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Review paper

BETWEEN THE RELATIVE AND ECLECTIC THEORY OF PUNISHMENT: THE PURPOSE OF PUNISHMENT IN SERBIAN POSITIVE CRIMINAL LAW

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Abstract. *The Criminal Code of Serbia is one of the few criminal codes that regulates the purpose of punishment and criminal sanctions. The latest amendments to the Criminal Code (2019) include a new provision on the purpose of punishment: to achieve fairness and proportionality between the criminal sanction and the committed crime. Until 2019, the purpose of punishment was purely preventive because the legislator accepted the relative theory on the legal purpose of punishment, which entails general and special prevention as the only legal goals. The situation has changed by introducing this new purpose of punishment, which entails the acceptance of the mixed or eclectic theory of punishment. Yet, the issue is still debatable. This paper aims to present a different standpoint on the new provision on fairness and proportionality between the criminal sanction and the committed crime. Although these concepts are intuitively related to the talion principle and thus to retribution, the author attempts to thoroughly argue the viewpoint that fairness and proportionality can also be understood as limitations of the repressive aspect of punishment. Retribution is often mistakenly used as a synonym for repressiveness, although the first term is related to the purpose of punishment and the second one represents the essence of punishment. The author will also consider the protective function of criminal law and some general principles, such as legitimacy*.

Key words: *purpose of punishment, repression, retribution, prevention, eclectic theory*.

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1. INTRODUCTION

The Criminal Code of the Republic of Serbia was significantly amended in 2019.[1] The amendments were based on the need to prescribe a fairer punishment for perpetrators of crimes against sexual freedom, especially when these crimes are committed against minors. In that regard, the most significant change in the Serbian Criminal Code (CC) is the introduction of life imprisonment into the penal system of Serbia. In addition, there are other changes in the General part of the Code, primarily in the sections dedicated to penalties and special rules for determining penalties. The purpose of punishment has also undergone changes (Article 42 of the CC).

The Serbian Criminal Code is one of the few criminal codes that regulates the purpose of punishment. Article 42 of the Criminal Code (CC)[2] explicitly prescribes the purpose of punishment within the general purpose of criminal sanctions and the purpose of individual types of punishment. Article 3 of the Criminal Code regulates the protective function of criminal law (the principle of legitimacy) by prescribing the basis and the scope of criminal law repression. This principle is important for considerations presented in this paper. The general purpose of prescribing and imposing criminal sanctions is to suppress the commission of criminal acts that violate or endanger the values which are protected by criminal legislation (Article 4 of the CC). Within this general purpose of criminal sanctions, the purpose of punishment is: 1) to prevent the perpetrators from committing criminal offences and deter them from future commission of criminal offences; 2) to deter others from committing criminal offences; 3) to express social condemnation of a criminal offence, enhance moral strength and reinforce the obligation to respect the law; and 4) to achieve fairness and proportionality between the committed offence and the severity of the imposed criminal sanction (Article 42 of the CC). The last provision is a newly introduced purpose of punishment (Art. 42 (4) CC).

The aim of this paper is to examine the meaning and effects of the newly introduced purpose of punishment. Until 2019, the purpose of punishment was exclusively preventive. The question arises as to how the situation has changed with the latest amendments. In particular, it is necessary to consider whether the added purpose of punishment is in fact an expression of retributivism, or whether it essentially means something else. In this paper, it will be done through the linguistic, logical, systemic and teleological interpretation of the new provision of the Serbian Criminal Code, as well as the analysis of the legislator's explanation on this new institute. On the basis of conclusions drawn from the interpretation, the question arises as to whether the provision on fairness and proportionality of the criminal sanction and the committed act was added in the right place, or whether it would have been more appropriate and meaningful to include it in some other article of the Criminal Code. The author attempts to address this question with reference to the distinction between retribution as the purpose of punishment and repression as the essence of punishment.

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[1] Zakon o izmenama i dopunama Krivičnog zakonika (Act amending and supplementing the Criminal Code), *Službeni glasnik* RS, 35/2019

[2] Krivični zakonik (Criminal Code), Službeni glasnik RS, br. 85/2005, 88/2005-ispr., 107/2005-ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019; available in English at https://www.mpravde.gov.rs/files/Criminal%20%20%20Code_2019.pdf

2. THEORIES ON THE LEGAL PURPOSE OF PUNISHMENT

While the criminal law science is primarily focused on examining the legal purpose of punishment, legal philosophers explore the ethical justification of punishment. One can debate whether legal scholars and philosophers are working on the same question, namely, whether the purpose of punishment and its justification are one and the same thing. In this field, the concepts of the purpose of punishment, the aim (goal) of punishment, and the justification of punishment intertwine. These terms are often used interchangeably due to the fact that perspectives on the justification of punishment and its overall purpose and individual goals branch out in two almost identical directions. Absolute theories on the legal purpose of punishment are essentially based on retributivism, while relative theories are based on utilitarian justification of punishment (Jovašević, 2018: 235-236).

Closely related to this issue is the question of the legal basis of punishment, i.e. the origin, nature, and scope of the state's right to punish. At this point, we may draw a parallel between the state's right to punish and the offenders' right to be punished. Hegel, along with Kant, is considered a classical representative of retributivism (Milevski, 2014: 36). In his retributive theory of *punishment*, Hegel perceived the state's right to punish as the other side of the offender's right to be punished and thus "reconcile with the law" (Čejović, 2008: 157), but Hegel did not deny the state's right to be the holder of the right to punish, which is vested in the state authorities for the sake of achieving absolute justice. Through its mechanisms, the state negates the negation of rights (Jovašević, 2018: 234). Hegel's concept of reconciliation with the law, which he sees as the right of the criminal to be punished, bears a striking resemblance to the understanding of punishment in ecclesiastical law (Orthodox church law), which is perceived as reconciliation with the will of God (Milaš, 2004: 528). Such a resemblance cannot go unnoticed as there is an opinion that retribution as a purpose of punishments represents the common feature of criminal and church law's views on punishment (Vuković, 2014: 153).

Absolute theories on the purpose of punishment consider repression, retaliation or harm inflicted on the offender/wrongdoer as the sole purpose of punishment because offenders have inflicted harm upon society through their unlawful and delinquent conduct. For the state or society, punishment represents retaliation, revenge, and thus the wrongdoer bears the consequences of his/her actions (Jovašević, 2018: 235). Legal literature includes the view that this theory of retaliation lacks any real purpose because it "is not interested in the outcome and empirical effect of punishment" (Stojanović, 2021: 227). This is in contrast to the utilitarian views which find the justification of punishment in its social utility. The utility of punishment lies in its preventive effect. Hence, relative theories on the purpose of punishment rest on utilitarian views and perceive preventive action as the sole purpose of punishment. While the essence of the absolute theories of punishment can be summed up in the maxim "the offender is punished because he erred", relative theories of punishment are based on the idea that "the offender should be punished to prevent further wrongdoing" (Jovašević, 2018: 235-236). The preventive function of punishment should primarily impact the wrongdoers, by preventing their recidivism. However, punishment should also have a broader impact on society, by deterring potential criminals and thus contributing to the suppression of crime on a larger scale. Relative theories on the purpose of punishment further branch into special prevention and general prevention theories.

In special prevention theories of punishment, preventive action is primarily achieved through deterrence. The method of executing punishment must not and should not involve

torture but the implementation of the imposed punishment, involving either the deprivation of liberty (a term of imprisonment) or a monetary fine, implies placing the convicted individual in an undesirable position that is worse than the one they were in before the punishment (Milevski, 2014: 25-28). However, punishment should also have a corrective impact on the criminal offender. Imprisonment as a punishment is now conceptually conceived and normatively shaped as individualized penitentiary treatment, aimed at eliminating the criminogenic factors in the offender's personality and working towards their overall rehabilitation. The third theory within the relative theory framework of special prevention views punishment as a form of state supervision and care over the perpetrators of criminal acts, aimed at making them resilient to challenges, opportunities and antisocial tendencies within themselves, and teaching them to live without breaking the law (Jovašević, 2018: 236).

In general prevention theories of punishment, preventive action can be divided into positive and negative aspects. In the Serbian Criminal Code, the general preventive action expressed in positive terms is explicitly stated as the purpose of punishment, which entails expressing societal condemnation of the criminal act, strengthening morals, and reinforcing the obligation to respect the law (Article 42 CC). On the other hand, the general prevention expressed in negative terms involves exerting influence on other members of society not to commit punishable acts (deterrence). How can an individual, a potential criminal offender, be deterred from engaging in criminal activities? The general preventive action inherently rests on the fact that specific behavior is criminalized and that punishment is prescribed for such behavior. This perspective is referred to as the theory of psychological compulsion. The execution of punishment towards a person who has already been criminally convicted can be intimidating and discouraging. In addition to the theory of psychological compulsion, there is the theory of moral compulsion. Essentially, it represents positive general prevention. i.e. an attempt to remind broader social circles that committing criminal offences is not only punishable by the law but also immoral, and it calls for strengthening morality and the obligation to respect the laws. The preventive action embodied in punishment and its utilitarian justification contribute to the protective function of criminal law. According to sociological theories, this social role of criminal law is considered as the ground of the state's right to punish (Jovašević, 2018: 235).

In comparative law,[3] the contemporary criminal law aims to move away from the classical repressive mechanisms and institutes, considering that the classical criminal has not yielded significant results. Such views naturally push prevention theories to the forefront of discussions on the theories of punishment. If punishment cannot be avoided altogether, these views put forth the relative (utilitarian) theory, where preventive action is the sole purpose of punishment. However, making prevention the sole purpose of punishment carries risks. Unlike repression or even retribution, which can be limited and theoretically and normatively controlled, prevention is unconstrained (Stojanović, 2011: 3). Could it be concluded that prevention is a good servant but a bad master? On the one hand, giving importance to prevention as the purpose of punishment precludes the infiltration of security-driven tendencies into criminal law; on the other hand, repression (limited by certain requirements, such as justice and proportionality) is still the only counterbalance to prevention. "Although the key aspect of the preventive action of criminal

[3] In the contemporary comparative law, " the purpose of punishment must follow the modern tendencies of criminal policy, which aims to reduce the use of prison sentences, expand the application of alternative sanctions and diversification measures, of course, with full respect for the rights of victims" (Miladinović Stefanović, 2012: 230).

law is its application, it does not mean that it is justified to strive for the application of criminal sanctions to everyone who has committed (any) criminal offense. It suffices that it be done to an extent where the threat of punishment becomes serious, primarily in relation to serious criminal offenses. Moreover, excessive application of criminal law does not contribute to prevention and, on the other hand, represents too heavy a burden for any society" (Stojanović, 2011: 20). It seems that the scientific and professional community has been so focused on the flaws, inefficiency and harshness of retribution that it has overlooked the fact that crime prevention[4] can also have its flaws and undesirable consequences. Stojanović warns that the idea of purely preventive criminal law is dangerous, and proposes introducing a retributive element into contemporary criminal law of democratic states. The question arises whether the intention of the Serbian legislator was to introduce the retributive element in the amended Criminal Code (2019) by including the requirements of fairness and proportionality in the provision on the purpose of punishment.

Although eclectic theories on the purpose of punishment can be criticized for inconsistency (Stojanović, 2021:228), they still exist and persist, combining within themselves the two aforementioned maxims of absolute and relative theories of punishment. Thus, offenders are punished both because they have erred and to prevent them from erring again. It is important not to forget that criminal law is *ultima ratio*[5] for the protection of society from criminality, and its mechanisms can only be employed after the commission of a criminal act. A criminal offence serves as the occasion for punishment, and the culpability of the perpetrator is the basis of punishability. Although based on opposing conceptions, absolute and relative theories can still coexist, each having its own complementary role within a mixed (eclectic) theory. According to some interpretations, the eclectic theory was embraced in the latest amendments to the Criminal Code of Serbia (2019). The presented theoretical and philosophical perspectives on punishment and its purpose were provided to clarify the views and arguments of the existing scientific theories. In the next part of this paper, the author will analyze in more detail the new provision on the purpose of punishment envisaged in Article 42 (4) of the CC.

3. New Provision on the Purpose of Punishment: Article 42 (4) of the CC

It is important to start the central part of this paper by interpreting the new provision on the purpose of punishment, envisaged in Article 42 (4) of the CC, and to support one's conclusions with an analysis of the authentic interpretation of this institute, provided by the legislator in the Explanation of the Draft Act amending and supplementing the Criminal Code.[6] Notably, both the provision and its explanation are filled with ambiguities and

[4] For more on the concept, fundamental principles and typologies of crime prevention, see: Jovašević, Kostić, 2012.

[5] Security measures (which by their nature significantly differ from punishments) cannot be applied *ante delictum*, even if the danger (temible state) that will later lead to the commission of a criminal act is indicated and manifested in some other way. The reason for this is that the characteristic features of some security measures involve repression and still represent a criminal sanction, not a societal measure. Kant, as a classic retributivist, did not deny the preventive action of punishment, although he was strongly opposed to making prevention its sole or predominant purpose. In this opinion, punishment is always imposed against the offender of the comitted crime , and that the offender must be considered punishable even before contemplating the societal benefit that might stem from that punishment. For more, see: Kant, 1993: 133.

[6] The Draft Act and the explanation of the Draft Act were downloaded from the official website of the Ministry of Justice of Republic of Serbia; https://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php (access 11. 4.2023).

inconsistencies. It may also be disputed whether such an exceptionally theoretical question, which is normatively regulated by the Code, deserves such effort in analysis. The newly introduced purpose of punishment does not produce any harmful or even new consequences for judicial practice, and the question is whether they have any practical implications at all. However, it must be noted that the purpose of punishment has a significant impact on judicial practice because it has a direct impact on sentencing. Fairness and proportionality certainly have the status of criminal law principles, and although they were not explicitly mentioned in the Code until recently, it is difficult to imagine that judges were not guided by these principle in determining sentences on a daily basis. Therefore, the theoretical and even philosophical nature of this question is not a sufficient argument to abstain from this analysis. Such an approach underestimates the question of the purpose of punishment, and legal science should not undermine the importance of this issue, especially if it is known that the legislator has had this underestimating approach. In the Explanation of the Draft Act, the legislator devotes much more attention to changes that might be more significant, such as life imprisonment or new rules for sentencing recidivism and multi-recidivism. If our legislator has already elevated this philosophical question to the rank of a legal norm with legal force, then this question deserves attention. If the legislator has approached this matter without due diligence, it should be noted by legal science by illuminating the causes of such mistakes and offering a solution. For Serbian criminal law, the purpose of punishment is not only a theoretical and philosophical issue, but also a practical question.

Article 4 (point 4) of the CC includes a new provision on the purpose of punishment: to achieve fairness and proportionality between the committed criminal offence and the gravity of the imposed criminal sanction. Even at the first glance, we may notice a mistake in this formulation. The provision envisages the principles of fairness/justice and proportionality of criminal sanctions with the criminal offense. What was the legislator's intention: did the legislator intend to supplement the general purpose of criminal sanctions but mistakenly placed this provision in the article about the purpose of punishment, or was it just *a lapsus linguae?* It may be easier to accept this mistake as a matter of careless misuse of terminology. Prof. Stojanović believes that justice and proportionality should not be understood as part of the general purpose of criminal sanctions, given that justice and proportionality cannot and should not be the purpose of certain types of sanctions, especially certain security measures (Stojanović, 2021: 229).[7] These are just some conclusions drawn from the analysis of this provision. Therefore, if the provision itself is taken into account and interpreted systematically (i.e. compared to the provisions on the general purpose of criminal sanctions and the purpose of individual types of sanctions) in the context of the entire spirit of the Serbian system of criminal sanctions, it is more acceptable to conclude that the provision should remain where it is, and that the legislator's mistake should be attributed to a careless misuse of terminology. However, these conclusions are not final.

Taking a step further involves the analysis of the explanation of this institute, i.e. its authentic interpretation. Unfortunately, the explanation does not meet expectations and does not resolve the ambiguity arising from the provision itself; instead, it creates new uncertainties. In the third section of this explanation, which contains the authentic explanations on the fundamental legal institutes and individual solutions from the general part of the

[7] Moreover, security measures (especially the curative ones) are determined in relation to the specific perpetrator and the circumstances that entail certain danger to perpetrators themselves and the environment, rather than being determined on the basis of the nature and gravity of the criminal offense (Stojanović, 2021: 229).

Code, the new purpose of punishment is explained as follows: "Article 42 of the Criminal Code is supplemented by Article 1 of the Draft Act, introducing another *goal* to be achieved by the purpose of punishment, namely, to achieve fairness/justice and proportionality between the committed offence and the severity of the criminal sanction. In this way, *guidelines* are provided to judges to take this provision into account when determining the sentence, with the aim of achieving the purpose of punishment in each individual case."

How does the legislator perceive the new purpose of punishment? Is it seen *as a new goal* to be served alongside the existing purpose of punishment, as *guidelines* for achieving that goal, or as *reasons* (*circumstances*) that judges should consider when determining the sentence? This is a citation from the explanation of the newly introduced purpose of punishment. Considering the structure of this explanation, which should clarify rather than further complicate the matter, what is most concerning is that it seems that the legislator is not even aware of the logical problems he has created. If the legislator does not know or at least does not give the impression (by his approach to the institute) that he knows what he intended to achieve by introducing this amendment, then how can jurisprudence approach this question?

The provided explanation gives an impression that fairness/justice and proportionality should represent a separate (independent) goal that is beyond the purpose of punishment even though the legislator may not have intended to do that. As it is clearly visible, this goal should serve the already existing preventive purpose of punishment. Taking into consideration the opinion of Prof. Stojanović that fairness/justice and proportionality cannot be a constituent part of the general purpose of criminal sanctions, the question remains: where does this provision belong, where is its rightful place, where it would make sense, and where it could produce the desired effect? It is also possible that the legislator wanted to regulate fairness/justice and proportionality as circumstances in determining the sentence because the explanation states: "In this way, guidelines are provided to judges to take this *reason* into account when determining the sentence..." It remains unclear which reason the legislator had in mind, and whether the legislator sees fairness and proportionality as reasons/circumstances that affect whether the punishment should be lighter or harsher. On the other hand, fairness/justice and proportionality are also labeled as *guidelines* when determining the sentence. The assumption that fairness/justice and proportionality should be taken as circumstances when determining the sentence is unsustainable. The simple reason is that the circumstances that influence the determination of the sentence relate to the criminal offense or the offender, not the sentence that the court determines on the basis of objective and subjective circumstances. Therefore, the most acceptable approach is to understand fairness/justice and proportionality as *guiding principles* for determining the sentence, which is in line with the nature of these concepts; justice and proportionality are essentially criminal law principles.

Unfortunately, these explanations have not resolved all the ambiguities regarding the new purpose of punishment. Even if fairness/justice and proportionality (as interpreted in the explanation) are understood as guiding principles (guidelines) for determining the sentence, (which would be the least incorrect answer to the question of what the legislator intended to achieve by introducing the new purpose), it cannot be ignored that these terms are simultaneously designated as the *goals* of punishment. Thus, how is it possible for fairness/justice and proportionality to be both the goals and the guidelines for effectively achieving that the intended aim? The legislator does not reject either of these two approaches in his explanation; rather, he presents them cumulatively and on an equal basis.

Thus, if we discard the understanding of fairness/justice and proportionality as part of the general purpose of criminal sanctions and the view on fairness/justice and proportionality as circumstances for determining the sentence, there are several remaining options (which are ranked here from the easiest to the more demanding one): 1) to completely discard this provision and delete it in the next amendments to the Criminal Code; 2) to correct the mistake and replace the phrase "criminal sanctions" with the word "punishment," thus aligning the content of the provision with its heading; and 3) to find a more appropriate place for this provision. The provision may also remain unchanged, as there are always other issues to be addressed (either in the general or the special part of the Code) which may be perceived as more important and require greater attention in subsequent amendments than the norm regarding the purpose of punishment, which is almost declaratory in nature.

4. In Search of the True Meaning and Suitable Context of the Provision on Fairness and Proportionality

It is challenging to examine the third possibility and offer an answer to the question of where the provision on the fairness and proportionality of a criminal offence and the criminal sanction would be better incorporated in the legislation in order to make sense and achieve proper meaning and effect. The answer to this question has already been indicated. Fairness and proportionality might be better suited within the provision on the basis and scope (limits) of criminal repression (Article 3 of the CC). The argumentation for this stance can take two directions. First, in the criminal law science, fairness and proportionality are understood as legal principles closely related to the principle of individualization of punishment, as well as the principle of legitimacy (Jovašević, 2018: 25, Stojanović, 2021: 40). In the given context, it is safer to confine the argumentation to punishment, leaving aside other types of criminal sanctions. Punishment must be proportionate to the gravity and nature of the criminal offense, adapted to the personality of the offender, and simultaneously in line with the intended purpose of punishment and within the prescribed limits. Thus, an individualized punishment is a just punishment, and fairness is the characteristic that gives legitimacy to punishment, rendering it just and acceptable.

Truth be told, we are dealing with highly complex concepts and legal institutions (fairness, legitimacy, justification of punishment) that are almost impossible to define with precision, let alone restrict them within the boundaries of valid norms, legal standards, and philosophical categories. The question of what constitutes a just punishment is a topic in itself, more suited for the realm of legal philosophy. As this paper focuses on the purpose of punishment in Serbian criminal law, the concept of just punishment should be based on the intuitive and commonsense understanding of this concept by the judicial practice. Following this logic and respecting the limits within which the criminal law science deals with this question, it is justified to view fairness as a principle which is fulfilled by achieving the purpose of punishment in every individual case in practice. Therefore, the legislator perhaps did not err when he justified fairness and proportionality (perhaps unconsciously?) as an independent goal attained by achieving the purpose of punishment. This establishes a connection between the legitimacy of punishment and its purpose.

The principle of legitimacy is formulated in Article 3 of the Serbian Criminal Code (on the basis and scope of criminal law repression), which envisages that the protection of

individuals and other fundamental societal values constitutes the basis and the limits for determining criminal offenses, prescribing criminal sanctions, and their application to the extent necessary to suppress these offenses. For this reason, the author believes that the provision on fairness and proportionality should be placed within the norm on the restriction of criminal law repression, rather than within the norm concerning the purpose of punishment. Lastly, these two criminal law principles are closely related in theoretical sense, so why shouldn't they be interconnected within the same norm of the Criminal Code.

The second argument actually builds upon the first. In domestic literature, there is an opinion that, by introducing fairness and proportionality as the purpose of punishment, our criminal law has embraced a mixed theory of the purpose of punishment (Stojanović, 2021: 228). This standpoint implies that fairness and proportionality are expressions of retribution, which has transformed the previously prevalent relative theory of punishment (embodied in purely preventive purposes) into an eclectic theory of punishment. The scholars aligned with this point of view do not justify or explain why they view fairness and proportionality of punishment as a retributive purpose. In his "Commentary on the Criminal Code" (2021), Prof. Stojanović noted: "In addition to general and special prevention, retribution as a purpose of punishment can be acceptable if its content is determined through the principle of fairness and the principle of proportionality, which must be respected in criminal law" (Stojanović, 2021: 229). In this quote, we underline the term "*content*." Fairness and proportionality should serve as factors limiting retribution as a purpose of punishment. Would it be wrong to perceive fairness and proportionality as factors that restrict the *content* of the punishment itself, which is embodied in repression? The repressive element of punishment almost entirely fulfills its content. It is a *sine qua non* feature of punishment, without which punishment would not be punishment.

It is hard to imagine that fairness and proportionality mentioned in Article 42 of the Criminal Code have any connection to absolute theories on the purpose of punishment. As explained, absolute theories view retribution as the sole purpose of punishment: vengeance, responding to evil with evil, and the act of punishment satisfying the sense of justice. "Absolute theories consider the essence of punishment to be its inner righteousness, which demands revenge for a certain evil with another evil, through punishment" (Subotić, 1910: 10). The principle of talion (*lex talionis*), which retribution is based on, implies "Legal Equality of Evils", an eye for an eye, a tooth for a tooth (Subotić, 1910: 7). Thus, it is clear why fairness and proportionality are linked to retribution. However, this connection should be viewed as a historical determinant, and it is quite reasonable to question whether it has been revitalized through the amendments to the Serbian Criminal Code (2019).

When introducing fairness and proportionality as the purpose of punishment, did the Serbian legislator intend to introduce retaliation (vengeance) as the purpose of punishment? A reasonable response to this question seems to be negative. The proportionality that was intended to be achieved through the principle of talion between retaliation and the committed crime is not the proportionality that the Serbian legislator had in mind. In the "civilized" states governed by the rule of law, those who committed murder cannot be sentenced to death, nor can sexual offenders be castrated, although comparative law literature includes ideas on introducing such measures for combating this type of crime. Notably, in scholarly discussions, the principles of fairness and proportionality are linked to the utilitarian nature of criminal law (Jovašević, 2018: 24). Given the fact that relative theories on the preventive function of punishment are labeled as utilitarian, this stance is diametrically opposed to the idea expressed in the new provision which introduces a

retributive aspect of the purpose of punishment in our jurisdiction. As noted by Montesquieu, "Utility is the highest justice; unnecessary punishment that does not serve the interests of the offender or society is mere tyranny" (Čejović, 2008:158).

Instead of striving to reconcile these two approaches, which would be quite ambitious considering their intrinsic opposition, the author will attempt to provide a different perspective on the following question: whether the newly introduced purpose of punishment is a formulation of retribution or rather a factor limiting the repressive nature of punishment.

The answer to this question would be clearer if the criminal law theory provided a more clear distinction between the essence, the nature of punishment, and the purpose of punishment. For example, these categories are much more clearly differentiated in ecclesiastical criminal law, thanks to the dedicated work of Bishop Nikodim Milaš in this area (Milaš, 2004: 104-114). Taking into consideration the essential and substantial differences between state and ecclesiastical law, it would not be inadequate to examine the conclusions that such an approach to punishment would lead to in the realm of state criminal law. In short, as previously discussed, the repressiveness (as a characteristic feature of punishment) is often neglected because it is so apparent and uncontested. To be more precise, its significance as a fundamental, *sine qua non* feature without which punishment would not be punishment, is disregarded. In that regard, evil (which is certainly embodied in repression) constitutes the essence of punishment; yet, it does not simultaneously imply that evil represents the purpose of punishment. Punishment is a repressive measure by which certain human rights and freedoms are restricted or taken away from an individual who committed a criminal offence, contrary to (or regardless of) that individual's will. Many authors agree on this, not only the scholars in the field of criminal law (Živanović[8], Jovašević[9], Stojanović, Čejović) but also philosophers[10] (Flew, 1954: 293). Although there have been debates on whether punishment should inflict pain upon the offender, or whether the essence of punishment is to put offenders in a situation they would never wish for themselves, punishment undeniably represents the deprivation or restriction of certain rights or freedoms (Milevski, 2014: 25-30). This fact is objective and does not lead to the conclusion that punishment would not be punishment if the offender did not perceive it as pain or evil. Conditioning the nature of a measure by subjective experience and the individual's attitude towards that measure would be incorrect, at least in the context of criminal law science.

In this paper, the author advocates for the standpoint that it is more accurate to view the new provision on fairness and proportionality as limitations on the repressive nature of punishment, rather than as a provision introduced for retributive purposes. In criminal law, there is a thin but clear line between the essence and the purpose of punishment, and it is necessary to constantly emphasize this difference. There is a strong and close connection between these concepts, but it does not mean that they should be mixed or equated. The practical implications of the regulated purpose of punishment are certainly conditioned by its nature and characteristics. Thus, a judicial warning as a measure of admonition cannot

[8] Toma Živanović spoke openly about punishment as an evil in his works *Ground problems of the criminal law – higher general part of criminal law* (1930) and *The Basis od Criminal Law of the Kingdom of Jugoslavia* (1936).
[9] Prof. Jovašević states that, in addition to the formal concept of punishment, the material concept of punishment is determined on the basis of its social role, i.e., as a measure to protect the society from crime. Nevertheless, it is and will always be a repressive, coercive measure. Yet, the repressive nature of punishment does not deprive punishment of the possibility of producing socially desirable effects. The repressive nature of punishment does not preclude its utilitarian effects. For more about the general and special features of punishment, see: Jovašević, 2011.
[10] Philosopher Antony Flew is known for his definition of punishment, which distinguishes five elements that are very similar to the general elements of punishment recognized in the criminal law science.

achieve the effects of even the mildest monetary penalty, while the public announcement of a verdict as a security measure has a different purpose than a judicial warning. It is logical that the effects of different types of criminal sanctions depend on their characteristics and nature. Although punishment essentially entails evil (repression, deprivation, objective limitation of certain rights and freedoms), it does not mean that it can only achieve retribution and not other socially beneficial goals. Kant, as an explicit representative of retributivism, did not contest the possibility of the preventive effect of punishment as retribution, with the caveat that he saw the preventive effect of punishment as useful but secondary to the punitive effect, "because one must never deal with a human being merely as a means to the purposes of another..." (Kant, 1993: 133). [11]

Article 3 of the Criminal Code prescribes the basis and the scope (limits) of criminal repression, specifying that repression is justified only to the extent necessary for the suppression of criminal offences. We have observed the connection between the necessity of repression and the proportionality of punishment, as well as the relationship between the purpose of punishment, justice, and the legitimacy of punishment. Another connection between the provisions on the limits of repression and the purpose of punishment is prevention; the limits of repression are set to allow for legitimate suppression of criminal acts, which also represents the purpose of punishment, in terms of both general and special prevention. Thus, considering the argumentation presented in this section, if the stance were accepted that the principles of fairness and proportionality are essential factors limiting criminal repression, it could be concluded that the Serbian Criminal Code still adheres to the relative theory of the legal purpose of punishment. The fact that the provision on fairness and proportionality was added to the norm on the purpose of punishment does not preclude the possibility of arriving at the correct interpretation of that provision through systematic and teleological interpretation. Thus, the conclusion that retribution (perceived as retaliation) would become one of the purposes of punishment in Serbia with the newly introduced provision seems to be superficial or rather intuitively based on the historical connection between fairness/justice and proportionality with retribution.

In the author's opinion, understanding fairness/justice and proportionality as limiting factors of repressiveness (as the fundamental characteristic of punishment) deserves to be considered. This new perspective shall be considered from the following viewpoint: "Besides the predominantly utilitarian condition, preventive interests should never contradict the principle of fairness/justice and proportionality; their realization must always be within the framework of an appropriate response to criminal acts. This means recognizing the necessity of introducing a retributive element even in prevention-oriented criminal law. However, this does not lead to a mixed theory, nor does it mean that retribution should be placed on the same level as prevention" (Stojanović, 2011: 22).

5. Conclusion

With reference to the latest amendments to the Serbian Criminal Code (2019), the central question addressed in this paper is whether the purpose of punishment has become eclectic, shifting from purely preventive goals to a combination of preventive and repressive aims. The answer to this question depended on the essence and meaning of the newly

[11] For more about Kant's retributivism and the justification of the death penalty from a philosophical point of view, see: Budić, 2017.

introduced provision on the purpose of punishment, envisaged in Article 42 (4) of the CC. Given the fact that relevant literature has only presented the view that Serbian criminal law has adopted a mixed (eclectic) theory on the purpose of punishment, without providing the explanation why fairness and proportionality are perceived as retributive aspects of the purpose of punishment, it was necessary to examine the new provision on the purpose of punishment from different angles. In that context, the paper discussed the theoretical concepts on the legal aim of punishment and some philosophical doctrines on the justification of punishment. In order to ensure that the perspectives in this paper were well-founded and elaborated, the author analyzed the criminal law theories and the new provision with reference to authentic legislative statements and interpretations. The first step was certainly a linguistic interpretation of the legal norm, and the final position on its true meaning was based on systematic and teleological interpretation.

Clearly, in comparison to other newly introduced or modified institutes in the general part of the Criminal Code, the legislator did not invest much effort or attention in shaping the new purpose of punishment or explaining it. It is legitimate to question the legislator's intention, why the purpose of punishment was supplemented by this provision, and why it was essential to do so at that time. The significance of amending the provision on the purpose of punishment could be sought and interpreted in the context of other changes which, even at a cursory glance at the Act amending and supplementing the Criminal Code (2019), indicate that Serbian criminal law is moving towards stricter solutions and penal mechanisms. The conclusion could be that the amendment on the purpose of punishment was a side change, accompanying the main amendments such as the introduction of life imprisonment and rules on sentencing multi-recidivists. This approach may be subject to further interpretation.

Considering all argumentation presented in this paper, we may draw the following conclusions. Serbian criminal law still fundamentally adheres to the relative theory on the purpose of punishment. Even after the amendments to the Criminal Code (2019), the predominant (if not sole) purpose of punishment is general and special prevention of crime. The author believes that it is more accurate to view fairness and proportionality primarily as general principles of criminal law that essentially act as factors limiting criminal repression. This viewpoint is based on differentiating between the repressive nature of punishment and the retributive purpose of punishment. The fact that repressiveness is an inherent (*sine qua non*) characteristic of punishment does not exclude the possibility of achieving utilitarian goals with such measures, without negating the preventive aspects of punishment. Indeed, the repressiveness of punishment is a factor that should deter potential criminal offenders from engaging in such punishable conduct (i.e. a factor of negative general prevention).

The author believes that the provision on fairness and proportionality could be added to Article 3 of the Criminal Code, which regulates the protective function of criminal law (i.e. the principle of legitimacy). In this paper, the author has explained the connection between the purpose of punishment, fairness and proportionality, the legitimacy of punishment, and the protective function of criminal law. The definitive answer has been provided by a systematic, particularly teleological interpretation of the provision on fairness and proportionality between the committed crime and the criminal sanction. This provision could be reformulated in such a way as to avoid the use of the terms "punishment" and "criminal sanctions", in order not to repeat the mistake that Prof. Stojanović warned about: fairness and proportionality cannot be the purpose of individual types of criminal sanctions. Thus, the legal principles of fairness and proportionality should complement the

principle of legality, i.e. the protective function of criminal law, prescribed in Article 3 of the Criminal Code. Following this logic, fairness and proportionality would be introduced as desirable characteristic of all law-prescribed mechanisms of criminal repression. This approach would link these two general principles of criminal law into a meaningful normative whole, analogous to their theoretical and legal correlation.

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IZMEĐU RELATIVNE I MEŠOVITE TEORIJE: SVRHA KAZNE U POZITIVNOM SRPSKOM KRIVIČNOM PRAVU

Krivični zakonik Srbije jedan je od retkih krivičnih kodeksa koji reguliše svrhu krivičnih sankcija i svrhu kažnjavanja. Najnovijim novelama Zakonika iz 2019. godine, normi o svrsi kažnjavanja dodata je još jedna odredba. Ostvarenje pravednosti i srazmernosti između krivične sankcije i učinjenog krivičnog dela sada predstavlja novu svrhu kažnjavanja. Do 2019. godine svrha kažnjavanja bila je čisto preventivna, to jest zakonodavac je prihvatao relativnu teoriju o pravnom ciljlju kazne. Generalna i specijalna prevencija bile su jedini pravni cilj kazni u Srbiji. Međutim, stanje stvari je promenjeno uvođenjem nove svrhe i mada je tako novoodređena svrha već određena kao prihvatanje mešovite, eklektičke teorije, o time se ipak još može voditi diskusija. Ovaj rad predstavlja težnju da se predstavi drugačiji pogled na odredbu o pravednosti i srazmernosti. Iako se ovi pojmovi intuitivno vezuju za talionski princip, a samim tim i za retributivnost, pokušaću da temeljno argumentujem svoj stav da se pravednost i srazmernost mogu shvatiti i kao ograničenja represivne prirode kazne. Retributivnost se često pogrešno upotrebljava kao sinonim represivnosti, iako je prvi pojam vezan za svrhu kazne, a drugi predstavlja njenu suštinu. Na putu ostvarenja postavljenog cilja ovog rada, biće razmotrena zaštitna funkcija krivičnog prava i neka opšta načela, poput legitimiteta.

Ključne reči: *svrha kazne, represivnost, retributivnost, prevencija, eklektičke teorije*.