BABEȘ-BOLYAI UNIVERSITY
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JUS PUNIENDI. CURRENT ISSUES IN LEGAL PHILOSOPHY

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Summary

It is Hegel who states that "The theory of punishment is one of the topics which have come off worst in the recent study of the positive science of law, because in this theory the Understanding is insufficient; the essence of the matter depends on the concept".

Embracing the Hegelian thesis that the various considerations of *punishment* as a phenomenon, its relation to the victim's conscience and its consequences for the representation of the punished party are *modalities* of punishment, which imply first and foremost that punishment is in and of itself *just* - thus serving as a validation of the very idea of its application -, this paper aims to reflect on how this justification of punishment is approached in the contemporary academic environment of moral, political and legal philosophy. The subject is at the confluence of these fields, since *Justice,* applicable in the state context, is equally a political and moral concept, there being, as Robert Nozick puts it in his book *Anarchy, State and Utopia*, a continuity between moral philosophy and political philosophy[1].

Defined by legal philosophy both in terms of the State's *power/capacity* (also known as *potestas criminalis*) and its (*subjective*) *right* to impose punishments, *JUS PUNIENDI* must be distinguished from *jus poenale*, which is its *objective* right, the sum of rules concerning criminal acts, procedural rules and types of punishments applicable under criminal law *(Criminal Law lato sensu*). Derived from the concept of *sovereignty*[2], pursuant to the social contract which gave the State the right to consider certain types of

[1] Robert Nozick, *Anarchy, State and Utopia,* New York, Basic Book, 1974, pp. 6*:* "Moral philosophy sets the background for, and boundaries of, political philosophy. What persons may and may not do to one another limits what they may do through the apparatus of a state, or do to establish such an apparatus. The moral prohibitions it is permissible to enforce are the source of whatever legitimacy the state's fundamental coercive power has. (Fundamental coercive power is power not resting upon any consent of the person to whom it is applied.) This provides a primary arena of state activity, perhaps the only legitimate arena. Furthermore, to the extent moral philosophy is unclear and gives rise to disagreements in people's moral judgments, it also sets problems which one might think could be appropriately handled in the political arena".

[2] For a historical perspective on the notion of *jus puniendi* see, for example, Lívia Horgos, *Thoughts about the Definition of Ius Puniendi in Legal Theory*, in *Belügyi Szemle*, 2021, Special Issue 1, http://real.mtak.hu/125088/1/HorgosBelugyiSzemle2021.eviSPEC1.szam9-19.pdf (last viewed on 10.12.2021).

conduct as reprehensible and to sanction them, *jus poenale* is only a corollary of *JUS PUNIENDI*[3].

The derivative character of the State's *right* to apply punishment from its *power/capacity* results from the very Hobbesian meaning of the *right* to punish, which, in principle, as a right of self-preservation, belongs to all human beings and which the sovereign acquires only through the State, as a result of its superior character *(Imperium*) and its right, but also its obligation, to protect its citizens *(jus eminens*). Also, the nature of *genus proximum* of *JUS PUNIENDI* as opposed to *jus poenale* can be deduced even from the transposition of this mechanism to the supra-state level, where the capacity to impose punishments is transferred to an international body with the authority to exercise this right.

On the other hand, it is well known that civil and criminal legal liability evolved together and without any clear demarcation between notions until after the French Revolution, when they separated and crystallized as distinct legal concepts. And currently there is a trend towards a re-approaching of these areas, as recorded in the Anglo-Saxon *Common* Law system, which provides for *punitive damages* to be awarded in cases of intentional torts or breach of fiduciary duty, but also in contractual matters, or in certain cases of negligence. This type of exceptional civil damages are intended to restore the link between Law and Public Morality and *prevent its ossification into a technical discourse of control*[4].

Taking all these arguments into account, the justification of the punishment applied by the State, i.e. the answer to the question *What justifies the general practice of punishment?* cannot be formulated without recourse to notions with a broader scope than the legal, on which positive law is based, namely those of: (i) Law/Good law (in the terms

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[3] The derivative character of *jus poenale* from *jus puniendi* is shared by most of the doctrine. See, in this regard, *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, Morten Bergsmo and Emiliano J. Buis (editors), Torkel Opsahl Academic Epublisher, Brussels, 2018, pag. 414, https://www.toaep.org/ps-pdf/34-bergsmo-buis (last viewed on December 10, 2021).

[4] See, in this regard, Marc Galanter and David Luban, *Poetic justice: punitive damages and legal pluralism*, in *American University Law Review*, No. 4, *Summer* 1993, pp. 1393-1463, where, on p. 1461, they state: "Punitive damages (...) help to maintain the connection of law with public morality and keep law from ossifying into a merely technical discourse of control. Punitive damages help ensure that economically formidable offenders do not enjoy the benefits of wrongdoing beyond the reach of the law. They serve vital retributive and preventative functions.", https://digitalcommons.wcl.american.edu/aulr/vol42/iss4/5/ (last viewed on December 10, 2021).

used by Professor Lon L.[5] Fuller) and the relationship between Law and Morality, (ii) *legal interpretation* (a concept with relevance both from the perspective of the adoption and the application of the law and, implicitly, of punishment), (iii) *truth, violence, liberalism* and *democracy*.

Consequently, I have chosen the Hart-Fuller debate on the relationship between Law and Morality as the starting point of my thesis, since this [6]has revealed the need to approach *punishment* starting from the concepts mentioned above, in the context of which it crystallizes and which serve as its foundation.

Following the points set out above, the structure of the thesis has been designed as follows:

Chapter I of the thesis formulates, starting from the perspectives opened by the dialogue between H.L.A. Hart and Lon L. Fuller, *the modern articulations of punishment*, which I have identified to be *Law/Good Law* and *Morality,* grounded and adopted in *the field of internal* and *external morality of the* Law, *respect* due to the Law and its *interpretation* as a matter of *responsibility*.

Chapter II outlines the evolution and confrontations of the modern foundations of punishment with postmodern deconstruction and challenges in neuroscience and how *the Law in the view of classical modernity* has been transformed by postmodern currents into its *present configuration*.

Chapter III outlines the image of *JUS PUNIENDI* in the current context by reviewing the main theories on the subject, namely Hart and the *mixed theory of* punishment, the "*fair play*" doctrine and the debates it has generated, "*communicative theory of punishment*", "*embodied social justice*" and relational justice. Once this representation was outlined, it was subjected to the test of evolutionary psychology and neuroscience, which, as a result, it can pass without difficulty at the current stage of that research. Also, by virtue of its eminently retributivist character, after a re-reading of the

[5] Matter raised by H.L.A. Hart in his book *Punishment and Responsibility. Essay in the Philosophy of Law*, Second Edition, Oxford University Press, 2008.

[6] The metaphorical use of the term "*quarrel"* in its French form is intended to refer to the climax of the *quarrel between ancients and moderns*, which gave rise to the word *modernism* first used in Europe in the first decades of the 18th century. This analogy is given by the significance that, in my view, the Hart-Fuller debate constitutes for the modern articulation of the notion of state punishment.

Kantian thesis, the current view on punishment has reconfirmed its moral principle, which justifies its applicability.

Chapter IV deals with the *limits of* the current punitive concept, which are represented, on the one hand, by the persistence in the legal vocabulary of the *death penalty* - as the "impossibility of any calculation" when faced with the finitude of the human being -, reflecting the Law's resistance to restricting its scope, and, on the other hand, its tendency to extend its normative system and punitive apparatus to new areas, such as the punishment of legal entities or artificial intelligence, thus revealing its *elastic* nature.

Chapter V addresses the importance of domestic acceptance of current aspects of legal philosophy on punishment.

Thus, following, throughout the thesis (within the chosen presentation interval, namely between the second half of the 20th century and the present), the way in which modern philosophical-legal thought, including its *post-modern* formulation, has approached the notion of *state punishment (JUS PUNIENDI),* I have been able to identify an evolution in the treatment of the subject that can be briefly described as follows:

Initially, the doctrinal focus was on the idea of *justification* of punishment, starting with Hart and the mixed theory and continuing with the *"fair play" doctrine* and the debates it provoked. Justifying the idea of punishment - starting from principles such as the moral dignity of the individual agent or legal protection in terms of "*fairness "* - and identifying its functions was, however, also a way of drawing the limits of sovereign power, which followed the Beccarian tradition and that of his disciple Jeremy Bentham. The legitimization of the act of punishment was intended to determine the conditions under which the exercise of this right can be manifested without provoking a reaction against the state power that imposes and applies it.

Subsequently, under the influence of critical discourse, legal sociology and postmodern thought, a *fin-de-siècle* direction of penology is taking shape, which is still under construction, oriented towards investigating in particular *what determines/generates the* application of a punishment[7], how it manifests itself and what effects it produces,

[7] A vivid example of this is, for instance, Michel Foucault's book *Surveiller et punir: Naissance de la prison*, Edition Gallimard, 1975, which, on p. 22, outlines the following general rule: "Ne pas centrer l'étude des mécanismes punitifs sur leurs seuls effets « répressifs », sur leur seul côté de la sanction », mais les replacer

respectively the way in which punitive practices have been reflected in the collective mentality, represented by currents such as *communicative theory of punishment, embodied social justice* and *relational justice,* which approach punishment as a complex social function.

As a manifestation of what I referred to as *Elastic Law*, within the current trend one can also observe a concern of an axiological nature, of probing how the punitive system speaks about us in terms of humanity and human values, in the context where the *Law,* which has become an object of study by *Science*, extends to new areas that it already masters. And the purpose of this concern, whether expressed or only implicit, is to *understand punishment*, not only on the basis of the evaluation of criminal practice and institutions, but through a multidisciplinary approach, a recomposing of an image based on fragments, a *kaleidoscope*.

In conclusion starting from the question *What comes after post-modernism?*, the thesis reflects the current trend of *retro-modernity* of theories of punishment, which I have shortly defined as the *freedom to manipulate, develop and transpose concepts, ideas, theories of modernity in various combinations, resulting in constructs adapted to the current complexity of law, without abandoning, however, the classical paradigm of legal thought*.

This *retro-modernity* of philosophical-legal thought has nothing in common with what Jean Baudrillard, in *Simulacra and Simulation* [8] *,* describes as *retro* as a demythologization of the past, a form of manifestation of simulation in today's world of virtuality, a fetishization of history. On the contrary, this movement is about a living current in which, metaphorically speaking, *the flared trousers of philosophy are being re-tailored as a reaction to the emperor's new clothes in the practice of justice*.

dans toute la série des effets positifs qu'ils peuvent induire, même s'ils sont marginaux au premier regard. Prendre par conséquent la punition comme une fonction sociale complexe."

[8] See, in this regard, Jean Baudrillard, in *Simulacra and Simulation*, translation by Sebastian Big, Idea Design & Print, Cluj, 2008.

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