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Nataliia Slotvinska
Lviv Polytechnic National University,
Educational-Scientific Institute of Law,
psychology and innovative education
Associate Professor of the
Department of Criminal Law and Procedure
ORCID: 0000-0002-2756-4557,
nataliia.d.slotvinska@lpnu.ua

THE CONCEPT OF PUNISHMENT

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The question of strict differentiation of responsibility and punishment in the legal literature arose at the turn of the 50–60's. Until 1958, the legislation did not generally consider criminal liability separately from punishment. An article appeared in the Principles of 1958 and the Criminal Code of the Ukrainian SSR in 1960, which provided the grounds for exemption from criminal liability and punishment. This was a confirmation, that the legislator does not equate criminal liability and punishment, but follows the path of distinguishing these concepts. Further development of criminal law led to the fact that in 2001, in the new Criminal Code of Ukraine, the grounds for exemption from criminal liability and the grounds for exemption from punishment and its serving were provided in different sections.

It is necessary to allocate specific signs of punishment, from which the concept of punishment consists: 1) punishment is a measure of state coercion. The concept of punishment as a measure means, that each type of punishment has quantitative limits and a specific meaning, and is a potentially feasible way to influence the convict, strictly regulated by criminal law. No one has the right to go beyond the quantitative and qualitative characteristics of punishment established by law; 2) the state nature of the coercive measure. This means, that punishment can be imposed only on behalf of the state, and is a public law, state assessment of the act as illegal, and the person, who committed this criminal offense, as obliged to serve the sentence; 3) the coercive nature of punishment as a state measure. All participants in the public sphere are obliged to obey the decisions, that have entered into force on punishment, and the state has the right to apply for their implementation appropriate measures of influence, the necessary ways provided by law to ensure the subordination of persons and bodies to such decisions, including necessary measures of physical influence. The coercive nature of punishment also means the convict's obligation to endure deprivation and restrictions related to the application of punishment to him; 4) criminal punishment is imposed for those acts, that are criminal offenses and contain all the elements of a criminal offense and is applied to a particular person. Guilt is one of the hallmarks of a criminal offense. It is clear, that the punishment applies to a person convicted of a criminal offense. Innocent punishment is impossible, and if the court does not establish the guilt of a particular person in the committing of a specific criminal offense, then such a person can not be subject to coercive measures, punishment; 5) punishment is imposed only by a court sentence and on behalf of the

state; 6) punishment, in contrast to other coercive measures, causes a special legal consequence – a criminal record, that can be removed or revoked under certain conditions specified in the criminal law (Article 88 of the Criminal Code of Ukraine). The criminal record distinguishes criminal punishment from other means of state coercion; 7) punishment in its content is a chastisement. Although, the very term "chastisement" is absent in the definition of punishment given in the Criminal Code. The punitive nature of punishment is provided in the restriction of the rights and freedoms of a person found guilty of committing a criminal offense. Chastisement is an integral part of any criminal punishment. It is determined by the terms of punishment, the presence of physical and moral suffering and deprivation, various restrictions. In some punishments it is more pronounced, for example, like life imprisonment, imprisonment, in others – restrictions on other rights prevail; engage in professional activities, having titles, awards, etc. In every punishment, of course, there is moral suffering – shame, shame before society and their immediate surroundings.

Key words: punishment; offense; criminal law; criminal law; freedom.

Problem statement. The question of strict differentiation of responsibility and punishment in the legal literature arose at the turn of the 50–60's. Until 1958, the legislation did not generally consider criminal liability separately from punishment. An article appeared in the Principles of 1958 and the Criminal Code of the Ukrainian SSR in 1960, which provided the grounds for exemption from criminal liability and punishment. This was a confirmation, that the legislator does not equate criminal liability and punishment, but follows the path of distinguishing these concepts. Further development of criminal law led to the fact that in 2001, in the new Criminal Code of Ukraine, the grounds for exemption from criminal liability and the grounds for exemption from punishment and its serving were provided in different sections.

There is no legal definition of criminal liability, so there are many points of view in the legal literature on issues related to criminal liability.

Analysis of publications that started solving this problem. Research of the criminal punishment has been carried out by many researchers, for example. V. Makarenko, M. Bazhanov, V. Bachynin, V. Shakun and others.

The article's objective is to study concept of criminal punishment in the theory and practice of criminal law of Ukraine.

Basic content. It is quite common to believe, that criminal liability, acting as a kind of social responsibility, is a dialectical combination of two aspects - negative (retrospective) and positive (prospective).

Regarding the definition of negative (retrospective) criminal liability, there are the following points of view: 1) criminal liability is identified with punishment; 2) criminal liability is defined as a conviction, conviction of a person for a criminal offense; 3) criminal liability is understood as the obligation of a person, who has committed a criminal offense to succumb to adverse consequences for him; 4) criminal liability is interpreted as the actual suffering of the perpetrator by coercive measures applied to him; 5) criminal liability is in fact identified with a criminal legal relationship or is considered as a set of criminal and other legal relations; 6) criminal liability is considered an object of criminal law and is recognized as a state condemnation and restriction of the legal status of a citizen, to which he is subordinate in connection with the committing a criminal offense [1, p. 32].

Analysis of existing views on the concept of positive criminal liability allows us to identify two main positions:

1) supporters of the first position believe, that positive criminal responsibility is an obligation to comply with criminal law prohibitions, to coordinate their behavior with them. Prohibitions themselves

constitute objective elements of positive responsibility; awareness of them, assessment of the behavior - subjective elements;

2) according to the second position, positive criminal liability is a set of general regulatory relations, where the subjects are the state and all legal entities. It arises from the beginning of activities in connection with the performance of legal obligations. Therefore, the objective element of positive responsibility is not criminal law prohibitions, but the activity itself, the subjective element - knowledge or ignorance of the requirements of the law to the behavior. As a special case of positive criminal liability is a set of criminal relations for the implementation of the rights of citizens to self-defense, detention of the offender, etc. [2, p. 190–196].

The concept of punishment in the form, in which it is set out in the Criminal Code of Ukraine in 2001, did not always exist. Moreover, it is fair to say, that previously in the 1960 Criminal Code there was no clear definition of punishment. The definition of punishment was developed gradually in the theory of criminal law. For the first time, the legislative definition of the concept of punishment was given in Article 50 of the 2001 Criminal Cod [3, p. 27].

It is necessary to allocate specific signs of punishment, from which the concept of punishment consists:

1) punishment is a measure of state coercion. The concept of punishment as a measure means, that each type of punishment has quantitative limits and a specific meaning, and is a potentially feasible way to influence the convict, strictly regulated by criminal law. No one has the right to go beyond the quantitative and qualitative characteristics of punishment established by law. Only within the limits of punishment as a measure the court has the right on the basis of the criminal law, determining the term and mode of punishment, to establish in what quantitative, and in some cases qualitative limits to apply punishment to the concrete person [4, p. 527]. It is illegal to deprive or restrict the rights and freedoms of a convict, not provided for by criminal law and which are not coercive measures;

2) the state nature of the coercive measure. This means, that punishment can be imposed only on behalf of the state, and is a public law, state assessment of the act as illegal, and the person, who committed this criminal offense, as obliged to serve the sentence;

3) the coercive nature of punishment as a state measure. All participants in the public sphere are obliged to obey the decisions, that have entered into force on punishment, and the state has the right to apply for their implementation appropriate measures of influence, the necessary ways provided by law to ensure the subordination of persons and bodies to such decisions, including necessary measures of physical influence. The coercive nature of punishment also means the convict’s obligation to endure deprivation and restrictions related to the application of punishment to him;

4) criminal punishment is imposed for those acts, that are criminal offenses and contain all the elements of a criminal offense and is applied to a particular person. Guilt is one of the hallmarks of a criminal offense. It is clear, that the punishment applies to a person convicted of a criminal offense. Innocent punishment is impossible, and if the court does not establish the guilt of a particular person in the committing of a specific criminal offense, then such a person can not be subject to coercive measures, punishment. This means, that the imposition of a criminal punishment and its execution is possible only in relation to the perpetrator [5, p. 7]. It cannot be directed at other people, even close relatives. Punishment is imposed and applied only to the offender himself and can never be transferred to another person;

5) punishment is imposed only by a court sentence and on behalf of the state. Thus, according to Article 62 of the Constitution of Ukraine, “A person is presumed innocent of committing a criminal offense and may not be subjected to criminal punishment until his guilt is proved in a lawful manner and established by a court conviction”. According to Article 124 of the Constitution of Ukraine, “Justice in Ukraine is administered exclusively by courts”. No other state body can impose on a person such a coercive measure as punishment;

6) punishment, in contrast to other coercive measures, causes a special legal consequence - a criminal record, that can be removed or revoked under certain conditions specified in the criminal law

(Article 88 of the Criminal Code of Ukraine). The criminal record distinguishes criminal punishment from other means of state coercion. In its content, a criminal record is a certain legal status of a convict, associated with various restrictions and other negative consequences during a certain period specified in the law. The criminal record as an independent feature of punishment is determined by the fact, that it is recognized as a circumstance, that aggravates liability in the event of a new criminal offense and retains certain restrictions on the rights of the convict after his departure [6, p. 15]. Consequences of a criminal record can be manifested as: aggravating circumstances, that affect the qualification of a criminal offense; aggravating circumstances when sentencing; circumstances, that exclude or limit the release from criminal liability and punishment;

7) punishment in its content is a chastisement. Although, the very term "chastisement" is absent in the definition of punishment given in the Criminal Code. The punitive nature of punishment is provided in the restriction of the rights and freedoms of a person found guilty of committing a criminal offense. Chastisement is an integral part of any criminal punishment. It is determined by the terms of punishment, the presence of physical and moral suffering and deprivation, various restrictions. In some punishments it is more pronounced, for example, like life imprisonment, imprisonment, in others – restrictions on other rights prevail; engage in professional activities, having titles, awards, etc. In every punishment, of course, there is moral suffering – shame, shame before society and their immediate surroundings.

The purpose of punishment. The goal is not a criminal-legal category, but a philosophical one. In philosophy, the goal means the prediction in the mind of the result to be achieved by action. It is always related to a person's ability to predict the future and the results of their actions. On the one hand, the goal is a model of the future, what still needs to be achieved, the future result of the activity, on the other hand, the already existing image of the desired result. The problem of the purpose of punishment has interested many scholars and philosophers throughout history. Many of their concepts and theories have not led to a clear understanding of this complex problem. However, from these numerous theories, two main groups can be distinguished: a) absolute theories of punishment (theories of retribution); b) relative theories of punishment (theories of achieving a useful goal).

Among the absolute theories of punishment are theological theories, theories of material and dialectical retribution. Representatives of absolute theories did not see in punishment any other meaning, except the only absolute idea – the purpose of retribution for the committed criminal offense. It means, punishment is imposed, because a criminal offense committed as a retribution for it. Theological theories (divine retribution), based on the fact, that a criminal offense is a sin, considered the purpose of the punishment of purification from this sin. Kant developed the theory of material retribution, Hegel developed dialectical retribution, whose ideas had a significant impact on the development of philosophical and legal views throughout the XIXth century, and in combination with other interpretations – in the XXth century. For example, Kant considered punishment as a material (real) retribution for criminal offenses and therefore advocated the need to consolidate the various systems of proportionality of criminal offenses and punishment, retribution with equal evil for the evil caused by the perpetrator. For example, for murder – the death penalty, for sexual offenses – castration, for property crimes – hard labor for various terms, for insult – the use of measures, that discredit the perpetrator, and so on. Proponents of relative theories were united by the fact, that they saw the meaning and usefulness of punishment in achieving any specific (useful) goal, for example, to keep other members of society from committing a crime, or to correct a convict, and so on. Among relative theories, the theory of intimidation has become the most widespread (Bentham and others). It is still followed by many criminologists in England and the United States. A modification of this theory is the theory of a psychological coercion, which was developed by the famous criminologist of the early XIXth century Anselm Feuerbach. Like the theory of intimidation, it is a theory of a general warning, according to which punishment should affect citizens, deterring them from committing a criminal offenses. A. Feuerbach believed, that punishment should oppose the person, who committed a criminal offense, more dissatisfaction, than the satisfaction he received from the criminal offense. The threat of such punishment should deter a person from committing a criminal offense.

Proponents of the theory of special prevention defended the idea of applying punishment solely to ensure, that the perpetrator did not commit a new criminal offense. The same ideas were defended by the followers of the theory of correction, according to which punishment should ensure the correction of the guilty, not committing new offenses by him.

Theories of achieving a single goal by punishment could not satisfy practice. Therefore, in the middle of the XIXth century, the so-called mixed theories of punishment appeared. Common to them is a combination of ideas of several absolute and relative theories about the purpose of punishment. Proponents of them in different versions recognize the purpose of punishment: intimidation, retribution, compensation for moral damage caused by a criminal offense, correction, general and special prevention. These theories differ not only in the combination of purpose, but also in their significance. In some prevails the goal of intimidation or retribution, in others – the goal of prevention or correction.

Determining the purpose of punishment is one of the most fundamental issues of criminal law. On its solution depends not only the construction of many institutions of this branch of law, but also the purposeful application of the criminal legislation itself.

In the legal literature of the first years of Soviet government, much attention was paid to the question of the purpose and objectives of punishment. The complexity of this problem led to the fact that some authors, having successfully formulated one or another aim of punishment – correctional, preventive, protective, in some cases considered it the only one, which distorted the real role of punishment in the Soviet state. During this period, the provisions of the Soviet theory of criminal law on the relationship between coercive and educational aspects of punishment, on the relationship between the concepts of "chastisement" and "upbringing", "chastisement" and "punishment" were just beginning to take shape.

Part 2 of Article 50 of the Criminal Code of Ukraine enshrined: "Punishment is aimed not only at chastisement, but also at correcting convicts, as well as at preventing the commission of new criminal offenses by convicts and other persons. Punishment is not intended to inflict physical suffering or degrade human dignity".

On the basis of which it is possible to allocate the following purposes of punishment: 1) chastisement; 2) correction of convicts; 2) prevention of committing new criminal offenses by the convicts themselves; 3) prevention of committing criminal offenses by other persons.

The chastisement as the purpose of punishment is not a cruel revenge or a retribution by a state for a criminal offense, but the orientation of the legislator to the court to apply to the convict such a set of restrictions on his rights and freedoms, which will be tangible and sufficient to achieve the main goals of punishment – correction of the convicted person, as well as special and general prevention.

The purpose of the correction of the convict involves the achievement of certain changes in his personality, the elimination of public danger, so that impact of punishment, as a result of which the convict during and after his serving a sentence does not commit a new criminal offense. The correction is to make adjustments to the offender's consciousness through an active coercive influence, to neutralize negative, criminogenic guidelines, to enforce the provisions of the criminal law or, even better, to instill, even under threat of punishment, obedience to the law, respect the law. The correction is associated with the appearance in the convict such traits, properties and attitudes, that would deter him from committing new, at least intentional, criminal offenses. Achieving such consequences is called a legal correction. This is a very important result of the application of punishment.

The purpose of special (private) prevention is the effect of punishment on the convict, which excludes the recurrence of criminal offenses. Prevention of new criminal offenses by the convict is achieved by the fact of his conviction. And also by execution of punishment, when the person is put in such conditions, which considerably interfere or completely deprive of an opportunity to commit new criminal offenses. The regime of execution of punishment, restriction of contacts, constant control over the behavior of the convict and so on physically deprive or significantly limit his ability to commit new criminal offenses during imprisonment. Special prevention of criminal offenses is achieved by imposing a certain punishment on the perpetrator, condemnation on behalf of the state and deprivation of essential

rights and benefits; severance of illegal ties between accomplices or even persons involved in a criminal offense, as well as with those, who had an illegal influence on the convict; isolation of the perpetrator from society, sentencing in the form of imprisonment.

The purpose of the general warning (general prevention) provides for the impact of punishment, which ensures the prevention of criminal offenses by other vulnerable persons. Punishment addresses this goal precisely to persons prone to committing criminal offenses. The vast majority of citizens do not need such influence of punishment. They do not belong to the category of persons prone to committing criminal offenses, and do not commit them not under the threat of punishment, but, because of their moral qualities, habits, civic and religious precepts and beliefs. For such citizens, criminal punishment raises the legal culture, cultivates intolerance towards offenders, and forms an appropriate level of legal awareness. General prevention of punishment is achieved by: 1) the inevitability of execution of punishment; 2) the presence of certain sanctions in criminal law: the threat of the law to punish anyone, who violates its prohibitions, as well as the publication of such laws; open court proceedings on a criminal offense, exposing all the circumstances and a negative assessment of the commission of the sentence; 3) publicity of the sentence – the proclamation of the sentence on behalf of the state, in the presence of a significant number of people mostly acquaintances of the convict, etc.; 4) legal propagation.

Conclusions. The goals of punishment are largely interrelated and interdependent. Therefore, in many cases, the application of punishment can achieve most of its goals simultaneously.

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Наталія Слотвінська
Національний університет "Львівська політехніка",
Інститут права, психології та інноваційної освіти,
кандидат юридичних наук,
доцент кафедри кримінального права і процесу
ORCID: 0000-0002-2756-4557,
nataliia.d.slotvinska@lpnu.ua

ПОНЯТТЯ ПОКАРАННЯ

Питання про сувору диференціацію відповідальності й покарання в юридичній літературі виникло на рубежі 50–60-х років. Законодавство ж узагалі до 1958 р. не розглядало кримінальну відповідальність окремо від покарання. У Засадах 1958 р. і Кримінальному кодексі УРСР 1960 р.

з'явилася стаття, що передбачає підстави звільнення від кримінальної відповідальності й від покарання. Це підтверджує, що законодавець не ототожнює кримінальну відповідальність і покарання, а розмежовує зазначені поняття. Подальший розвиток кримінального законодавства привів до того, що вже в 2001 р., у новому Кримінальному кодексі України підстави звільнення від кримінальної відповідальності й підстави звільнення від покарання і його відбування передбачено в різних розділах.

Потрібно виділити специфічні ознаки покарання, з яких і складається це поняття: 1) покарання – це міра державного примусу. Поняття покарання як міри означає, що кожен вид покарання має кількісні межі й визначений зміст, тобто це потенційно здійсненний спосіб впливу на засудженого, строго регламентований кримінальним законом. Ніхто не має право виходити за межі кількісних і якісних характеристик покарання, встановлених законом; 2) державний характер примусового заходу. Під цим мають на увазі, що покарання може бути призначено тільки від імені держави і є публічно-правовою, державною оцінкою діяння як протиправного, а особи, що вчинила це кримінальне правопорушення, як зобов'язаної зазнати покарання; 3) примусовий характер покарання як державної міри. Всі учасники публічно-правової сфери зобов'язані підкорятися рішенням, що набули законної сили, про покарання, а держава має право застосовувати для їх реалізації відповідні заходи впливу, тобто передбачені законом необхідні способи, що забезпечують підпорядкування осіб і органів таким рішенням, ураховуючи необхідні заходи фізичного впливу. Примусовість покарання також означає обов'язок засудженого зазнати позбавлень й обмежень, пов'язаних із застосуванням до нього покарання; 4) кримінальне покарання призначають за ті діяння, що є кримінальними правопорушеннями, тобто містять всі ознаки складу кримінального правопорушення і застосовуються до конкретної особи. Тобто винність є однією із ознак кримінального правопорушення. Зрозуміло, що покарання застосовують до особи, визнаної винною у здійсненні кримінального правопорушення; 5) покарання призначають тільки за вироком суду і від імені держави; 6) покарання, на відміну від інших примусових заходів, спричиняє особливий правовий наслідок – судимість, що може бути знята чи погашена за певних умов, зазначених у кримінальному законі (ст. 88 КК України). Саме судимість відрізняє кримінальне покарання від інших засобів державного примусу; 7) покарання за змістом є карою, хоча терміна "кара" немає у визначенні покарання, поданому в КК. Каральний характер покарання передбачається в обмеженні прав і свобод особи, визнаної винною у вчиненні кримінального правопорушення. Кара є складовою ознакою будь-якого кримінального покарання. Вона визначається строками покарання, наявністю фізичних і моральних страждань та позбавлень, різними правообмеженнями. В одних покараннях вона виражена більшою мірою, наприклад, довічному ув'язненні, позбавленні волі, в інших – переважають обмеження інших прав: займатися професійною діяльністю, мати звання, нагороди тощо. В кожному покаранні, безумовно, є і моральні страждання – ганьба, сором перед суспільством і своїми близькими.

Ключові слова: покарання; правопорушення; кримінальне право; кримінальний закон; свобода.