation lies in our basic needs, primary vital engines which bring the human psyche into a dynamic state that directs it to ultimately address the needs of the subject [12, p. 132]. As I.L. Petrazhitsky observed, psychology and its theory of motivation can provide scientific explanations for the regulation and assessment of individual and mass behaviour [15, p. 85], and in psychology the term 'regulation' is understood as covering the action of a set of mental factors which are formed as a result of the behaviour of individuals and social groups. Psychology and other humanitarian sciences converge on the regulation of the activities of people, as O.D. Sitkovskaya rightly notes: "If we proceed from the fact that psychology is the science of the regulation of human mental activity and its implementation in behaviour, then it follows that the subject of legal psychology includes the basic patterns of legal regulation of this activity at the level of formation of the concept of the legislation, as well as the investigative and judicial practice in the field of criminal law measures aimed at combating crime [18, p. 4].

The psychological impact of punishment lies in suppressing and weakening the eradication of human character traits that could lead to committing a crime. Psychology tells the legislator how best to achieve the desired result by means of criminal punishment, and it helps in understanding the effectiveness of the psychological effects of punishment on the population as a whole and individuals in particular. It is through psychology that we are able to clarify and understand the system of humane punishment, and so we agree with G. V. Maltsev's statement

that "of those who think that there is no other regulation for the activities of people in the world save legal, the lawyers must begin with psychology" [12, p. 116].

Currently, psychology pays serious attention to in-depth research into the psychological relationship of people to criminal punishment as a means of influencing the psyche of the individual in order to create an effective system of punishment. We talk of creating a system of 'human punishment' and so, along with criminal, judicial and correctional labour psychology, we should also include legislative psychology or psychology of lawmaking in the subsystem of legal psychology.

Is it possible then to create and formulate an effective optimal punishment that relies only on a precautionary deterrent power and the fact that it takes place today within the practice of legislative work? The requirements of the legislator in taking psychological approaches and concepts to human punishment are quite obvious and necessary from both a theoretical and practical point of view. The legislator should not be indifferent to what is happening in the human soul - the subject of the psychological impact of criminal punishment - and how it regards punishment. The legislator who does not consider this type of circumstance will not be in a position to make the correct science-based decision regarding the form and amount of criminal punishment. In addition in this, from a purely practical legal point of view, there is also a theoretical need for a system of punishments based on the solid foundation of knowledge of human psychology.

In the human punishment system, the mental processes of activity and formation of behaviour develop in accordance according to its laws, and they ultimately lead to behavioural acts which include those that are illegal. The task of the legislator is to identify the most effective influence on such behaviour, something that is possible only on the basis of the psychological knowledge of the human relationship to the threat of punishment. However, given the fact that the psychology of humans varies, it will be impossible to find a single tool that can be utilised as a means of psychological impact on each individual human. We can

speak therefore only of a general awareness of society - the population - and its resulting attitude to crimes and punishments. In other words, legislature must consider laws and mechanisms of the action of punishment on people's behaviour along with the attitude of the population to the system of punishment in general and its individual enactments in particular. Consequently, science-based lawmaking in forming punishment involves the obligation to incorporate data from the psychological sciences.

We know that a human being, irrespective of any knowledge of the law, is capable of independently finding the right option of behaviour connected to its violation. A person may be ill-informed about criminal punishment and yet he is still able to distinguish criminal from non-criminal, unlawful from lawful. This is intuition, which, according to the psychologists, is a kind of knowledge. Does this mean that in regard to this category of people punishment does not have a psychological impact?

In a conversation with a compatriot of mine who has lived in Europe for a long time, I discovered something significant that is relevant to our problem. I had asked him how often he visits his homeland of Azerbaijan, and he answered: "Very rarely". To my subsequent question "Why?", he replied: "There are too many policemen in Baku". At first I thought he was joking but then I realised that had said this in all seriousness. He explained that the presence of the police officers had a negative psychological impact on him, not because he is afraid of them but because it is unusual for him. But those of us who permanently live in Azerbaijan are used to see policemen on every corner and so their presence does not fill us with fear. What my European-based compatriot sees, feels, perceives or imagines from encountering these representatives of law enforcement is an extreme personal experience that results in an emotional relationship linked to the sight of the policemen. The same may be said about the impact of punishment on the population.

Intuitive compliance with the law does not mean that a person is not in a state of information-interaction with criminal punishment itself. The person may not be aware of the particular punishment for a particular crime but does realise that after the act there will ensue some responsibility or other. The fact is that feelings experienced by us and perceptions of the presence of punishment, whose nature may be unknown to us but whose action is well known, are part of a person's ability to experience the properties and content of punishment, i.e. suffering and other experiences which punishment can cause.

Sensations and perceptions experienced by us as a result of the availability of criminal punishment do not pass without consequences but leave traces, the nature of which we may term psychological coercion or influence - deterrence - experiences that psychology calls imaginings. This is highly relevant here, because a person imagines the consequences of punishment: deprivation of liberty, shame, suffering in the process of serving the sentence, the conditions under which the perpetrator will serve it and so on. This sort of imagining touches that part of the population which has not yet been subjected to punishment, while for those who have already experienced and witnessed it, this takes the form of memories. So if we assume that legal psychology is a psychological pattern of ‘human law’, then logically the psychological impact of punishment is a system of 'human punishment' which should be developed by sciences such as psychology, philosophy, criminology, sociology and pedagogy, because we talk about a complex object and subject of study: the human as a biological and social being through his mental activity.

So does punishment have objective properties for its impact on the human psyche? Criminal punishment as a limitation, as a suffering and deprivation imposed on a person from the outside by the stale is naturally a source of fear. In other words, as explained by psychology, the fear of punishment is the emotional aspect of the tension generated by the threat of deprivation, suffering and shame.

Psychology says that humans from an early age demonstrate a remarkable ability to experience fear of objects and events which are life-threatening. Some psychoanalysts have drawn up distinction between the phenomena that cause anxiety in human, described with such terms as 'fear', 'fright' and 'anxiety' (Freud, Horney, Sullivan et al). Fear, therefore, is a subtle mental condition that occurs in humans, which means that there must be some grounds for the appearance of that fear in a person, and the threat of punishment is of course one of these sources. However, "we can only threaten in a reasonable manner for a specific action (or inaction), committed or not committed, which depends on the will of the one to whom these demands are made" [13, p. 54]. Therefore there can be no doubt that fear is one of the most important motives of the actions and abstinence of actions in humans and animals alike. Consequently, the use of fear is to mobilise for vigorous activity, as is so often necessary in an emergency.

Normal fear can mobilise the consciousness and will of a human. Fear in this sense can prove to be an effective countermeasure to the commitment of crimes. It is this positive fear that is one of the basic motifs in the general precautionary action of criminal punishments It follows from this that the legislator, when determining the nature of punishment, cannot ignore this fact and yet at the same time we should not forget the words of I. Shevelova that "fear in small doses stimulates, in large does it paralyses" [24, p. 69-70], because increasing social fears sees the manifestation of their negative and even destructive sides.

The Dutch philosopher Spinoza wrote: "No society can exist without authority and power, and, in consequence, without laws that moderate and restrain the passions and unstoppable impulses of the people. However, human nature does not tolerate that it should be unlimitedly coerced… . The laws in each state should be installed so that people are not constrained so much by fear as by hope for any benefit that is most wished for; after all, in this way everyone will be willing to perform their duties" [22, p. 63-79].

Indeed, life has shown that the more freedom that exists in a country, the softer its punishment, because when people are content and free, then there is no need to multiply the threats. People living in a society that has reached a sufficient cultural level can be guided by motives of a higher order that rests on morality and not fear of the threat of the law, because fear of punishment stands on a lower rung in the moral and legal development of the individual.

A question that follows is what kind of elements in the post-criminal genesis of human behaviour affect the fear of punishment? In the first place, these elements are the needs and interests of a human being, in other words the choice of a human between the available legal and illegal opportunities to meet his existing needs. The threat of punishment also affects the system of values of a person. In principle, in order to answer such questions, we must of course identify the mechanism of criminal behaviour in a human being. Unfortunately at present none of the sciences available to us has yet been able to provide a concrete answer for the causes of criminal behaviour.

Another relevant question is whether a person can rid himself of fear. According to H. S. Sullivan, we can talk about four methods that allow relief for the stress of fear: the elimination of circumstances causing fear; the avoidance of these circumstances; the neutralisation of situations that give rise to fear; ignoring a threatening situation or the risk of it. Which of these is the more acceptable, in removing the fear of punishment? Avoiding circumstances would be the most appropriate means of relieving the tension of the fear of punishment. In this case, circumstances involve good behaviour and, for potential lawbreakers, the neutralisation of situations that generate fear. In the case of professional criminals, of course, they will simply ignore the situation of threat.

Thus, by applying one of these four means available to an individual, he is able to eliminate the circumstances that contribute to the appearance of fear of punishment: either lawful behaviour or the commission of crime. Of course, it would be better if a person did not commit offences because of their inner

conviction and good intentions. Unfortunately, such inner conviction is rarely possible by means of punishment. It requires other means of education because it is only possible to eliminate harmful, evil qualities in a human through internal rebirth and self-education. Just as it is impossible to force a person to feel patriotism, respect for other people's property or love for one's neighbour, punishment cannot rebuild or improve the inner world of a human because punishment is a compulsion and a warning, not a belief.

Improving the inner qualities and properties of a person in factors not available to punishment. At best, it produces conformity of behaviour but it is not actually capable of changing the human mind or strengthening moral norms. The Austrian Loffler casts further light on the subject, asserting that "if the best citizens themselves are known to have an aversion to the majority of the acts selected by the state as crimes, this sense is a product of public education, and the critical role played by education is precisely criminal punishment" [25, c. 388]. While agreeing in principle with Loffler, S. P. Mokrinskiy adds: "Criminal punishment, at least, is able at most to strengthen existing moral views but it does not create them again". And further: "If a criminal and a political system of psychological coercion seek moral support for the faint of heart at a time of transition and fluctuations, than it indirectly contributes to the overall strengthening of the moral and legal foundations of social life, it reduces the chances of the occurrence of such things" [14, p. 96-97].

Mokrinskiy expresses an original idea, the essence of which is to ensure that a new force appeared to replace one that has outlived its time and so emerged a new beginning for physical and psychological deterrence, which thus can protect without threats or enforcement the rule of law and the therefore provide peace of mind. What sort of new power is this then? Mokrinskiy's reply is to the point: "The effect of the punitive impact of punishment is reduced in our time, and the further it goes, the more exclusive it becomes *in inflicting mental suffering*

[emphasis I. R.], and it forms the basis of the repressive forces of the threat of criminal law" [14, p. 75].

According to Mokrinskiy, it is not the fear of physical torture, suffering, coercion, intimidation or punishment but the shame of stigmatisation which drives that sensual stimulus, on which modern criminal policy rests itself hopefully. Based on this logic, Mokrinskiy proposes a system of the psychological coercion of punishment exhibited by a social species characterised not by intimidation and coercion but social shame. I have no doubt that in Mokrinskiy's times it was indeed considered shameful to bear the stigma of a criminal, thief or murderer but nowadays, unfortunately, certain kinds of human criminal behaviour evident in society are considered no more immoral and consequently are not the subject of common discussion and condemnation as they were, for example, in the Soviet period. Public shaming has the force of impact where the level of ethics and morality in society is high. At the same time, the psychological impact will have a clear effect in a society where there is a high level of civilisation and culture, implying a highly developed sense of personal self-esteem as well as a high level of legal awareness within the population. As a result, it would be premature to talk of shifting the centre of gravity away from the psychological impact in terms of public shaming and intimidation to the moral pressure brought about by society. The level of development of society must first be raised before turning to any thought of easing the nature of punishment. Modern psychology indicates that education, including moral education, as adapted to certain categories of people can be harmful to others, and so a particular system of punishment that is useful for some may be harmful to others. The efficacy and usefulness of psychological prevention and deterrence rests on its compliance with the ethical and social views of society, on a common understanding of the requirements of morality and retributive justice.

It is indisputable that if punishment and its character comply with the moral and legal levels for the development of society, then it is via psychological

influence, i.e. the effects of prevention and deterrence on the population, that it is possible to push the majority away from criminal intentions. But this requires the moral character of society to be greater than the morality of its constituent individuals, since only a group of people is capable of high-level unselfishness and devotion. It is only in this case that the psychological impact of a society will be effective in respect of its members. It is only human society that prescribes its standards of morality, while an individual person as a rule lags behind such high demands. What then are the guarantees that the state and its authorities will not use this punishment as a deterrent force? Certainly not every act of violence against the individual can be justified by a generally useful purpose that much is obvious. Naturally society cannot be without punishment but it does have to fall within certain limits. In other words, the most important thing is the ability to achieve its goals without stepping over the boundaries of an ethical and fair assessment of the individual. For example, if a legislator wishes to halt the growth of drug abuse in his country and so assigns it twenty-five years imprisonment or the death sentence, it is clear that in this particular case the preferred option is in reality general prevention through the threat of punishment, and the person becomes a means of achieving this purpose.

The wise legislator is always on the look-out for a compromise between the interests of the person who committed the crime and society as a whole, from the midst of which unknown people may in the future commit crimes. The history of criminal policy shows that the authority of the legislator, and thus his power, rests not on the fear of punishment - and the capacity to increase it, even if in certain circumstances there is a clear need in this - but on public trust and the solidarity of mutual interests in respect to historical traditions and customs. Through psychological impact, forced submission and cruelty, the legislator and the government ward society from crime. More importantly, people also tend of their own volition to respect the law, and so the moral underlay of punishment involves a conscious interplay.

As we know, the principle of the middle way was formulated by Aristotle, the founder of ethics. According to him, moral principles, like the peak of a mountain, should rule over passions located at its foot between excess and deficiency. In principle, if everything in nature is endowed with properties that involve excess or deficiency in relationship to a thing, then the middle must exist in morality, i.e. the boundary between the moral and the immoral. In fact, Aristotle translated the known position of the ancient Greeks into ethics as 'nothing is too much'. So if we take Aristotle as the basis for determining the relationship of a person to the death penalty, then moral principles should be fundamental to arguments for and against. If in morality the middle is the main figure of a human, then in punishment everything revolves around society, represented by the state, because it is the creator, the subject that ensures the interests of society.

Punishment defines the character of the people as a whole in its relationship to this measure, while morality defines the relationship of the individual to punishment and his inner sense of freedom. Since the subject of the right of punishment is the state, it alone can be moral or immoral, thus when we talk of the morality or immorality of punishment, we are in fact talking about the state and not about punishment, which merely a means in the hands of the subject.

Consequently, it is the boundary between moral and immoral that determines (he slate, hi other words, the definition of the middle of morality belongs to the state. It can offer advantages to the public good such as the protection of property of the state, for example, as in Soviet times, when criminals such as serious embezzlers were readily shot. But if you then place emphasis on personal freedom, it becomes necessary to abandon severe punishment for crimes such as premeditated murder. A fair approach like this also requires something that lies between excess and lack, i.e. something equal. In other words, principles of justice and morality take away the excess and give it to the lack, thereby creating an element of equalization and recovery. It is worth pointing out that very often morality has a reducing effect on the inevitable austerity and rigor of punishment.

Morally speaking, the greatest goal for any advanced society is, of course, the interests of the common good and its individual members. Therefore if the power of the state constructs an attitude based on the priority of political interests over society, this can hardly be considered a moral phenomenon. It is the principle of justice that has to be the criterion applied to evaluating the moral nature of the state in relationship to the common good, and it is humanism that defines the boundaries of morality in relationship to the individual. In other words, humanity is expressed in the relationship between the state and the individual. The state's fairness towards the public interest must take into account the absolute value of the person. Humanism is the moral position of the state, stating recognition of the value of humans as an individual being. What humanism does not permit the state to resort to is a repressive model of criminal policy directed against the individual offender as a 'bearer of ill will'.

Justice also serves as a principle which does not allow the state to break the golden mean, i.e. it warns against the harmful consequences in the case of neglecting the interests of the public good. So if the principle of humanism serves the interests of a particular individual, then the principle of equity in the form of retribution or recompense is in the interests of the common good.

Consequently, in determining its relationship to punishment, the state finds itself between two driving principles: humanism and justice. On the basis of these basic principles of philosophy, which serve as a scientific theoretical basis, the study of specific problems of other sciences including law should be based on the moral principles of punishment.

The indisputable right of the state to punish and to establish the limits of coercive implies that to such a body belong the activities of defining punitive measures for the establishment of precise and clear boundaries between the moral and immoral use of coercion as the confrontation of the evil wrought by crime. In developing a definition of punishment, criminal lawmaking is a conscious process of learning the need for this facility as well as understanding upcoming activities

concerning the application and definition of the objectives and methods required to achieve it. After all, before you start such an activity, you must be aware of what is to be done and how to do it. And so the wise legislator before tackling this or that punishment should be fully cognisant not only of what is legally required but, first and foremost, of the moral significance involved. His duty is to inform the public about it, because "the people, who obey the law, should be its creator" [18, p. 218]. A legislator must be convinced not only of juridical necessity but also the morality of any decision on punishment or altering it. Therefore, before accepting a punishment, we should examine in depth the social conditions, circumstances and factors which led the legislator to its particular formulation. Of particular importance is the way people will perceive this decision, because the inner conviction of the population largely depends on the necessity and justice of punishment and its practical application. The main point here is that there should be a moral need for this or that punishment. As Hobbes once said: "The clarity of the law depends not only on the presentation of the law itself but also on the announcement of the reasons and motives of its publication. It shows us the intention of the legislator, and where the intention is known it easier to understand the law as set out briefly and not long-winded [4].

The character of every punishment must not take shape at the whim of the legislator in his capacity as the representative of the ruling power, rather it should be determined by the necessities of life - otherwise punishment will create a range of sociopolitical issues. Therefore the formation of punishment should involve two fundamental factors: the moral level of society, i.e. an objective factor, and the thinking cognitive activity, i.e. a subjective factor. J. L. Berzhal noted that "sociology as a science analyses the facts of social life at a fairly high level of generality, acting as one of the essential elements that contributes to the development, implementation and evolution of positive law" [3, p. 275]. And according to B. A. Kistyakovsky, the process of lawmaking, at least in its early stages, is a purely social process [10, p. 208]. R. Iering, writing from a sociological

view of law, excluded the 'unconscious' developing of the law but recognised the ‘law of trust’ as the main rule of social development in any main lawmaking factor, connecting its implementation to the activity of legislation [8]. At the same time, any successful activities in establishing a system of punishment depend on the legal culture of the legislator, his genuinely creative approach to its mission and art of lawmaking itself.

Legal culture is tied by innumerable threads to a common culture. Its powerful beneficial effect on the legal consciousness, thinking and ideology of those who create the laws and on their legally placing value determines the nature of legislation directly or indirectly and determines its adequacy to historical and national spirit of the people, as well as their needs and interests [9, p. 349].

Unfortunately, modern criminal lawmaking does not consider factors such as these. In fact, laws that are created by the state neither take into account public opinion nor seek its authorisation, being guaranteed by the state’s coercive power in the form of rules and formal definitions. It is for this reason that criminal law often does not gain the internal approval or consent of the community over its necessity and justice. In discussing the law, Bentham raised the question of the meaning of right and wrong: to speak of the law as right means “to represent all good and all evil that should lead in the law: the more good, the more arguments in its favour; the more the evil, the more the arguments against it”. To speak of wrong means “to submit to the defence or refutation of the law is neither good nor bad consequences, but something else” [2, p. 166]. It should he remembered that for criminal threats, as for all means of bringing to bear influence, there is a limit beyond which increasing the dose does not significantly raise the chances of achieving private purpose, and reducing the social evils of crime begins to be threatened by disorder of the whole.

Setting the desired limit is a matter for the criminal legislator’s instinct for the problem as viewed within its overall social policy [14, p. 68]. After all, a remedy will not achieve its purpose if the dose is either too large or too small, and the same

goes for punishment when it surpasses the limit of necessity. In applying a particular punishment to certain acts, the legislator understands that in the case of a violation of the law, the individual concerned must suffer a recognised sensory or mental deprivation as a necessary and reasonable consequence. The legislator becomes immoral if lie knows in advance that these sufferings will not match the deed, where the reward is not the idea of law, justice, moral and punishment.

It is obvious that the more important a law is - more specifically, the object of protection which was violated by the crime - the more important is the crime itself. The importance of the object of abuse determines the degree of severity of punishment. But which object is more important? It is a relative concept because it is solved by the state powers itself, implying that each state has its own individual opinion. This is perfectly acceptable because each nation has its own criteria for evaluating moral values and its own concept on the importance of certain values. Every nation will have a different view of the severity of a crime, and so, as a rule, the punishment for the same offence in different nations will be found to be different. Of course, it was meaningless, unfair and immoral in equal measure the fact that the death penalty was established for the theft of state and public property during the period of Soviet rule in the USSR. Here the state, in establishing this type of punishment, did not come from the norms of morality and the principles of humanism or the ideas of justice, but from ideological reasoning and misconceptions regarding criminal policy in the fight against crime. Hence the importance of the act determined in each given epoch depends on how the legislator is placed in terms of the interests of the dominant power, the place of the individual and their interests in society. It follows that the construction of an identical punishment system designed for all ages and nations is impossible considering the difference of criminal acts in different periods of the histories of different nations.

As we noted earlier, it should move from the idea that we can create an ideal system of punishment, one that includes individual specific penalties that are ideal

both in form and content. After all, the types and quantities of punishments are subject to slow change since each era brings its own criteria for assessing the significance of criminal acts [16, p. 184-185].

For example, from the viewpoint of today, we reject the punishments of the medieval era and consider them incompatible with the principles of humanity and morality even though they were considered appropriate by the legislators of the time. This should be neither surprising nor strange, because every age brings its own punishment and its own interventions to bear on criminal manifestation, which for subsequent eras may seem inappropriate and therefore immoral.

So where is the boundary for the state's use of coercion that will be the red line? Naturally we can define such a boundary on the basis of how society treats and refers to a person who has committed a crime, i.e. whether it seeks to save him with a human moral attitude or not. If the answer is positive, then logically society will not seek revenge through punishment but will simply assert the fact of self-defence against an atrocity and approve its right to protect its members. In other words, society will declare: "I want to prevent evil and crime, I want to protect you, the citizens, and I do not want to destroy or humiliate you for these acts". As proof of its loyalty, society in its determination of criminal punishment must adhere to the principle that punishment reflects the crime, which is provided for in any law based on the moral standards of the people. For example, during Draco's tenure in Athens nearly all crimes were assigned one punishment, that of death. As a result we have the saying that "Draco wrote the laws in blood".

Plutarch, referring to the rule of Solon in Athens of the sixth century BC, acknowledged one of its main achievements: "Solon is first of all, the one who abolished all the laws of Draco, except for the laws of murder". From this historical example it is evident that the laws of Draco were not based on moral principles but on oppression, fear and terror. And yet in tracing the history crime and punishment, it is easy to see that the alternation seen during periods of increasing and mitigating punishment is not associated with any explicitly

consistent pattern. Each of these changes finds its root in specific historical reasons, which could easily be random. In particular, such changes depend on the sociopolitical organisation of a society, on the characteristics of the personality of a particular ruler whether he is prone to tyranny or charity. Consequently, the moral principles of punishment depend largely on who and under what circumstances and conditions it is used.

The principle of humanity (philanthropy) is not a means in itself but to be used in society as represented by the power of the state. We can find fair democratic laws based on morality and humanism but we can also find them used as a means of repression or other pressure. Nevertheless, the history of mankind shows that the level of moral principles of punishment depends on the level of development of the nation. In principle, it can be argued that the system of punishment is a mirror that reflects the mores, customs, traditions and level of consciousness, including those that are legal, to be found in every nation. In turn, Mokrinskiy notes that: "With criminally political considerations on the one hand and the moral views of the ruling circles of the population on the other, legal principles are already perceived through legislation and the force of historical tradition; these are the main factors in determining the apparatus of criminal repression [13, p. 19].

The set of punishments applicable in a particular nation in a certain era forms a system of punishments. The choice of the system of punishments - i.e. type, size, character, harshness and so on - is determined by the general state of culture, morality, government and social conditions of the times. In Rome, for example, the system of punishment was originally built on the compositions of minor crimes while the more important revolved around the sacral institution, i.e. the consecration of the criminal to the deity where it was forbidden to give him shelter, and if caught he was punished by the death penalty. Nevertheless citizens could avoid this punishment by their voluntary removal from society.

The ancient Germanic system of punishment fell more into the idea of private rewards and of powerlessness. Crime was seen as a violation of private law, punishment as a reward for that violation. The person who cannot reward with money will pay with his personality and placed into slavery. The Russian system of punishment law has survived distinct historical stages and, like the Roman and German systems, begins with monetary punishment which tasked a particular reward to the victim. The canon law of Western Christianity then introduced very different ideas where a criminal act was a sin, meaning that punishment was regarded by the canonists as a means of reconciling the offender with the community, aimed at appeasing God.

In principle, the definition of a system of punishment and the nature and type of its individual species has to be based, in our view, on a basis that is both moral and legal which the legislator cannot ignore if he seriously intends to prevent manifestations of crime and not to take vengeance on criminals. Of course, the legislator may for political or other self-serving reasons ignore these principles. However, he will ultimately realise that following such a policy is neither far-sighted nor wise. You can stand up before society and prove that you are a spokesman for moral principles; conversely you can be a legislator who hides behind moral principles and public consciousness because of his ignorance of the level of cultural development of the people. In latter case, it is from the legislator’s hands that society will surely receive a punishment system that is not only ineffective hut also harmful m this very society.

But should the legislator he bound by the moral worldview of his people? Of course he should be. Indeed he should not and cannot ignore public opinion as to the fairness of punishment for an act, especially since it is possible that society deems morally illicit a range of specific punishments for a particular offence. In this case, the legislator may lose credibility and confidence in the eyes of the public. This is certainly possible when punishment is considered to be over harsh and clearly not in compliance with the act in law and therefore contrary to the

moral standards of the people. The effect of such punishment is not to be expected because in practice it will be ignored by people. Based on the nature and content of his sociopolitical regime, the legislator is accordingly empowered to use punishment as the most powerful tool available for innovating his ideas and views on issues pertaining to life within the community.

The result of the moral development of mankind is, as we know, contained in progressive steps toward the mitigation of punishment, even if the pace is slow. However the history of the doctrine of punishment tells us that a similar level of development is to be found in the principles of humanity and morality where legislators determine and apply a variety of punishments in different countries. From our point of view here, the story of punishment and the basics for building it are instructive not only in terms of the knowledge of the essence of this phenomenon but also in terms of a comprehensive picture of the life of people and their customs, manners and mentality which have been deployed for centuries as a means to combat evil and crime - combined, these present the most powerful weapon to create an impact on people.

The system of criminal punishment in almost every nation in the early stages of its development in many ways was a means of limiting customs and ousting undesirable traditions because they conformed no longer to the moral level of the nation. At the same time, sanctions, i.e. punishment, were not legislative in nature but rather an imperative from the head of the clan, tribe or other group. It is interesting that these punitive structures mirrored the individual races in being very different from each other, yet it appears that the actual development of the system of criminal punishment follows more or less the same path in every nation. The system of private revenge and personal protection from encroachments are considered by many to be the first stage of this process in society. Anyone could seek revenge in any way they wanted against someone who had caused them harm while the customs of the tribe did not consider this kind of behaviour as a crime. We can assume that the tribe, family or community sanctioned this means of

dealing with violations of human rights and the freedoms of others. From the moment there springs the idea of revenge, it becomes a way to respond to evil - and yet there was still no criminal punishment in the sense we now understand it, because retaliation did not have the nature of a law adopted by the people. It would have been impossible for almost any nation in early times to reject in either theoretical or practical terms the brutal corporal punishments that existed everywhere since they would be fully consistent with the mental, cultural and moral development of the era. As N. Evreinov explains: “The features of barbarism, brutality, mental roughness, depravity and humiliation inherent in a nation find simple explanation in the measures that existed of limiting and intimidation to which the people were long accustomed during the centuries of the formation of their state” [6, p. 2].

Corporal punishment, for example, in the Middle Ages was consistent in the main with the spirit of the period's state and society at a mental, moral and economic level. Society most probably demanded the most punitive, harsh punishments that were also simple and cheap to carry out, and so corporal punishment was personified by brute force that both corrupted and punished offenders. Punishment used wisely on the other hand is beneficial and necessary— and not immoral - and its use on the contrary is consistent with moral principles, provided of course that we do not cross the line that separates the moral and immoral use of punishment as deterrent and enforcement.

Moral principles basically act as guarantors that the stale does not exceed its authority by requiring compliance with the limits of law enforcement. If society through punishing does not seek revenge in other words, extends humanity to the person who committed the crime - then it is simply confirming a necessary defence against atrocities and asserting the right to protect its members, and we can assume that the line has not been crossed. In short, moral principles teach a political power how to achieve these goals through punishment without prejudice to the interests

and freedoms of its citizens, thus respecting the rules of ethics that govern the relationship between the state and the members of society.

The moral principle demands that people be free to improve themselves under society's conditions, which cannot exist if the members of this union are freely given the opportunity to commit murder, rape or steal. What then should be society's attitude to such phenomena from a purely moral point of view? Above all, there should be protection of the general interest and of public safety through punishment. But if we do not want this to be an idle threat, it needs to be based on real, actual power, sufficient to bring it to effective implementation.

Only through coercion and deterrence, although not permitting physical violence and humiliation, is it possible to achieve the goals set by the state and therefore create grounds for the improvement of society. At the same time, the moral principle requires us to recognise not only the right of the offended, the victim, who not only equitably requires a deserved punishment for the perpetrator but also an appropriate attitude towards that perpetrator. This should not involve humiliation and destruction but punishment for the relevant act committed in view of his personality. After all, a verbal admonition alone, without coercion, is also contrary to the moral principles of punishment. Unfortunately, the historical process of moral perfection of humanity has not yet eliminated punishment and cannot transfer over to 'public custody over the offender' [21, p. 471]. As Solovyov points out, moral principles demand that we "feel sorry for both", in other words in following the principles of humanism in relationship to the offender, we must not forget the feelings of the victim – or indeed the principle of social justice.

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