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Right to punishment

Abstract: It is considered theories of origin of the right to punishment, is researched a core of the notion, its constituent elements.

Particular attention is paid to formation of the right to punishment in the Muslim law, is analyzed the genesis of the Muslim legal doctrine.

It is concluded that the right to punishment received by a state on the basis of public agreement, is used to protect public order and prevent crimes through coercion and intimidation.

Keywords: the right to punishment; state; the Muslim legal doctrine; justice; society; crime; coercion.

It came time when the right to punishment became to belong to a state. How and why did a state become authorized to fulfill these duties, which had belonged in former times to a community or private individual? Who gave the right to punishment to a state? In spite of the fact that these philosophical issues have been exited for a long time but they are topical and disputable up to nowadays.

As it is justly noted by Y.V. Golick, "correct answer on the question about the state's right to punish will allow more exact to understand a role of the state in the modern, quickly changing world, a role and significance of the criminal justice and criminal prevention, to build such system of the penalties, which will be accepted by everyone, and the main, it will be work" [1, p. 21].

The right to punishment gives also the right to determine the purposes, which a subject of the right is going to reach through punishment. Therefore these issues are not only just philosophical, but and practical ones as the determination of criminal policy depends on their solution.

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In former times the philosophical problem about a state's right to punish was a subject of interests for the philosophers, clericals, and many thinkers. Nowadays this issue is not a subject of the serious discussions and research. Y.V. Golick explains this situation by the following: "The right has been transformed into the duty. Therefore, search the grounds of the right to punishment has been stopped" [1, p. 50].

So, whether the right to punishment is begun with religion, morality or just in public interest?

Theory of divine origin of the right to punishment searches the basis of the right to punishment in conditions of appearing of human communication, in the laws of the universe that is in religion, but not in morality beginnings public interest, retribution or in the features of an individual. The core of reasoning as follows: with the creation of the world, God took the trouble to manage with all matters as in physical life so and moral one, in politics and religion; He made the people such as they are now; He is lawmaker, teacher, lord and judge of them.

Representatives of the theory of divine origin of the right to punishment say that the right to revenge, belonging to the God, at the same time might be delegated to the clerical and secular lords. The latter is vested duties to punish. Thus, it is getting that the law to punish belongs only to the God and without his authorization nobody, even society, has the right to encroach at life and freedom of man. It should be noted that in order to achieve their goals the canonists of the Middle Ages, being quoted to the Holy Scriptures and considered theory, could execute the indescribable cruelties, death penalties and tortures by means of punishment.

According to logics, the right to punishment has a subject who has established the rules of conduct, has determined, which behavior should be considered the right and which illegal one, that is crime. Therefore, in order to prove that the right to punishment belongs to the God, it is necessary to apply to the Holy Scriptures, which is considered as legislative acts. If they are provided what should be considered a crime and what kind of penalty is imposed for that, then according these Scriptures the right to punishment belongs to just the God as a subject of legislation.

Let's begin from the Christian doctrine about crime and punishment. This religion, as and other ones, provides a certain model of manner in spite of the fact that it has not a public nature, cannot act on behave of state, direct their dogmas as generally binding to whole society. Therefore, the Christianity cannot be considered as means of regulating the public relations

That's why the Christianity as a norm of manner has attitude to a specific man who accepted this creed, reflecting his relation to other people. Among the religious sources, which have historical significance, we may distinguish the legislation of Moses – the Law, sent the Jewish people by the God through Moses.

Legislation of Moses is system education, the key element of which is 10 God's commandments that named also as the Decalogue. It is asserted that the text of Testament was received by Moses from the God on Mount of Sinai (Exodus 20: 1-17) and together with the laws declared to his people (Exodus 21: -36; 22: 1 - 31; 23:1-33). Testament and the laws have a kind of agreement, and consequently, legally significance act. Therefore it might be come from the two positions: the author of the legislation is as the God so and the Jewish people; or the subject of the first act is only the God, and Moses acts as a mediator in relations of the Jewish people with the God. We will proceed from the fact that the Old Testament law was received from the God and consequently it is considered to be the Divine law. Undoubtedly, the legislation of Moses has a number of features that inherent to criminal law. Determination of crime, establishing of guilt, punishment and circumstances that exclude responsibility of criminal are one of the most important of them. So, for example, the Law provides detailed description of evidence of premeditated murder, which have criminalistical and evidential significance. Punishment is an integrated part of the legislation of Moses; it consecrated by the God, accepted for granted by the Jewish people. Consequently, it is initially established by the God as a mean of influence on created by him human being.

So, it was the Law of Moses, which had attitude only to one people – the Jewish one. The God was an author of the legal act. Consequently, the right to punish belonged to the God until the historical time when this Law lost legal force (not

spiritual). It is understandable that the God does not punish himself, at least, in this life. In certain historical period on behalf and dictate of the Most High this task had been fulfilled by the Church. It executed in exact compliance with the norms, which indicated by the Creator and his immediate disciples. Being visible head of the Church and visible Vicar of the Christ on the Earth, Pope pays tribute to the penalty for crime in the form of retaliation in that sense, in which the God provided Himself this retaliation, saying: "Vengeance is mine, I will repay".

Unlike the Catholic Church, the Orthodox Church, not having other head apart from the invisible Christ, cannot hand on any visible authority the retribution for crimes as kind of the Divine justice satisfaction. The retribution is given by the Orthodox Church directly to the God's court.

In contrast to the Laws of Moses that had lost its juridical force but is continuing to act as spiritual source, the Quran as the Law, sent by Allah for the Muslims, is acting for some people up to nowadays.

Arabs began to live the rules of the Quran after Divine revelation. It meant that one should do as Allah tells; otherwise they will get a severe punishment. But, sometimes people met with circumstances, which stood them in complicated, stalemate, i.e. the Quran "kept silence" and they did not know how lead themselves in such situations. But, unlike the Laws of Moses, the Law, which sent the Prophet Muhammad, regulated criminal legal relations more specifically and actively. In such situations the Sunna(h) was a base for people's manners and their responsibilities. The Arabian word ("as-sunna(h)") has a lot of meanings, for example, custom, moral and manners, traditions, way of life etc.

In connection with this, we may dispute with G. Oppenheimer, who asserted that "bases of the Mohammedan criminal law, laid down in Quran, are extremely meager, and the scientists are not agreed in interpretations of some texts referring to this subject" [2, p. 47]. First, Quran is the message to humanity through the Prophet Muhammad, and not product of human creation. Second, according to confirmation of the modern scientists, Quran is very clear provided what Allah considers a crime and what kind of punishment he demands for these deeds.

Unlike Quran, containing the messages of Allah to Muhammad, Sunna(h) is the collection of adats, traditions associated with the actions and words of the Prophet. Sunna is a source of Islamic law, second only to the Quran, and applied when Quran was not a special instruction on permission these or those special cases from legal life. Sunna contains information about associates and followers of the Prophet. Figuratively, we can say about Sunna the following: "To observe Sunna means to emulate Muhammad". On behalf of Allah Prophet Muhammad addressed some main rules of manners, norms and punishment to the believer Muslims. Other part legally significance norms formed during life and activity of Muhammad. After death of Muhammad rulemaking activity of his were continued by his close associates - righteous caliphs - Abu Bakr, Omar, Osman and Ali. Being based on Quran and Sunna, they had formed new rules of manners, which, according to their views, corresponded to will of Allah and Prophet Muhammad. Upon absence of responses on issues from crime and punishment sphere, the criminal legal norms had established by joint discretion or by each caliph in person, as it was recommended by the Prophet.

So, in 7-8 centuries Quran, Sunna and discourses of the Prophet's associates were the sources of the Muslim criminal law. This meant that *the right to punishment belonged to Allah - the author of Quran, the Prophet Muhammad as the author of supplements to the Message of Allah in sphere of criminal law and the associates of the Prophet.* In principle, we should agree with statement that the Prophet Muhammad did not seek to create any law in strict sense. He taught people how to act in all living situations, how to deal to these or those event, fact, action etc.

We should stress that only in 8 century the Muslim jurisprudents could separate criminal legal norms from religious ones, i.e. they had worked out the Muslim law, including criminal, seeking to substantiate the decisions coming from the Quran or Sunna.

There are sufficiently examples, which confirm that religious and based on it criminal legal norms, which regulated similar relations, not always coincide on contains with the rules of manner fixed in them. So, essentially, the Quran allows the

blood vengeance and punishment on lex talionis for intended killing and bodily injury. But, the Muslim criminal law, rejecting application of the principles of the Quran in respect to punishment, insists on ransom demand and allows the death execution as extremis. Beginning from 9-10 centuries a role of the source of the Muslim law gradually went to the doctrine, which had developed a significant majority of specific criminal legal norms of the Muslim legislation.

The first step on the way of the Muslim legal doctrine formation was *the paradise* – relatively free discretion, which had applied during interpretation of the Quran and Sunna and formation of new rules of manner if these sources did not contain required information.

But, to the end of 10th century the Muslim judges lost the right to make a decision on their discretion under absence criminal legal norms required in the Quran, Sunna and other sources. It had been necessity to manage with persuasion accepted by the population of a country. To the 13th century the Muslim criminal law practically lost its integrity and transferred in semi-doctrinal law, divided on various branches.

Thus, until end of 15th century the Muslim criminal law in the form of doctrine – the conclusions of the famous representatives of the main persuasions – was the leading source, which had established a system of punishment for crime and regulated an order of their application. With formation of the Ottoman Empire an expanding legislative practice of the rulers had become to give a noticeable influence on this branch of law. The rulers passed laws on the issues, not regulated by the Quran and Sunna. Practically, at ruling of all Ottoman sultans had been drawn normative legal acts on criminal issues. But, just Mehmed Fatikh systemized them and introduced in form of the two consolidation laws – Kanun-name; the second of them contained detailed chapter about criminal penalties.

Beginning from the second half of 19th century serious changes had a place in the Muslim criminal law. First of all, instead of it the developed Muslim countries began to use the legislation based on western European samples. In particular, in 1840 it was passed the Criminal Code of Ottoman Empire, which had based on the

French legislation. The Code effect had spread almost on each of the Arabian countries, which were a part of the Ottoman Empire. But, collapse of the empire after First World War was caused that new criminal legislation, which was based on the European models, adopted in some of the countries.

To the middle of 20th century new criminal legislation was introduced in the most developed Arabian countries. This legislation had been based on the bourgeois models and replaced the Muslim tort law as the main source under resolution of criminal cases. There is not unified criminal code in Saudi Arabia until now. Criminal law is not also codified in Yemen. Process of Islamic directionality of the criminal law the most brightly manifested in Pakistan, Iran, Sudan. Until now, legislation of Morocco, Jordan and Pakistan provided criminal liability the Muslims for nonobservance fasting during Ramadan. Special Muslim courts in Iran, which set up to fight with so named moral degradation, may punish for disregard of the Muslim traditions in clothing or violation of the Sharia norms of public conduct.

Thus, the right to punishment belongs to the state, as it determines the rules of conduct for the members of society. How did this right pass into the state?

The right to punishment belongs to the state of necessity. Manouvrier writes: "I think that the right to punishment is as necessity of punishment. Society should be aimed to decrease this necessity but not to abolish of it. Word "punishment" has to express a concept of useful and indispensable reactions against the acts, which are harmful for general welfare and social progress." [6, p. 116].

In opinion of N.D. Sergiyevsky, "state has the right to punishment because it cannot exist without criminal justice. Juridical substantiation of the right to punishment follows from the next: if there is law and order, then criminal justice should exist" [3, p. 231].

According to Y.V. Golick and I.Y. Foynitsksy, the right to punishment, belonging to the state, at the same time is its duty, which should be carried out by the state [4, p. 305; 1, p. 50].

A. Frank answered the following to a question: who had possessed the right to punishment before formation of state and how this right had been passed to the state:

“Whether we have the right to believe that the right to punishment warping from historical reasons is as the right to vengeance?” “Right to punishment exists everyplace where only it presupposes to be obeyed. In its turn, obligation obedience presupposes the right to coercion and punishment.” [5, p. 116].

Nowadays, the supreme state power is a specific carrier of the public criminal law in all developed countries independent on their political organization. Consequently, the problem is whether a society may punish and in which bounds, and why this right is given the society?

In period of primitive-communal system the right to punish children, wives for crimes and offenses, which committed in community, belonged to a head of family or stripes. In principle, there is not a society, which would not have its mandatory rules and support itself through those or other coercive measures. Leaders of tribes, clans and unions were initially as legislators, so and judges and executors of own sentence. Only they had the right to punishment.

During historical progress a state power became standing up against illegal actions. It had taken responsibility from all violations. Under pain of penalty a state might ban any actions or inactions and also the right to award and execute punishments.

But, it does not mean that a state was formed as result of arbitrariness of people. Moral necessity lies in basis of it. Organized life of people that stimulate welfare, development of man and growth of culture is possible under law and order only. And nomocracy is possible only in a state, which has the right to stop those who violate its laws, i.e. society charged a state to protect of it with appropriate means from illegal actions. We are talking about such means of defence as criminal punishment. Therefore, we may assert that *natural beginning - the main principle of the right to punishment comes from necessity of defence as whole public organism so and its personal individual*. The right to punishment, belonging to a state, is a duty before individual members of society and whole society.

With other hand, any violation of established legal norms causes reaction as from public so and state, which applies its efforts to protect the law that comes from public authority.

So, the right to punishment that belongs to a state in compliance with public agreement is indefeasibly like the right to punishment of a family head. The difference might be in their aims [5, p. 116].

Right to punishment becomes for a state as means protection of public order and prevention crimes through coercion and deterrent. It should be noted that we are talking about a moral necessity of punishment but not providing a state with the right to retaliate of offender for his deeds.

Sense of just retribution (not revenge) requires existence and application of criminal punishment, without which a state cannot exist. That is why a punishment is lawfully and justly. In order to disallow lynch law, arbitrariness, revenge a society in face of state takes responsibility to punish criminal as a victim requires of it. At last, it is sufficiently to imagine what would happen if authorities repeal criminal punishment for criminal offence in order to convince as far as a punishment is useful or not.

Thus, according to I.Y. Foynitsky, "the right to punishment belongs the only and exclusively to a state as a subject" [4, p. 302]. In regard of the Divine right to punishment, this may apply if frames of the Divine scripture of the Laws.

We did not make a goal to consider in details existing theories in respect of the state's right to punishment. But, we consider it necessity to note that according to N.D. Sergiyevsky, beginning from Hugo Grotius there are up to 24 philosophical systems and about 100 separate theories of various jurists, joined to those or other trend [3, p. 77]. There are schools of philosophers and jurisprudents among them, which completely reject the right to punishment as they deny existence of an object of this right, i.e. moral evil.

Representatives other trend, in particular A.D. Spasovich, recognize a denial of a will freedom as a sign of denial the right to punish and include all determinists with theologians and materialists in this group.

There is a school, which, not denying the right to punishment does not recognize the fact that this right has to belong to society or any authority. Thus, the right to punishment is a sphere of medical art. Therefore, nobody has the right to punish criminals; they should be treated through various instruments and exercises, which slowly by slowly return illness organ necessary force and health or correct wrongness of its forms, perverting on the nature. But, does medicine exist for this? Prisons will be replaced by special hospitals, and justice and criminal legislation – with new therapeutic and hygienic system.

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