

### **To an issue on “a crisis of the punishment”**

**Abstract:** A concept of social protection as an alternative to the criminal punishment is analyzed in the article. It is considered an essence of the non-punitive influences.

Change of the punishment contents through a gradual bringing all its punitive elements to nought is an issue actually unsound and even harmful in the modern conditions. This is confirmed also by state, structure and dynamics of the criminality. We may speak on parallel existence of the measures of social influence and education with criminal punishment, but not about a gradual replacement of the latter.

**Keywords:** punishment; combating crime; social protection; non-punitive influence; criminal law; repression.

Beginning from Cesare Lombroso, a fact of the low efficiency of the criminal punishment put under doubts its future in a fight to criminal. Basing on anthropology, psychology, criminal statistics, criminal law and penitentiary science, he suggested refusing on the punishment as a useless means and to replace it with other measures. What is it suggested instead of an intimidation, punishment?

Doctrine of the criminal-anthropological school, recognizing of the biological features of the criminality, offered replacing a criminal punishment with “the measures of a security”, and criminal-sociological direction – with “the measures of a social protection”. This replacement had come to a search of the universal means of the criminality overcoming, as a social-psychological phenomenon, through the psychological-medical and social influence on a criminal conscience.

So, A. Prince tried theoretically to substantiate a necessity of the criminal

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punishment replacement with the measures of a social protection, which, according to his assertion, had had a fundamental peculiarity.

In connection with that at present time in the theory of criminal punishment is more often and insistent reminded about an idea of the social protection, it is appeared a necessity and practical needs in implementation of the differentiation between the institution of punishment and the measures of a social protection. As it known, first time he introduced into a practice the name of Swiss project, though the ideas in various forms were expressed by the theorists of the West much earlier. Therefore, a conception of the social protection measures has for a long origin. But, even today it is not determined neither an essence of their attitude to a punishment, nor their volume. Existing in the science the views in respect of the nature of social protection might be turned to the two points – these are either a denial of the basic distinction between the punishment and social protection measures or confession of it. Considering of an external expression of this institution and clarifying its internal content, we have found that the social protection measures are an absolutely independent institution, which keeps a special place among the other forms of the criminality prevention. Unlike the punishment, application of the social protection measures are caused not a need to give an estimation of the crime, which has already committed, but extremely with a need to prevent an opportunity a crime commission by the person against of which they are applied. It follows from that this institution has an extremely preventive nature. Therefore one can assert that a conception of the punishment is a narrower idea in the meaning of that the measures of a social protection have the more opportunities to achieve the goals.

S.K. Goguel identified the punishment with a repression, a source of which was, undoubtedly, revenge. He wrote: “With emergence and development of a state in the modern sense of a word, the revenge in a form of repression passed into the hands of public authorities... The repression as a duty of the state became absolutely powerless in fight with criminality and little by little was considered, but not finally, unfit in combat to criminality” [3, p. 142].

It seems that it is mistakenly from the legal and socially-political points of the views to put a sign of equality between the repression and revenge. The repression is a purely political measure applying with a state and it does not have a direct attitude to the justice. At the same time, even the cruelest criminal punishments, applied in fight to criminality, might not be called as repressive where the political goals are absent.

Consequently, denying a punishment, Goguel offers a transfer from repression to prevention. “In favour of possibility such transfer – moreover a full one – from repression to prevention say the following reasons. In the most cases a commission of crime has not an accidental nature in a life of separate individual, and it is a result, completion of slow and consecutive process of economic, physical and moral weakness” [3, p. 139].

The same ideas had D.A. Dril. He wrote: “Results of thorough study of the phenomenon of real life loudly object to an application of the measures of repressions in a fight with already originated criminal, which had planned to make pains and suffering” [4, p. 158].

As we see, in principle, it is not existed any difference between a conception of the social protection and prevention as in the both cases it is talking about prevention of criminality not by the means of punishment and with non-punitive influences onto the reasons and source of the criminality. In 1945 in Genoa, on initiative of F. Grammatik, the followers of the conception of social protection established a Center for the social protection, and Frenchman Marc Ancel created a trend of “a new social protection”. The ideas of F. Grammatik are a new variant (a modern) of the Italian positivist school, developing in the works of Raffaele Garofalo and Enrico Ferri. Grammatik denied the right of a state to punish of the criminal, and M. Ancel had based on that in respect of the criminal should be applied only humane measures of influence with purpose of their correction and re-education.

As it seen, the followers of the new trend of the social protection acknowledge a conception of the sociologists about the social protection and agree with their refusal from a classical understanding of the punishment as a responsibility for guilt.

Meanwhile, unlike the sociological school, the new trend tries to find a balance between the society and a person. They accuse of the classics and neo-classics in that they consider the punishment as the only possible and fair kind of the state reaction. A.A. Piantkovsky categorically refuted the conception of “the new social protection”, seeing in it an excessive subjectivism and psychological nature of the punishment institution [11, p. 14].

At present day some scientists believe that “criminology of the 21<sup>st</sup> century should pay attention in perspective of the non-punitive sanctions, including them into the context of individual preventive treatment of the crimes” [7, p. 12].

What does non-punitive influence mean, which became very popular at the last time in the science of criminal law and criminology?

An essence is in the next: to sentence persons accused in similar crimes to the various measures of the influence in the name of their rehabilitation, to punish them not for the deeds, and in connection with the condition of its commission. Otherwise speaking, an idea to punish not for the deeds and in connection with the condition of its commission, varying the punishment measures in conformity with presupposed danger features of a criminal, and as result, this has caused an appearance of the theory and practice of the non-punitive influence. This system is extremely based on the principles of rehabilitation of a criminal personality, or, where it possible, his isolation until it is necessary, in order to deprive him an opportunity to commit a crime again. To do this, some representatives of the theory offer to draw the psychiatrists, psychologists into rehabilitation of an individual mentality who committed crime. In principle, the non-punitive influence is apprehended as noble, humane action since it is directed into improving of a client health, following under this one goal – to return to an individual his social health, treat him from a crime. But, as medicine says, it is necessary to know a reason of this illness in order to treat it. As it known, until today a reason of the criminal behavior of an individual has not exact determined. In addition, even if the reason is hidden in a person himself (except external conditions), then it is necessary to find out a specific source exactly, which is concealed in the complex biological organism. But, is this possible? At least, today

the science is not in position to give a positive respond on this question. In comparison with the criminal punishment, which has a deep history of application of the various cruel kinds, the non-punitive influence, in opposite, looks a humane and modern. That is why it is considered as a task of the future. An idea of the non-punitive influence has one advantage. The matter is that not only theoretically but and practically the prevention of crime through the criminal punishment is more complicated from the point of view of its effectiveness determination, than the non-punitive influence, since in this case we are speaking about clearly determined object – which is inflicted an influence.

As rule, the followers of the non-punitive influence are reasoning in such way: an experience teach us that the punishment has on a criminal an opposite effect, which is caused of a second offence (recidivation). But a positive role of the punishment is in that others would have had crimes, i.e. in prevention through the intimidation and preventive impact. It seems that in spite of good intentions, the attempts to replace the punishment by a combination of the actions of the non-punitive influence may cause uncertainty and arbitrariness. It should also remember that from the ethics side a conception of the non-punitive influence breaks of the ideas about justice, measure of the kind and evil, proportionality of a guilt and responsibility and etc., which have been forming during thousand years [9, p. 9].

One of the bright representatives of this theory – N. Kristi notes that “theory of the non-punitive influence had very successful decided the issues of the valuable nature. Based on the analogy with the somatic medicine, the non-punitive influence had perceived as obvious benefit. In a system of the justice a treatment and the non-punitive influence have had a goal to improve the state of health of a client. That is why it was out of turn to ask, whether the non-punitive influence causes a suffering” [6, p. 45].

K. Sych justly notes: “Conception of the non-punitive influence is, in our opinion, a sample of continuation of the positive ideas development in form of the doctrine about “innate criminal type” (C. Lombroso), a conception of “a danger state”

and “criminal – illness man”, subjected to treatment (E. Ferry, P. Garofalo)” [12, p. 60].

So, an essence of the theory of social protection, a conception of prevention and an idea of the non-punitive influence, except some non-principle distinctions, is concluded, as we saw, in denial or distrust to the punishment as a means in combat to criminal. It is presented itself, that an issue is concerned not a replacement of the punishment with other measures but on improvement its effectiveness and parallel existence of the different measures of a fight to criminal. No doubt, it is not theoretically excluded that will come “a time when a punishment will lost an intensiveness and require introduce a new terminology” [7, p. 225].

But, being refused from intimidation, causing an evil, suffering, at least today, it should be logically refused from the punishment, which currently is not presented as disgraceful phenomenon, opposite, it is recognized as an inevitable and necessary consequence of the famous profession.

Speaking about punishment, very often and for a long time everybody is suggested absolutely normal and natural arguments. Mankind tested all means of the repression including qualified kinds of the death execution and sophisticated tortures. But, it is neither criminality nor other forms of the deviant behavior have not disappeared. When we are talking about punishment as a means of the fight to criminal, we are not bearing in mind any miracles, eradication of the criminality, but mainly, about delay its further growth. It should take into account the fact that sometimes achievement of the goal depend not only on that whether it has chosen correctly, but mainly from effective using the means of achievements, which we have. In really it may be, a punishment on its objective opportunities is very useful means, but we unable to use by it in maximum extent. We agree with opinion of S. Goguel, who emphasized: “Punishments are excluded by a lawmaker from the list of the punishments when they are not corresponded anymore to the views and customs of the society because of mitigation of the customs, not allowing anymore committing of the cruelties and violations neither in private nor in social life” [3, p. 129].

Now, I would like to be asked a question: whether a level of our ethics and morals and on the whole our development corresponds to that we could refuse from the punishment and replace it with the non-punitive influences? One time in the science of the criminal law of the soviet period existed trend, which had considered that criminal-legal policy was going to the way of limitation of the sphere of application of the criminal punishment for account of the public influence and education.

So, I.I. Karpets wrote: “In accordance with improvement of the social relations, growth of the awareness of people will be disappeared necessity in the various forms of the state coercion. Punishment will be accumulated in the most extent the features of educational measure than punitive one” [5, p. 68].

Some authors pointed out that development of the process of the punishment replacement with the measures of public influence includes in itself a gradual mitigation of them as a precondition of the punishment replacement. Growth of the cultural level of the workings is caused not only to reduction of the criminality, to a process of the punishment measures with educational ones, but also to mitigation of the measures because more strict measures in the most number of the cases are not necessary [10].

N.A. Belyayev believed that “reduction of the circle of the criminally punished deeds and decreasing of the criminality is the main way of the punishment replacement by the measures of public influence and education” [2, p. 76].

Notion of the “measures of a public influence and education” is the same that a term “the measures of a social protection”, “non-punitive influence”. As it known, the term “a social protection” arose earlier and then began to be used a notion “non-punitive measures”. As for the measures of a public influence and education, this term was popular at the soviet period, and, as rule, had used in ideological and political purposes.

In our opinion, the followers of gradual replacement of the criminal punishment by the measures of public influence and education are mistakenly considered it possible the punishments' existence, fully deprived the punitive elements that is

principally impossible since a punishment is, first of all, a presence of the punishment's elements in its content. Therefore, to consider that a punishment should be deprived of the elements, causing physical suffering or humiliation is an absurd.

S.P. Mokrinsky wrote: “As a fact of the sensible life, a criminal punishment is an act of the coercion to suffering. Beginning the time when a state stops to react onto certain facts through causing sufferings, then this historically formed notion should be also disappeared from the juridical lexicon” [8, p. 3].

It is presented that a change of the punishments' content by a gradual leading down all punished elements to a nought is a measure, practically impossible and even harmful in today's conditions, as this is confirmed also with a state, structure and dynamic of the criminal. The matter is not in gradual replacement of the criminal punishment with the measures of public influence and education, but about parallel existence of the measures of non-punitive nature with criminal punishment that come from a principle view into historical destinies of the state and law, role and place of the coercion and conviction in a society. Today, it should be especially emphasized that a wide application of the measures of public influence instead of a punishment, without detailed and deep preliminary preparation to this, might be caused unwilling consequences. At the same time, one cannot be agreed that today's legislation about reacting on criminality is required in real reform, similar on the depth to the reforms of the end 17<sup>th</sup> - beginning 19<sup>th</sup> centuries, when mankind became free from body-harmful punishments and qualified kinds of the death executions [7, p. 12].

Revision of the long term punishment in a form of the liberty deprivation and fundamental change of the punishment execution content should play today an important role in development of the scientific idea. Therefore we cannot agree with position asserting that “the social systems should be built such way to minimize tangible needs of the pains causing with purpose of the social control” [6, p. 23].

Such approach is a denial of the totally preventive influence of the criminal punishments into population, which plays an essential role in criminal prevention. Unlike it is possible to impact on peoples' behavior in a socially useful direction without suffering, pains, deprivations, which are the elements of the punishment



content. One can speak only about restrictions of these punitive features of the punishments for the individuals, who committed insignificant crimes. But, it is excluded in the nearest future a possibility of the restriction of punishment's role in criminal prevention and strengthen attention to other measures of influence, first of all, to those, which are enable to impact into a personality not only directly, but also through changes of the social and economic, cultural and etc. terms, in which he/she lives and is formed.

Thus, we would like to remember to those who assert that it is the time now when a movement of the theory of intimidation should be stopped: a theory of the holding is fully unacceptable, if the matter is about a choice between two extremes – all or nothing. If not to accept any actions to the offenders, and not to intimidate then, undoubtedly, it would affect on a general level of the criminality.

One cannot forget that today an ability to resist the criminality efficiently is not a private problem, but an issue of survival of society in whole. It is not necessity to prove today that the positive results of withstanding to criminality can be achieved as with help of the rational social policy so rendering influence into a personality of the criminal. Therefore a social control over the criminality includes a fight by means of punishment and preventive treatment. In connection with this we would like to make one important clarification. When we are talking about intimidation, we keep in mind an influence into the certain unstable part of population with expediency punishment with purpose to help them to be adapted to the conditions of a society life. Nevertheless, it would be accepted with great pleasure non-punitive influence and refused from punishment, if it is any awareness that the criminality begins gradually reduced after that. Since, if it is not such awareness then it should consider a criminal punishment as crimes preventive in the nearest future. Therefore, assertion about that “it is not important finally whether the punishment acts or not as it goes out usage” [13, p. 79], is absolutely unfounded. It is true, the indicators of the actual criminality show low efficiency of the preventive influence of the punishment and the same time they do not give respond on an issue about the number of people, not committing crimes on reason its threat. Basing on this, a lawmaker does not think over issue – to

accept punishment or not to, though he knows that a threat does not affect to all without exception. Therefore, it is practically impossible to select a fear of the punishment, intimidation from all combination of the circumstances, on reasons of which a man refused to commit crime and determine exactly what a level this threat has in total numbers of the reasons. Influence of the criminal punishment is not persuaded of the numerical determination. It acts unnoticeable. The reality is concluded in that during determination of the criminal punishments, the idea of prevention is the main for today's lawmaker. Consequently, it is beyond of doubts that intimidated preventive actions of the punishment is increased together with its strengthening in respect of certain categories of the crimes. From the experience of combat to crime in the soviet period one can make the samples, when because of toughening a punishment for the specific kind of crime, seen a strict its reduction (for hooliganism, bribery, theft of the state and public property etc.). But, it seems completely inadmissible to do conclusions about influence of the punishment in the criminality with considering of cruelty of the repression and dynamic of the previous conviction. It cannot be such provision in the practice when a level of the criminality depends only on an influence of the punishment cruelty. It is mandatory required a multifactor analysis of the circumstances, which are influenced in criminality in specific conditions. So, reasoning about future of the criminal punishment and possibility its replacement with the measures of the non-punitive influence, we are supporting a position of I. Andenes, who told: "I choose the criminal law, which has an open and direct punitive nature and does not try to hide for generous rhetoric about correction and restoration of a personality, i.e. the criminal law, based mainly on total holding and ideas of the justice, and I foretell that the future belongs to it" [1, p. 261]. That is why we should speak and argue not about "crisis of the punishment", and to study and understand deeply an impact mechanism of the punishment threat on a man. Can it be discovered something that earlier was not be known, or restore a positive truth and support it with new proofs?

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