

# Theories of Punishment and Reform of Criminal Law

## (Reform as a Change of Mentality)

### Theories of Punishment as the Basis for Legitimation of Criminal Law

It is a commonly accepted concept that theories of punishment represent the basis of legitimation for the state's criminal punishment procedures. Different theories of punishment – absolute, relative, and mixed theories – explain in different legal philosophical and legal theoretical ways the nature of punishment and, via the objectives of punishment, the goals of the state's interference in criminal law.<sup>\*1</sup> The theories of punishment and the objectives of punishment formulated on their basis have at all times been the subject matter of scientific debates, discussions in comparative law included.<sup>\*2</sup> Besides, the theoretical bases and preferences of punishment recognised by a particular state condition the definition of the grounds in the Criminal Act on which penalties are imposed and ultimately the state's policies and practices of punishment.

In this article the author treats the issue of punishment theories against the background of Estonian criminal law reform. Hopefully, the issue of the exact theoretical basis of punishment which should underlie the development of our criminal law as a whole – an issue that is of paramount importance to Estonia as it continues to undergo reforms – and the law of sanctions and the bases of imposing penalties will attract the attention of scientific communities.

Estonian legal reform as a whole and, consequently the reform of Estonian criminal law aspire to disembark the totalitarian Soviet law and mould a European legal system that matches the current level of jurisprudence.<sup>\*3</sup> The matter, however, does not just involve the dogmatic review of certain problems but also concerns the legal philosophical and legal political bases of the reform of criminal law. Thus, the reform makes the jurisprudence and legislators face several tasks which can be solved only provided that besides

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<sup>1</sup> About the purport of the State's punitive authority and theories of punishment, including the most recent trends of development in theories of punishment, see *e.g.* H.-H. Jescheck, T. Weigend. *Lehrbuch des Strafrechts. Allgemeiner Teil*. Berlin, 1996, pp. 60 *et seq.*; C. Roxin. *Strafrecht. Allgemeiner Teil Bd 1*. München, 1994, pp. 36 *et seq.*; J. C. Müller-Tuckfeld. *Integrationsprävention. Studien zu einer Theorie der gesellschaftlichen Funktion des Strafrechts*. Frankfurt/Main, 1998; W. Kargl. *Integrationsprävention. – Rechtstheorie*, 1999, No. 30, pp. 371–381 (includes criticism of J.C. Müller-Tuckfeld's monograph); N. Walker. *Why punish. Theories of punishment reassessed*. Oxford University Press, 1999.

<sup>2</sup> See *e.g.* B. Schünemann (Hrsg). *Positive Generalprävention. Kritische Analyse im deutsch-englischen Dialog*. Heidelberg, 1998.

<sup>3</sup> About the general bases and objectives of the reform of Estonian criminal law, see *e.g.* J. Sootak. *Stand und Tendenzen der Strafrechtsreform in Estland. – Von totalitärem zu rechtsstaatlichem Strafrecht*. Freiburg, 1992, p. 75–85; P. Pikamäe, J. Sootak. *La réforme du droit pénal estonien: la voie vers l'indépendance. – Revue Pénitentiaire et de Droit Pénal*, 1999, No. 2, pp. 193–216.

the availability of answers to legal theoretical and legal philosophical questions the legal mentality will also change.\*<sup>7</sup>

The problem is aggravated and interest increased by the fact that the current Estonian criminal law, derived from the Soviet criminal law, ignores or offers just a moderate treatment of the issue of punishment theories. Consequently, in the course of the reform we must understand which thought models and legislative solutions stem from a totalitarian state's law, which are simply outdated, which should be transferred to the new legal system for the sake of nurturing traditions and stability of the legal system, which should be taken over from other countries, and which we should devise ourselves.

## Position of Punishment Theories in the System of Criminal Law

The problem of punishment theories in view of the objective of a punishment is *per se* one of the oldest legal philosophical problems, on top of it being the focal one. Historically, the idea behind the punishment can be reduced – albeit in retrospective – to the dilemma of **retribution** or **prevention**, *i.e.* to the question whether the punishment is a vehicle of visiting fitting retribution upon the offender for what they have committed, or whether the public authority in which the right to exercise punishment is vested should be proactive and try avoiding similar offences in the future? The definition of the antimony of punishment theories can with a natural limitation be even traced back to Seneca who, using Plato as a middleman, cited what Protagoras was believed to have said: “...*nemo prudens punit, quia peccatum est, sed ne peccatur...*”.\*<sup>8</sup>

The development of the problem of punishment theories can be observed throughout the history of criminal law, both during the Middle Ages and during the Enlightenment, both in the natural law codification and the criminal law philosophy of Italian positivist rebellion, and in the disagreements of different schools at the turn of the 19<sup>th</sup> and 20<sup>th</sup> centuries. What interests us now, however, is the problem of when the theories of punishment ceased to just justify the objectives of punishment and started occupying a much more important position within the system of criminal law – they grew into the legitimation basis of criminal law.\*<sup>9</sup>

Obviously, criminal law needs to be legitimated only at a certain level of development, primarily at the point when criminal law intervention collides with the principle of human dignity. This is the position where criminal law intervention must justify itself in a state ruled by law. It is clear that an esoterically operating criminal law built on the absolute theory of punishment does not face such problems even though it may recognise the guarantees provided to an offender in a state ruled by law.

In this respect, the problem of legitimacy of criminal law arose acutely during the disagreement of the schools as it was then that the issue of whether a punishment should have objectives and if yes, which, became the subject of disputes.\*<sup>10</sup>

To this date the theories of punishment with a sociological edge reproach the theory of absolute punishment because of its esotericism and evasiveness of the problems facing society. For instance, W. Hassemer believes that criminal law should look beyond its goals because there are phenomena outside the criminal

<sup>7</sup> See *e.g.* M. Luts, J. Sootak. Rechtsreform in Estland als Rezeptions- und Bildungsaufgabe. – Juristenzeitung, 1998, No. 8, pp. 401–403.

<sup>8</sup> About the history of punishment theories, see *e.g.* H.-H. Jescheck/T. Weigend (Note 1), pp. 66 *et seq.*

<sup>9</sup> True, the purport of punishment (*Sinn der Strafe*) can be distinguished as the legitimation basis of criminal law and the theories of punishment as its various options. See *e.g.* H.-H. Jescheck/T. Weigend, p. 70. But even in this case, the theories of punishment still remain the basis of substantiating the punitive authority of the State, *i.e.* the variants of the purport of punishment. About arguments pro the difference of the objectives of punishment and the theories of punishment, see *e.g.* C. Roxin (Note 1), p. 39 including the reference to H.-P. Callies (*ibid.*, p. 39 Note 1) who, however, believes that such a distinction serves no purpose and calls criminal law the “concretised constitutional law” (“*konkretisiertes Verfassungsrecht*”).

<sup>10</sup> As an example of the status of discussion at the beginning of the 20<sup>th</sup> century, see *e.g.* K. Binding. Strafrechtliche und strafprozessuale Abhandlungen. Erster Band. Leipzig, 1915, p. 70 (“With an absolute theory the offender always occupies a higher place than the innocent does with a relative /theory/”); F. v. Liszt. Lehrbuch des Deutschen Strafrechts. 23. Aufl. Berlin, Leipzig, 1921, pp. 20–21 (“When the State Criminal Code entered into force in 1870, the building of the classical school was completed. /---/ He believed to see the justification of punishment in a principle that was beyond the State and law, be it a divine world order or a categorical imperative...”). The German science of criminal law was of course already familiar with theories of punishment and in later writings they have been treated in very different dispositions. See *e.g.* A. Berner. Lehrbuch des Deutschen Strafrechts. Leipzig, 1857, pp. 6–35, but *cf.* *e.g.* R. v. Hippel. Lehrbuch des Strafrechts. Berlin, 1932, Kap IV (“Die Wirksamkeit des Strafrechts”, §§ 16–18).

law systems which function just like criminal law and which also determine whether the goals of criminal law have been attained. Therefore, criminal law must redefine itself within the general.\*<sup>11</sup>

This issue is important in the context of Estonian criminal law reform for the very reason that as of now we have to redefine criminal law. Currently the priority is not which punishment theory to choose or which theoretical standpoints to prefer. We must go farther than that – both the jurist and the legislator need to wake up to the problem of legitimation of criminal law as a whole. As can be seen below, it requires a substantial change in the legal consciousness of Estonian jurists as far as their mentality is concerned.

Below I will make an attempt to demonstrate that in the course of Estonian criminal law reform, the concepts of the legitimacy of criminal law and punishment theories should be introduced to the jurisprudence and legal awareness. The issue is not so much in just introducing the concepts to law or dogmatics. Such an introduction of concepts does imply the redefinition of criminal law in the minds of society. The problem is further complicated by the fact that although the Soviet criminal law and criminal jurisprudence recognised the concept and goals of punishment, they did not recognise the concept of punishment theory. The problems of the justification of punishment and the legitimacy of criminal law were just as unfamiliar.

## Russian and Estonian Criminal Law in the First Half of the 20<sup>th</sup> Century

There is no doubt that the criminal laws of Germany and France substantially influenced the criminal laws of Tsarist Russia and the first Republic of Estonia.\*<sup>12</sup> However, the uniqueness of Russian criminal law should also be taken into account; for instance one of the leading criminal jurists of Russia, N. Tagantsev, based his treatment of the topic purely on normativist ideas.

The concept of crime was explicated by Tagantsev to be a legal relationship between an individual and society. Crime is dangerous because it creates relationships between the offender and society and between the offender and injured party that differ from the legal order. Crime and punishment as legal phenomena represent the object of criminal law. Thus, crime is directed against a legal norm.\*<sup>13</sup> But Tagantsev does not analyse the bases of punitive power in terms of criminal law, which were at that time acknowledged in German criminal law as a substantial abstraction.\*<sup>14</sup> Tagantsev treats the punitive power of the State only within the framework of the theory of punishment although he did so with extreme thoroughness. He differentiates between the bases of the State's penal law (*karatelnoye pravo*) and the purport and goals of the State's punitive actions. Tagantsev treats the theory of moral and spiritual characteristics of human nature, the theory of divine origin, the theory of contract, the idea of law, etc. as the bases of the punitive power.\*<sup>15</sup> Tagantsev views material retribution (Kant), dialectic retribution (Hegel), utilitarianism (Bentham), prevention (Grolman), protection of society (Liszt), etc. as the goals of the state's punitive actions.\*<sup>16</sup>

Russian criminal law as reflected in the work of its leading scholar did not contemplate punishment theories or the general concepts of punishment objectives as abstractions. This also explains why the 1903 Russian New Punitive Code and the 1929 Republic of Estonia Criminal Code modelled on it lacked provisions on the bases of imposing penalties or the objectives of punishment.

The theory of punishment and the objectives of punishment, and the issue of legitimation of criminal law did not occupy a significant place in the works of Estonian criminal law jurists after the country achieved independence in 1918. H. Kadari speaks about punishment theories as "legal political doctrines of

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<sup>11</sup> W. Hassemer. Einführung in die Grundlagen des Strafrechts. München, 1990, p. 316. W. Hassemer. Einführung in die Grundlagen des Strafrechts. München, 1990, p. 317

<sup>12</sup> For instance, A. Berner's textbook (2<sup>nd</sup> edition: Sankt-Petersburg, 1865–1867) and F.v. Liszt's textbook (12<sup>th</sup> edition: Moskva, 1903–1905) had been translated into Russian. Their impact on Russian jurists was obvious. About the impact of German criminal law on the Russian criminal law and about the impact of Russian and Soviet criminal law on Estonian criminal law, particularly in relation to the issue of crime theory, see J. Sootak. Verbrechensbegriff und Tatbestand: Erfahrungen der russisch-sowjetischen Strafrechtswissenschaft und deren Ausstrahlungen in Estland. – Ost-Europa Recht, 1998, No. 1, pp. 57–67, *ibid.* The Concept of the Crime and Estonian Criminal Law Reform. – Juridica International. Law Review. University of Tartu, I, (Tartu), 1996, pp. 55–61.

<sup>13</sup> N. Tagantsev. Russkoye ugolovnoye pravo. Lektsii. Obstchaya tshast. Tom 1. Sankt Peterburg, 1902, p. 7, 18, 34.

<sup>14</sup> See Note 7.

<sup>15</sup> N. Tagantsev, vol. 2, pp. 856 *et seq.*

<sup>16</sup> N. Tagantsev, vol. 2, pp. 880 *et seq.*

punishment” in the part of his textbook dedicated to the punishment doctrine.<sup>\*17</sup> K. Saarmann treated “theories of punitive law” in conjunction with the concept of criminal law but groups them with indeterminism and determinism as “trends in the science of criminal law”, thus not at all as the bases of the State’s punitive power.<sup>\*18</sup>

## Soviet Criminal Law: the Concept and Objectives of Punishment in Criminal Law

Obviously the Soviet Russia that emerged and developed as a totalitarian power did not need to justify intervention in criminal law or the imposition of penalties. Doubting the state’s right to apply criminal liability did not even occur to anyone.

All these problems were solved by a provision that treated the tasks of criminal law in general. Thus, § 1 of the 1926 Russian SFSR Criminal Code cited the task of criminal legislation as “the protection of the socialist state of workers and farmers and the law and order thereof ... by applying the means of social protection prescribed in this Code”.

Under § 9 the objectives of punishment were to prevent people who have once committed crime from commissioning new crimes, influence insecure members of society and adjust offenders to the society of the working people’s country. Such a wording rather clearly insinuated special prevention and negative general prevention (or deterrent prevention) which quite understandably was clad in the ideology of class struggle. Already then, the special preventive goal was set up as the priority and as we see later it remained the very cornerstone of Soviet criminal law’s punishment theory and penitentiary doctrine. The general preventive goal was, to some extent, hoped to be achieved with the unstable hostile classes and other insecure elements.<sup>\*19</sup> We should also mention that in terms of structure, the code did not differentiate between the theory of crime and that of punishment as all the related provisions were compiled in Division 3 “Fundamentals of Russian SFSR criminal politics”.

Literature on criminal law emphasised another task of punishment – repression or suppression of the resistance of hostile ranks.<sup>\*20</sup> As the socialist order is secured and the hostile element liquidated, the repressive content of punishment remains in place but not as a means of class struggle but rather as the nature of punishment. Consequently, two categories evolved within the Soviet doctrine – the concept and objectives of punishment. At the same time, elements considered as an independent institute are formed within the criminal law, not directly connected with the objectives of punishment.

For instance the 1939 draft of the Soviet Union Criminal Code provided that the objectives of punishment are to punish the criminals (!), reform the criminals, prevent new crimes by persons who have committed crimes and prevent the possibility of other persons’ committing crimes (§ 25). The circumstances to be taken into account in imposing the penalty – seriousness of the crime, aggravating and extenuating circumstances and the personality of the offender – were set forth under separate provisions (§§ 46–48).<sup>\*21</sup>

The same system was preserved in the 1955 draft Soviet Union Criminal Code which, however, defined punishment as a “coercive means of the state applied by a court in respect of a person convicted in crime” (§ 4). What is extraordinary though is that this provision was inserted into Chapter 1 (“The Bases”) immediately after the sections on the tasks of the Criminal Code (§ 1), the concept of crime (§ 2) and the basis of criminal liability (§ 3).<sup>\*22</sup>

The concept of punishment theory cannot be found in any textbooks of that time; neither did special literature contain any charts or guidelines for judges on how to blend the special and general preventive goals of punishment on the one hand and the circumstances to be taken into account upon imposing the penalty on the other hand.

<sup>17</sup> H. Kadari. *Kriminaalõigus. Üldosa* (Criminal Law. General Part). Tartu, 1939, pp. 204 *et seq.*

<sup>18</sup> K. Saarmann. *Kriminaalõigus. Üld- ja eriosa* (Criminal Law. General and Special Part). Tartu, 1935, p. 2.

<sup>19</sup> About the then debate and the development of the system of sanctions within the Soviet criminal law in general, see U. Schittenhelm. *Strafe und Sanktionensystem im sowjetischen Recht*. Freiburg, 1994, (pp. 138 *et seq.*).

<sup>20</sup> See *e.g.* *Ugolovnoye pravo. Obschaya tshast*. Moskva, 1939, p. 270.

<sup>21</sup> *Proyekt ugolovnogo kodeksa SSSR*. Moskva, 1939.

<sup>22</sup> *Ugolovnyi kodeks SSSR. Project. Sine loco*, 1955.

The reform of the Soviet criminal law did not add anything substantial though to some extent it did concretise criminal law as a whole. The following system developed both in the 1958 Fundamentals of the Soviet Union and Soviet Republics' Criminal Legislation and the criminal codes of the Soviet republics (e.g. the 1961 Estonian SSR Criminal Code):

- a) Tasks of criminal law: the protection of the Soviet order, socialist property, the character and rights of citizens and the entire social law and order. For the purpose of performing these tasks, the Code defines crimes and punishments (§ 1).<sup>\*23</sup> The provision can be found in Chapter 1 ("General Provisions") of the general part.
- b) The concept and goals of punishment: punishment is not just a repression, but aims to reform and re-educate the convicted offender in the spirit of honest attitude towards work, verbatim adherence to laws and respect of the rules of the socialist way of life, as well as the prevention of new crimes by the convicted offender or any other persons (§ 20). The provision is placed in Chapter 3 ("Punishment") of the general part.
- c) General provisions related to the imposing of sentence: courts are guided by socialist legal conscience and take into account the character and level of danger to society, the character of the offender and the extenuating and aggravating circumstances (§ 36). The provision can be found in Chapter 4 ("Imposition of Penalty") of the general part.

As we see, the dogmatic ways of Soviet criminal law solve the issue of legitimacy of criminal law in a way that principally differs from the conceptions adopted in Europe. The tasks of criminal law are given as the first provision of the Code, which *per se* represents a sufficient basis both for defining a crime and imposing the sentence (a).<sup>\*24</sup> Thereafter the concept and goals of punishment are defined, which contain both the repressive content of punishment and prevention (b). In Soviet criminal law the legal definition of punishment is a comprise which attempts, using a peculiar technique of negative definition ("punishment is not just a repression ..."), to soften the repressive purport of punishment.<sup>\*25</sup> The bases of imposing a sentence (c) do not however depend on the concept or objectives of punishment, or on prevention, and there are no models that would bring together the goals and prevention of punishment and the bases of imposing a sentence.<sup>\*26</sup> The concept of punishment theory remained unknown in the Soviet criminal law doctrine; it was not even used in treatments criticising "bourgeois theories".<sup>\*27</sup>

As we know, the issue of punishment objectives has been solved differently in European criminal law conceptions. The issue of punishment theories is a part of criminal policies or the bases of criminal law and belongs, with the material definition of crime, in the beginning of the text of law.<sup>\*28</sup> On the basis of scientific analysis of theories of punishment and criminal political considerations, the bases of imposing a penalty are formulated in the sanctions part of the criminal code. For instance, under § 46 of the German *StGB*, the guilt of a person is the basis of imposing a penalty. Thereafter, the impact that the punishment may have on the convicted offender's future life in society should be taken into account (*i.e.* special preventive prognosis in a very cautious formulation). Special preventive prognosis must however be taken into account when applying conditional deprivation of liberty (§ 56 I and II), as well as general prevention (§ 56 III), etc. The French *Code penal* does not speak about prevention. Under articles 132-24, only the elements of the crime and the character of the offender are taken into account in imposing the penalty. The circumstances aggravating the penalty are outlined in articles 132-71–132-75.

<sup>23</sup> Here references are made to sections of the Estonian SSR Criminal Code as an example of the Soviet criminal law.

<sup>24</sup> E.g. the Democratic Republic of Germany Criminal Code too provided for several provisions on the protection of the socialist law and order and society (§ 1), the bases of criminal liability (§ 2), the protection of dignity and rights of man (§ 4), the guarantees of the justice and legality of jurisdiction (§ 7), etc. The Code specified "the exercise of the principle of socialist justice" (§ 61 I) as the basis underlying the imposition of penalty. See *Strafrecht der DDR. Kommentar zum Strafgesetzbuch*. Berlin, 1987.

<sup>25</sup> In special literature, several essential features of punishment have been outlined such as the coercive means of the state which causes losses and restrictions for a convicted offender, the negative assessment of a crime by the state, public condemnation, etc. See e.g. I. Rebane. *Nõukogude kriminaalõigus. Üldosa. Õpetus karistusest. I osa* (The Soviet Criminal Law. General Part. Doctrine of Punishment. Part I). Tartu, 1971, pp. 3 *et seq.*; *Kurs sovetskogo ugolovnogo prava. Tshast obschaya. Vol 2*. Leningrad, 1976, pp. 193 *et seq.*

<sup>26</sup> The monographs are structured according to the same scheme. E.g. M. Shargorodski does analyse "bourgeois" theories that treat the concept and objectives of punishment but does not do so within the conceptual system of punishment theories. See M. Shargorodski. *Nakazaniye. Yego tseli i effektivnost*. Leningrad, 1973, pp. 110–160.

<sup>27</sup> See e.g. M. Shargorodski. *Nakazaniye po ugolovnomu pravu ekspluatatorskogo obschestva*. Moskva, 1957, pp. 71 *et seq.* True, the Estonian scholar of criminal law Ilmar Rebane approaches at one point bourgeois theories of punishment, mentioning absolute, relative and mixed theories. See H. Kadari, E. Raal, I. Rebane. *Nõukogude kriminaalõigus* (The Soviet Criminal Law). Tallinn, 1963, pp. 275–277.

<sup>28</sup> See e.g. C. Roxin (Note 1), § 3, in Chapter 1 ("The Bases"). True, for instance H.-H. Jescheck/T. Weigend (Note 1) under § 7 the issue of punishment theories is contained in the part treating the criminal law (General Part I – Criminal Act), but in essence the talk is about the justification of a punishment which forms the basis of the state's punitive authority.

In the reform of the Estonian criminal law we obviously had to pick up a model to follow – whether we should continue with the old system or subscribe to a new one. However, it should be clear from the above review, that the lawyers who operated during the twenty years of independence and the following fifty years of the Soviet occupation were only superficially aware, or not at all aware of the theory of punishment. Therefore, it is no wonder that for the lawyers of the newly independent Estonia the problem of theories of punishment and the legitimization of the state's penalising authority did not exist and the goal of punishment was mostly seen in reforming the offender.

Before we proceed with the problems of the criminal law reform of the re-independent Estonia, we will take a brief look at the choices made by some other countries as they may serve as possible examples for Estonia.

## The Reform of Criminal Law in East European Countries: Russia, Latvia, Poland

The 1996 Russian Criminal Code follows the traditions of the Russian SFSR, as the first thing it does is to specify the tasks of the Russian Federation Criminal Code (§ 2 whose content and structure is similar to § 1 of the Russian SFSR CrC and § 1 of the Estonian SSR CrC).

Similarly to § 20 of the Russian SFSR (*cf.* above ESSR CrC § 20), § 43 of the Russian Federation CrC (Part 3 “Punishment”, Chapter 9 “Concept and Goals of Imposing a Penalty. Types of Punishment”) sets forth the concept and goals of punishment. Under the provision punishment is a “coercive means of the state imposed by a court order”. Punishment means the deprivation or restriction of the rights and freedoms of the convicted offender as prescribed by the Criminal Code (§ 43 I).

Section 43 II defines the goal of punishment as the restoration of social justice, reformation of the convicted offender and the prevention of new crimes. The goal of restoring social justice arises out of the fact that a crime violates the justice by damaging the rights of the injured party (individual, society or the state). Social consciousness foresees the restoration of justice by means of punishment. The goal of preventing new crimes is seen, in terms of special prevention, as the prevention of new crimes by the convicted offender, and in terms of general prevention, directly as a threat to apply the punishment and ingenuously – as the enforcement of a sentence.<sup>\*29</sup>

The exact concept of the special preventive goal has not taken shape in Russian criminal law literature. Thus, in furnishing meaning to the concept reference is made to the explanation of the 19 October 1971 Soviet Union Supreme Council Plenum according to which the reformation of a major or minor convicted offender is demonstrated respectively by his or her honest attitude to work or studies.<sup>\*30</sup> It has also been claimed that a person is reformed from the moment he or she no longer poses a danger to society.<sup>\*31</sup> With reference to J. Andenaes it has also been said that a punishment has consummated its special preventive goal when the previous punishment that has been experienced prevents the commission of a new crime.<sup>\*32</sup>

Under the general preventive goal of punishment the educational effect of punishment is provided for. The impact of the punishment on the general public means thus stimulating the law abidance of members of society. Nevertheless, it has been concluded that such a construing of general prevention is overly comprehensive. The general preventive effect of punishment should be targeted at insecure members of society who, due to relations with the criminal environment, bad upbringing, etc., have a distorted idea of social values.<sup>\*33</sup> Thus, Russian science of criminal law is still at the level of A. Feuerbach's deterrent prevention and the conception of positive general prevention is still completely unknown.

<sup>29</sup> V. Radtshenko (red). *Kommentarii k Ugolovnomu Kodeksu Rossiiskoi Federatsii*. Moskva, 1996, § 43 comment 4.

<sup>30</sup> *Ugolovnoye pravo Rossiiskoi Federatsii*. *Obschaya tshast*. Moskva, 1996, p. 347.

<sup>31</sup> N. Belyayev. *Ugolovno-pravovaya politika i puti yeyo realizatsii*. Leningrad, 1986, p. 46.

<sup>32</sup> *Ugolovnoye pravo* (Note 27), p. 349. J. Andenaes's book (*Punishment and Deterrence*. University of Michigan Press, 1974) was one of the few treatments of criminal law by a Western author which was translated into Russian, substantially influencing the Soviet scholars of criminal law. It is only symptomatic that the work of an author originating in the Scandinavian legal system which is sociologically and punitive-theoretically oriented towards special prevention and not of an author representing the classical direction of criminal law and in a legal system built on an absolute theory of punishment was chosen to be translated. See I. Andenes. *Nakazaniye i preduprezhdeniye prestuplenii*. Moskva, 1979.

<sup>33</sup> *Ugolovnoye pravo* (Note 27), p. 350.

Section 60 I sets out justice as the general basis of imposing a penalty (Chapter 10 “Imposition of Penalty”). Under § 60 III, the character and degree of danger to society of a crime, character of the offender, extenuating and aggravating circumstances, as well as the impact of the punishment on the reformation of the convicted offender, and the living standard of his or her family are taken into account in imposing a penalty. Here however the justice of punishment is not understood as social justice but as legality and justification of punishment that in turn is expressed in taken into account the circumstances provided for in subsection 3.<sup>\*34</sup>

The concept of just punishment was not unfamiliar to Soviet criminal law theory although it was declaratory: every court order must be lawful and justified while the punishment must be just; the meeting of the goals of punishment is the best secured by a just punishment.<sup>\*35</sup> Literature, however, does not show the balance between the two difference concepts of justice – social justice as the content of punishment (§ 43) and just punishment (§ 60). Therefore, the new criminal law of Russia has adopted the concept of just punishment from the Soviet criminal law doctrine but the new doctrine still does not explicate the essence of it.

We see that the differences between the Russian Federation and Russian SFSR criminal codes are not big. In essence the previous triad system has been preserved (see above indents 3 a)-c)), while the special preventive goal of punishment is stressed both in the context of the concept of punishment and the bases of imposing a penalty. The special preventive goal – reformation of the offender – is the priority; deterrent prevention serves as general prevention.

The Russian penitentiary doctrine is in agreement with material criminal law. The Soviet theory of punishment deemed the reformation and re-education of the convicted offender to be one of the main goals of punishment. Labour was seen as the basic tool for reforming and re-educating the inmates of prisons. It is no wonder that the Soviet law and legal theory did not know the concept of *criminal enforcement law*. Instead, there was the concept of *law of punishment with labour*, which corresponded to the purport of the legal branch. The Russian Federation Criminal Enforcement Code entered into force on 1 July 1997, consequently the legal branch no longer bears the name of law of punishment with labour. However, the substance has changed relatively little as labour continues to be the main tool in reforming a convicted offender under the new code and the reformation of the convicted offender is the main goal of fulfilling the custodial sentence. The administration must carry out educational work with convicted offenders.<sup>\*36</sup>

Of the Baltic countries, only Latvia has adopted a new criminal code – The Criminal Act.<sup>\*37</sup> The Act has abandoned the formulation of the tasks of the Criminal Act as was customary in the codes of Soviet republics and as it still stands in § 2 of the Russian Federation Criminal Code.

In other respects, the provisions treating the issue of punishment theories do not substantially differ from earlier regulations. So for instance § 35 II of the Act provides for goals of punishment to be the punishing of offenders for the crime committed and the goal of achieving observation of laws by the offender and other people and refraining from the commission of new crimes. This translates as repression<sup>\*38</sup>, but also as special and general prevention.

Section 46 II of the Act sets out the general principles of imposing a penalty which the court must take into account as the character of the criminal act and the damage incurred, the character of the offender, the extenuating and aggravating circumstances.

The new criminal code of Poland (*Kodeks karny*)<sup>\*39</sup>, however, does not contain provisions on the tasks of the code, the concept or objectives of punishment. On the other hand, the bases of imposing a penalty are exposed in detail. *E.g.* article 53 § 1 sets out that a court shall in particular keep in mind that the restriction

<sup>34</sup> Radtshenko (Note 26), § 60 comment 1.

<sup>35</sup> I. Rebane (Note 22), p. 138 with a reference to the guideline regulation of the Soviet Union Supreme Council plenum of 30 June 1969.

<sup>36</sup> See *e.g.* A. Mihlin, V. Seliverstov, I. Shmarov. Kontseptualnye problemy novogo Ugolovno-ispolnitelnogo kodeksa Rossiiskoi Federatsii. – Gosudarstvo i pravo, 1997, No 8, pp. 69 *et seq.*

<sup>37</sup> Adopted on 17 July 1998, entered into force on 1 April 1999. The author of this article used the Russian version: Ugolovnyi zakon. Riga, 1998.

<sup>38</sup> In the Russian translation of the Code *pokaraniye*; in the Russian legal language *kara* denotes the repressive purport of a punishment, *i.e.* the repression. *Ibid.*: I. Rebane (Note 22), p. 26.

<sup>39</sup> Adopted on 6 June 1997 and entered into force on 1 September 1998. The author of this article used the German version of the bilingual publication: Das polnische Strafgesetzbuch. Zweisprachige Ausgabe. Freiburg, 1998.

resultant of the punishment (*Übelzufügung*) should not exceed the degree of guilt. The degree of damage incurred to society by the act, the preventive and educational impact of the punishment on the convicted offender and the needs of shaping the legal conscience of society must be considered. In imposing a penalty on a minor or adolescent, the court must be primarily guided by educational considerations (article 54 § 1).

As we see, a system of prevention has been formed through defining the goals of punishment. The system is built on a certain punishment theoretical conception under which the extent of guilt determines the maximum punishment while other criteria rule the determination of the lowest punishment – the danger posed by the act to society and the prevention.

No doubt that the new criminal law of Poland has waived negative or deterrent prevention and deems positive general prevention as a goal of punishment. Punishment is a vehicle that helps stabilise the feeling of right and wrong and trust in legal rules and norms on the part of society.<sup>\*40</sup> The maximum of punishment must not be greater than the fault even if the crime is recurrent (articles 65, 65), although in such cases the stricter punishments are substantiated by general preventive considerations.

## Corpus Juris

The penal provisions introduced for the protection of European Union financial interests, *Corpus Juris*<sup>\*41</sup>, are important stages in the development of European criminal law. Estonian jurists have found that many standpoints expressed by *Corpus Juris*, which represent the common part of European criminal law, have also been expressed in the draft Republic of Estonia Penal Code (e.g. the three degrees of intent, differentiation between factual error (*Tatbestandsirrtum*) and juridical error (*Verbotsirrtum*), etc.).<sup>\*42</sup> Notwithstanding, the provisions of *Corpus Juris* related to the imposing of penalties are not very fortunate.

The imposition of penalties is regulated by article 15 which proceeds from the principle of proportionality and attempts, as the authors have claimed, to represent “the synthesis of national legal cultures”<sup>\*43</sup> whilst taking into account the unique features of different countries. In this, they largely rely on the dogmatic style of French criminal law, where to date the individualisation principle applied upon punishing an individual has been developed into the principle of personalisation so that it could be applied to punishments of legal persons. Under article 15, the penalties applicable to offences are to be imposed in accordance with the seriousness of the act, the individual fault of the offender and the extent of his participation in the offence. In particular the previous life of the accused, any previous offences, his character, his motives, his economic and social situation, and his efforts to make amends for the damage caused will all be taken into account. The authors believe that theirs was an attempt to combine the two major approaches in imposing penalties – the explicate inheritance of the German, Austrian and Portuguese law and the implicitness that dominates in the Italian and Spanish law.

The provision on the imposition of penalty is, however, not good at all; instead of synthesis there is an eclectic set of features which do not in the least alleviate the antimony of punishment objectives. The definition does not include the requirement of the European Court of Justice according to which a sanction must be effective, proportionate to the seriousness of the act and deterrent; in choosing the type and extent of a sanction, it must be taken into account that the sanction should not be more lenient than the sanction applicable to a similar violation under domestic law.<sup>\*44</sup> The content of the first and second sentence of the provision are contradictory to each other.

The critics have also stressed that the ambiguity of the provision essentially denotes the lack of a mechanism for imposing penalties, which in turn is contrary to the principle of legality.<sup>\*45</sup> Naturally we have to admit

<sup>40</sup> E. Weigend. Das neue polnische Strafgesetzbuch von 1997. – Zeitschrift für die gesamte Strafrechtswissenschaft, 1998, No. 110, pp. 114 *et seq.*

<sup>41</sup> Published in German and French: M. Delmas-Marty (Hrsg). *Corpus Juris der strafrechtlichen Regelungen zum Schutz der finanziellen Interessen der Europäischen Union*. Köln, 1988; published in French and English: M. Delmas-Marty (ed). *Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne*. Paris, 1997.

<sup>42</sup> J. Ginter. *Corpus Juris* ja Eesti kriminaalprotsess (*Corpus Juris* and Estonian Criminal Process). – *Juridica*, 1999, No. 4, pp. 184 *et seq.*; J. Sootak. *Corpus Juris* ja Eesti kriminaalõigus (*Corpus Juris* and Estonian Criminal Law). – *Juridica*, 1999, No. 4, pp. 176 *et seq.*

<sup>43</sup> *Corpus Juris*, art 15 comment 3.

<sup>44</sup> F.N. Heise. *Europäisches Gemeinschaftsrecht und nationales Strafrecht*. Bielefeld, 1998, pp. 19–31; about the law of sanction as a whole, see M. Böse. *Strafen und Sanktionen im Europäischen Gemeinschaftsrecht*. Köln, 1996.

<sup>45</sup> P. O. Träskman. *Rules of Corpus Juris for Sanctions. Analysis of the specifications*. Trier, 1999, p. 3.

that the problem of antinomy of punishment objectives is complicated. But the German *StGB* and the new Polish *Kodeks karny* demonstrate that it can be solved. The draft Estonian Penal Code also attempts at putting together a more concrete system.

## Estonian Version: Discussion Between Mentalities

The Criminal Code of the Estonian SSR applicable until the criminal law reform in 1992 represented a system typical of the Soviet criminal law, contained in the provisions concerning the concept and objectives of punishment and circumstances to be taken into account in the imposition of penalty (*cf.* paragraph 3, indents a-c above). The reform aimed at making the most essential changes in the applicable criminal law, leaving the drafting of new criminal law to the future.<sup>\*46</sup>

This kind of amendments was also made to provisions concerning the imposition of penalty. Section 1 of the code was changed (*cf.* subparagraph 3a above) by omitting the list of protected benefits such as the Soviet social order, the socialist property, etc. and essentially only defining criminal law – the code determines which acts are crimes and which penalties or other sanctions are applied. The new draft Penal Code<sup>\*47</sup> does not contain such a provision and the text of the code begins with a section expressing the principle *nullum crimen nulla poena sine lege*. The authors of the draft have been reproved for the opening section not saying anything about the objectives of the code.<sup>\*48</sup>

After the reform of 1992, § 20 defining the concept and objective of punishment remained, but in a considerably different form (*cf.* subparagraph 3b above). Subsection 1 provides the definition of punishment (punishment is applied on the basis of a court judgement and it consists in the restriction or deprivation of the rights of the convicted offender). Subsection 2 stipulates that penalty expresses public condemnation and induces the convicted criminal and other persons to restrain from further crimes. The wording reflects denouncement of Soviet rhetoric, but the code still contained the pointless textbook-like provision providing the definition of penalty (§ 20 (1)). Limitation of the special and general preventive objective of punishment to the prevention of further crimes was important though, particularly concerning special prevention. By this amendment, the criminal law reform of the time clearly stated that the criminal law of a state governed by the rule of law could not assume the role of an ideological reshaper or a schoolteacher of people.

The new draft Penal Code does not contain such a provision at all. The draft does not define the concept of punishment and transfers the issue of the objective of punishment to the bases for imposition of penalty (*cf.* below). This change has caused objections. It is found that the omission of the concept and objectives of punishment from the code and shifting the stress away from reforming the convicted offender means “ignoring the humane goals of punishment and the progressive imprisonment system created over years of intense work”.<sup>\*49</sup>

A statement could not be clearer. The mentality of lawyers indeed conforms to a system and to models of thinking developed over many years, it is just that these many years were not led by ideas attributable to a state governed by the rule of law. The understanding that criminal liability need not reform anyone, that the state cannot undertake to reshape its citizens, that the reforming of a convicted offender is not humane, that the progressive system of serving custodial sentence is out-dated, etc., is difficult to implement.

The bases for imposition of penalty are regulated by § 36 of the applicable Criminal Code (*cf.* subparagraph 3c above). According to the wording of § 36 (2) applicable before 1992, the dangerousness of the act to the society and the degree of crime had to be taken into account in imposing a penalty. The reform renounced the provision, as dangerousness to the society as a characteristic feature of a crime was omitted from the entire code. According to the new wording, the court has to take into account the seriousness and type of the crime.

The relevant provision of the new draft Penal Code (§ 59 (1)) does not contain this requirement either. The seriousness and type of crime are vague general terms, expressed one the one hand in the punishment

<sup>46</sup> Sources concerning the reform: Note 3 and Note 9 in this article.

<sup>47</sup> The general part of the draft code together with a justification has been published: M. Ernits, P. Pikamäe, E. Samson, J. Sootak. Karistusseadustiku üldosa eelnõu. Eelnõu lähtealused ja põhjendus (Draft General Part of the Penal Code. Sources and Justification.). Tallinn–Tartu–Kiel, 1999. The draft is currently in the *Riigikogu* (Parliament of Estonia).

<sup>48</sup> K. Kimmel, U.-P. Rahi. Mõtteid Karistusseadustiku eelnõust (Thoughts about the Draft Penal Code). – *Juridica*, 1997, No. 9, p. 448.

<sup>49</sup> *Ibid.*, p. 449.

framework provided in the general and special part<sup>\*50</sup>, but also reflected in the extent of the fault of the criminal and other circumstances.

Subsection 59 I regulating the imposition of penalty is currently worded as follows in the draft:

“The basis for punishment is the fault of the person. Upon imposition of penalty by court or by an official, account shall be taken of mitigating and aggravating circumstances, the type of intent and negligence upon committing the crime, as well as the possibility to incline the criminal to restrain from further crimes and the interests of protecting legal order.<sup>\*51</sup>”

As we see, the provision is rather similar to § 53 (1) of the new Polish *Kodeks karny* (cf. paragraph 4 above). There is also similarity with § 46 I of the German *StGB*, but as opposed to the latter, the Polish code and the Estonian draft code contain general prevention in the general provision of imposition of penalty.<sup>\*52</sup> The draft thus tries to resolve the problem of antinomy of objectives of punishment and to form a system of bases of imposition of penalty: first the extent of fault, then general and special prevention. In the opinion of the authors of the draft code, degrees of intent and negligence and mitigating and aggravating circumstances (the latter are separately provided in the draft code) should express the extent of fault.

Another question is whether there will be a model for taking account of the extent of fault and objective of punishment, and what the model will be like – will it be a summarising or dialectical mixed theory, point punishment theory (*Theorie der Punktstrafe*) or *Spielraumtheorie*, etc.? Such schemes cannot, of course, be established by legislation – their implementation in the knowledge of judges is a lengthy process.

The requirement to take account of the person of the criminal is left out of the bases for imposing penalty. This, like the omission of the objectives of reforming the criminal, is the result of lengthy and difficult discussions. The authors of the draft have, at least so far, been able to defend their position that automatic taking account of the person of the criminal is contrary to the principles of the criminal law of offence a state governed by the rule of law. The concepts of the criminal law of offence and the criminal law of the offender are also new to our legal thinking, but one of the goals of the reform – to renounce the totalitarian criminal law – also implies denouncement of person criminal law or offender criminal law. Just as the criminal law of a state governed by the rule of law does not criminalise acts arising from the lifestyle of a person (parasitism, prostitution, etc.), such criminal law does not consider reformation of a person and changing the lifestyle of a person its tasks.

The new Estonian Imprisonment Act also corresponds to material criminal law.<sup>\*53</sup> According to § 6 I of the draft act, the enforcement of imprisonment has two objectives: to direct the imprisoned person to law-abiding behaviour, and to protect legal order. The authors of the act proceed from the assumption that circumstances that are taken into account in imposing penalty, including objectives of punishment arising from punishment theory, must be kept apart from the objective of enforcing punishment.<sup>\*54</sup>

Hence, the Imprisonment Act provides not reformation of the criminal, but direction of the criminal to law-abiding behaviour as the objective of enforcing punishment. Punishment is enforced in order to direct the prisoner to such a lifestyle after release that he or she should be able to behave so as not to commit crimes. By this relatively weak wording of enforcement of punishment the Estonian Imprisonment Act wants to stress that the task of the state is not to reshape a person, but the activity of the state must be limited to directing the person to law-abiding behaviour.<sup>\*55</sup>

The second objective of enforcing punishment is to protect legal order. It is not clear yet how the Estonian penitential doctrine will provide essence to this objective. Legal order may be protected general-preven-

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<sup>50</sup> The concept of *punishment framework* is also new to our legal terminology and requires implementation. About the meaning of the concept, cf. e.g. H.-H. Jescheck/T. Weigend (Note 1), p. 872.

<sup>51</sup> In German: “Als Grundlage für die Zumessung der Strafe gilt die Schuld des Täters. Bei deren Festlegung berücksichtigt das Gericht oder der Beamte die die Schuld des Täters mildernden und erschwerenden Umstände, die Art des Vorsatzes und der Fahrlässigkeit, als auch die Möglichkeit, den Verurteilten künftig von der Begehung der Straftaten abzuhalten sowie Interessen des Schutzes der Rechtsordnung.“ The Ministry of Justice of the Republic of Estonia has the unpublished translation into German.

<sup>52</sup> It is also our position that general prevention should be regarded as positive general prevention, although this is more clearly expressed in the Polish code.

<sup>53</sup> Vangistusseadus (Imprisonment Act), passed 14.06.2000 – Riigi Teataja (the State Gazette) I 2000, 58, 376.

<sup>54</sup> We here rely on the limitation in accordance with the status and situation decision theory (*Statusentscheidung* and *Gestaltungsentscheidung*) common in German theory. For details: M. Walter. *Strafvollzug*. Lehrbuch. Stuttgart, 1991, p. 68.

<sup>55</sup> One has to fully agree with the position of the German Constitutional Court (*Bundesverfassungsgericht*), that the state cannot assume the task of reforming a person, but it has to limit itself to the task of preventing further crime. For details: G. Kaiser *et al.* *Strafvollzug*. Eine Einführung in die Grundlagen. Karlsruhe, 1974, p. 50.

tively, namely the enforcement of imprisonment has an automatically frightening effect on other members of the society, *i.e.* it prevents further crime and protects the legal order. Providing general-preventive essence to this goal of enforcement in the sense of not only negative, but also positive general prevention is basically not excluded. Like imposition of penalty, serving imprisonment conforms to the validity of the norm and the public's faith in legal order.

The objective of protecting legal order should also be provided specific preventive essence. The society is protected against the potential crimes of a criminal during his or her imprisonment. If we include further crimes after release from prison, the two objectives of enforcement coincide. However, it is believed in literature that in such an event, this pertains to the first objective of enforcement (to direct the convicted criminal to a lifestyle of not committing crimes in future), and that the objective of protecting legal order or the so-called assurance clause is applicable to the time of imprisonment.<sup>\*56</sup>

## Conclusions

To sum up, we should stress that currently two discussions are held within the framework of Estonia's reform of criminal law. One of them represents the subject matter of this article – legal political bases of the reform which are often expressed in the mentality. Declaratory provisions, which at the first glance seem to be of secondary importance (the tasks of the code, the concept of punishment, the ranking of punishment objectives), may become the main points of the reform ideology.

The authors of the draft Penal Code have been reproached for their attempt of planting into our society models that derive from quite another society and legal order. Though this is not the main issue – it is true that neither the draft Penal Code nor the reform of criminal law as a whole can be transferred to a legal and social environment alien to them. But the real issue is whether our legal and social environment is alien to the criminal law of a state governed by the rule of law. Hopefully the ten years of independence have managed to change our mentality so that we are ready for a new legal system.

As for the second discussion, it concerns legal dogmatism and is relatively simple – despite the complicity of dogmatic action. The introduction of a neutral in terms of the ethical dogmatic action of crime concept is not just a matter of mentality.

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<sup>56</sup> Again we rely on the German penitential doctrine. *Cf. e.g.* K. Laubenthal. *Strafvollzug*. Berlin, 1998, p. 66.