

**THE PHILOSOPHY OF THE SOCIETY RIGHTS IN THE
APPLICATION OF PENALTIES IN IMPLEMENTING
THE CRIMINAL LAW**

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Abstract: *"Responsibility" means, on one hand, responsibility for your acts and actions, and, on the other hand, liability for the consequences of your acts and deeds. Our approach starts from the second point, where there is a moral, ethical, deontological, legal, material liability, etc. Legal liability intervenes where the law provides or jurisprudence establishes. It is natural to resume the notion of responsibility to legal liability and this shall be based only on law or jurisprudence. Everything lies in the extent of liability, meaning, will we be the followers of the Law of Talion, or the measure must be a reflection of a necessary social and human balance? In criminal law is called punishment, in administrative-contraventional law, sanction. Who gives society the right to apply the rules of deprivation of liberty for the acts and deeds of an individual? In this context, Montesquieu states that "any punishment that does not derive from an absolute necessity is tyrannical." By means of this study, the authors ask the questions and try to answer to the proposed theme.*

Keywords: *punishment; liability; responsibility; rules; society; deprivation of liberty.*
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1. INTRODUCTION

We do not know, we do not understand or maybe we didn't think if there is an assumed right of the society to punish? Or for what would you punish? How far can this right of punishment go? If at the beginning of mankind the chief of the tribe, the king of the polis, the voyvode was considered the "anointing" of God, and divinity gave him the right to punish in his name (?), what he did after the appearance of the written Constitution of America 1787, of the fundamental freedoms 1789, 1792, 1793, when the human rights and freedoms were plenary, the punishment, the divine sin remained to be maintained in the social existence. But do you ask yourself what is the illicit act that gives birth to the right of society or even the obligation to apply it? "Every moment of our life is, in fact, driven by a system of values." (Simone, 1941) Law is a rational matter, or it

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should be, which adapts almost mechanically to the conditions of social, economic, political environment.

In the context of some questions that are often unanswered, you are not clear if it is useful or harmful for a nation to be given this freedom to choose permanently? (Cesare, *Dei delitti e delle pene*, 2007) Hegel said that "*freedom is the need to understand...*" How far does this freedom go, how should this need be explained? Every act of man implies responsibility.

"Responsibility" means, on one hand, responsibility for your acts and deeds, and, on the other hand, to answer for the consequences of your acts and deeds. Liability, as this is the subject of our approach, intervenes where the law provides and the case law strengthens ("*nulla poena sine lege*").

But what exactly does the law provide? How should the legislator regulate? And here is the question: are we supposed to be the followers of the Talion Law, or does the measure of responsibility be a reflection of a necessary rational balance? The criminal law should provide only those "punishments" that "are in full accordance with the moral and legal conscience of society." (L., 2016)

The punitive power, as presented by the French philosopher Michel Foucault, is organized in three dimensions: power as a regulatory role, power to apply the punishment, and power to create the prison institution.¹

2. SHORT HISTORY

In order to fully understand the concept of "punishment," we need to make a few points about its origin. The emergence and evolution of punishment began from the idea of the offender's sacrifice, continuing with the cruelty of corporal punishment in the Middle Ages and culminating in the deprivation of liberty in contemporary society (Igor & Ana, *Evolutia pedepselor ca sanctiuni de drept penal*, 7/2015) (giving up the death penalty may be a sign in reconsideration and settlement on other bases, maybe human, of the punishment institution).

The term "punishment" derives from the Latin "*poena*", which derives from "*pendere*": "Punishment is more than a stock exchange, it is the" currency "to which the crime is paid." (Francesco, 1897) The Roman legislator uses two meanings of the word "punishment," respectively the meaning of "redemption of damages" caused by the illicit deed and the meaning of "atonement." (Igor & Ana, *Evolutia pedepselor ca sanctiuni de drept penal*, 7/2015)

Considered to be one of the oldest antiquity laws, *Hammurabi's Code*, it is remarked by the complexity and modernity of the time in which it was elaborated. However, it reflects an extremely rigorous system of punishment, most crimes being sanctioned with capital punishment. The Code also provided for certain causes that remove punishment, current, such as the state of necessity: "if someone has been captured and there is nothing left in his house, and his wife enters the house of another, this woman has no blame "(131) and consequently is not punished with drowning, as the wives who, although they do not

¹<https://books.google.ro/books?id=3wEh1zs07hkC&pg=PT88&lpg=PT88&dq=filosofia+pedepsei&source=bl&ots=HhovQGaCbC&sig=rqFCEXL46iRUg-AEF4UPm2Apr6I&hl=ro&sa=X&ved=0ahUKewjr8-I7cjZAhWJ6qQKHboLCJIQ6AEIKzAC#v=onepage&q=filosofia%20pedepsei&f=false>

have any material lack, leave the house of the fallen husband to live with another man (Article 133).² "Similarly, guilt was the basic element in the type of offense, in which sense the code stipulated that" the person who, in a struggle, hitting another hurts her, proving that he did not strike it intentionally ("I did not hit her "), will not be punished, but will be held to pay for medical care (Article 206).

If the injured person dies, the offender will be punished with a half-silver fine when it comes to a free man and only the third part of the mine if the victim was a "minor" person. (Article 207, 208).³

Roman laws, such as the Law of the XII Table, were based on the idea that "the law should have a universal character and be the foundation of legal equality."⁴

The Middle Ages were dominated by cruelty and atrocities of punishment: decapitation was considered an honorable way of execution; hanging⁵ was the most common punishment applied; (Charles, 2005) torture and cruelty were meant to incite terror among citizens. On this daily scaffolding appeared also the industry revolution that, at least apparently, involved changes in the mechanics of the punishment institution.

Later, in the eighteenth century, Cesare Beccaria adopted the concept of humanizing punishment. He considered that if "human punishment is out of divine justice, then its purpose can only be social-utilitarian: to defend the society born from the contract"⁶ (did it refer to the social contract of Jean Jacques Rousseau?).

3. PERSPECTIVES ON THE APPLICATION OF PENALTIES - A NUANCED CRIMINAL LIABILITY

Human behavior has been subject to norms from the beginning. Laws are the conditions that united people in society.

The man is born in a society ... a society that he does not choose, just as he does not choose the rules to which he is compelled to obey. As each individual member is linked to the company, and society, in turn, is linked to each member by a "contract" that is binding on both sides. (Cesare, Dei delitti e delle pene, 2007)

Referring to this context, it is to be noticed that a first problem emerges: the simple fact that you were born without wanting, are you bound to obey those rules?

The nature and extent of liability as outlined above evolved from one society to another according to economic, social and political evolution, reflecting the configuration of that age and in accordance with the characteristics of national civilization.

Montesquieu said that "the sovereign's right to punish offenses is the need to protect the public good from the usurpation of private individuals."

But who gives the right to punish with imprisonment? Or, more simply, who gives the right to punish? In an attempt to answer these questions, the English philosopher John Locke presents some possible answers:⁷

² <https://istoriiregasite.wordpress.com/2012/08/02/codul-lui-hammurabi-infractiuni-si-pedepse/>

³ <https://istoriiregasite.wordpress.com/2012/08/02/codul-lui-hammurabi-infractiuni-si-pedepse/>

⁴ www.hamangiu.ro/upload/cuprins_extras/sactiunile-contraventionale_extras.pdf

⁵ During the reign of Henry VIII of England (1509-1547) more than 65,000 hangings were organized.

⁶ www.hamangiu.ro/upload/cuprins_extras/sactiunile-contraventionale_extras.pdf

⁷ <http://carneades.pomona.edu/2014-Punishment/11.Locke.notes.html>

- the right to maintain social order grants anyone the permission to punish criminals for what Locke calls "the prevention of future crimes;
- victims' rights to claim compensation;
- provide their rights by offenders.

Similarly, Hobbes puts the same question in "*Leviathan*" (Jean-Marie, Manuel d'introduction historique au droit, 2002): how did the state win the right to punish? People are ahead of society. The right to punish is a natural right, which means it is a right owned by people before the state. (Friedrich, 1999) But this could lead to unimaginable consequences ("eye for the eye, tooth for the tooth"), so that people have organized themselves in society and given their freedom and other natural rights to the state in exchange for their protection.⁸ It is understandable that this transfer was not done "willingly", but is a reflection by birth of an "accomplished fact."

It is unanimously recognized that laws, in one form or another, have existed and have always led people. They, the laws, are not an inheritance from ancestors, but from society, as it evolves over time. Laws should not be regarded as obligations, but as a "unspoken oath of the members of a society" (Cesare, *Dei delitti e delle pene*, 2007) so that each person has the right to exercise his rights freely as long as it is not for the purpose of injuring or harming another, contrary to good faith (Article 15 of the new Civil Code).

Therefore, laws are not a form of coercion and do not have an exclusive role to punish, but they guide the human conduct so that each member of a society must not be forced to give up part of its own freedom.

And then, what is the purpose of the punishment? Certainly, the application of a punishment (and here we relate to contemporary society, as history shows us other stages of punishment governed by the Law of the Talion) does not aim at the challenge of suffering to a person ("Le cruel plaisir de punir" (Foucault, 1975), and nor to cancelate an offense already committed, which is not possible. This is why the punishment, in addition to being a coercive measure, also has a role of re-education (as was expressly regulated in Article 52 of the old Criminal Code, the present code has not explicitly preserved this purpose of punishment) in order to protect social values which the criminal law protects them. The punishment must be a balanced result between the analysis of the entire existing evidence material, the judge's intimate conviction (based on evidence) and its purpose. The real purpose of punishments is to prevent new offenses and to force people to commit no such acts by the power of the example. Thus, the application of punishments must respect the principle of proportionality, be "chosen" to affect human behavior, but not to interfere with man's nature (see "aberration area" chemical castration⁹). However, coercion does not automatically lead to the disappearance of crimes, but it has a role of caution, "influencing the human-specific psychic structure: reason, will, sentiment." (George, 8/1981)

In view of the above, the necessary step is to understand the basis of the classification of offenses and the scope of that classification.

⁸ <https://ro.wikipedia.org/wiki/Leviatanul>

⁹ There is a bill that states that "In the case of offenses of sexual assault on minors or following the death of the victim, the perpetrator will be obliged to follow the chemical castration training if he has, through his consent, benefited from the provisions of Article 218 (Crimes against Freedom and sexual integrity) paragraph 4 ind. 1 or Article 220 (Sexual act with a minor) paragraph 4 ind. 1". "The special limits of punishment are halved only if the perpetrator accepts a chemical castration treatment."

The special part of the new Criminal Code regulates a series of offenses, structured according to the object (Pierrette, 2001) and the social values that they protect. It can be noticed that there are crimes that affect the private security of the persons, such as those against life, liberty, , property, etc., as well as crimes that harm society, such as public security, national security, etc. By reference to each type of offense, it can be established that the true measure of punishment is the harm to society, in general and to the individual, in particular. (Cesare, *Dei delitti e delle pene*, 2007) Thus, it is incomparable more serious the affect produced to the live of a person in relation to the affect , produced, for example, to the patrimony, regardless of the amount of the damage caused. Therefore, the difference in the penalty regime as well as the amount of it should be obvious. The Constitutional Court of Romania in Decision no. 405 of June 15, 2016 (paragraph 69)¹⁰ stated: "For the application of the penal sanction, it is necessary that the interference of the protected social values must present a certain degree of intensity, gravity, which justifies it."

Therefore, in the case of violent acts, it is imperative to establish and enforce the sentence by the judge, precisely to prevent the commission of new offenses and to make the perpetrator bear the consequences of his actions. But the penalty in this case also has a general preventive role.

But what penalty would it be for the other offenses, the non-violent ones? Is prison a useful and necessary punishment for the safety and proper functioning of the society? Can the same punishments be useful at all times, especially nowadays for all types of crimes?

The new Criminal Code came into force on the 1st of February 2014, being more severe than the previous one, the one from the Communist period, and we have no explanation in this respect (criminality and arithmetic cumulation, worsening the suspended sentence).

At the same time, it seems that worsening the liability for the economic crimes was wanted at the expense of the more serious offenses against the person. Thus, for example, for an offense against life, the perpetrator may receive a smaller punishment than the one that would have been imposed under the old Criminal Code, or smaller than in the case of committing several corruption or service offenses, in contest . Therefore, we do not consider it to be the most favorable and right solution for the execution of the act of justice or to achieve the purpose of the punishment.

An example that emphasizes this particular case is the one from the Tribunal of Arad where there were 138 material acts qualified as concurrent offences (...) committed in the execution of a common criminal offence, and the court could not remark that there are three offences in a continuous form (each offense being committed by 46 material acts and 46 passive subjects) because the condition of the unit of passive subject is not fulfilled, as it results from the provisions of art. 35 par. (1) of the Criminal Code (continued offense). Therefore, if the court establishes for each offence a penalty of imprisonment equal to the special minimum diminished with one-third, this means setting minimum sentences of imprisonment of 8 months for each offence of fraud, of 4 months for each offence of forgery documents under private signature and 8 months for each offence of forgery. Under these circumstances, the defendant would receive a minimum of

¹⁰ Published in the Official Journal of Romania no. 517 from the 8th of July 2016.

8 months 'imprisonment, plus a 25-year and four-month increase, as well as two years' rest from a previous sentence, to execute 28 years of imprisonment.¹¹

Or not any illicit act of man constitutes the crime of corruption. The widening of the basis of crimes considered to be corruption, for the sake of punishment, is in itself an act committed without responsibility.

On the same note, if we take the case of another offense, such as fraudulent bankruptcy, it can be seen that initially this kind of deeds were regulated in commercial codes. Thus, the simple and fraudulent bankruptcy was laid down in the Commerce Conditions of Wallachia in 1840 and later in the Commercial Code from 1887 (Hotca, 2008). There followed a series of regulations, such as Law no. 31/1990 on commercial companies, Law no. 64/1995 regarding the procedure of reorganization and judicial liquidation, a period of its decriminalization, being criminalized in the Law no. 85/2006 on the insolvency procedure, and finally it was taken over in art. 241 of the new Criminal Code (Cioclei, 2013). As a result, they were not even provided for in the Criminal Code in their previous form. So why punish with prison in these cases?

Looking at the legislation of other states, we observe the case of Slovenia, which does not know the sentence for life. Moreover, only by way of exception, the system in that state provides a 30-year prison sentence in the case of the most serious offenses committed intentionally. Similarly, in the Netherlands, the penalty can not exceed a period of 20 years.¹²

A question remains to be asked: what happens in the event of a judicial error, when it is later found that the convicted person was not guilty? Can compensation be considered fair and sufficient to "erase" the years in which he was deprived of his liberty? Our response can only be a negative one. But without liability there will never be any responsibility in the act of justice.

From this perspective, we appreciate that society at this point must change the philosophy of the institution of punishment. The inheritance of the mentality regarding the punishment must be changed. A new configuration of punishments imposed on non-violent crimes is necessary, since, as currently existing, it can no longer be considered to be fulfilled either by reason or by their purpose. In the case of crimes such as tax fraud, money laundering, fraudulent bankruptcy, etc., imprisonment is neither justified, nor proportionate. The "re-education" of the perpetrator of these types of offenses can be achieved in a much more beneficial manner for both the individual and the society, by the application of penalties with fine or other alternative means of execution of the punishments. The taxpayer is always responsible for the state. Therefore, is it not the recovery of the damage the best way to restore the previous situation?

4. INSTEAD OF CONCLUSIONS ...

The laws and, through them, the punishment, are made by man, so that, like man, they are subjected to error. Many of us believe that punishment is in most cases justified, but in the face of justification we remain uncertain.

¹¹ <https://www.jurisprudenta.com/jurisprudenta/speta-nlcd7ff/>

¹² https://www.avocatnet.ro-UserFiles/acte/20111018234159_226398.pdf

Punishments are created and transformed under the influence of society, the concept of "state" allowing a justification of the "state violence" that is the power to punish. (Poncela, 2001)

A useful punishment is not always and in all cases a prison sentence.

De lege ferenda, we appreciate the need to reconfigure punishments in a more modern, justified and consistent manner with the purpose of punishment: prison sentences for acts of violence and for other offenses, a lucid, rational "sine ira et studio" analysis is required. Is punishment necessary? Under what form?

A lesser punishment is not forgiveness, but wisdom.

REFERENCES

Books and Journals

- George Antoniu, Sancțiunea penală-concept și orientări, publicată în Revista Română de Drept, nr. 8/1981
- Cesare Beccaria, Dei delitti e delle pene, Editura Humanitas, București, 2007
- Jean-Marie Carbasse, Manuel d'introduction historique au droit, Presses Universitaires de France, Paris, 2002, pag. 247
- Igor Ciobanu, Ana Negruța, Evoluția pedepselor ca sancțiuni de drept penal, în Revista Națională de Drept, nr. 7/2015
- Valerian Cioclei, Infrațiunile contra patrimoniului în noul Cod penal-principalele modificări față de reglementarea actuală, publicată în Revista Curierul Judiciar, nr. 7/2013
- Michel Foucault, Surveiller et punir, Editions Gallimard, 1975
- Carrara Francesco, Programa del Corso di diritto Criminale, Ed. Firenze, paragraf 696, Cours nr. 196, 1897
- Mihai Hotca, Bancruta frauduloasă, Editura C.H.Beck, București, 2008
- Friedrich Nietzsche, Voința de putere, Editura Aton, Oradea, 1999
- Charles Panati, Cartea sfârșiturilor, Editura Orizonturi, București, 2005
- I.Pascu ș.a., Drept penal. Partea generală, ed. a IV-a, Ed. Hamangiu, București, 2016
- Pierrette Poncela, Droit de la peine, Presses Universitaires de France, Paris, 2001
- J. Petion de Villeneuve, Discours a la Constituante, Archives parlementaires, XXVI, apud. Michel Foucault, Surveiller et punir, Editions Gallimard, 1975
- Simone Weil, „Quelques reflexion autour de la notion de valeur” (1941), în Oeuvres, op.cit., citat în Alain Supiot „Homo Juridicus”-Eseu despre funcția antropologică a dreptului, Editura Rosetti Educational, 2011, București

Web-sites

<https://books.google.ro/books?id=3wEh1zs07hkC&pg=PT88&lpg=PT88&dq=filosofia+pedepsei&source=bl&ots=HhovQGaCbC&sig=rqFCExL46iRUg-AEF4UPm2Apr6l&hl=ro&sa=X&ved=0ahUKEwjrr8-I7cjZAhWJ6qQKHboLCJlQ6AEIKzAC#v=onepage&q=filosofia%20pedepsei&f=false>

<https://istoriiregasite.wordpress.com/2012/08/02/codul-lui-hammurabi-infractiuni-si-pedepse/>

www.hamangiu.ro/upload/cuprins_extras/sactiunile-contraventionale_extras.pdf

<http://carneades.pomona.edu/2014-Punishment/11.Locke.notes.html>

<https://ro.wikipedia.org/wiki/Leviatanul>

https://www.avocatnet.ro/UserFiles/acte/20111018234159_226398.pdf

<https://www.jurisprudenta.com/jurisprudenta/speta-nlcd7ff/>

