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Thoughts about the Definition of Ius Puniendi in Legal Theory

Abstract

In my paper I deal with the jurisprudential interpretation of *ius puniendi* by providing a historical overview of theories concerning this notion in a time span of almost 6000 years until it became a state monopoly and the humanization of criminal law. The interpretation of *ius puniendi* as the legal ground of punishment is based on different principles in different ages. The jurisprudential interpretation becomes less relevant with the birth of the legal state, when *ius puniendi* is a state monopoly. Nowadays the meaning of *ius puniendi* has been modified and broadened with new, different elements, since the principle of opportunity plays a more decisive role in the criminal law systems of modern states. In my study I interpret and examine *ius puniendi* unlike the classical authors of criminal law, i.e. a notion referring to the legal ground of punishment, but in its original meaning, i.e. the right of punishment, because of its modern function. With my work my aim is to answer the question whether the dogmatically elaborated category of *ius puniendi* has to be incorporated into the substantive and procedural jurisprudence of the 21st century.

Keywords: *ius puniendi*, interpretation of the right of punishment, interpretation of *ius puniendi* in a legal state

Introduction

The history of criminal law has been intertwined with the history of philosophy and especially the theory of punishment has been greatly influenced by philosophy (Irk, 1915, 71.). According to conclusion of András Szabó the most important elements of criminal law are sanctioning, and punishment (Szabó, 1989, 172.). Hungarian criminal law science unanimously agrees on the principle that the *genus proximum* of punishment is sanctioning (Blaskó, 2016, 434.). In the

course of history those philosophers of law who examined the legal ground of punishment – earlier philosophers, later legal experts – tried to find the answer to the question; who, – especially the state (or the ruler) – on what basis and according to what law has legitimacy, i.e. where his right to sentence perpetrators is derived from, with special regard to the fact that the right of punishment is considered the natural conditions of the power by the representatives of legal science and its other fields. *The one who punishes has to be legitimized to punish properly.*’ (Grotius, 1999, 21.)

The origins of ius puniendi and the birth of punitive power

The punitive power of states was formed in the course of history. In prehistoric societies, in tribal communities, individual people took revenge of any injuries, the perpetrator and the injured party stood face to face with each other. The origins of the institution of punishment were the primitive forms of compulsion – personal revenge and vendetta (Horváth, 1981, 15.). The community intervened on behalf of the injured party for amends and compensation only in a later phase. After the dissolution of tribal communities, the institute of talio (ius taliones), which is the right of equal retaliation, the principle of ‘eye for an eye’, became universal in classical slave states. The institute of redemption (compositio) evolved in classical slave states and became universal in the early Middle Ages. The principle of redemption laid the constitutional foundations of criminal law as it made possible for the perpetrator to compensate financially the injured party or the community in order to avoid being revenged: the injured party did not take revenge for the sake of ransom or blood money, some of which and later the whole amount was due to the tribal leader, the prince or the king. *‘Redemption evolved gradually and existed parallel with vendetta and talio and later it became less widespread and finally as the claim of punishment of states were stronger – when both the perpetrator and the injured party were obliged to accept the offered peaceful settlement of disputes as courts could help and really did help those seeking remedy - it transformed, became exceptional or was used only in private law in the majority of states.’* (Blaskó, 2011, 52.). Talio and composition are forms of punishment but reflect the old concept according to which it is primarily the injured party that has to be remedied, which was provided by the state only as a last resort (Horváth, 1981, 15.). The legal ground of punishment was the retaliation of detriment and injury, which was authorized by the judgement of the society. The institute of vendetta, talio

and composition became less general as the executive power strengthened and sentencing and execution of punishment became gradually the duty of the state with relapses and sometimes decline (Blaskó, 2016, 24.). In the era of feudal absolutism, the unlimited power of rulers resulted in a more or less arbitrary practice of punitive power. Since the High Middle Ages criminal law has become more and more constitutional. Since the beginning of Modern Age states have practiced the right of punishment over perpetrators. The obligation of the enforcement of the punitive power of states was and is based on legality during criminal procedures, which means an obligation for law enforcement authorities, primarily for public prosecutors and the Prosecutor's Office to enforce claims and apply the statute of criminal procedure (Nagy, 2012, 26-27.).

A historical overview of theories concerning ius puniendi

The right of punishment in the Middle Ages

A new era started when states began to exercise their punitive power directly. *'In this way self-defence transformed into the defence of the society, revenge into retaliation, and punishment into repression of anti-social activities.'* (Friedman, 1912, 158.). In the Middle Ages theories concerning the legal grounds of punishment could be found in the works of philosophers and theologians. The punitive power of states (rulers) i.e. their right for punishment was derived from God according to canon law and theology (Blaskó, 2016, 418.). According to Saint Thomas Aquinas (1225-1274) crime is an offence against the earthly order created by God and punishment is the manifestation of divine justice on the earth (Heller, 1924, 14-15.).

The right of punishment according to natural law

Philosophers of natural law – Hugo Grotius (1583-1645) in the Netherlands, John Locke (1632-1704) and Thomas Hobbes (1588-1679) in England, Charles-Louis Montesquieu (1689-1755) and Jean- Jacques Rousseau (1712-1778) in France – examined primarily the legal ground of the punitive power of states. Natural law philosophers of the Modern Age derived the inalienable and permanent rights of man from eternal nature. According to natural law theories the legal ground of punishment is the connection between criminals and the state and, as consequence, theories connected to God became less relevant. Punishment is considered necessary and useful by them. The punitive power of states is based

on justice as a superhuman law and usefulness by them and punishment is considered just by them if it is lawful regarding the individual. According to natural law theories the essence of punishment is retaliation. Different political and legal systems are derived from human nature by Grotius, Locke and Hobbes, from the human mind by Immanuel Kant (1724-1804) and from necessity by Georg Wilhelm Friedrich Hegel (1770-1831) (Horváth, 1981, 38-39.). As Grotius wrote, the legality of punishment is based on human nature (Grotius, 1999, 22.). As people convey all rights to the state for the sake of practicability, the right of punishment devolves on states themselves. Natural law did not define who has to be punished and how by the state, it only stated that crime has to be punished. The rebirth of criminal law is connected with Italy and France, as they did not accept the cruel punishment of their age and struggled for the reform of criminal law based on humanitarian ideas. The forerunners of the reform were philosophers (e.g. Locke, Montesquieu). This time the most important question was not the legal ground of punishment but the practicable and just limits of it (Blaskó, 2016, 419.). As states became consolidated and established institutes in the Age of Enlightenment, the social contract based on natural law defined the legal ground of punishment, i.e. citizens entered into a contract with the state for the sake of their safety. Those who breach the contract were punished by the state based on the conveyed rights (Tóth, 2012, 371.). According to Locke individuals transfer the right of punishment to the state (Locke, 1964, 173-174.). Montesquieu also defined the right of punishment as a voluntarily transferred right (Montesquieu, 2000. 48.). Montesquieu basically agreed with the views of Grotius and Locke, he emphasized the proportionality between crime and punishment and opposed cruel punishment (Horváth, 1981, 4.). Rousseau – similarly to Montesquieu - regard social contract as the legal ground of punishment and derived the justice of punishment from the idea of state treaty, in as much as its goal is to guarantee the survivor of individuals (Horváth, 1980, 45.). Karl Anton von Martini (1726-1800) was a representative of the natural law school, whose ideas represented the general law philosophy of the era of enlightened absolutism. According to his opinion the contract of the ruler is decisive, which implies unconditional subordination of the people under the ruler (Szabó, 1980, 44-48.). *Ius puniendi* is the right of the ruler that provides legal base for him to impose sentences in case of activities contradictory to the aim of the state, public law and order and the security of individuals (Martini, 1795, 47.). These ideas became comprehensive at the end of the 18th century when Cesare Beccaria (1738-1794) laid the foundations for the reforms of criminal law. *'Only law can impose a sentence for a crime, and this power is the legal due of the legislative, who represents a whole society based on a contract. [...]*

The ruler represents the society itself [...]' (Beccaria, 1989, 20-23.) By referring to written law Beccaria did not consider the foundation of the punitive power of a state that the perpetrator voluntarily submits himself to punishment (with respect to the social contract). He did not deal with the legal base of the punitive power of a state but examined the appropriate and just limits of punishment. In Beccaria's theory the cardinal principles of criminal law can be detected, i.e. *nullum crimen sine lege*, *nulla poena sine lege* and equality before the law (Blaskó, 2016, 419.). Kant deduces the punitive power of a state from the absolute and unconditional unity of pure mind, which is a right due to the ruler over its subordinates. He emphasizes that the foundation of punishment can be exclusively retaliation, since violating the set of values of a society must meet violence (Horváth, 1981, 52-53.). Hegel derives *ius puniendi* from logical necessity. According to his views, perpetrators act according to their own absolute will when committing crime, which activity is unreasonable and occasional, while imposing a sentence is reasonable and inevitable (Horváth, 1981, 52-53.).

The legal foundations of punishment in utilitarian criminal law

Jeremy Bentham (1748-1832) is a representative of utilitarian law philosophy while the philosophy of Johann Anselm Feuerbach (1775-1833) is related to the theory of psychological constraint. Bentham denies the theory of natural law and refuses the theory of social contract but accepts that states need the right of punishment. According to his views, without the punitive power of states no public or private authority can exist (Bentham, 1842, 111-257.). According to Feuerbach necessity is the foundation of punishment. In order to avoid breaches of law states need the right to threaten with punishment and legally demand from citizens not to commit crimes. Criminal activities must be inevitably followed by punishment (Feuerbach, 1799, 1-73.).

Conclusions referring to the legal foundations of punishment in theories based on the necessity of punishment

In the 19th century Faustin Hélie (1799-1884) and Adolphe Chauveau (1802-1868) defined the legal ground of punishment in its indispensability, since states need punishment in order to survive. Punishment is justified by the society and the law of survival (Chauveau & Hélie, 1837, 15.). In his theory of punishment Francesco Carrara (1805-1888) combined the theories of natural law and the principles of objective idealism (Carrara, 1878/1879). Social power has the right to do everything in order to protect law. It is the foundation of its

right to use physical pressure to prevent crime. The necessity of the protection of human rights is the limit of punishment, as states have to protect the right of not only the injured party but also that of the perpetrator (Horváth, 1981, 80.).

The foundations of punishment in the penal theory of the late 19th century

In criminal law theories at the late 19th century – due to anthropological and sociological trends – the perpetrator, the criminal individual became the focus of studies instead of the criminal act itself, since the scientific theories of classical criminal law did not meet the requirements of societies struggling with increasing crime. In penal theories the legal grounds of punishment were considered the most important issues until this period, and studies dealing with the aim of punishment were of secondary importance. At the end of the 19th century priorities changed, and penal theories were mainly concerned with the purpose of the punishment since punishment were logically justified by its usefulness thus the legal ground of punishment became less important (Horváth 1981, 82.). According to Rudolf von Jhering (1818-1892), the first protagonist of purpose-theory, states have right only to punish if they are unable to reach their goals without it (Jhering, 1877, 480-481.). Franz von Liszt (1851-1919) – the founder of mediatory school – accepted and developed Jhering’s theories. According to him punishment cannot be anything but purposeful, thus the legality of punishment is its purposefulness since the aim of the law is to protect human values (Liszt, 1882/1883, 53-54.).

Hungarian theories concerning the legal foundations of punishment in the 18th and 19th and early 20th century

In Hungarian criminal law science, the theoretical classification of philosophical-ethical, social, political and legal approaches concerning punishment began in the 18th century but became more dominant in the first half of the 19th century. The legal-political generation of the 19th century - breaking up with the theories of university science - looked for the answers to the problems of punitive system following West European patterns. The main target of contemporary punitive theories was the establishment of the punitive system of civic state. Its philosophical ground was Bentham’s civic society, utilitarianism and liberalism. Their approach to the theoretical, judicial and judicatural problems concerning punishment and punitive system was realistic (Horváth, 1981, 177.). According to Mihály Szibenliszt (1783-1834) states have a legal due to punitive judicial power and *ius puniendi* for the sake of their security (Szibenliszt,

1821, 115.). According to Bertalan Szemere (1812-1869) the legal ground of punishment is *'the committed crime [...] and safeguarding freedom and peace, together'*. (Szemere, 1841, 46.). As a matter of fact, it is the committed crime and safeguarding legal order, and according to his opinion punishment cannot exist without crime. Tivadar Pauler (1816-1886) developed the punitive theories of the Reform Age and forms a link to the concept of the Codex Csemegi. He believes that the foundations of punishment are the idea of justice and, as a consequence, only offenders can be punished. The principle of justice according to the requirements of the due process of law defines the limits of punitive power (Pauler, 1872, 36-61.). Later punitive theories focussed on criminal political ideas overshadowing the problem of legal ground since the justification of punishment is logically supported by its expediency and necessity. According to the punitive theory of Rusztem Vámbéry (1872-1948) punishment is justified because it is applied by the state and there is no need for extra legal grounds. The notion of state and its relationship to its citizens are the legal grounds themselves, *'since a state that renounces its right of punishment and does not fulfil its punitive obligations ceases to exist as a state'*. (Vámbéry, 1913, 39.). As Ferencz Finkey (1870-1949) wrote *'Punishment is always constitutional. It is always the state that is authorized to exercise punishment and the state can have it exercised by unique organizations, i.e. criminal courts. The individual authorized to punish is the state [...]'* (Finkey, 1902, 331.). According to Pál Angyal (1873-1949) *ius puniendi* is an equal definition to the subjective notion of criminal law, that is the power of states limited, insured and regulated by law, which is used against criminal activities in presence of defined conditions by applying codified measures, through appropriate institutions following the defined methods (Angyal, 1920, 1.).

The birth of modern states and the role of constitutional state in defining *ius puniendi*

With the birth of modern states and the strengthening of authorities exercising the state power, *ius puniendi* became a state monopoly. In modern states there was no need to explain the punitive rights of states with a contractual relationship. According to statist theories, which accepted the absolute role of states, the punitive right of states derives from the paramount nature of states and to exercise this right in order to avoid anarchy is an obligation. In the next phase of development the usefulness of right punishment – becoming apparent in its practical feasibility and successfulness – is emphasised by pragmatist theories

and the legitimacy of the right of punishment became a mere legal philosophical problem of less importance (Tóth, 2012, 372.).

'Ius puniendi is the constitutionally defined, regulated and ensured punitive power of states.' (Blaskó, 2019, 17.). The Constitutional Court declared that *'in a democratic constitutional state punitive power is – constitutionally limited – executive authorization of states in order to call perpetrators to account. In this criminal law system criminal offences are defined as the breach of laws of the society and the right of punishment is a legal due of the state.'* (40/1993. (VI.30.) CC Resolution) Nowadays it is unanimously accepted that the punitive power of states is based on the actual power of states. *'In constitutional states the state does not have and cannot have unlimited punitive power, especially because executive power itself is not unlimited. Because of constitutional fundamental rights and constitutionally protected liberties, executive power is entitled to interfere in the rights and liberties of the individual only on the basis of constitutional authorization and constitutional grounds.'* (11/1992. (III.5.) CC Resolution).

The exercise of punitive power in a constitutional state is always limited and regulated by criminal law policy and punitive judicature policy thus determining the content of *ius puniendi*. For example, the codification guidelines resulting from the above-mentioned policies – effectiveness, promptness, simplicity, modernity, coherence and expediency – are typical of the resolutions of Act XC (Be.) of 2017 effective from 1st July 2018. In the 21st century the functional role of *ius puniendi* changed especially within the framework of the guarantees and requirements of a constitutional state. A reasonable transformation of the punitive power of the state and rethinking of its content are under way by realizing concessions and reaching compromises in constitutional states. Punitive power is exercised by constitutional states according to constitutional principles by enforcing the principle of opportunity. Based on legal political concerns – usefulness and expediency – the law may restrict the obligation of legality in a way that legislative power grants exemption from the fulfilment of obligation under certain conditions. Thus, states waive the enforcement of penal claim in public prosecution cases. Constitutional states more often decide that perpetrators may have the opportunity to be totally or partially exempted from the legal consequences of committing crime – even by disregarding punishment - based on the conditions codified by the legislative power in legal resolutions. The exemptions from the exercise of punitive power of states are primarily based on the discretionary authority of the public prosecutor authorized by the legislative.

The new resolutions of criminal procedures – such as the abandonment of independent indictment, the possibility of promising measures or resolutions in

case of confession, the agreement, and rethinking earlier introduced legal institutions (intermediary procedure and widening the scope of suspension by the public prosecutor) – follow the actual trend, that is the principle of opportunity gains more ground as the tasks of the public prosecutor increase. With respect to the above mentioned facts and with regard to *ius puniendi* the limits of the punitive power of states are examined with special respect to punitive claims, i.e. whether states are obliged to enforce their punitive claims in every case and the relationship between *ius puniendi* and *obligatio puniendi*. Can a constitutional state disclaim its punitive claim, its enforcement, does it have the right to do so, or is it disclaim at all? Furthermore, how do states punish, and under what conditions can be and should be legislative, judicature entitlement and punitive power, which embody *ius puniendi*, limited?

Closing remarks

I believe that *ius puniendi* is a right that is and has to be exercised based on the supra society nature of states, which is closely attached to *obligatio puniendi*, the obligatory fulfilment of functions. *Ius puniendi* – similar to the punitive power of constitutional states – is not absolute, but it fulfils its purpose according to constitutional requirements. The relevant conclusions concerning the fulfilment of the constitutional content of *ius puniendi* through constitutional requirements have to be drawn in accordance with the considerations of usefulness determined by legal policy. Exercising penal power and fulfilling penal claims are not only the right but the obligation of states as well. According to my view *obligatio puniendi* is a closely related key issue to the fulfilment of *ius puniendi*. It is an obligation of any state to maintain the basic set of values and contribute to the maintenance of social integration by criminalizing and sanctioning acts dangerous to society. By fulfilling these obligations states defend their citizens. As a result, criminal law has a value defending function by enforcing *obligatio puniendi* thus influencing the fulfilment of *ius puniendi*. The constitutional fulfilment of *ius puniendi* manifests itself by legislation in a way that a constitutional state decriminalizes, and the Constitutional Court annuls prohibitions or orders codified in criminal law, or provisions codified in the law of criminal procedure as unconstitutional. This fulfilment manifests itself in judicature in the struggle between legality-opportunity, the construction of officiality and private motion, and the epistemological relations of suspicion and certainty, and the legal conditions of accusation. According to my view a constitutional state does not renounce its legal right to punitive claim. But it

reaches its goal with other measures, as I have mentioned in a constitutional state the reasonable reassessment of the punitive right, rethinking of its content is under way by certain well-considered compromises and by emphasizing the principle of opportunity. As a result, the constitutionally restricted punitive power fulfils its purpose with its new institutions and by well-considered compromises. I firmly believe that an actual, valid, dogmatically well elaborated constitutional category of *ius puniendi* has to be part of the theory of criminal substantive and procedural law, because *'the quality of the performance of judicature and legislation depends on the solutions of dogmatic.'* (Farkas, 2002, 62.).

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