

SUMMARIES

of reviewed publications

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Manolova, Miroslava (2021) Why do we punish? The theoretical and normative model of the purposes of punishment in Bulgarian criminal law", Sofia, Mont, Ilkova, R. (ed.)

This monograph is full and in-depth research on the subject of the purposes of punishment in Bulgarian criminal law from the point of view of the classical theories of punishment, namely the utilitarian, retributive and mixed ones. It consists of three chapters, introduction and conclusion, and an elaborated bibliography. The print edition contains 208 pages.

The question of the purposes of punishment is particularly important. Not only because, above all, it very clearly and visibly crystallizes the idea of justice in criminal law. But also because the answer to the question "Why do we punish?" depends on the answers of the other two questions – who should be punished and how much, i.e., the determination of the different types of penalties, their severity and amount in relation to the different crimes, or in other words the construction of a given sanction system.

The question of the purpose that justifies the existence of punishment at all, i.e., why it is necessary to have it is different from the question of the purposes of the punishment when it is imposed by the court for a specific crime. These immediate aims are usually, unlike the first one, explicitly stated in criminal law. The question of the general aim of punishment is also different from the question of the principles of punishment, in respect of which it is possible to achieve these purposes. However, the two questions - regarding the aims and principles - are deeply interlinked and presuppose the framework in which the punishment at the normative and law enforcement level is constructed as an effective measure of the most severe state coercion in response to crimes committed.

The study examines both of the purposes of punishment - its general purpose and immediate ones. They are analyzed together with two of the principles concerning the punishment, which are most closely connected with them, especially with the immediate aims of punishment, explicitly established in

our criminal law, namely on the personal nature of the punishment (only the one who has committed a crime is punished) and on the proportionality of crime and punishment.

The question of the purposes of punishment has been studied in the light of the three classical theories of punishment - utilitarian, retributive and mixed ones. **Chapter 1** analyzes their most important characteristics, as well as the main criticisms that these theories provoke. The aim is to reveal the exceptional importance of the question and to show how the different answers are able to shape the structure of a judicial system and to predetermine its development for years to come. The first section is devoted to utilitarian views on punishment. According to them, crimes cause suffering, unhappiness, and therefore the purpose of punishment is to reduce, even prevent crime, and hence suffering, that is, to restore the balance between happiness and unhappiness. The emphasis in this case is on the good that would be achieved through punishment. That is why the utilitarian theory is also defined as a theory of consequences (consequentialist), because it considers punishment precisely in view of the consequences it leads to. And since punishment in this case is seen as a way to limit crime, i.e. to prevent the commission of future crimes, its main purposes are the prevention - both general and individual, as well as the rehabilitation of the offender.

The impact of utilitarian views on punishment in Russia and the United States during the same historical period, the first half of the 20th century, is examined in two separate subsections. In Russia, this is the time of two revolutions - the February and October of 1917 and the ensuing Civil War (1917 - 1922). These are the years of the radical change of one socio-political order with another and of the actions for the establishment of the new Soviet communist system. The denial of the then existing bourgeois system is also expressed in a change of views for the purposes of punishment. Something more. In an effort to completely deny the understanding of bourgeois criminal law of punishment as retribution and revenge, the concept of "punishment" was replaced by a new concept - "social protection measures". The objectives of these measures are the prevention of the commission of crimes, the deprivation of the socially dangerous elements of the opportunity to commit new crimes and the corrective-labor impact on the convicted persons. Thus, in the criminal law of Soviet Russia at that time, the utilitarian understanding of punishment was fully expressed.

At the same time - the beginning and the first decades of the 20th century, in the USA the activity of Ku-Klux-klan became more visible - after 1915. These were the years of the Dry Regime (1920 - 1933) and the collapse of Wall Street occurred in 1929, which marked the beginning of the Great Depression, the greatest economic crisis of the 20th century.

During this period, the foundations of a criminal justice system were laid in America, in which the ideas of the utilitarian theory of punishment were brought to the fore, as well as the theses of the positivist criminal law school. Here, too, the understandings of punishment as a retribution inherent in classical school and retributive theory are denied. Punishment is not seen as a means of retribution, but for the correction of the offender, with an emphasis on the threat he poses to society. This utilitarian view of punishment and its aims is based on two conditions - to correct the criminal and to predict his future criminal activity. Both have to do with the fairly wide discretion of American judges.

Thus, in both Russia and the United States, at about the same time, albeit for different reasons, utilitarian views of punishment changed the positive criminal law of these countries and set the direction for its development over a relatively long period.

In Russia, the perception in Soviet positive criminal law of the inherent utilitarian understanding of punishment, according to which its aim is prevention - by deterring and warning and intimidating the criminals, creates in practice the legal basis for the subsequent repression and suffering of hundreds of thousands of people.

At the same time, the United States is idealizing another, also inherent in utilitarian theory, understanding of punishment as a means of correcting the offenders. However, its introduction into the American criminal justice system also leads to repression, in this case due to its inefficiency and the opportunities it creates for the imposition of unjust punishments.

More importantly, however, the negative consequences that these utilitarian views lead to in practice help to revive retributive understandings of punishment. Their most significant features are analyzed in the **second section**. Unlike utilitarian theory, retributive theory focuses on the past. It is based on the thesis that punishment aims at retribution, in other words to punish the criminal, to make him suffer, to pay for what he has done. Punishment is imposed because the criminal deserves this suffering, precisely because of the evil he has committed.

In this case, it does not matter whether the punishment will achieve something else as a consequence - e.g. prevention or correction of the offender. Various retributive views on punishment are also considered.

Examples have been used to examine how these retributive views influenced the development of the American criminal justice system in the second half of the 20th century. At that time, the crime in the United States increases sharply. That is why the fight against crime is becoming a major political issue. Changes are being made to the judicial system, which put emphasis on deterrence and retribution as the purpose of punishment. The scope of the mandatory minimum penalties is being extended. The so-called Truth-in-Sentencing Laws, which require recidivists who have committed violent crimes to serve at least 85% of the sentence they have been sentenced to. With great public support are met and the so-called The Three Strikes Laws, which generally provide for a person convicted of two serious crimes to be sentenced to imprisonment for a certain period of time, usually a minimum of 25 years, or life imprisonment, after committing a third without the right to early release. However, such a rigid crime policy, based on the retributive view of punishment, has led to a dramatic increase in the number of prisoners in US prisons and to the US leadership in this world ranking, to the intensification of racial differences in the country and to injustice in punishment.

The **third section** is devoted to the mixed theories of punishment, which try to "reconcile" the two classical views on punishment - the utilitarian and the retributive ones. The possible solution of this, at first glance, impossible task is expressed in the division of the question of the purpose of punishment into two different questions: 1) what are the purposes of punishment as an institution in general, i.e., why do we punish for a crime, and not e.g. we forgive and 2) what are the purposes of the specific punishment, i.e., why we punish the specific offender for his crime. Thus, the answer to the first question is offered by utilitarian theories and to the second question by retributive theories or vice versa. The different mixed views on punishment are examined as well as their impact in the United States and Germany.

The classical theories of punishment discussed in the first chapter provide a good basis on which to consider the question of punishment - in view of its goals and principles, in Bulgarian criminal law. This matter is studied in **Chapter 2**. The normative framework is analyzed in separate sections, as well as the theoretical views on the purposes and principles of punishment, and especially

those on the personal nature of punishment (only those who have committed a crime are punished) and on the proportionality of crime and punishment. The relevant provisions of both the various constitutions and the criminal laws have been discussed. The understandings of our doctrine before and after 1989 are fully explored with regard to the question of the general purpose of punishment as a legal institution, i.e., why there is punishment at all. The theoretical views on the immediate aims of punishment imposed by the court - those that have been enshrined in our criminal laws - are also analyzed in depth. They are examined together with the two principles of punishment mentioned above.

Based on this, the theoretical and normative model of the purposes of punishment, adopted in Bulgarian criminal law from the point of view of the classical theories of punishment, is derived. Over the years in our country, despite the profound social changes that occurred in the second half of the 20th century, the utilitarian conception of punishment is adopted, as far as the so-called general purpose of the penalty. That is, what justifies its existence in general is prevention - limiting crime and protecting society from criminal encroachments on its interests.

As for the immediate purposes of the punishment, retribution, understood as the reception of the punishment deserved by the offender, has never been explicitly mentioned among them. They have always, including now, been entirely utilitarian in nature - re-education and correction of the criminal, deprivation of his ability to commit other crimes and prevention - special and general. At the same time, however, retribution - as deserts for the crime committed, is not denied in our theory, but finds a place in the law implicitly, through the traditional principles of punishment for our criminal law, inherent in the retributive theory. In other words, the achievement of utilitarian purposes, which, however, is possible only in compliance with retributive principles. Moreover, the principle of proportionality of crime and punishment is perceived in our theory as applicable at both levels - by the legislator, in determining in law the penalties corresponding to the gravity of crimes, and by the court - in determining the specific punishment for the crime committed.

By its nature, this is a mixed theoretical model of punishment, in which both the general and the immediate purposes it pursues are utilitarian, but the framework within which it is possible to achieve them is retributive. This understanding for the aims of punishment in theory is reflected at the normative level - especially in the aims explicitly established in Art. 36 of the Criminal Code

and in the principles regarding the punishment, provided in Art. 35, para. 1-3 thereof.

The **third chapter** examines the extent to which the legislative proposals and the adopted changes in the Criminal Code, especially in the last 15-20 years, are in line with this theoretical and normative model of the purposes of punishment. An in-depth critical analysis of individual changes in the Criminal Code, as well as legislative proposals for such, has been made in a separate section. These are the changes in the criminal law regarding the kidnapping from 2010, the drugs crime from 2004-2006, as well as the legislative proposals for amendments to the criminal regime of minors from January 2020 and to the sanctions regime for serious transport offenses of April 2020.

These examples reveal a worrying trend not only due to the fact that, with few exceptions, they are aimed at intensifying criminal repression. The problem is that they create contradiction and internal tension in the normative basis on which the theoretical model of punishment in Bulgaria is built. Such changes too often violate the principle of proportionality of crime and punishment, establishing punishments that do not take into account the public danger of the respective act, i.e., go beyond the retributive framework outlined by this principle. Many of them also affect the utilitarian nature of this model, embodied in the fully utilitarian purposes of punishment, enshrined in Art. 36 of the Criminal Code.

A separate section examines the extent to which such changes, providing for the intensification of criminal repression primarily by increasing the sanctions in the special part of the Criminal Code, lead to the imposition of these sanctions in reality.

The thesis is that such legislative changes, motivated mostly by the argument "this is what people want", make vulnerable to penal populism the Bulgarian theoretical and normative model of the purposes of punishment. The penal populism is gaining more and more supporters in our country, and not only because it is quite convenient for politicians, because it equips them with a tool to easily win votes, but also gives the impression that they have found a solution to a problem. It also sounds tempting to people because it gives them what they want to hear. But at the same time, it is extremely dangerous for our criminal justice system because it calls into question its credibility, and thus its legitimacy, its ability to do justice in punishing crimes.

In this regard, the features of populism are discussed, in particular the penal populism as a threat to our theoretical and normative model of the purposes of punishment. The results of two public opinion polls on the punishment of crimes were also analyzed. One was conducted in Bulgaria in 1983-1984, and the results were published in 1987. It was conducted jointly by the Unified Center for State and Law Sciences of the Bulgarian Academy of Sciences and the Council for Criminological Research at the General Prosecutor's Office, in two districts - Sofia-city and Mihaylovgradski (now Montana). The survey reveals a coincidence between public opinion and that of the legislator regarding the purposes of punishment. The second survey of public attitudes was conducted between 2009 and 2012 in five Scandinavian countries - Denmark, Norway, Sweden, Iceland and Finland, under the guidance of academics in these countries. Its aim is to study the public sense of justice in Scandinavia, to answer the question of whether Scandinavians really want harsher punishments than those imposed by the courts. According to the summarized results of it, with the provision of more knowledge and information about the specific case and more proximity to the persons affected in it, the society becomes less and less criminal.

The **conclusion** returns to the two classical theories of the purposes of punishment - the retributive and the utilitarian ones. An example illustrates the significance of the question "Why do we punish?" and to what extent the direction in which a society can develop depends on its answer.

Manolova, Miroslava (2019). The retributive theory of punishment or why do we punish. In: Scholarly Readings: The Sanctions in Law. Sofia, University Press "St. Kliment Ohridski", 368-376

The article discusses the retributive understanding of punishment in terms of its purposes - as a retribution for the crime committed by the offender. Few examples from the last decades of the 20th century in USA reveal how this theoretical view of punishment has influenced the development of the American criminal justice system and what are the consequences of that.

Manolova, Miroslava (2018). On just punishment and Aristotle - In: Criminal justice - traditions and perspectives. Sofia, University Press "St. Kliment Ohridski", 346-354

The paper discusses the principle of proportionality of crime and punishment as a means towards just punishment. It has examined the Aristotle's views on justice in its meaning as equality and its two forms - the distributive and

the corrective ones in order to explain this principle as a basic requirement of fairness.

Manolova, Miroslava (2018). Populism and the Bulgarian Criminal Code - In: Contemporary challenges to criminal legislation. Sofia, University Press “St. Kliment Ohridski”, 266-274

The article discusses the penal populism in the light of the more general notion of populism. It examines one of the essential characteristics of populism, namely the confrontation and the social division, and the consequences to which it leads to criminal law. Two examples are used to reveal the threat posed by penal populism.

Manolova, Miroslava (2017). On the proportionality of crime and punishment. A principle vs expectations - In: Scholarly Readings in memory of Venelin Ganev and Nikola Dolapchiev. Sofia, University Press “St. Kliment Ohridski”, 284-291

The article is devoted to one of the essential principle of criminal law. The proportionality of crime and punishment is discussed from three perspectives: criminal legislation, judicial practice and public sense of justice. The increasing overcriminalization as a mean of satisfying the public expectations for justice calls into question the proportionality rule. But does the society really want harsher penalties and more repression?

Manolova, Miroslava (2017). Three theories of punishment and one principle - In: Scholarly Readings: Legal Norms and Legal Principles. Sofia, University Press “St. Kliment Ohridski”, 315-322

The paper discusses the basic views of punishment. It examines their differences in the light of the principle of proportionality. The three crucial questions when it comes to criminal policy are set out, namely why do we punish, who should be punished and how much.

Manolova, Miroslava (2016). On principles of legality and proportionality of crimes and penalties – more than a century after the first Bulgarian Criminal Law Act - In: Criminal legislation - traditions and perspectives. Sofia, University Press “St. Kliment Ohridski”, 159-169

The article explores the principles of legality and proportionality of crimes and penalties. These are basic rules underpin the criminal law. It is the task of the

article to examine whether some of the law amendments relating to kidnapping and drug crimes have moved away from these principles. The article aims to provide a discussion of the nature of criminal law as a criminal policy instrument.