

UDC: 343.24(497.22)

PUNISHMENT AND OTHER PENAL MEASURES

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Abstract:

For centuries, the only purpose of punishment was to punish an offender and it should be equal to the damage caused by the crime. While the development of humankind, these purposes changed and became more human and tolerant. That is why the aims of punishment changed and criminal law should consider the other penal measures, besides punishment.

In the current Criminal Law, the purposes of punishment are: to punish an individual without causing physical pain or humiliating him/her; to reform a criminal, re-socialization and rehabilitation of the convicted person; to prevent the crime by the same offender or other members of society.

The conception and purposes of punishment are various in the Penal Codes of different countries, but the main principles are the same.

The list of penalties are also different in the Criminal Laws of different legal systems. Some Penal Codes contain the exact list of penalties, also the list of other penal measures which are called “security measures”.

There is no definition of security measures in the current Criminal Law. In general, these are the compulsory measures of medical and correctional nature.

The principles of sentencing are also various, but the major are: dangerousness of a criminal act; guilt of an offender, his/her personality and past. That is why the most Penal Codes contain penalties and security measures that may be imposed in special cases.

Most of the countries also differentiate adult and juvenile offenders. While common penalties may be imposed on an adult offender, special penalties may be imposed on a minor.

1. The system of penal measures

During the centuries punishment was the only way for the implementation of goals of the Criminal Law. Now it is commonly recognized that to implement its protecting and preventing goals, Criminal Law is able and should consider the other penal measures, besides punishment.

In Criminal Law penal measures are defined as the measures set by the Criminal Code, restricting the human rights; they are compulsory measures of punitive, correctional and educational impact [1].

The penal measures can be defined as any kind of state enforcement, compulsory measure applied by the state, which is imposed by a court's judgment upon a person who has committed a crime or misdemeanor.

All the penal measures obey common principles of the Criminal Law, but differ according to their purposes.

There is no general definition of penal measures in the contemporary criminal law. In each country the legislator solves this issue differently. In general, there are the following penal measures:

- 1) Penalty;
- 2) Compulsory measures of a medical nature;
- 3) Compulsory measures of a correctional nature to juveniles;
- 4) Confiscation of criminal assets.

The Criminal Code of France states that a juvenile, having been found guilty, is subject to measures of protection, assistance, supervision and education according to the conditions laid down by the specific legislation [2]. In France, compulsory measures of a medical nature are withdrawn beyond the Criminal Law.

In Japan, educational compulsory measures to the juveniles are used in accordance with the law on minors. Compulsory measures of a medical nature are used to socially dangerous individuals in accordance with the law of mental health and welfare of mentally defective persons [7].

Nowadays, correctional compulsory measures are considered by the special laws on juveniles instead of the Criminal Code (for instance, in Germany, Spain, Portugal, Switzerland). Special laws on confiscation of criminal assets are used more frequently, especially in Anglo-American countries.

In the Criminal Code of Latvia, besides punishment, there are three kinds of penal measures:

- 1) Compulsory measures of a medical nature;
- 2) Compulsory measures of a correctional nature;
- 3) Compulsory measures applicable to legal entities.

In the Criminal Code of Lithuania there are the following penal measures:

- 1) Penalty;

- 2) Compulsory measures of a medical nature;
- 3) Compulsory measures of a correctional nature;
- 4) Penal sanctions [3].

An adult released from criminal liability or released from a penalty may be subject to the following penal sanctions: a) Payment of a Contribution to the Fund of Crime Victims; b) Confiscation of Property; c) Unpaid Work; d) Compensation for or Elimination of Property Damage; e) Prohibition to Exercise a Special Right [3].

2. Concept and purpose of a penalty

In the contemporary criminal law there is no universal definition of the concept of punishment and its purposes.

Legal definition of punishment and its aims are given in the Criminal Code of CIS countries, Hungary, Latvia, Lithuania, Romania, Bulgaria, Colombia, Portugal, etc. Punishment is a compulsory measure set by the Criminal Code which a court adjudges on behalf of the State against a person found guilty of a crime considered by the code. The court should ascertain the punishment within the scope of the code determined by the legislation [4]. According to the code, punishment is a legal judgment for the committed crime. The aim of a punishment is prevention – defending society from crimes [5].

Sometimes the legislator does not define the purposes of punishment, but mentions about it in the Criminal Code with other institutes or in the norms of more private nature.

For example, in the Criminal Code of Belarus is mentioned criminal liability, matching with the purposes of punishment in other Criminal Code of CIS countries. In Criminal Codes of Mexico, Poland and Puerto Rico there are no special definitions of purposes of punishment, but they are mentioned with common principles of sentencing [11].

The purposes of punishment can be found not only in Penal Codes, but other normative sources. For instance, in Italy, Spain and Salvador the purposes of punishment are defined in Constitution.

In the current Criminal Law there is opposition between the two approaches concerning the aims of penalty. According to Neo-classical school, penalty is punishment for the committed crime and serves two main purposes: retribution and intimidation for implementing general prevention. On the contrary, the Social School considers the purpose of punishment as treatment and re-socialization of an offender. According to the International

Covenant on Civil and Political Rights, “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.” [6].

In every specific type of punishment, one purpose rejects others. For example, death penalty and life imprisonment have retributive nature, provide specific prevention and pursue to provide general prevention for their particularly deterrent nature, excluding criminal correction and re-socialization. So, if the legislator proclaims the purpose of penalty correction and re-socialization, he maximally restricts or rejects these types of punishment.

Deprivation of the rights, community service, or restriction of liberty have less preventive potential, but allow (at least, in theory) rehabilitation and re-socialization.

The modern legal system recognizes all the above-mentioned purposes of punishment.

The English Criminal Law recognizes the following purposes of punishment: Retribution - punishment is morally acceptable as a response that satisfies the aggrieved party, their intimates and society; Deterrence – of an individual and society; Rehabilitation – change an offender for better; Isolation – protection of society; Reparation — repayment to victim(s) or to community; Denunciation – censuring an offender for committing a crime offense [7].

The American Criminal Law recognizes the following purposes: retribution; deterrence, incapacitation, rehabilitation.

According to the legislation of the most of CIS countries, the purposes of punishment are restoring social justice, reforming a convicted person and preventing further crimes [8].

The Criminal Code of Lithuania states the following purposes of punishment: 1) to prevent persons from committing criminal acts; 2) to punish a person who has committed a criminal act; 3) to deprive the convicted person of the possibility to commit new criminal acts or to restrict such a possibility; 4) to exert an influence on the individuals who have served their sentence to ensure that they comply with laws and do not relapse into crime; 5) ensure implementation of the principle of justice [9].

In the Muslim law is expressed the retributive nature of punishment for the *Qisas* category crimes, murder and battery. For these categories of crime Sharia sets the exact sanction - *Qisas* Punishment is either exact retribution or compensation. It is the *lex talionis* [10].

In general, there are the following purposes of penalty in present Criminal legislation:

1) To restore social justice (the CIS countries), ensure implementation of the principle of justice (Lithuania) [9];

2) To reform a criminal (the CIS countries, except Georgia, Bulgaria, Spain, Italy, Cuba, Lithuania, Poland) [8]; [9]; [11];

3) Re-socialization of the convicted (Georgia, Spain, Columbia, Romania, Bosnia and Herzegovina, Portugal) [9]; [11]; [12];

4) General and specific prevention (the CIS countries, Hungary, Columbia, Cuba, Latvia, Mexico, Romania) [9]; [11]; [17];

5) To punish a person (Columbia, Latvia, Lithuania, Ukraine) [9]; [11];

6) Suppression of a crime (Cuba, Uzbekistan) [9]; [11];

7) Protection of juridical assets (Portugal) [12];

8) To express social condemnation of a criminal offence, enhance moral strength and reinforce the obligation to respect the law (Serbia, Croatia) [11]; [14].

3. The system of penalty

The types of penalties are divided into specific groups. It depends on the legal system of each country.

In the countries of the continental law, penalties are divided into *principal* and *secondary* sanctions. Some penalties may be pronounced as principal and as secondary sanctions. Some penalties are accessory; they are automatic consequence of certain penalties, even in the cases, when nothing is mention about it in the court's judgement. (For example, imprisonment entails deprivation of political and civil rights for the whole sentence) [29].

There is a separate category of *substitute* penalties which may be imposed only as replacing the other penalties, such as community service.

In the countries of common law there is no division of penalties, every punishment has alternative nature and may replace or fill each another.

There are penalties for legal entities, for the crime committed by a natural person for the benefit and in the interests of the legal entity. In general, the following penalties may be imposed upon a legal entity: fine, restriction of operation of the legal entity or its.

There are three categories of penalties in the Muslim law: Qisas, Hudud and Tazir. Hudud is mixed punishments for violating the major values of Islam, such as: larceny, fornication, consumption of alcohol, apostasy, false accusation of crime, crucifixion (for robbery with homicide), amputation of hands or feet (for larceny and highway robbery without homicide), flogging with a varying number of strokes (for drinking, for fornication,

when the offenders are unmarried or not Muslims, and false accusations). A victim has the right to choose the punishment and the way of its implementation [10]; [15].

The penalties can be classified as follows:

- 1) Punishment related to deprivation of life (death penalty);
- 2) Corporal punishments (mutilating and painful);
- 3) Punishments related to deprivation of liberty (life imprisonment, fixed-term imprisonment);
- 4) Punishment related to restriction of liberty (Restriction of Liberty, exile);
- 5) Proprietary punishments (confiscation of property, fine, correctional labour, community work, criminal compensation);
- 6) Punishment related to restriction or deprivation of rights (deprivation of the right to be employed in a certain position or to engage in a certain type of activities, or political rights, annulment of parental rights, deprivation of the right to weapon ownership, deportation);
- 7) Punishment related to moral impact (Annulment of military rank, special titles, qualification (classification) degrees and state distinctions, publication of the sentence) [27]; [29];
- 8) Other penalties, including mixed punishments (restriction of the military service, community work, deportation of a foreigner).

4. Other penal measures (security measures)

In the present Criminal Law there are penalties and other penal measures (security measures).

Common between them is that they are measures of compulsion applied by the state which is imposed by a court's judgement upon an individual who has committed a crime or misdemeanour. They may be imposed under the Criminal Procedural rules, following the constitutional guaranties.

Formal difference is that other penal measures may be imposed not only for crime, but also for socially dangerous acts. Penalty is always the implementation of criminal liability, other penal measures may be imposed: 1) as implementation of criminal liability (confiscation of crime weapons, restriction of rights); 2) as release from criminal liability (correctional compulsory measures to the minors); 3) to individuals that are not under the criminal liability (incapacity or diminished capacity).

Punishment and other penal measures pursue the purpose of specific prevention, but unlike punishments, penal measures do not pursue the purpose of punishing an offender. Some of them have the purpose to eliminate or reduce consequences of criminal activities (for example, confiscation of criminal assets), also reforming an individual (correctional compulsory measures to the minors).

There are no clear boundaries between punishment and other penal measures. For instance, in case of special confiscation, deportation of a foreigner, or restriction of special rights, it is only up to a legislator to ascertain which category a certain sanction belongs to.

The theoretical basis of security measures in the Criminal Law is from the originated in XIX century.

In the studies of Social School criminal factors and “dangerous state” of an individual are of utmost importance. According to this thesis, there is a definite category of people who appeared in the “dangerous state” under the influence of some criminal factors turned out and thus, are danger for society. They should be revealed and disarmed before committing a crime [16].

According to the Social School, the traditional penalties imposed upon a criminal should be changed into security measures, having the purposes of protecting the society from criminals considering the dangerousness of their personalities.

In the times of Social School influence (at beginning of XX century), the security measures were included in some of the Criminal Code.

Currently, security measures have got more support as the criminal mechanism cannot be based on punishment only; it should have different methods of impact including treatment, correctional, educational, defending measures, also some sanctions helping to prevent the crime.

In general, the absence of security measures is caused not by the principal differences between the bases and means of these measures, but also by peculiarities of legal techniques.

In most countries is used term “security measures” (Germany, Greece, Spain, Italy, Columbia, Mexico, etc.). In the Criminal Code of Hungary they are called “measures” [11]; [17]. In the Criminal Code of Germany and Greece they are called “measures of rehabilitation and incapacitation” [11]; [18]; in the Criminal Code of Poland “criminal sanctions”; in the Penal Code of Norway - “other sanctions”, in the Estonian Penal Code “Other Sanctions”. In the Criminal Code of Armenia, Russia and Tajikistan they are called - “other penal measures”; in the Penal Code of Turkey - “Security Precautions”, etc. [11]; [20].

Every country has its own system of penal measures. The legislator establishes a list of these measures.

In the Criminal Code of Moldova, security measures are: a) medically coercive measures; b) coercive educational measures; c) expulsion; d) special seizure [21].

In the Criminal Codes of CIS countries, a legislator does not specify the meaning of other penal measures. At the doctrinal level they include compulsory medical measures and compulsory correctional measures.

As a result of the current legislation, a legislator establishes the following penal measures:

- Compulsory measures of a medical nature (Austria, Bolivia, Brazil, United Kingdom, Hungary, Germany, Spain, Italy, Columbia, Cuba, Moldova, Norway, Portugal, Russia, Romania, USA, Turkey, Czech Republic, Estonia) [11]
- Disqualification a profession from the occupied position (Germany, Spain, Paraguay, Poland, Portugal, Romania, Turkey) [11]
- Special Confiscation (Hungary, Moldova, Norway, Poland, Russia, Romania, Turkey, Czech Republic, Estonia) [11]; [27]
- Supervision by a probation officer (Brazil, Hungary, Germany, Italy Columbia, Norway, Paraguay, USA, Turkey) [11]
- Forfeiture of the right to vote (France, Lithuania, Germany, Hungary) [11]
- Temporary driving ban (Germany, Spain, Paraguay, Poland, Portugal) [11]
- Deportation of a foreigner (Spain, Italy, Moldova, Romania, Turkey) [11]; [20]; [21]; [29]
- Expulsion (Brazil, Spain, Italy, Norway, Romania) [11]
- Prohibition of visits to certain places
- Compulsory measures of correctional nature to minors (the countries of CIS, Spain, Italy, Moldova, Turkey, Czech Republic, Estonia) [11]; [20]; [21]; [27]
- Prohibition of alcohol consumption (Iraq, Norway) [11]
- The right to make a witness statement in court other than a simple declaration (France) [2].

5. Basic principles of imposition of a penalty

The difference between penalties and other measures is also the principles of sentencing in each country. As a rule, it depends on the degree of dangerousness of a committed criminal act and the personality of an offender.

In some countries the security measures may be imposed on a person is released from the penalty, also some measures may be applied independently (as a rule reprimand, probation, forced medical treatment). Some of the measures may be applied with a penalty, some independently and with penalty. The Hungarian Penal Code: forced cure of alcoholics may be applied in addition to a punishment, confiscation; forfeiture of assets may be applied independently and in addition to a punishment; supervision of a probation officer may be applied in addition to a punishment or a measure [17].

As a rule, restriction of special rights, confiscation of property, prohibition of approaching a victim, participation in the programmes addressing against a violent behaviour may be imposed together with a penalty. Also, in some countries penal sanctions shall not be combined with penalties and shall be executed separately [9].

According to the Serbian Penal Code, imprisonment and community service may be pronounced only as principal sanctions. As a rule, imprisonment is a principal sanction in the Penal Code every countries [9]; [11]; [22]; [23].

In general, the bases of punishment are re as follows:

- the degree of dangerousness of a committed criminal act;
- the form and type of a guilt;
- the motives and objectives of a committed criminal act;
- the stage of a criminal act;
- the personality of an offender, his/her the past;
- the form and type of participation of an individual as an accomplice in the commission of the criminal act;
- mitigating and aggravating circumstances;
- the degree of endangering or damaging protected goods;

- the circumstances under which an offence was committed;
- the behaviour of an offender after the commission of the criminal offence, etc.

In most countries there are differences in imposing penal measures on minors. In the Penal Code of Bulgaria these measures are called “special rules for underage person“. [25] The general purposes of imposing are:

- to ensure correspondence of liability with the age and social maturity of individuals;
- to help a minor to alter his/her manner of living and conduct by co-ordinating a penalty for the committed criminal act by developing his/her personality and eliminating the reasons for the unlawful conduct;
- to prevent a minor from committing new criminal acts.

The main penalties to minors are: admonition, supervision, placement in a youth home or in a school for pupils who need special treatment due to behavioural problems, fine, public work, arrest, imprisonment for a certain period [11]; [29.]

In some Penal Codes, commission of a crime by a juvenile is mitigating circumstances [21]; [24].

For minors, who at the time they committed a criminal act were under 18, the imprisonment sentence may not exceed half of the term of punishment provided for by law for the criminal act committed. [22]

According to the Article 91 of Criminal Code of Georgia, punishment may be meted out and coercive measure of educative effect may be awarded against juvenile offenders. In this case, the types of punishment are: a) fine; b) deprivation of the right to pursue a particular activity; c) socially useful labour; d) corrective labour; e) jail term; f) imprisonment for a particular term [26].

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