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PURPOSES OF PUNISHMENT IN TRANSNATIONAL CRIMINAL LAW, EFFECTIVENESS OF APPLIED PUNISHMENTS

Abstract

Punishment is a sanction imposed by the state in return for a crime committed. Punishment is a fact accepted as an undeniable necessity. Indeed, it is impossible to give up punishment in public life. Punishment is necessary for the maintenance of state and legal order. The qualities that must be meted out in a sentence are that it is lawful, concrete and measured, fair, humane and moral. Because punishment, like crime, can only be determined by law. It is inadmissible to impose an unjust punishment that infringes on human rights and dignity. This must be prevented. In addition, the punishment must be adapted to the identity of the offender to be punished. Therefore, the punishment should be divisible, not a fixed punishment, and thus the individualization of the punishment should be allowed.

Key words: *punishment, criminal law, theories of punishment, the purpose of punishment, the effectiveness of punishment*

Səbahət Əbülfət qızı Həsənova

Transmilli cinayət hüququnda cəzanın məqsədləri, tətbiq edilən cəzaların effektivliyi

Xülasə

Cəza törətdilən cinayətin müqabilində dövlət tərəfindən tətbiq etdiyi sanksiyadır. Cəza danılmaz zərurət kimi qəbul edilən bir həqiqətdir. Doğrudan da, cəmiyyət həyatında cəzadan imtina etmək mümkün deyil. Cəza, dövlət və hüquqi nizamın davam etdirilməsi üçün zəruridir. Tətbiq edilən cəzada olması lazım olan keyfiyyətlər onun qanuni, konkret və ölçülü olması, ədalətli, insani və əxlaqlı olmasıdır. Çünki cinayət kimi cəza da ancaq qanunla müəyyən edilə bilər. İnsan hüquq və ləyaqətinə xələl gətirən ədalətsiz cəza tətbiq etmək yolverilməzdir. Bunun qarşısını almaq lazımdır. Bundan əlavə, cəza cəzalandırılacaq cinayətkarın şəxsiyyətinə uyğunlaşdırılmalıdır. Bu səbəbdən, cəza sabit cəza deyil, bölünə bilən olmalıdır və beləliklə, cəzanın fərdiləşdirilməsinə icazə verilməlidir.

***Açar sözlər*:** *cəza, cinayət hüququ, cəza nəzəriyyələri, cəzanın məqsədi, cəzanın effektivliyi*

Introduction

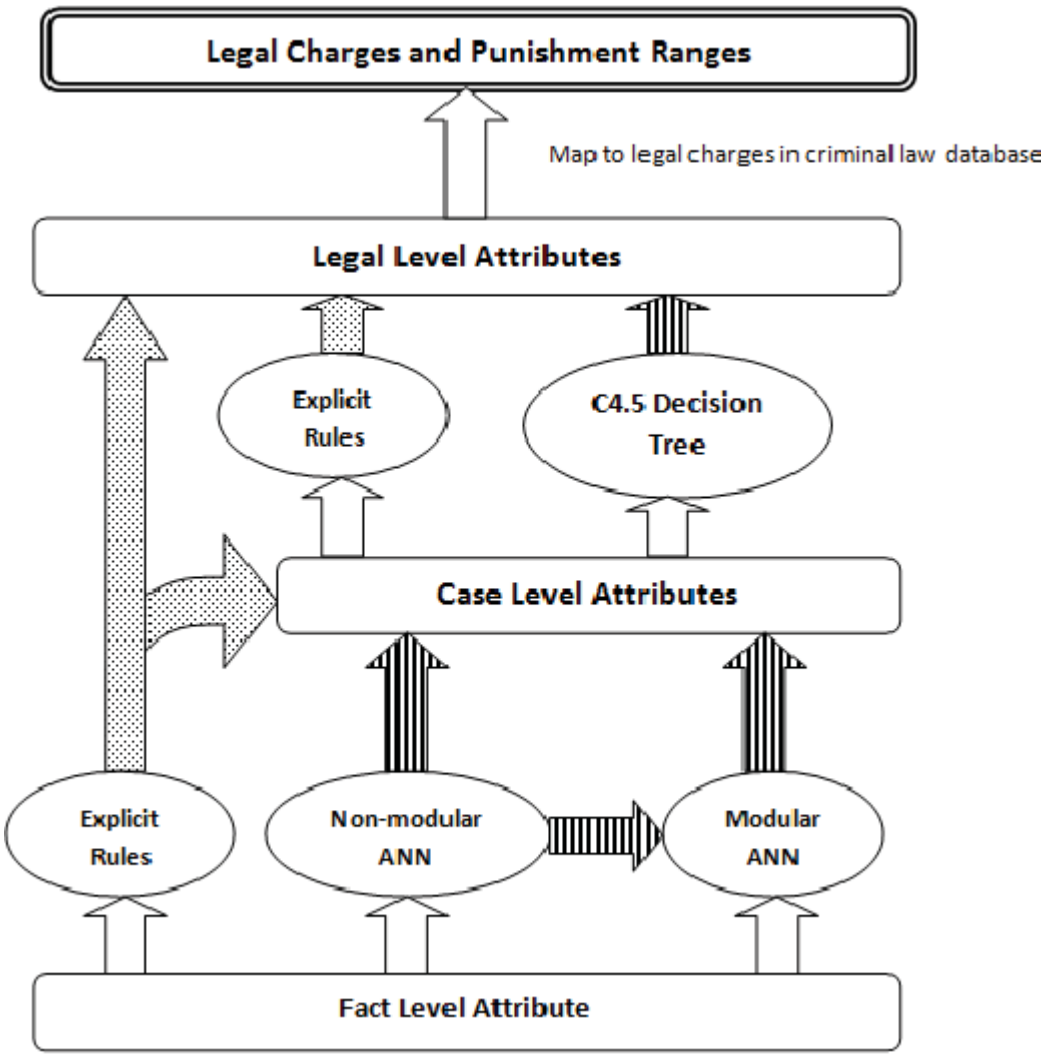
It is seen that the special prevention purpose of the penalty is given importance in the court decisions. Indeed, according to the Constitutional Court, the old understanding of criminal law, which adopted the principle of satisfying the feelings of revenge of the society in the execution of punishments and that criminal sanctions be an effective example, has been abandoned almost completely in our time when the level of civilization of societies has developed to a great extent and human dignity is more respected (1). A new system based on both humane and social principles and aims, such as correcting criminals with education, training and employment ways suitable for their personalities, and making themselves useful individuals for the society, has been envisaged by all western countries. The monitoring of convicts who have repented and recovered after leaving prisons in order to prevent them from committing crimes again, and even to protect them against delinquency in a way, is also within the scope of the modern fulfillment system, which is more appropriate for this new human dignity. In accordance with the main purpose of imposing criminal sanctions in contemporary criminal law, the basic principle in the implementation of these sanctions is to enter the inner existence and world of the criminal convicts, to correct them, to prevent them from committing a crime again and to be a constant danger to the society,

and to make them useful individuals for the society again. Since it should be released into the society afterward, ensuring the convict's own will and consciousness and the need to be in partnership with his own will and consciousness in tending to such a way of correction constitutes the leading conditions for success (2). Such a successful result can be achieved by softening the fulfillment, which is increasingly practiced in all the civilized countries of our age, by bringing the convicts closer to the society in various aspects during the execution of the penal sanctions and reintegrating them. In the field of contemporary criminal and execution law, it is necessary to move away from the old rigid punishment system and to evaluate the fine distinctions in the personality of the criminal and the way the crime was committed, in order to reach the conclusions that satisfies the sense of justice, truly rehabilitates the criminal and prevents him from committing crimes again, and to reach the necessary protective results against the crime and the criminals. The tendency and attempt to move towards a more convenient, flexible and soft order has gained importance and intensity as a necessity, especially in recent years. The idea emphasized by the Supreme Court in its various decisions is that the purpose of punishment is to train a person who commits a crime in order to prevent him from committing a crime in the future. In that case, the Court of Cassation adopts that the purpose of punishment is to rehabilitate the perpetrator and thus to protect it from repetition. Therefore, the special prevention purpose of punishment is brought to the fore in court decisions.

Main text

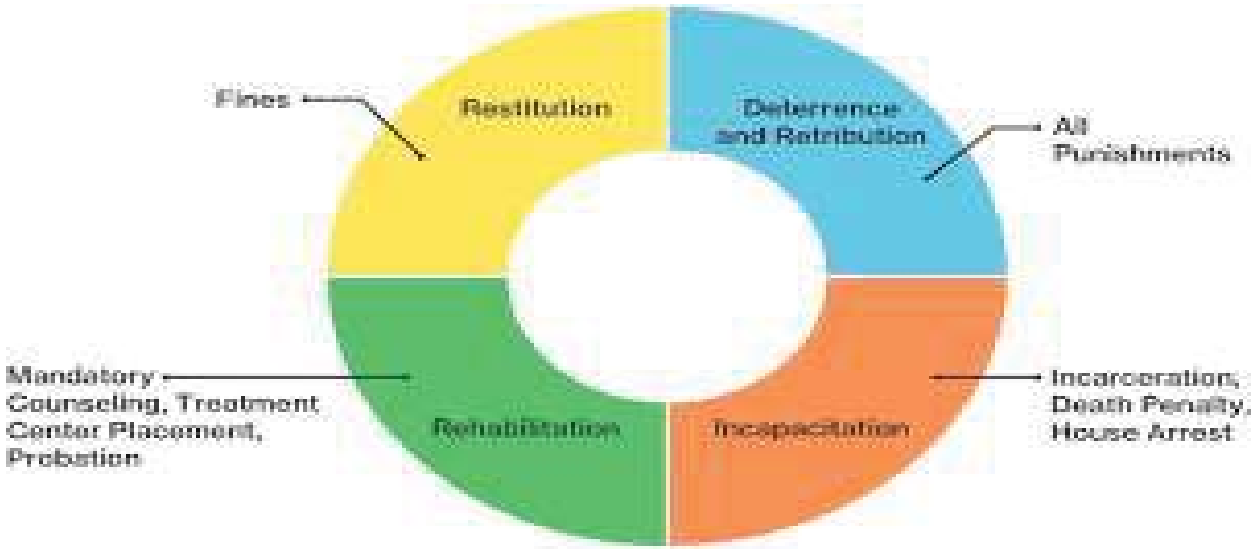
There are various views as to what the purpose of punishment is:

1. Absolute Theories - Theories that see the application of punishment as an end in itself are called absolute theories. According to these theories, punishment is applied not for the future, but because the order of the society is disturbed, and it is accepted that the purpose of the punishment is realized with the punishment. Absolute theories are the theories of atonement and justice: a) Atonement theory - The earliest thought on the purpose of punishment is that punishment is atonement. The essence of this theory is an eye for an eye, a tooth for a tooth. The wicked must pay for it. In this sense, punishment is retroactive. The fault of the perpetrator can only be compensated by the application of punishment. Atonement means that the criminal is cleansed of his sin by punishing him and closing the account between him and the society. This understanding looks at punishment only from the point of view of morality. The idea that punishment is revenge and retribution, which can be considered together with atonement, aims to fulfill the moral balance that has been disturbed by the commission of the crime, but prioritizes the prevention of crimes, not the moral cleansing of the offender. b) The theory of justice - According to this theory, imposing punishment does not have a purpose, but only the realization of the idea of justice. For justice to be served, punishment must be given. According to Kant, even if the state and society come to an end, the last murderer in prison must be hanged before society falls apart. For Hegel, punishment is the denial of the denial of law. The expiation is paid by the withdrawal of the penalty, which will restore the violated right (3).



Absolute theories do not start from the understanding that punishment has a purpose, but accept that the application of punishment is the goal itself. In order for justice to be done and for the satisfaction of their feelings of vengeance, the offender will be punished. Punishment should not look for a forward-looking purpose. The premise of absolute theories is imperfection [4]. The perpetrator should be punished proportionally to his fault. c) Criticism of absolute theories - Absolute theories that do not seek a prospective purpose in punishment and apply punishment retrospectively have received various criticisms. According to one view, it is not possible to explain the purpose of punishment with the theory of atonement. Because: 1) this theory reveals the necessity of punishment, but it cannot explain when punishment should be given. The question of under which conditions the fault will be met with punishment remains unanswered. This theory falls short of limiting the state's power to impose penalties in terms of content. This theory cannot prevent arbitrary behavior from being included in the penal laws and actually punishing in the presence of general criminal charges. In this respect, it is as if the legislator was given a blank check. The theory contains not only theoretical weaknesses, but also practical dangers. 2) Although it is considered unrestricted that the state has the authority to punish the wrongful behavior, it is not satisfactory to explain the penal sanction with the idea of equalizing the fault, because the possibility of fault stipulates the freedom of will, and its existence has not been proven. 3) On the other hand, how can an evil be removed by another evil, namely by punishment (4). Although this satisfies people's sense of revenge, state atonement should be completely different from revenge. For these reasons, the atonement theory cannot explain the essence of punishment. Because it cannot explain the conditions of punishability and cannot form a solid foundation. Another criticism is as follows: According to the theory of justice, the meaning of punishment is to perform justice. Here, compensatory justice (equalization of evil with criminal evil) is in question. The criminal act is paid

with a penalty. However, over the centuries, some crimes of the same nature have been paid with very different punishments. For example, some cases of theft crime are still in the XVIII. While it was punished with the death penalty even in the 19th century, only freedom-binding punishment is given today. However, this situation is not contrary to the theory of justice. Because justice cannot set an absolute measure valid for every period, justice is different for each period. However, this situation gives rise to the question, "we are really punishing for the sake of justice". It is difficult to compare here with other moral requirements such as being compassionate, telling the truth, keeping one's word, trusting. Because these obligations are directed towards individuals. On the other hand, the state has a duty in punishment. In the punishment of individuals with the capacity of educating children and young people, the aim of correction and upbringing dominates, not justice. In this area, it is known that the aim can be achieved by forgiveness or ignoring wrong behavior rather than punishment. However, the possible obligation of individuals to assist the sentencing through reporting crimes, testifying as a witness, participating in the trial as a judge, etc., is only in question if these are accepted as a social duty before sentencing (5).



On the other hand, in practice, some crimes go unpunished (black numbers), some attempted crimes are not punished, some crimes are subject to the victim's complaint, and finally, institutions such as postponement and statute of limitations prevent punishment from being imposed. Whereas, if punishment were to be given to carry out justice on earth, every crime should be punished. Since the state does not punish for the sake of justice, some crimes go unpunished, and many people console themselves by saying that "there is retribution justice in the other world". The phenomenon of punishment clearly shows us that punishment is not given for the sake of justice. However, this does not mean that the legislator and the judge will not strive for justice. But the justice governing punishment is very formal. If we wanted to make evil pay with equal weight of evil, it was necessary to determine the punishments according to the effect of the punished person. However, we are content with formal justice. As punishment, we usually apply what is accepted as punishment. We cannot avoid some injustices. For example, life imprisonment for a 25-year-old murderer takes longer than a 75-year-old. These considerations show that we cannot see punishments as behaviors applied for the sake of justice. On the other hand, the theory of atonement does not fit with today's moral phenomenon. Although this theory requires us to bring our relative who committed a crime to justice, the provisions of the law leave impunity for abetting or perjury for their relatives. A close examination of the punishments in this way shows that no punishment was given for the purpose of expiation either. Atonement theory is not conducive to answering the question of the meaning of punishment as a public institution. Like other absolute theories, the atonement theory looks more at the punishment inflicted, trying to make as much sense as possible from it for the punished. According to another view, the meaning of the idea of atonement XVIII. century has begun to change. Today, penance means: Punishment is a response to

wrongful injustice and should be equivalent to this injustice according to the principle of distributive justice. That is, penance is not related to the society's sense of revenge and hatred, it is a measure of the punishment. The reason and measure of the punishment is the crime committed (6).

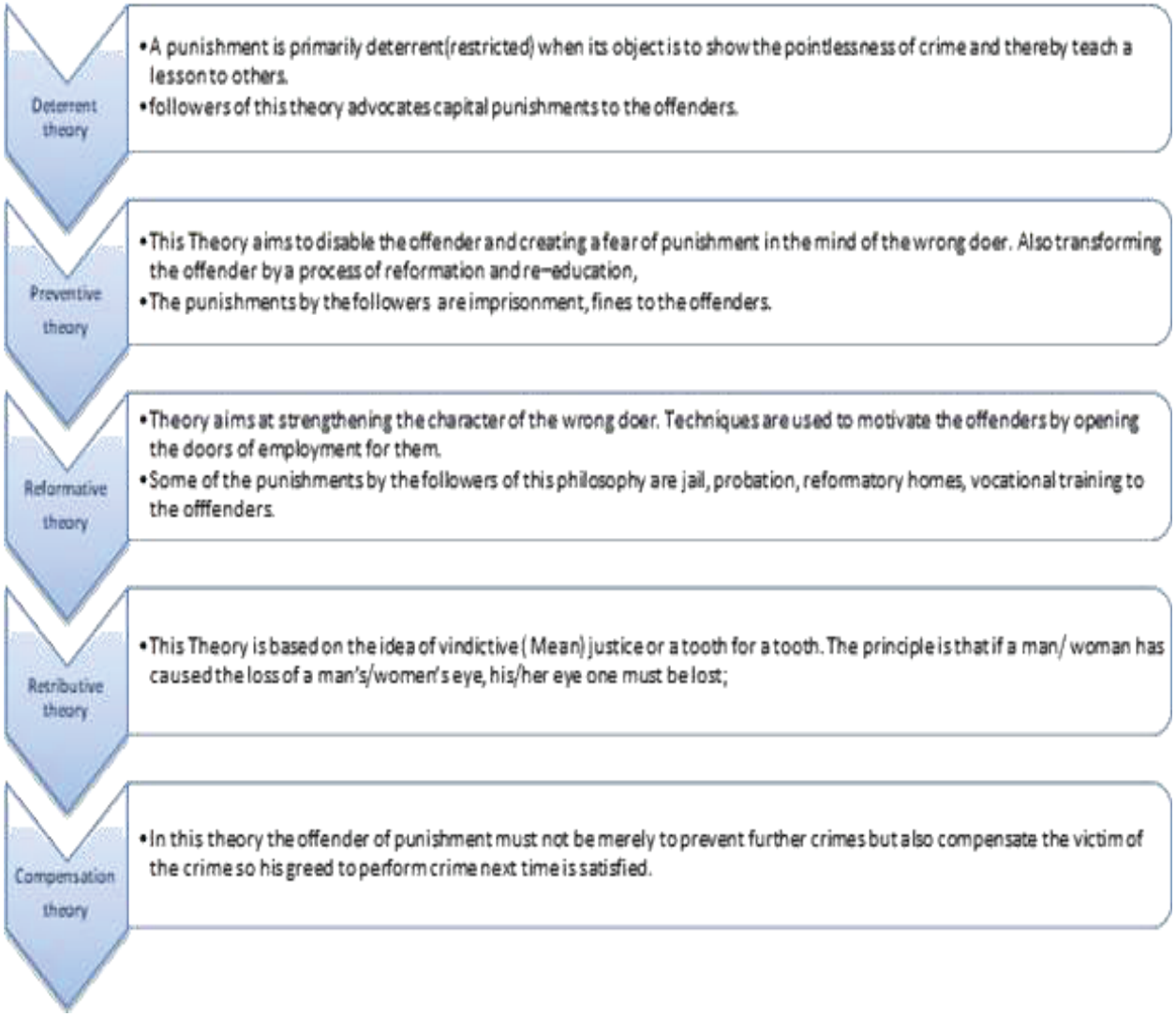
2. Relative Theories - According to relative theories, which are the opposite of absolute theories, punishment is given for the future, the purpose of punishment is to prevent crime. However, there is no consensus on how to prevent crime. Accordingly, special and general prevention theories, which are completely opposite to each other, have emerged.

a) Special prevention - According to this theory, which is the opposite of the atonement theory, the purpose of punishment is future-oriented. This consists of keeping the perpetrator from future crimes. Punishment is a means of protection from crime. The purpose of punishment is only prevention. Crime is not the cause of punishment, but the occasion for punishment. The perpetrator is not punished at the rate of his fault, but in the amount necessary for his re-socialization. The type and extent of the punishment is determined by the purpose of prevention, not the wrongful injustice (7). The first traces of the theory of private prevention also go back to ancient times. As early as the 1st century, Seneca expressed the classic maxim of all prevention theories, based on the idea conveyed by Plato from Protagoras: "The wise man punishes not for being a sinner, but for not being a sinner", or "the wise man punishes not because crime is committed, but so that crime is not committed." punishes" (nemo prudens punit quia peccatum est, sed ne peccetur). These views put forward about the purpose of punishment resulted in the establishment of an independent theory of private prevention in the age of enlightenment, and this caused the atonement theory to lose its importance. According to Liszt, spokesperson of the sociological criminal law school, special prevention takes three forms: 1) Securing the society against the perpetrator by isolating the perpetrators, 2) frightening the perpetrator from committing other crimes by means of punishment, 3) protecting the perpetrator from repetition by reforming. In line with these views, the author talked about different processes according to the types of offenders in the Marburg program: 1) rehabilitating those who can be corrected and in need of remediation, 2) frightening accidental offenders, 3) rendering harmless the conventional criminals who are frightened and cannot be reformed (8).

b) Criticism of private prevention theory - Various criticisms have been leveled against private prevention theory. According to one view, private prevention theory serves the welfare state principle better than other principles, since it aims at the re-socialization of the perpetrator. As this theory undertakes to protect the individual and society, it also aims to help the perpetrator, does not exclude or stigmatize him. However, unlike the penance theory, it has shortcomings such as not being able to bring any measure and not knowing what to do with the perpetrators who need re-socialization. In theory, the prisoner should be kept in prison until they can socialize again. This leads to an indefinite term punishment. This results in long-term punishment if there is a sign of severe personality disorder, even for a minor crime. In fact, a person who has not committed a crime but is in serious danger of guilt can be treated with socialization. These are interventions that go far beyond the measure of punishment that is appropriate according to the theory of atonement, and lead to the restriction of the freedom of individuals far beyond what would be permissible in a liberal state of law. On the other hand, according to the private prevention theory, punishment should not be applied even for the most serious crime if there is no danger of re-offending. Also, the idea of correction becomes a purpose in punishment, but this in no way demonstrates that the purpose is appropriate. It must be asked what justifies the imposition of the majority on the minority with its own way of life, and where the right to reform adult humans arises against their will. Kant and Hegel see this as a violation of human dignity, while the German Constitutional Court states in a decision that the state has no duty to reform the individual (9).

According to another view, representatives of the private prevention theory are generally those who reject the freedom of will and rely on the fact that punishment presupposes the existence of freedom of will. For this reason, they struggle for the abolition of punishment and the application of treatment in its place, accepting that only such a reaction is appropriate when the will is not free. However, there are two important errors in this thought: 1) the unrealistic expectation that the special preventive treatment of criminals will be like the treatment of sick people in the future, so that the evil nature of punishment

in terms of general prevention will disappear, 2) the fault and punishment of the perpetrator, the freedom of will of the person. Considering that it is a condition to admit that it exists. However, punishment in no way stipulates belief in freedom of will, and the idea of fault is not related to freedom of will (10)



Punishment stipulates that the perpetrator violates the basic values of social life not only in his voluntary behavior but also in his spiritual behavior. For this reason, minors and mentally ill people are not properly punished for their criminal behavior. However, since this content of the concept of fault is not understood, freedom of will is discussed in the context of the perpetrator "could have avoided the crime". However, as the conditions of punishment, only the perpetrator's life, honor, property etc. It should be contented with the determination of intellectual participation in such a value and its violation, no more can be asked and answered. Undoubtedly, the idea of fault is still of great importance because of its function of limiting punishment. If there is no fault, no punishment can be given. If a penalty is given, the measure of the penalty should not exceed the measure of the fault. On the other hand, the suggestions of special prevention theories for criminal groups are criticized and inconsistencies are tried to be revealed (11). According to specific prevention theories, punishment exists to fight offenders. That is, punishment is given to ensure that the offender does not re-offend by constantly isolating or educating or intimidating. In special prevention theories, criminals are generally divided into three groups in terms of punishment: accidental offenders, habitual offenders and non-reformable habitual offenders. An accidental criminal is a person who commits a crime as a result of coincidences, albeit grave ones. In practice, people who have committed more than one crime, but only one of them is revealed and those who know how to hide the others are also considered accidental criminals. Just as the doctor cannot be thought to treat the healthy or the cured, so the accidental offender must be left

unpunished for special prevention. However, those who support this theory do not make such a recommendation for this group, which, according to crime statistics, constitutes 2/3 of all convicts. Undoubtedly, in many cases, the application of punishment by suspension is abandoned and this is in various ways beneficial to the accidental offenders. However, it is intolerable, especially in serious crimes, to abandon the punishment of accidental or first-time offenders as a general rule. The second group consists of habitual criminals. A habitual criminal is someone who tends to commit crimes repeatedly. Special prevention theory is particularly suitable for this group. Among these perpetrators, the group of those who can or are eligible to be resocialized is important. This includes anyone who commits more than one crime and can be brought to the right path. Punishment against this group of offenders should serve to resocialize. Resocialization is a concept that requires being socialized before: By committing a crime, the perpetrator is out of society. Now it must be regained and made a "re-member" of the "legal society" (12). These concepts can be perceived intellectually: The perpetrator is excluded from the society by violating the law, and rejoins the society with punishment. However, this understanding fits with German idealism and the view of its followers (like Hegel's denial of denial). On the other hand, by re-socialization, the modern understanding does not mean the intellectual but the completely real, that is, the procedure that will ensure the actual recovery of the agent and will be fully effective on him in order to recognize the limitations imposed on the individual for a life for the benefit of society or for the sake of life for the benefit of society. Among the perpetrators in this group, those who can be described as truly asocial, hostile to society, maintain a private livelihood and almost unrelated people can be found. However, as a rule, the necessity of re-socialization can be approved only if the perpetrator is completely in the society and does not obey the prohibitions and orders of the society in one way or another. Such a perpetrator may be known as a law-abiding person. For example, when it turns out that a successful official has been embezzling money for years. This example shows how little the theory of private prevention takes the facts into account by requiring the offender to be reformed to be a previously socialized person in need of resocialization. In the condition of being previously socialized, there is usually nothing more than the fact that the perpetrator has committed more than one crime (offenses committed by perpetrators, many of whom have not been caught and resocialized, as the black numbers assumption suggests). Private prevention theory tends to substitute the notion of harmfulness and dangerousness for fault as a condition of punishment. However, these concepts apply more to animals than to humans. Moreover, if the balance sheet of a human life's usefulness and harmfulness for society is drawn, the comparison between some criminals and some law-abiding citizens can reveal a surprising picture. For example, a large number of fraudsters may also have done very well. The person who is enriched by constant blackmail has the courage to save a few children from a burning house, perhaps at the cost of his own life. Of course, the three children saved from death outweigh the thirty blackmails in this usefulness assessment. The suitability of punishment for resocialization is also questionable. Especially in freedom-binding punishments, re-socialization is not achieved by giving punishment, it is important how it is punished. If we understand resocialization as discipline in mentally healthy offenders, we see that the discipline of not only adults but also juveniles contains contradictions in terms of removing freedom in criminal execution: the person can be disciplined by restricting this freedom for the proper use of external freedom. And finally, determining the amount of time that training will require poses a problem. It is not possible to talk about a period such as the period whose necessity for school education is calculated here. For the perpetrator, maybe 2 weeks will be more successful than 2 years. Or maybe putting him in prison will not serve to re-socialize, the perpetrator will come out worse than he entered (13)

Conclusion

Punishment is the reaction of the state in case of violation of benefits deemed worthy of protection in society. The general purpose of punishment is to make social life possible. Punishment is society's defense tool. Community life requires peace and security. If the order created to achieve this is disrupted by the violation of the rules protecting the order, sanctions must be applied to re-establish it. Punishment is a tool to make social life possible. If the deteriorated social order can be re-established by means other than punishment, such as administrative and legal measures, punishment is not applied. Therefore, punishment is of secondary nature. The purpose of punishment is neither to do justice by making

atonement for the wrong done, nor to rehabilitate the perpetrator in order to prevent new crimes, nor to deter crime by frightening potential criminals. In my opinion, the purpose of punishment is all of these. Apart from these, it is unacceptable for some criminals to have other purposes, such as liquidation. Undoubtedly, there is a great deal of truth in the criticisms leveled at each of the theories on the purpose of punishment. As we mentioned above, the theories are one-sided in line with the view they advocate, ignoring the fact that punishment can include more than one purpose. Indeed, justice is a relative concept. Absolute justice is impossible. The benefit of society should be the guide. Atonement results in looking at punishment purely from the point of view of morality. Special prevention necessitates indefinite punishment and includes an indefinite concept such as dangerousness. General prevention results in heavy penalties, includes a contradiction such as punishing the perpetrator for others, and the high risk of being caught affects potential criminals, not the height of the penalty. However, despite all these, the purposes of expiation, general prevention and special prevention are within the scope of punishment. Punishment, on the one hand, constitutes atonement for the evil done. The fact that the punishment is proportional to the fault shows this. Punishment must be fair. On the other hand, there is a small possibility that the threat of punishment prevented some people who did not commit crimes. There is no doubt that the existence of punishment strengthens the sense of trust in the society. The execution of the sentence, on the other hand, prevents the offender from committing a crime again by serving for his rehabilitation and re-socialization. The fact that these are assumptions does not prevent the penalty from including these purposes. Although punishment includes these purposes, only rehabilitation and re-socialization are aimed in the execution of the sentence in contemporary criminal law. The education, vocational training and employment programs envisaged to be implemented in contemporary execution systems are aimed at this. Even if the idea that punishment provides the correction of the criminal and deters potential criminals from crime goes beyond being an assumption, we will not be able to give up punishment in the name of social life. Thinking about the uneasiness and the feeling of insecurity that those who do not commit crimes will feel if the perpetrators go unpunished is enough to show us why we cannot give up on this institution. The following evaluations made by an author on the purpose of punishment are perhaps the best sentences to summarize the subject: We are not punishing for the sake of justice. But if we are punishing, we must be as fair as possible. We do not punish for the sake of atonement, but if we do, the realization of atonement should not be made impossible. We do not impose punishment to correct or improve individuals. But if we are punishing, we must do everything so that the prisoner can regain his confidence in himself and in others and on the right path.

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