Some Aspects of Crisis of Punishment

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Abstract

An important area of criminal law discourse in recent decades has been the idea of a crisis in criminal punishment. At the same time, the crisis of punishment is seen in the fact that it in no way can achieve the goals set for it to prevent crimes and correct the perpetrators. The article substantiates the opinion that such an approach to assessing the theory and practice of punishment is not entirely justified. The crisis of punishment is not that it is incapable of achieving a goal, but that society and the state set deliberately unattainable goals before punishment. What is called the crisis of punishment is in fact a crisis of goal-setting in criminal punishment.

Keywords: *criminal policy, crisis of criminal punishment, purpose of criminal punishment, humanization of criminal punishment.*

I. Introduction

The idea of a "crisis of criminal punishment" has become a solid part of the pool of the most important research problems of criminal policy since the second half of the 20th century. It has long been the subject of lively discussion and is still very popular in the literature. Referring to the works of T. Mathisen, N. Christie, and other authors, many experts see the crisis of punishment in its inability to achieve the noble goals of correcting criminals and preventing crimes, in its excessive harshness and even cruelty, offering substantial humanization of penitentiary practice as prospects for overcoming the crisis and the development of alternative measures to punish criminals. It seems to us that such reasoning does not quite correctly describe the real state of affairs in the field of theory and practice of the application of criminal punishment. In an article we will try to substantiate that what in science is called the "crisis of punishment" is in fact a "crisis of goal-setting of punishment."

II. Sources review

In Russian literature, a detailed description of the phenomenon of the punishment crisis given by Ya.I. Gilinsky: “Punishment, intended for millennia to perform the

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function of deterrence, reduction of crime, is not effective, does not fulfill the tasks assigned to it!"… "The crisis of punishment" is manifested, in particular, in the fact that (1) in the entire history of mankind, none of the most severe punishments (including the qualified death penalty – quartering, burning alive, pouring hot lead down the throat etc.) did not "liquidate" crime; (2) from the end of World War II to the late 1990s – early 2000s, the crime rate increased throughout the world, despite all the efforts of the police and criminal justice, and since the late 1990s and early 2000s, it has been decreasing in all countries, regardless of activities of law enforcement agencies; (3) the rate of recidivism is relatively constant for each country (and in Russia it has increased over the past ten years from 25% to 56%, which indicates the complete ineffectiveness of punishment)[3].

According to foreign scholars, the crisis of punishment is in its cruelty (the preservation of the death penalty[4]), the unjustified scale of the use of punishment[5], in the impossibility of adequately substantiating punishment either from the standpoint of retribution or from the standpoint of utilitarianism[6], and, as a consequence, in the growing attractiveness of alternatives to punishment (including restorative measures[7]) or other preventive practices[8].

Backed up by a wide body of evidence, the very idea of a punishment crisis is appealing. At the same time, we dare to suggest that the crisis of punishment in question presented in literary sources for the most part as an empirical reality, rather than a theoretical problem. In theory, the question of the crisis of punishment seems to merit a broader view. The thought seems to be correct: the practice of criminal law and punishment is far from ideal. This raises difficult questions about the relationship between theory and practice. The "gap" between theory and practice can lead to a frustrating impasse in which the empirical reality of criminal justice used as evidence against ideal theories[9].

III. Discussion

3.1. History of Punishment as History of Crises

As an initial thesis, let us express the idea that the entire history of criminal punishment is at the same time the history of its repeated crises, or, more precisely, the history of overcoming multiple crises.

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[3] YA.I. Gilinskij, *Kriminologiya postmoderna. Neokriminologiya* [Postmodern criminology. Neocriminology] – SPb.: Aletejya, 2021, pp. 94-95; YA.I. Gilinskij, *Kriminologiya: teoriya, istoriya, empiricheskaya baza, social'nyj control* [Criminology: theory, history, empirical base, social control], 2nd ed., rev. and add., Legal Center Press, 2009, pp. 404-410.

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- the first historically documented crisis, perhaps, can be considered a crisis of blood feud in tribal societies and the concentration of punitive power in the hands of the state, which led to the limitation of the scale of uncontrolled violence and the formation of the punishment system itself as measures of public-legal, official, state reaction to crime (remember Russkaya Pravda and its role in forming the foundations of criminal law);
- the second clear "decay" of the punishment system is observed during the second half of the 18th – early 20th centuries, when the humanistic criticism of Beccaria and the development of sociological criminal law theories led to the expulsion of the ideas of punishment and retribution from punishment, the limitation or exclusion of extremely cruel and inhuman punishments, and the formation of an expanded system of "progressive" consequentialist measures of influence on criminals, focused on their correction and prevention of crimes (a clear evidence of the results of this crisis should be recognized gradation of punishments into "criminal" and "corrective" in the Russian Code of 1845, as well as the subsequent replacement of the category “punishment” by the category “measures of social protection" in the post-revolutionary legislation of Soviet Russia);
- the third crisis is clearly correlated with the judgments of T. Mathisen, N. Christie, J. Gilinsky, close to us in time, testifying that an attempt to achieve the goals set for "correctional" punishments can hardly be recognized as successful or effective, which led to a new modernization of the theory and practice of criminal law measures, including through the development of a restorative justice system, preventive criminal law and risk-based justice.

It is hardly true to believe that the history of crises has been exhausted and completed on this, and this ingenuous forecast prompts our opponents to focus their attention on one very important circumstance.

The three mentioned crises are at the same time three ways out of the crisis, each of which was a stage in the movement towards the humanization of the system of penalties.

If we proceed from the logic of the supporters of the crisis theory, such progress would have to be accompanied every time by a further reduction in crime. However, there is no such effect. Why? In our opinion, it is precisely this question that should have arisen in the first place before the authors of works on the crisis of punishment and put “for resolution”. Who, where, when, why and on what legal basis decided that the solution to the problem of reducing the crime rate is part of the punishment mission? What is the theoretical basis for such a decision? Why this mission has never been marked with success, and the history of many thousands of years of punishment has become a history of its failures. Alas, we are not aware of works in which similar questions arose before the authors and became the subject of in-depth research.

3.2. Humanization and effectiveness of criminal punishment

A quick overview of the main milestones in the development of punishment shows a clear connection between the categories "crisis" and "humanization": punishment is steadily (albeit with inevitable fluctuations) moving in the direction of humanization and each crisis in its development can be perceived as a public acknowledgment of the excessive cruelty of punishments, the consequence of which is another process of mitigating criminal law measures and sanctions. There is a persistent feeling that the ineffectiveness of punishment over the centuries was determined by its insufficient

humanity, and therefore the achievement of the humanistic ideals of punishment was thought of as a movement towards the effectiveness of criminal punishment.

What is called the crisis of criminal punishment should not be regarded as a purely legal phenomenon, and its overcoming by humanizing the punitive system should be associated only with the innovations of criminal law and criminal political thought.

In fact, we believe that the initial driving force here should be considered not some unacceptable state of punishment and punitive practice, called a crisis, but the onset of the next stage of the civilization process. At each of them, naturally, assessments of many values and priorities change, ethical and cultural postulates, understanding of what is good and what is evil are corrected. New concepts and views, of course, penetrate into the sphere of law, changing the idea of what is allowed and what is not, what is unacceptable even in such an acute social situation as the fight against crime. The need for general changes, updates, growing in society, has been and remains a source of progress and gives impetus to development, including in the field of criminal law.

"Efficiency" and "humanity" of punishment are, although related, but qualitatively different parameters and characteristics. An attempt to connect them together, and even more so to establish the presence of deterministic connections between them, is essentially erroneous. It, in our opinion, is direct evidence of a persistent and persistent misconception that by using criminal punishment, in principle, it is possible to solve the problem of crime.

The system of punishments should be assessed as some somewhat a given, a derivative of the political, social, economic order of things that exists in the state. Criminal law reality, accordingly, cannot be better or worse than this order of things, if only because they are formed, regulated and controlled from one source, which is the state power.

However, the initial predestination does not mean the inviolability, inability of the criminal legal institutions to change. However, in order for these changes to bring a result in which society and citizens are interested, they must be timely, scientifically substantiated and motivated by the objective innovative needs of society. This means, first, that a certain synchronization of the planned changes with changes in the life of society is necessary, i.e. a significant improvement in the living conditions of the population, the growth of their moral, political and legal consciousness, general culture etc. The above applies to the level of professionalism and the formation of progressive positions of power.

"Games" ahead of the curve, running ahead are not allowed here. One should not hope that the super-liberal system of punishments and the superhuman conditions for their execution (let us call them "Norwegian" for short) by themselves can lead the country to progress and the general triumph of humanism.

Instead of harsh imprisonment, "Norwegian" punishments are easy to enact in the law. However, they still need to find criminals who would be able to perceive (recognize) them as punishment, as a proper warning signal from the state and society and follow it. And we must add here a society that will be convinced that such laws and "humane" prisons with colonies reliably protect them from crime. Therefore, that everything else would be like in Norway.

Then (maybe!) the administration of the Russian prison without laughing will meet the complaint of the prisoner that in the morning he is not served hot enough coffee, as was the case, by the way, with the Norwegian Breivik, who was in a separate

two-room cell with all the amenities and means of communication, who shot more than 70 people from the machine.

With these words, we least of all justify and defend the order and manners prevailing in the modern penitentiary system, the conditions for serving sentences in many prisons and colonies with their, sometimes blatant cruelty, towards those awaiting punishment and convicted persons. It is about something completely different, about the inadmissibility of extremes, about the need for thoughtful proportionality in solving problems behind which the fate and lives of people stand.

3.3. Costs of humanizing punishment as a crisis

Now, the symptoms of the next crisis of punishment are clearly predicted. Entry into the era of the dominance of IT technologies, biotechnology, robotization, artificial intelligence, total control over human behavior and manipulation of it predetermines fundamental changes in the very life of society, in the system of values and preferences of people, in the complex of factors that generate crime, in its structural and other meaningful characteristics etc. All this cannot fail to lead to serious criminal-legal innovations and, at the same time, to a clash of old, ingrained and newly emerging, growing strategies and tactical ideas for combating crime. Including ideas for building a system of punishment. In fact, the first steps towards its restructuring are already being made, but sometimes they are accompanied by unexpected results.

Humanistic, maximally sparing human rights, aimed at preventing early deviations from social norms, a system of soft punishments and "pre-punishments" (fines, restrictions and control over the exercise of rights, compulsory treatment, education etc.), which abandoned the idea of retribution and corrections, suddenly opened a wide road to the almost uncontrolled design of criminal law prohibitions and the large-scale application of criminal punishments. The increasing mitigation of criminal punishments inevitably led to the expansion of the scope of criminalization of acts due to the desire to impose precisely criminal (albeit slightly repressive) punishment on such types of deviant behavior that, if the criminal punishment were more severe, could remain outside the framework of criminal law. The diagnosis of such a crisis in science was made: "overcriminalization" and "overpunitivity". This situation can be viewed as the use of humane punishments in order to increase the level of repressiveness of the criminal law system.

Let us illustrate this idea with just four examples from the Criminal Code of the Russian Federation:

- part 1 of art. 139 of the Criminal Code of the Russian Federation "Illegal entry into a dwelling committed against the will of a person living in it" – the maximum sanction – arrest for up to three months – 5388 people were convicted in 2020;
- art. 171.4 of the Criminal Code of the Russian Federation "Illegal retail sale of alcoholic and alcohol-containing food products" – maximum sanction – correctional labor for up to one year – 681 people were convicted in 2020;
- art. 158.1 of the Criminal Code of the Russian Federation “Petty theft” – the maximum sanction – imprisonment for up to one year – 5773 people were convicted in 2020;
- part 3 of art. 327 of the Criminal Code of the Russian Federation – "Acquisition, storage, transportation for the purpose of use or sale or use of a knowingly fake passport of a citizen, identity card or other official document granting rights or exempting from duties, stamps, seals or letterheads" – the maximum sanction is up to one year in prison – 5487 people were convicted in 2020.

We are not sure that in all these cases the legislator was strongly concerned with the idea of economizing on repression. However, we are sure that the low level of public danger of these acts (and the indicated maximum sanctions are evidence of the official recognition of such) gave and gives reason to think repeatedly how necessary it was, in principle, to elevate them to the rank of crimes. Meanwhile, 17329 people (3.3% of the total number of convicts) were convicted for their commission in 2020 alone. Undoubtedly, an impressive group of people who broke the law, whose fate could have turned out differently without prejudice to our common cause.

These sad examples should not be taken as evidence that the introduction of optimal and minimum severe punishment into the law is inexpedient and undesirable. In no case! The humanization of criminal law and punishment is a permanent process and not just a "revolutionary coup" (always carrying many dangers) in the event of a real or imaginary "crisis" of these most important institutions. In principle, it should not be interrupted if the process is limited by a reasonable framework and correlated with the dictates of the times and social needs. We fully agree with U. Hellman: "The crowding out of... harmful prison isolation requires the creation of a system of criminal-legal sanctions, which allows, on the one hand, to impose a punishment corresponding to the guilt of the offender, but, if possible, dispensing with actual imprisonment, and on the other hand, provides public safety when the harmful premises are driven back to institutions for the execution of sentences in the form of imprisonment"[10].

We believe that the recommendation is quite appropriate and relevant, first, with regard to the design and adjustment of sanctions for crimes that are notable for a low degree of public danger, since it is in this segment of Russian regulatory practice that examples of the unjustified use of too severe punishment can be found.

3.4. Crisis of goal setting of criminal punishment

As the purposes of punishment in the doctrine, there are ideals that set the vector of movement, which must be guided by, which must be strived for, but cannot be achieved. Part 2 of art. 43 of the Criminal Code of the Russian Federation, the purposes of punishment are called the restoration of social justice, the prevention of crimes and the correction of criminals.

In our opinion, the problem of the purposes of any legal institution should be specified, dividing the purposes into two groups. This division is based on the criterion that can be defined by the word "resource". This is what provides the opportunity to move towards the purpose.

The first group includes the purposes of legal institutions that have resources that allow them to solve problems that are adequate to the purposes set, and to actually and successfully move in the right direction. In other words, these are correctly set purposes correlated with the capabilities of the actor. Let us call them the secured targets.

The second group includes unsecured and (or) insufficiently secured purposes, i.e. incorrectly placed before legal institutions that are actually deprived of the above-named internal resources or possessing them to such a small extent that one can count on only minimal success.

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[10] U. Hell'man, *Znachenie preventivnogo zaklyucheniya dlya praktiki ugolovnyh nakazanij v Germanii* [The value of preventive detention for the practice of criminal punishment in Germany], Soyuz kriminalistov i kriminologov [Union of Criminalists and Criminologists], no. 1/2013, pp. 92-95.

Purposes formally assigned to criminal penalties are a classic example of “unsecured” goals. This circumstance serves as evidence that the restoration of social justice, the correction of the convicted person and the prevention of crimes in the text of the law as the purpose (special task) of punishment is not advisable. Moreover, the society has not been presented with any evidence that at least one of the purposes listed in the law, our judicial system has approached, even to the modest extent that could be called satisfactory.

Let us pay attention to one fundamentally significant circumstance: criticism of the normative purposes of punishment in no way concerns important and practically significant ideas inherent in the concept of purpose of punishment. The categories "justice", "correction of convicted persons", "prevention of new crimes" should not be lost for criminal law and codified legislation. The only problem is that the level of fixation of these legal values does not match their nature and content. In any case, these values are not specific purposes of punishment, according to the degree of achievement of which one can assess the effectiveness of criminal punishment.

IV. Results

According to the supporters of the theory of the crisis of punishment, the essence of this crisis lies in the fact that it was intended to fulfill the function of deterring and reducing crime, but it turned out to be ineffective and does not fulfill its tasks. The "crisis of punishment" is manifested, in particular, in the fact that in the entire history of humanity, none of the most severe punishments has "eliminated" criminality.

In our opinion, the very idea of a punishment crisis, and the arguments in support of it, look unconvincing. I think it is time to admit that the failure to achieve the unattainable cannot be considered a crisis. A crisis is a negative assessment not only of certain performance results, but also of the source that gave rise to them. A crisis is a destructive process that takes place within the framework of that social, legal institution, which, in principle, is capable of achieving the set goal, but for various reasons, “fails” the assigned task. However, what happens to the punishment (the "register" of its vices is known and can be easily continued) can be called whatever you like, just not a crisis. However, there is also a name: this is not a crisis of punishment, but a crisis of goal setting, the result of a dramatic error in setting goals where they do not belong. Fortunately, the negative consequences of such an error did not overstep the boundaries of various kinds of theoretical disputes and did not affect the activities of the courts, in judicial practice.

Moreover, one more thing: proponents of the punishment crisis theory argue that its history goes back millennia. In other words, it turns out that the crisis is as old as the punishment itself. However, the crisis cannot last many millennia. Be it so, any substance should have been "gobbled up" by the crisis long ago. However, the punishment does exist and, good or bad, does its job.

Yet it really is not capable of changing the crime statistics, which is what not only citizens and society expect from it, but also a certain circle of specialists. In addition, if such a desired influence on crime is considered a mission of criminal punishment, then it must be said with all certainty: the mission is impossible. We are convinced that since punishment, functioning within the limits of the possible does not have a tangible effect on crime, there is no reason and reason to talk about a crisis and “blame” the punishment for allegedly failing to fulfill its erroneously understood social purpose.

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