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PHILOSOPHY OF PUNISHMENT AND THE PROBLEMS OF ITS FIXING

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«Diplomat»

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CHAPTER I

PUNISHMENT

§1. THE NOTION AND ESSENCE OF PUNISHMENT

I. The notion of punishment. Sometimes we think that the notion of punishment belongs to those notions which appear to be clear and simple for everybody. But, as it was justly noted by List "we don't often have a clear idea of the difficulties which appear in science when this seemingly very clear notion and especially its separation from other social measures of guard is described. And in this sphere we are at the very first steps of scientific work".[1] And List is realy right, because the word "punishment", not only in colloqual speech, but also in literature, and even in special criminal language has a rather various meaning, though reality of history shows that in all nations at all periods of time, with the first appearance of organized community appears punishment. Soon the problem of punishment becomes the main problem of the whole criminal law. Once Kistyakovsky wrote: "If the teaching about crime is in the first place in criminal law from scientific point of view: and it is its main component, then the main part in criminal law undoubtedly belongs to punishment from the point of view of essence and aim of criminal law as the social institution. It reflects the idea of criminal law"[2]. And it is really so, for the truth and falsehood, consistency and inconsistency of the theory and stability or unsteadines of practice depend on definiteness and indefiniteness of only this notion. It is punishment that determines the policy of every government in its struggle against criminality. One mustn't forget that criminal law in action is to a considerable degree determination and application of punishment. If we refer to the consideration of the notion of punishment, we can notice that punishment was considered differently at different times. We know philosophers were the first to give answers to the problems set by humanity. The problem of punishment was not an exception.

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[1] 1. List. Die Ausgabe and die Methode der Strafrechtsnis - Senchaff (Strafrechiche Anfsare und Vortzage, 1905. B II 2932.

[2] Kisyakovsky "The Elementary Manual of General Criminal Law", 1980, p.696.

And it is to be expected that they understood punishment as a philosophical phenomenon. Plato stated that punishment was good for the criminal and served to clear this soul.[3] The others, on the contrary, affirmed that as punishment brings harm to the criminal, it is the evil.[4] Characterizing punishment as good and evil, we see that philosophers deal with the world of morals because these notions are not those of ethical law. But how is good and evil displayed?

The essence of good is that punishment is estimated like something in the way of "curing medicine" for the patient, that is, the criminal and not the means necessary in the struggle of society against criminality. In other words, punishment, being good is necessary for the criminal, not the society, of course, if we consider punishment from the point of view of achievment and realization of highter tasks (the task of criminal's reformation, or "cleaning of soul" as Plato says, is meant), it is good. And it is good not only for the criminal, but also for the society as a whole.

All kinds of punishment, beginning with capital punishment and ending with a fine, are certain uneasiness and embarasment of the criminal in his interests and for his good. That's why punishment is inevitably the cause of suffering, the meaning and intensity of which changed considerably in the course of time, being directly dependant on the culture of epoc, way of life, condition of morals, customs and habits of people. That's why criminal punishment should be determined through the notion of "suffering"[5], and not through the notion compulsion or "retribution".[6]

Taking this into consideration, we think that punishment is a suffering from the point of view of common conditions of human life, in the way of loss or restriction of civil rights and material wealth. But to understand the notion of "punishment" whole, the existence of suffering is not sufficient. It is necessary to begin the discussion of that

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[3] See: Plato, Works, v.3, part II, Moscow, 1972, p.339.

[4] V.Solovyov. "The Law and Morals. An Essay of Applied Ethics. 1899, p. 103. <-Punisliment thcoiy in Soviet Criminal Law", Saratov, 1962, p. 155; N.A.Belyayev. "Criminal Law Policy and the Ways of Its Realization", Leningrad, 1986, p. 14; "A Course of Soviet Politician" Leningrad, 1986,"p. 16; "A Course of Soviet Criminal Law", vol.3, Moscow, 1970, p.29-30; S.V.Polubinskaya. "The Aims of Criminal Punishment", Moscow, 1990, p.6-8, and others.

[6] V.K.Duyunov. "Punishment in the Criminal Law of Russia - Compulsion or retribution?" In: "State and Law", 1997, № 11, p.61-68.

which gave the nature of suffering by means of loss or restriction of human rights and material wealth. It is necessary to discuss - who causes these sufferings, why and what for?

II. The Essence of punishment. Essence is the kernel of a phenomenon, which is stable and appropriate in it. It is generally accepted in philosophic literature that essence reflects the typical features of the content of those phenomena, in which we try to distinguish what is general and decisive.[7] Essence and content are not the same notions. P.P.Osipov notes that "essence characterizes a phenomenon from the point of view of its stability, whereas content contains elements manifesting themselves in stability as well as in the process of modification and development conditioned by the appearance of new elements "hostile" to the essence and undermining it. Therefore, content is not only stable, but also changeable".[8] The demarcation of essence and content is particularly important, as it has not only theoretical but also practical value. But what is to be understood by the criminal law, this question is given a generally accepted answer - the essence of punishment is retribution.[9] In a number of languages, both in western and eastern, there is no special term corresponding to the notion of "retribution" in contrast to the notion of "punishment".

In the Russian language the word "retribution" has a peculiar shade of meaning. According to Dal, not only punishment in general, but also a severe punishment and death sentence are retributions. It is the property of retribution that makes punishment different from all the measures of state compulsion. Therefore, crimes represent social danger to a different degree as well as punishments differ from one another as to their degree of retribution both qualitatively and quantitatively. The distinction between the notion of punishment content and the notion of its essence are connected with the qualitative

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[7] M.Mamojan. "The Common Essence and Variety of Forms of Establishing Socialism". In the book: "A highly - developed socialist society: essence, criteria of maturity, the criticism' of revisionist conceptions". Moscow, 1973, p.300; D.A.Karimov. "The Philosophical Problems of Law", Moscow, 1972, p. 190; Z.M.Oru- jayev. "Dialectics as a System", M., 1973, p.275.

[8] P.P.Osipov. "Theoretical Principles of Forming and Applying Criminal Law Forming and Applying Criminal Law Sanctions", Leningrad, 1976, p.65.

[9] "A Course of Soviet Criminal Law", vol.2, Leningrad, p. 193; N.A.Belyayev. "Criminal Law Policy", p.64; "A Course of Soviet Criminal law"; T.Z.M., p.26; S.V.Polubinskaya. "On the Problem of the Aims of Punishment". In: "Problems of Making Criminal Law Perfect", Moscow, p.100.

characteristic of retribution. The concrete expression of retribution forms the content of punishment of one kind or another. While analyzing the system of punishment, one cannot fail to see that different kinds of punishment, having one and the same essence differ from one another.[10] They arc all included in this system. The essence of punishment is characterized by stability, whereas the content of the kinds of punishment changes comparatively fast. In the science of criminal and reformatory law a heated discussion concerning the following question has been held for a long time: whether the question of the essence and content of punishment is settled by retribution alone or it is accompanied by some elements of education. On the face of it, this question may seem to be of purely theoretical character. But it is necessary to keep it in mind that the effect of the realization of criminal and reformatory policy, the creation of many institutions of criminal and reformatory law depends on the settlement of this very question. This argument was caused by a rather vague wording of article 20 of criminal legislation principles, because it gave grounds to understand the content of criminal punishment in 2 ways: "Punishment is not only retribution for the reformation of the convicted person in the spirit of honest attitude to labour, strict observation of laws, respect for the rules of social co-existance, and also the prevention from commitment of new crimes by the convict as well as other people". It is the negative particle "not" and the conjunction "but also" that caused divergences among authors. Criticizing the legislator for this not very exact wording of article 20 of the principles, N.A.Struchkov was quite right to note: "as there is the conjunction "but also", one may think that punishment is not only retribution by its content, but also something else, evidently, a measure of teaching". Consequently, when the punishment content problem is concerned, some authors confine themselves to the point of view that punishment is made up of 2 elements - retribution and education.[11] They think as following: if punishment is not only retribution, it means that it includes something more. This "something more" may be, in their opinion, nothing but the educational elements. Some others consider that punishment is

[10] See: A.E.Natashev, N.A.Struchkov. "The Main Principles of RZ". Moscow, 1967, p. 18.

[11] N.A.Struchkov. "The Problems of Reformatory Law Science in the Light of New Reformatory Legislation". Moscow, 1972, p.30.

retribution for the committed crime and it is not logical to include the measures of education in its content[12], as "according to the sense of the law of word", "not only" is used only to emphasize the non-retributional nature of the aims of punishment. We proceed from the assumption that the content and essence of punishment do not depend on the way by legislator. Punishment is merely retribution by its inherent essence. The legislator is not able "to deprive" punishment of this property or add some elements of education at the same time, the legislator can influence the content of this punishment or another by means of defining this "dose" of punishment or another in its content. For instance, the "dose" of retribution of imprisonment differs quantitatively from "the dose" of retribution in a fine. And it is quite natural, because it is necessary to have an over dose of retribution in some cases and under dose in others in order to achieve the aims set before punishment. The difficulty realization of the punishment essence lies not only in divergent approach to the defamation of the role of retribution in punishment which can be found in science, but also in divergent viewpoints of scientists to the nature of retribution itself.

B.S.Utervsky difined retribution as compulsion.

[13]B.S.Nikiforov, criticizing this understanding of retribution considered that retribution presupposes compulsion to suffering.[14] In this way, in contrast to B.Utevsky, B.S.Nikiforov understood retribution not only as compulsion in general, but also compulsion to suffering, which is proportionate to the committed crime. Later on I.S. Noy also defined his attitude to the notion of retribution: "Retribution is compulsion which aims at arousing suffering. Only this interpretation of retribution lets us distinguish it from other kinds of compulsion included in punishment, but not being retribution".[15]

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[12] N.A.Struchkov. "The Problems of Reformatory Law Science in the Light of New Reformatiory Legislation", Moscow, 1972, p.34-35; A.I.Natashev. "New Works on Reformatory Law". In: "Social Lawfulness", 1963, N«10, p.93; A.L.Remenson. "Theoretical Problems of Imprisonment and Re-Education of the Cen- vict", p. 12-18; "Soviet Reformatory Law"; General part, Moscow, 1977, p.5-8; and others.

[13] B.S.Utevsky. "The Problems of Reformatory Law Theory and its Application Practice". In his works: "Materials of Theoretical Conference on Soviet Reformatory Law", Moscow, 1957, p.37.

[14] See: "Materials of Theoretical Conference on Soviet Reformatory Law", Moscow, 1957, p. 128.

[15] I.S.Noy. "Essence and Functions of Criminal Punishment in the Soviet State",

S.V.Polubinskaya considers that retribution is the essence, an inseparable part of punishment. In this sense retribution consists of depriving the convict of the chance to commit new crimes... In this interpretation retribution is a precondition necessary for achieving the aim of prevention from crimes by means of punishment.[16] A group of authors insists on retribution being one of the aims of criminal punishment[17] whereas some other authors do not agree with it.[18] And fimally, the last view - point concerning this problem in juridical literature belongs to V.Duyunov, whose- opinion is that "retribution is a reaction in the form of reprimand, reproach, blame of the guilty for the blunder committed by him- irrespective of the sphere of social life in which this notion is used"[19].

We think that the notion of retribution may conform to the notion of requital. To inflict penalty means to requite for what has been committed. Punishment possesses the property of making the convicted person suffer only due to retribution. Having lost this property it has ceased to perform the function of punishment. In the course of the centuries - old history of human society development, the notion of punishment was just like this:

it was reduced to the notion of retribution, requital for the committed crime. Unfortunately, during the soviet period some attempts were made to change the nature of punishment completely: It was asserted that among the elements of punishment one more element appeared, and it is conviction - a notion, which is essentially incompatible with the historical notion of punishment. Unfortunately, the view - point mentioned above was generally accepted in literature. In other words, the opinion that punishment is made up of retribution and education was widely spread. Thus, I.S.Noy noted: "... the denial of conviction as an element of punishment, the reduction of the notion of punishment to retribution alone would lead mainly to the repressive

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Saratov University Edition, 1973, p.31.

[16] S.V.Polubinskaya. "On the Problem of the Aims of Punishment", p. 100.

[17] See: N.A.Belyayev. The Mentioned Works, p. 117; l.I.Karpets. "Punishment. Social, Law and Criminological Problems". Moscow, 1973, p. 138-147.

" See: I.S.Noy. "Problems of Punishment Theory in Soviet Criminal Law", Saratov, 1962, p.62; "A Course of Soviet Criminal Law", vol.II, p.216-219; "A Course of Soviet Criminal Law", vol.III, p.31-40.

[19] V.Duyunov. "Punishment in the Criminal Law of Russia - Compulsion or Retribution?". P.65.

influence on the personality, to the misrepresented notion of soviet criminal policy. It would lead either to the formation of a wrong idea of the punishment effectiveness or to contradictory statements on this problem". [20]Punishment (retribution, requital) is not capable of convincing, educating. It terrifies, depresses. Therefore, P.P.Osipov is right to say: "it is necessary to pay attention to a wide-spread delusion in the soviet criminal law science which concerns the educational capacity of retribution". [21]Punishment, i.e. the introduction of the limitation of rights, the cause of hardships which, in a word, damage the personal interests of the convicts and cannot be considered as a means of education.

III. Punishment - Retribution - Requital. Whether punishment is requital by its essence, or it is one of the historical forms of manifestation of punishment that does not consist of requital only is a problem which was raised long ago. Thus, assuming that punishment and requital, Aristotel wrote that people "try to render evil for evil, and if it is impossible, this state is considered to be slavery".[22] Thus, he considered that requital is just and lawful. According to Aristotel, requital is some kind of making even of what is uneven, but this process must not be a mere talion. Exner notes that "it is out of the question that any punishment is requital, as punishment is in its essence evil for evil".[23]

Gegel considered that "requital, overtaking the criminal, looks like a strange destination, which does not belong to him, whereas punishment is, as we see, only the display of the criminal, i.e. the other part which necessarily suggested by the first. The first thing that averts us in requital that it manifests itself as something immoral, like revenge. And in this way it may be looked upon like something personal. Not being personal, the notion itself realizes requital"[3].

A.A.Gijilenko was a staunch supporter of the theory of requital. He wrote: "Thus, we confess that the content of any punishment in its essence is requital and as we think that punishment is, in general, a

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[20] I.S.Noy. "Essence and Functions of Criminal Punishment in the Soviet State", Saratov University Edition, 1973, p.510.
[21] P.P.Osipov. "Theoretical Principles of Forming and Applying Criminal Law Sanctions", Leningrad, 1976, p.68.
[22] Aristotel. "Ethices", p.89.
[23] Exner. Die Theorie der Sicherungsmitel, 1914, p.27.
[23] A.A.Jijilcnko. "Punishment", Petrograd, 1914, p.211.

kind of legal institution, different from other similar institutions. It is this institution that we imagine ourselves as the one which includes the element of requital. This element is not the aim of punishment, but its essence"[1]. As we see, A.A.Gijilenko emphasizes that we must distinguish between the notion of requital as the essence or content of punishment and the notion of its being the aim of punishment. It is quite important and precise definition. On the whole, the analysis of the view - points on the essence of requital, which exist in the criminal-law literature makes it possible to distinguish the following 5 groups among them. They are: i)the understanding or requital as smoothing or levelling; 2)the understanding of requital as satisfaction and this satisfaction is understood either in the sense of a necessity, inherent in an individual person or in the sense of social and even state requirements; 3)the understanding of requital in the sense of general prevention; 4) the understanding of requital in the sense of requital to a person which causes a certain mental suffering; 5) the understanding of requital as a reaction to what has been committed.

The theory of requital has always been subject to grave objections. It has not been categorically accepted by quite well - known and reputable authors. The social revolution denied the very existance of it. Therefore, this problem did not become the object of grave investigations and discussions during the period of communist ideology. Objections against requital, existing in the literature, appear to be very diverse according to their starting points of view. Thus, it is noted in particular, that requital is inadmissible in modern social life being a remnant of the past, as it is revenge at the same time, i.e. something outside the reasonable activity of man. It is caused by that instinctive inclination, which is clear on the initial stage of the development of mankind, but without which one can perfectly do it present. V.Solovyev writes: "The criminal law doctrine of requital, which is quite deprived of both logical and moral sense, and a remnant of the savage past, and criminal punishment which is now in common use, as it becomes the aim of legal reaction on the crime to cause the criminal suffering and hardships, represents a historical transformation of the savage form of blood fend"[24]. Here the immoral

[24] V.Solovyev. “Law and Morals, an Essay of Applied Ethics”, 1899, p.60.

nature of requital is also pointed out. Posnishev notes that "this ideal i.e. the idea of requital) prompted by the brutal feeling of revenge is immoral"[25]. There are some authors who point out the insufficiency of requital theories, because they are devoid of a definite stable criterion for indicating punishment.[26] The inner content of punishment, its essence as represented in the criminal law makes it possible to notice that the distinguisihing feature of the punishment institution as compared to other criminal measures is its inherent element of requital. It is necessary to emphasize that it (requital) is not the invention of the legislator, and is not an element, which can be taken away from the content, which can be taken away from the element, which can be taken away from the content of punishment in accordance with somebody's will today, tomorrow or any other day. Requital is a phenomenon, which underlines the objective nature of punishment. We understand requital not as the aim of punishment, but as an instant characterizing the very essence of punishment. It is impossible to imagine punishment without this instant. Reguital rests on the feeling of indignation which arises as the result of the perpetration of a crime. That is why requital is the means of satisfying the feeling of social justice in society. People will reject requital when the necessity of punishment vanishes and new measures replace it, ousting this weapon of struggle against criminality. The opponents of the requital theory often allude to the admission that requital and revenge are identical notions. That is why the notion of requital as well as that of revenge involves the immoral nature of requital and consequently, its inadmissebility in modern conditions of the cultural life of mankind. But A.A.Gijilenko was right to note: "*Undoubtedly,, requital underlies both revenge and punishment, but it does not diminish the importance of requital as an element of punishment. The general character of the basis of requital and punishment cannot in itself disoredit the view point which admits requital as an essential clement of the notion of punishment»*

The idea of requital is not the idea of Talion, which means formal, qualitative or only quantitative equality. It is not revenge which is characterized by roughness, instinctiveness, infinite and senseless

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[25] Posnishew “The Main Principles of Criminal Law Science”, 1912, p.60.

[26] Sec: Belogrits -Kotlyarovsky: “A Manual of Russian Criminal Law”, 1904, p.56; Tagansev. "Russian Criminal Law", 1902, p.310.

reaction of the victim. It is not the satisfaction of the latter either, not the smoothing of the harm and not moral requital which can be discerned by a human eye. It is the idea of punishment which, being the violation of social order, must arouse the attitude corresponding to its negative estimation. It is in this sense that the 2 notions - requital and retribution are synonymous.

§2. THE RIGHT TO PUNISH

As we see, the problem of the essence of punishment, its juridical nature and its relation to the state is an old one in science. Beginning with classical philosophers, it has interested people. The fact of the existence of punishment in all states irrespective of the stage of their development is not to be doubted.

It existed and was in power before man asked himself: why and what for does punishment exist? That is why when considering the essence of punishment one should not spare too much time on the question whether it is necessary or not for the state, as the fact of its centuries - old existence convinces us best of all. But, as it is rightly noted by N.D.Scrgeyevsky: "We cannot consider this fact of the centuries-old existence of punishment occurring everywhere sufficient for its juridical basis".[27] Therefore, if the legal basis of punishment is not established, its lawfulness will be doubtful

The of problem of the basis punishment is one of the central problems in criminal law.

It has always been in the centre of attention of philosophers, teachers of social sciences, psychologists rather than lawyers. Unfortunately, the soviet criminal law science never paid attention to the investigation of this problem, proceeding from the assumption that it is rather a philosophical issue. In the history of science not only the basis of punishment, but also "the right to punish" was discussed. At any rate, the question is put like this: what is the source of the right to punish and what is it based on?

Beginning with Hugo Yrocie there are 25 accomplished philosophical systems and more than a hundred different theories put forward by various scientists of law which try to base theoretically the state right to punish. Among these theories one can clearly distinguish 2 main groups - absolute theories and relative theories.

Absolute theories base the right of a state to punish in absolute basis which the mankind must obey. This basis orders to punish criminals only because they have committed criminal acts. The following theories can be included into this group: theological theory, the theory of dialectical requital, the theory of justice, the theory of

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[27] A.A.Jijilcnko. “Punishment”, p.223. 23

self - defence, the theory of explicit imperative and the theory of inherent justice.

Relative theories perceive the essence of retributional activity not in this absolute basis or the other; which people inevitably obey, but exclusively in the known result useful for the state life which ensues a consequence of the application of punishment. The decrease of the number of criminal acts is such general result for all relative theories. According to the content of special aims the following main types of relative theories can be put farward: the thory of general frightening (general prevention), the theory of criminal's frightening (special prevention), the theory of mental compulsion (the theory of frightening by threatening with punishment), the theory of defence of social security, the theory of reformation of criminals. We think it would be useful to give a brief description of some of the theories accepting the right to punish.

Representatives of the theory of power consider punishment to be an institution which exists to support the authority of the state power. There is a school which, not refecting the right to punish, does not, however, admit that any society or human power can make use of this right. This conclusion is based on the existence of certain conditions which one must know in order to acquire the right to punish. The following conditions can be referred to them: a)to know definitely what is evil and what is good; b)to know different degrees of the guilt of those who must be punished by the criminal law; c)to define the kind and degree of the inflected punishment for any violation of social laws. Society must reject the right to punish and content itself with selfdefence, because all the mentioned conditions are impracticable.

Representatives of social law and followers of theological school consider any kind of power as coming from. Yod and His representative on the earth. Therefore, the right of punishment belongs to Yod only. The followers of private rights ascribe the right of punishment to a personality, an individual and make a social property out of him as a consequence of the argument known as "Contract social". According to Kant, the right to punish is based not on the property of right, not on the interests of society, but only on the moral requirement confirmed by "a priori" without any proofs. The school of Kant requires the right of punishment to be based exclusively on

justice harmony existing between the moral evil and suffering, on expilation imposed on the quilty during necessary satisfaction of the requirement of conscience. In Kant's opinion the right to punish is the right of the ruler to inflect punishment on his subordinates for the committed crimes, i.e. for those violations which make the guilty unable to remain a citizen.[28]

Gegel assumes that the reference to the moral feeling which was put by Kant into the basis of the proof of the right to punish, appears to be unsubstantiated and arbitrary, whereas the law and all institutions resting on it must be unshakeable. Therefore, according to Gegel, one must seek for the basis of the right to punish in the properties of human thinking, in indisputable laws of logic in almighty power of understanding, in a three - member dia- lectical development of idea not only as the law of thinking, but also the one of existence. Gegel asserts that the subject of punishment is, in fact, the law itself, whereas the state is its body[29]. There are some philosophers and social scientists which absolutely deny the right to punish. They put forward several arguments, particularly, that a person is not free in his choice of behaveour, i.e. the freedom of man's will is denied. Logic is quite simple if a man cannot control his actions it is unjust and silly to punish him for them. Consequently, any criminal system irrespective of the principle it is based on is, in its essence, unjust. As the result of it neither punishment, nor expiation and morals of the compulsion of a human being, deprived of freedom can be thought of.

Hence we think, that the right problem of punishment is divided into the problems concerning the subject and object of punishment: the former is connected with the problem of the right basis of punishment and the latter deals with the aims and properties of punishment. The right to punish can be found wherever there is human society. Society has a right not only to prevent, to force, but also to punish. The formal basis of punishment is the state power will which is its subject. The right of punishment which belongs to the state consitutes its duty and it cannot avoid realizing it. This is the duty before separate citizens which suffered from crimes and before

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[28] See: N.S.Tagantsev. “Russian Criminal Law”, Moscow, 1994, p.24-26.
[29] See: N.S.Tagantsev. “Russian Criminal Law”, Moscow, 1994, p.26-28.

the whole society. In this sense the right of punishment is quite different from the right of revenge. Hatred manifests itself in revenge, whereas justice - in punishment. With the development of society the right to punish began to belong only and exclusively to the state which is its subject. The person who takes revenge does not ask himself if he has a right of doing it and if he acts in the right or wrong way, he gives himself up to aspiration which involves him, to blind power which controls him until his fury comes to an end. But as far as punishment is concerned, you ask first of all: who has the right to punish the criminal for the committed crime? Then you ask: is the punishment itself just? The true basis of punishment is justice. L.D.Frank notes: *"Punishment is just not because it is useful for reformation or prevention, but it is useful in both cases because it is just".* Thus, the subject of punishment is the state which realizes special measures, creates social system resisting criminality. In this sense punishment is a means of the realization of the criminal policy.

The state has its own policy in each sphere. It sets concrete aims, defines specific means and methods of their achievement, forms of the settlements of the set problems. The choice of the right direction, manifesting itself in preventive punishment and special measures of prevention of criminal phenomena, the working out and introduction to practice of optimal forms and methods of this activity in concrete conditions of social development constitute that general line of struggle against criminality which is the criminal policy. N.A.Belyayev notes that "the essence of soviet criminal policy consists of defining the orientation of reality in the sphere of struggle against criminality by using punishment".[30] The criminal policy makes it possible to answer the following question: Is there any need for social relations, which are subject to infringement dangerous for the society, to be protected by means of criminal punishment?

[30] L.D. Frank. “Criminal Law Philosophy”. S.Pe- terburg, 1868, p.88.

§3. THE OBJECTIVE POTENTIALITIES OF PUNISHMENT

As we know, criminality is a serious danger for any society. Therefore, the social system resisting criminality functions wherever it exists. At the same time, a right organization and effective functioning of the system of struggle against criminality presupposes a clear notion of a multi level system of motives which conditions the existence of this negative phenomenon in our conditions.[31] According to its origin, criminality belongs to those social phenomena which are connected not with local and separate spheres of social life, but with those, all of which are of utmost importance, such as economical, political, religious, etc. P.P.Osipov was right to note: "Criminality should be regarded, first of all, in its real relation to the microstructure of society, the main appropriateness of its functioning and development".[32] Undoubtedly, this approach to the explanation of the motives of crimes creates a reliable general theoretical basis for finding those social phenomena and process which are situated near to the aspects of criminal behaviour and form a complex of direct motives and conditions of the latter. But, according to G.I.Nesterenko, along with the study of general social motives of criminality it is necessary to study separate, concrete, specific motives[33] which can certainly be defined correctly only when their origin from general social motives is taken into account. The nature of social system of influencing criminality depends, to a great extent, on its ability to make an impact on direct motives of criminal behaviour, to realize the prevention of crimes. As not only objective phenomena and process, but also definite negative and socially conditioned private properties participate in the detenu in at ion of concrete acts of criminal behaviour, the motives of a concrete crime always have not only objective, but also subjective nature. It means that there is a possibility to make desirable changes in criminality by means of influencing subjects of criminal behaviour as well as those who are

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1 1. l.A.Ismailow; "Criminality and Criminal Policy", Baku, 1990, p.58.

[32] P.P.Osipov "Theoretical Principles of Ferminy and Applying Criminal Law Sanctions" Leningrad, 1976, p.30-38.

" G.l.Nesterenko. Problems of Consciousness in Marxist Sociology", Moscow, 1971, p.267.

inclined to such behaviour. The influence of this kind is realized particularly by means of the measures of punitive nature, method of compulsion, and threat of criminal punishment. Of course, it is wrong to think that punishment can eliminate or reduce the objective causes of criminality. It does not influence "original motives" or criminality, that is why the setting of tasks, such as to eliminate, eradicate, etc. is quite unreal. However, that does not mean that right now or in the nearest future criminal punishment can be "dumped into history".[34] Punishment realizes its specific role of protecting society from criminal encroachments.

Mankind cannot imagine anything new for the present. Therefore, N.A.Belyayev's assertion is quite right. He says that "the use of criminal punishment to those who committed a crime continues to be an important orientation of criminal law policy. It seems that for a rather long historical period it will hardly be managed to settle the cardinal question in the sphere of struggle against criminality: to eliminate criminality as a social phenomenon remove the motives causing it. As long as there is criminality, there will be a necessity both in criminal legislation and in punishment, the latter being the legal consequence of a crime".[35] We consider that the objective possibility of punishment is reduced to creating obstacles preventing the subjects inclined to commit a crime from doing it. Therefore, the achievement of this aim indicates the effectiveness of prenishment. The feature of prevention manifests itself in the existence of criminal law which prohibits the commitment of any kind of crime on pain of punishment. People gain a clear notion of definite actions as being criminal which are associated in their minds with punishment as the result of the crime.

The threat to punish is, in fact, opposed to those qualities, needs, desires which incite a man to commit a crime and it warns him against disadvantageous consequences. B.S.Volkov notes: "In all cases the thought of punishment even if it does not eliminate the intention to commit a crime plays its part of counteracting incentive, against the background of which the stableness and activity of anti-social direction, the power and impetuosity of predominating

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[34] P.P.Osipov “Theoretical Principles”, p.41

[35] N.A.Belyayev. “Criminal Law Policy and Ways of its Realization”. Leningrad, 1986, p70-71.

inducements manifest themselves more clearly. On the other hand, the very fact of the application of punishment greatly influences the state of mind of the guilty, his consciousness and will. Consequently, it also has a great importance in the prevention of crimes".[36] As it is known, the criminal law expresses its demands of proper behaviour by threat of punishment, therefore, the consciousness of punishability of an action is the most important part of the psychological content of the process of will, and it manifests itself as a countermotive of anti-social behaviour. The unfavourable consequences in the form of punishment make up a component of the criminal law influence, that is why punishment is none other than a means of self-defence of society against the violation of the conditions of its existence. Therefore, "just as there may not be any law which is not supported by compulsion, there may not be a criminal law which does not frighten".[37]

Concrete social-psychological and legal investigations indicate that the idea of the severity of punishment has a great importance in creating obstacles to the commitment of crimes. It means that "the nature of legal consequences of an action including the degree of severity of the impending punishment is one of the factors influencing the choice of the variants of behaviour in a number of cases".[38] It has been known for a long time that the most severe punishment employed throughout centuries towards criminals did not yield the results for those who used the punishment wanted to get. V.P.Lyuiblinsky wrote: "Torture or qualified execution may serve as a good means for threatening the criminal, but one can hardly use them without offending the moral knowledge of society. Bad prisons are also capable of threatening more than good ones, but in consequence of it one should hardly take care of deterioration, and not improvement of prisons".[39] If the effectiveness of punishment depended on its cruelty, the simplest way to make people more obedient would be to make it tougher. We fully agree with the assumption that one cannot demand from punishment more than it is intended for.

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[36] B.S.Volkov. “The Motives of Crimes”, Kasan University Edition, 1982, p. 119.

[37] V.M.Kogan. “Social Mechanism of Criminal Law Influence”, Moscow, 1983, p.43.

[38] V.N.Kudryavtsev. “Law and Conduct”, M., 1978, p. 144.

[39] V.P.Lyublinsky. "On the Effectiveness of Punishment". In his bock; "New Ideas in Science of Law", 1914, tedition, p.5.

However, punishment must be sufficiently repressive to prevent the citizens from the temptation to commit a crime. All these taken into account, one must not forget G.P.Marat's words: "... It is wrong to think that the villian is inevitably stopped by the severity of punishment: the thought of it soon disappears, whereas the constantly appearing demands follow the unfortunate wretch everywhere. If he gets an opportunity, he'll yield the tempt, listening only to their importunite voice. Even the sight of executions is not always a sufficient bridle: how many a time did crimes take place at the fboot of scaffold for which the convicted was killed".[40] At the same time one should not ignore a true statement by S.V.Posnishev that "if punishment is an insignificant, not sensitive evil for the criminal, it will not serve as a deterrent in man's behaviour, no matter how inevitable it appears to be"[41]. It means that punishment must not exceed the limit of endurance of everyday burdens by a man of a well-known epoch.[42] Therefore, on the one hand, punishment must not be excessively cruel, and on the other, hand taking into consideration the level of population if must make a sensitive impression by means of retribution necessary for it in order to make punishment capable of creating obstacles preventing a man. The historical experience of mankind shows that it is senseless to fight against criminality by means of severe punishment, that does not mean that one should go from one extreme to another and consider that punishment must be groundlessly mild. It only means that punishment must be expedient and reasonable.

Hence, punishment and the threat of punishment are one of the determiners of human behaviour. We state that they influence by means of the will and minds of people. Punishment influences an individual, determining his individual behaviour through individual psychological mechanism. In order to evaluate the role of psychological threat of punishment it is necessary to define correctly the group of persons it influences. Many authors consider that the threat of punishment turns to those who intend to commit a crime because of their immoral qualities which are the remnants of the

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[40] J.P.Marat. "The Plan of Criminal Legislation". Moscow, 1951, p.47-48.
[41] S.V.Posnishev. "The Main Problems of Punishment Theory". M., 1904, p.377.
[42] L.E.Vladimirov. "Criminal Legislator As the Educator of People", Moscow, 1903, p.99.

past.[43] Others suppose that punishment influences all citizens of society.[44] We think that it would be right to proceed from the threat of punishment being directed at everybody, but the psychological attitude of citizens themselves concerning this threat is different.

[43] M.D.Shargorodsky. "Problems of the General. Study of Punishment in Soviet Law theory on the Modern Stage". - Soviet State and Law, 1961, N«10, p. 140; I.I.Karpets. - "Social and Legal Aspects of Punishment Theory". - "Soviet State and Law"; 1968, N<?5, p.65; N.A.Belyayev. "Aims of punishment and ways of their achievement". P.56; I.S.Noy. "Essence and Functions of Criminal Punishment"..., p. 158.

[44] A.l.Natashev, N.A.Struchkov. "The Principles of Reformatory Law Theory". M., 1967, p.30.

§4. THE AIMS AND EFFECTIVENESS OF PUNISHMENT

I. The aims of punishment. The definition of the aims of punishment is one of the most principal problem in criminal policy. Not only the creation of many institutions of criminal law, but also a purposeful use of criminal legislation depends on the settlement of this problem. One must bear in mind that the thing for the sake of which criminal repression is used, represents the state policy in respect of the methods of struggle against criminality and with respect to the criminal. The wording of the aims of punishment in any state has been defined more exactly with the change of the social structure of society.

The analysis of article 20 of Criminal Code of Azerbaijan of 1960 gives grounds to affirm that the aims of punishment are:

1) reformation and re-education of the convicts;

2) the prevention from commitment of crimes by other people;

3) the prevention from commitment of crimes by the convicted person.

In juidical literature scholars and lawyers have been discussing for a long time whether retribution should be considered the aim of punishment or not.[45] This debate was caused by the inexact wording of article 20 of Criminal Code: "Punishment is not only retribution for the committed crime but it also aims at reformation and re-education of the convicts in the spirit of honest attitude to labour, exact execution of laws, respect for the rules of coexistence and also the prevention from commitment of new crimes by both the convicted person and other people". As one can see from the content of the text of article 20, the legislator does not define retribution as the aim of punishment. It should be mentioned that up to the middle of the thirties such question had never arisen to be discussed among marxeist theorists of criminal law. It was considered settled in favour

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[45] N. A.Belyayev. "Aims of Punishment and Ways of its Achievement in R.L". Leningrad, 1963; M.D.Shargorodsky. "Punishment, Its Aims and Effectiveness", Leningrad, 1973; I.S.Noy. "Essence and Functions of Criminal Punishment in the Soviet State". Saratov, 1973; I.I.Karpets. "Punishment. Social, Law and Criminological Problems". Moscow, 1973; N.A.Struchkov. "Criminal Amenability and Its Realization in the Struggle Against Criminality", Saratov, 978; A.I.Na- tashev, N.A.Struchkov. "Principles of Reformatory Law Theory". M., 1967; A.L.Kemenson. "Theore - Education of the Convect". Tomsk, 1965.

of decisive break with retribution and requital as the aims of punishment. However, since the term "punishment" was restored in legislation, it has been asserted that punishment pursues a twofold task: retribution and reformation of the criminal.[46]

At the beginning of the fifties this assertion began to be disputed by different authors.[47] Without going into details of this discussion we would like to express our point of view. We proceed from punishment being, in fact, retribution by its essence. Therefore, it is quite evident that punishment, being retribution is, first of all, a measure of compulsion irrespective of the purposes it is used for. However, that does not mean that the state punishes criminals far the sake of retribution itself. It means that retribution is necessary only as a means of achieving other aims set by the state before punishment. Punishment is inconceivable without causing suffering, hardships. That is why punishment is always retribution. But retribution is not the end of punishment in itself.

I.S.Noy was right to note: "Its role is considerably less. Retribution is necessary only as a means, though very important one, of attaining the prevention of crimes".[48] The following should be particularly mentioned: though to couse suffering is an indespensable feature of threatening and preventing from committing crimes, it by no means indicates that punishment aims at causing suffering. M.D.Shargorodsky wrote: "To cause suffering for the action harmful for society is one of the demands of the content of punishment, but not its aim".[49]

II. Reformation and re-education. Most of the soviet criminalists were always right to consider reformation and re-education of the persons quilty in commitment of crimes as an indepentent and very important aim of punishment.[50] However, some

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[46] See: Criminal Code, Jeneral Part. M., 1939, p.259.
[47] K.S.Salikhov. "Aims of Punishment in Soviet Law". M,, 1951, p. 10-12.
[48] I.S.Noy. "Essence and Functions of Criminal Punishment in the Soviet State", Saratov, 1973, p.62.
[49] M.D.Shargorodsky. "Punishment. Its Aims and Effectiveness", p.30.
[50] N.A.Belyayev. "Aims of Punishment and Ways of their Achievement in RL", Leningrad, 1963, p.4l; V.A.Eleonsky. "Imprisonment as a Punishment Connected With Reformatory Influence". Ryazan, 1975, p.14; P.P.Osipov. "Theoretical Principles of Forming and Applying Criminal Law Sanctions". Leningrad, 1976, p.58-59; N.l.Titov. "Reformation and Re-education of the Convict". Leningrad, 1966, p.7; I.S.Noy. "Essence and Functions of Criminal Punishment in the Soviet State".

authors have recently begun to deny the independent content of re-formation and re-education and reduce the aims of punishment to the ensuring of special and general prevention of crimes. For instance, M.D.Shargorodsky wrote: "Reformation and re-education of the law infringer is not the final aim of punishment, but a means of its achievement. Reformation and re-education form one of the aims of punishment, but they are, at the same time, means used far achieving the main, final, specific aim of punishment - the prevention of commitment of crimes".[51] The same view - point was supported by A.Z.Remenson.[52]

There would be no necessity to oppose this point of view if the divergency of views had only theoretical importance. The trouble is that the nature of punitive practice and princp- les of the activity of reformatory institutions depend first of all on the aims which will be set before punishment, and on the role which reformation and re-education will be given. From social point of view some authors arc right to note that the necessity of regarding the aim of reformation and re-education as one of the main aims is conditioned by the following considerations: no matter how long punishment consisting of imprisonment is, sooner or later the convict returns to society and must join all kinds of socially useful activity which arises from the social status of the citizen. The possibility of setting and achieving the aim of reformation and re-education is scientifically based on psychology and pedagogy and proved by practical activity of the punishment execution bodies.

General prevention. General prevention manifests itself in the very existence of criminal law which prohibits this crime or another on pain of punishment. The criminal legal regulations, define what socially dangerous actons are crimes, and determine punishment due to be used to those who committed crimes have a preventive influence on citizens. It consists of creating a clear idea of definite actions as being criminal which are associated in the minds of people with punishment as the result of a crime. General prevention opposes the

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Saratov, 1973, p. 105, and other.

[51] M.D.Shargorodsky. "Punishment, its Aims and Effectiveness, p,31; "A Course of Criminal Law". Vol.II. Leningrad, 1970,p.202.

[52] A.L.Remenson. "Theoretical Problems of Imprifonment and Re-Education of the Convict". Tomsk, 1965, p. 19.

use expected from the criminal action to the disadvantage of its commitment.

Ulla Bundesan asserts quite rightly that "the threat to use sanction for the crime influences not only those it is used to, but also affects others. It is disputable, to which extent and how criminal law measures exert a general preventive influence, but one should hardly doubt that this influence is considerable or can be as such".[53]

The counter-motive of commitment of crimes by induviduals is the very fact of existence of criminal punishment as the result of an anti-law action. Conditions, in which the convicts serve their sentences also play a special part in general prevention. l.M.Galperin writes, that "the threat of the use of imprisonment must have a frightening influence on unsteady persons not only by possibility of fixing a comparatively long term of this punishment, but also by limitations inherent in it".[54]

The object of general preventive influence of punishment is the inner mechanism of human behaviour. Therefore, in order to know the general preventive and mental influence of punishment on a person, one must know his peculiarities, disposition, world outlook, his understanding of what is due and undue, his attitude to moral values and to the rules of coexistence. One should also bear in mind: any measure is able to influence human behaviour only in that case when the behaviour itself is controled by his will and consciousness. Otherwise, punishment is aimless, senseless and immoral.[55]

Special prevention. Two points of view concertning special prevention have been expressed in literature. Some authors consider that the task of special prevention includes the creation of special conditions for the term one serves his sentence which exclude the commitment of new crimes and the cultivation of that kind of consciousness in the convict which rejects any thought of committing a new crime.[2] It means that the aim of reformation and re-education is involved in the task of special prevention and its mentioning in the

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[53] Ulla Bundesan. "Surveillance of People Serving Their Sentence at Liberty". Moscow, 1979, p.76.

[54] l.M.Galperin. "Punishment. Social Functions, Practice of Application". M., 1983, p. 117.

[55] See: Social Departures. Introduction in General Theory". M., 1984, p.275.

' M.A.Yefimov. "Imprisonment As a Kind of Criminal Punishment". In the book. "Selected Scientific Works". I edition, Sverdlovsk, 1964, p.200.

law supports the necessity of educational influence on the convicted person.

Others suppose that such an extended interpretation of the content of the notion of special prevention is not justified, because it is absorbed by the aim of reformation and reeducation of the convict. Under special prevention they understand only the creation of conditions eliminating the possibility of committing crimes within the period of serving sentences.[56] Committing a crime, a person "self-declares" his being dangerous for society. That is why one of the aims of the following influence on this person is the necessity of elimination of this possibility. A.S.Chervotkin notes: "Hence it appears that one of the mani- festa- tions of special prevention of crimes as the aim of punishment is to hinder the commitment of new crimes by the convict not by means of alteration of the personality or his frightening, blit by means of the elimination of possibilities, conditions, the presence of which can lead to commitment of new crimes, by creating conditions -preventing from their commitment".[57]

Thus, the aim of special preventive influence of the criminal punishment is to prohibit the commitment of new crimes by the convicts within the period of serving of their sentences.

II. Estimation of Effectiveness of Punishment. The notion of effectiveness in punishment can be imagined as a proportion of the aims of punishment and the results of influence. Therefore, on a large scale punishment sets the aim of preventing people from commitment of socially dangerous actions. The legislator is guided by this aim defining what actions to punish and how. The achievement of this aim shows the effectiveness of punishment. It means that the essence definition of punishment effectiveness consists of comparison of the actually attained aim and the one set. The central place in the settlement of this complicated problem is occupied by the question of criteria, indices and estimations of punishment effectiveness. To ascertain this means to find "the point of counting" while measuring

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[56] N.A.Belyayev. "Aims of Punishment and Ways of their Achievement in R.L." p.21.

[57] A.S.Chervotkin. "The Aim of Special Prevention of Crimes and Ways of its Achievement by Means of Criminal Punishment Application". In the book: "Actual Problems of Struggle Against Criminality". Tomsk, 1984, p. 150.

the effectiveness of punishment as well as any other phenomenon.[58] At the same time the solution of this problem presents great difficulties and causes numerous arguments. As we know, economists are able to define the effectiveness of the production activity of the enterprise and fortell the expenses in production of one output or another with quite insignificant mistakes due to their knowledge of technical process and existing methods of production, physical productive capacities, potential expenses and expenditures. The peculiarity of punishment is that here we don't speak about concrete economy or the manufacture of production and expenditures, but about more complicated phenomena - about social process, the consequences of which one can hardly fortell, about the attained results which can be hardly estimated without associating them with that social aim to the achievement of which the whole process was submitted. Therefore some authors express their doubt concerning the possibility of measurement and estimation of the effectiveness of punishment. Thus, M.D.Shargorodsky wrote: "The possibility of investigating and defining statistically concrete influence of definite measures (both with respect to some persons and in general) on achievement of aims by means of statistic empiric analysis appears to be doubtful".[59]

Some others reduce the notion and estimation of effectiveness in the law to the activity of law application. In their opinion, the effectiveness of legal regulations activity can be displayed only through the use of the law. Thus, A.Kuznetsov writes: "The effectiveness of legal regulations of criminal law in prevention of crimes and their social value manifests itself to a great extent in the process of the law application, particularly in fixing and executing a punishment".[60] It is our opinion that a criterion denotes a means of settling something, the indication of the truth, trust
worthiness or the judgement standard.

From the philosophical point of view, the criterion of the truth

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[58] F.R.Sundrov. "Imrisonment and Social-Psychological Premises of its Effectiveness". Kasan University Edition, 1980, p.65.

[59] M.D.Shargorodsy. "Aims of Punishment in Socialist Criminal Law and its Effectiveness (analysis and prognosis)". In the book: Criminality and its prevention, Leningrad, 1971, p. 120.

[60] A.Kusnetsov. "The Role of Criminal Law Regulations in Prevention of Crimes". - Soviet justice, 1981, №10, p.5.

of an assertion, hypothesis of theoretical construction is social practice. Hence, under the criterion of the effectiveness of criminal punishment one can understand the result of its influence on the citizens. While determining the effectiveness of punishment, the aims and results of its achievement, it is necessary "to materialize" them by means of introducing corresponding indices which would impart a quantitative definiteness to them M.Y.Savvin notes: "The objective character of such measurements depends to a considerable extent on the indices, the finding of which presents some difficulty".[61]

The index of effectiveness is the indication characterizing a programmed aim and also a practically achieved result and allowing to impart a quantitative definiteness. Thus, if a criterion denotes a means of solving something, the indication of the truth and trustworthiness or the standard of judgement, the index makes it possible to judge the development of a phenomenon. One can judge a phenomenon as a whole by a criterion, and for the present instance, he can judge the results of the influence of punishment is accordance with its aims. An index exposing this state is used as form filling its content. Thus, it is clear that it is necessary to measure the aims set before punishment and results attained after its adoption by the legislator for the definition of the punishment effectiveness and as a result, to make corresponding conclusions concerning effectiveness and uneffectiveness by means of comparison. But to measure the quantity means to find proportion of the measured quantity to another proportion of the measured homogeneous quantity taken as a unit of measurement.[62] In other words, in order to realize the procedure of measuring, one must first of all carry out their comparative semblance, i.e. firstly, find a direct model of evalution, secondly, express both the aims of punishment and the results of its effect in simple numbers of measurement. Hence, we will not be able to measure the effectiveness of punishment until we express its aims and results in correlative units of measurement in advance. It is necessary to work out a system of indices for it. What indications must characterize the indices of punishment effectiveness? First of all, the

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[61] M.Y.Savvin. "Administrative Penalty". Moscow. 1984, p.37.
[62] O.N.Melnikov. "On the Role of Measurement in the Process of Cognition". Novosibirsk, 1968, p.6.
[62] A.E.Zhalinsky. "Analysis and Estimation of the Effectiveness of Prevention".

indices must expose the qualitative importance of the influence of punishment, secondly, it must give a quantitative idea of the aims and achieved results of punishment. It follows that the punishment effectiveness indices must:

a) be themselves quantitatively measured; b)be easy for practice and opportune for use; c)real and concrete.

In connection with it, the main question naturally arises: how to measure the correlation between the aims and results of punishment and must this correlation possess a relative numerical nature? In our opinion, the measurement of punishment effectiveness docs not necessarily require numerical indices. Yes, it is practically impossible. But they may be based on relative quantities of number: low, middle, maximum; worst, middle, best; small, middle, large. The same view - point is supported by A.E.Zhalinsky. He notes that "one can introduce 3 stages of effectiveness in practice: maximum, middle and low (zero)".[1] It appears to be expedient to distinguish 4 conventional stages of the effectiveness of punishment: highly effective, medio-effective, ineffective, uneffective (zero effectiveness).

Highly effective stage - the result is so positive that it is equal or nearly equal to the ideal planned as the aim. In this case punishment prevents people from committing crimes. But criminality does exist, it has social roots. Its level is insignificant, it tends to decrease. The struggle against criminality is no problem. Such are the results of punishment.

Medioeffective stage - the guaranteeing of the achievement of definite results corresponds to the modem level of objectively laid claims. It is applicable to the effectiveness of punishment - it means that punishment is not able to prevent everybody from commitment of crimes. That is why an insignificant part of population commits crimes. Consequently, criminality exists, though its level is not high.

Ineffective stage - the results of the existence of punishment proved to be considerably lower than the planned aim. That means that punishment is not able to keep a definite part of population from committing crimes. That is why, the level of criminality is comparatively high and stable. A tendency to decrease is not observed, on the contrary, the increase of certain categories of crimes is going on. The problem of struggle against criminality is critical.

Uneffective stage - punishment, being a means of struggle against criminality is unable to bring positive results, i.e. it is not able to keep

a considerable part of population from committing anti-social actions. The level of criminality is very high and there is a tendency to its increase. Theoretically, we should proceed from the assumption that the effectiveness of punishment must not be reduced to the really attained desirable results, as it is practically difficult to imagine a situation where the aims and results completely coincide. Besides, the results of punishment may fail to be achieved not because of its uneffectiveness, but because it has been badly realized. For instance, because of the precariousness of the inevitability principle of punishment. It is necessary to have corresponding requisites and conditions to guarantee the effectiveness of punishment. The economic and political social systems, of a society the standard of consciousness and the sense of justice of citizens, high standard of culture, etc. May be attributed to general preconditions of the effectiveness of punishment.

Thus, the following conclusion. Can be made effectiveness is a qualitative - quantitative description reflecting the determination of the correlation of aims and results. Proceeding from this point of view on the notion of effectiveness, we consider the effectiveness of punishment and those social aims for the achievement of which it is used.

Therefore, in order to define the effectiveness of punishment practically, it is necessary: a)to define the aims and results of punishment; b) to find the indices of the effectiveness of the achievement of each aim, taken separately by means of the correlation of the aims and results of punishment; c)to define a general index of punishment effectiveness by analysing the sum of all indices; d) to define the stage of effectiveness of punishment on the basis of the scheme suggested before. When expressed by a formula it looks as following:

a) $$E_{gpi} = \frac{R_{gpi}}{a_{gpi}};\ E_{ri} = \frac{R_{ri}}{a_{ri}};\ E_{spi} = \frac{R_{spi}}{a_{spi}};$$

b) $$E_{pi} = \frac{R_{pi}}{a_{pi}} = \frac{R_{gpi} + R_{ri} + R_{spi}}{a_{gpi} + a_{ri} + a_{spi}}$$

Here:
E_{gpj} - the effectiveness of general preventive influence
E_{ri} - the effectiveness of reformatory influence;
E_{spi} - the effectiveness of special preventive influence;
- the result of general preventive influence;
R_{ri} - the result of reformatory influence;
R_{spi} - the result of special prefentive influence;
a_{gpi} - the aim of general preventive influence;
a_{ri} - the aim of reformatory influence; **a_{spi}** - the aim of special preventive influence;
E_p - the effectiveness of punishment;
R_p - the result of punishment;
a_p - the aim of punishment.

CHAPTER II

THE PROBLEMS OF SETTING PUNISHMENT

§1. GENERAL PRINCIPLES OF FIXING THE PUNISHMENT

In order that the court may fix a just punishment, Criminal Code provides for general prinsip- les of its fixing (article 35 of the Criminal Code of Azerbaijan Republic), i.e. the rules, by which the court should be guided while solving the problem of punishment fixing for the committed crime. The first of them contains the demand for the fixed punishment to be within the limits, specified in the corresponding article of the special part of Criminal Code. The extent of punishment of Criminal Code. The extent of punishment has a relatively definite nature and gives the court a scope for a more weighed approach to the setting of a just punishment.

The second general principle of the fixing of a punishment is the demand of taking into account the regulations of the General part of Criminal Code of Azerbaijan (articles 36, 37, 38, 39, 40, etc.). The third general principle consists of demanding to set a punishment in accordance with the nature and degree of social danger of the crime. The nature of punishment is its qualitative side. It depends on the extent of the harm done to the concrete object. While fixing a punishment the court is bound to take into account the personality of the guilty man, i.e. his social and biological essence, for the estimation and consideration of social danger of a crime in fixing must be guided exclusively by the characteristics of the crime and cannot be based on the personal virtues of the guilty. His personality is an independent basis for choosing the kind and determination of the degree of punishment.

"To my mind, the trouble is that we have not yet learned to approach punishment from a purely individual point of view, taking into account the peculiarities of each personality". [63]Therefore, judges

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[63] K.K.Platonov. "To Study the Personality of the Criminal". "The Neiospaper of Literature", 1968, September, 18, p. 13.

must place the criterion "with respect to whom" near the criterion "what for" when fixing a punishment. But the concept "the personality of the guilty" is a loose one. It includes a great number of indications. Therefore, judges usually find difficulty in defining exactly what in the personality of one guilty person or another must be taken into consideration when fixing a punishment. P.P.Osipov considers that "when fixing a punishment the personality of the guilty must interest us both in general social value and professionally purposeful, narrow aspects".[64] In his other work P.P.Osipov renders his view - point more concrete; "In the light of a complex approach to the accused in the process of fixing a punishment, he must at the some time be considered as: a) the bearer of social danger;
b) the bearer of social retrospective value".[65] Hence it follows that if judges adhere to this position taking into account the personality of the guilty, they must estimate not only the social danger of the personality of the guilty, but also that peculiarity which it represents for the society, being its member in the diversity of it social functions can be judged proceeding from its perspective and past value. Therefore, we should agree with V.Tkachenko that the main feature of the personality is the social sphere.[66]

The general principles of fixing a punishment include the circumstances which extenuate and aggravate punishment. The circumstances extenuating punishment are taken into account in choosing a milder punishment within the limits of sanctions. They can be divided into circumstances referring to the crime itself and to the personality of the guilty. The list of circumstances extenuating punishment is approximate. The law also permits to acknowledge other circumstances as such.

The circumstances aggravating punishment influence the fixing of a more severe punishment within the limits of sanctions. They also refer to the crime and personality of the guilty. New Criminal Code of the Russian Federation also included into the general principles of punishment its influence on the reformation of

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[64] P.P.Osipov. "Theoretical Principles of Forming and Applying Criminal Law Sanctions". P. 126.
[65] The Complex Approach to the System of lnflu- encing criminality . P. 114.
[66] V.Tkachenko. "General Principles of Punishment Fixing". "State and Law". 1997, №1, p. 11.

the convict and the conditions of the life of his family. Here the financial and physical state of the family, also the necessity of keeping and looking after one of them is meant. The enumerated factors are reflected in the law and they influence the degree of punishment (the action, personality, extenuanting and aggravating circumstances). They are interrelated and interdependant, and can hardly be analysed separately. The nature and degree of the danger of the act are closely connected with the personality, for they are the results of his behaviour, whereas extenuating and aggravating circumstances refer cither to the act or to the personality. The law enables the court to choose the kind and degree of punishment, but at the same time it requires that every kind of punishment it fixes should be as rational as possible, limited by the necessity, i.e. expedient and just. A case can be investigated skilfully, a trial can be conducted well from the point of view of professional skill and culture and then the whole work can be reduced to nothing by a wrong, unjust fixing of punishment.

Z.Astemirov and Y.Baybakov are right to note that "The sentence reviews the previous work concerning educational influence upon the transgressor who was exerted in the course of investigation and trial of the case as well as the process of his reformation and re-education planned for the future".[67] The practice of judicial activity shows that the general legislative principles are not enough for the most expedient choice of the kind and degree of punishment. Therefore, in no other sphere of judicial activity so many mistakes arc made as in solving the problems connected with the fixing of a punishment. Judges on criminal cases constantly come in their practice across numerous questions of the fixing of a concrete punishment. The indications of the law and recommendations of the higher legal instance concerning the measure of punishment which must be fixed within the limits of sanction, the weight of the crime and the personality of the guilty being taken into account, do not give a concrete answer to the question whether the defendant should be sentenced to a year and a half or 2 years of imprisonment or may be a year of reformatory labour. This problem is always settled without the consideration of numerous and various factors which arc at present

[67] Z.Astemirov, Y.Baybakov. "Mativation in Fixing a Punishment For the Minors". Soviet Justice. 1970, №1, p. 16.

studied by psychology, sociology, reformatory pedagogy and other branches of science.

As a rule, judges are guided by their own experience, formed practice and proceed from the principles of policy. But it would be more effective if the judge knew at least the basic principles of the theory concerning these questions. At the same time we realize that it is not easy to define the necessary punishment in practice. Unfortunately, many questions connected with this problem have not been settled legislatively and elucidated in scientific theoretical literature.

M.I.Kovalyev is quite right to note: "Open any book dealing with crimes. There you can find an answer to the most tricky question concerning qualification of separate cases of criminal behaviour, but, undoubtedly, you will not find a well-reasoned consultation with regard to the punishment for them. There are no concrete, precise and plain recommendations in any of these books dealing with the punishment which should be used in similar cases for the committed crime. We are obliged to state that up to the present the theory of criminal law studies the problem of individualization of punishment generally, following article 32 of the principles which can hardly be called concrete and definite".[68]

This leads to the following: in order to interprete empirically the directions of legislation concerning the general principles of the punishment fixing, every judge in every concrete case seeks to answer the following questions:

a) How right was his inner conviction formed in connection with the given concrete care;

b) what should be understood under the nature and degree of the social danger of a concrete criminal act?

c) which criteria must be applied for the practical determination of the nature and degree of social danger of the committed crime, i.e. how and with the help of which instrument is the social danger of a concrete crime to he measured?

d) which indices is it necessary for the court to use when considering the personality of the guilty?

e) how to know the future results of one's decision?

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[68] M.I.Kovalyev. "Soviet Criminal Law". A course of lectures, Sverdlovsk, 1974, p.86-87.

The absence of theoretically right and tested answers to these and many other questions leads in the end to the commitment of new errors by our judges. It means that the system of guarantees of the effectiveness of justice is not quite reliable yet and it is necessary to perfect it. The present day problem consists of giving into the hands of judicial body a subsidiary instrument which could facilitate it to make a substantiated decision or, at least, avoid gross errors when fixing a punishment. In other words, the guaranteeing of the extent of individualization principle of punishment is meant.

Individualization is one of the central criminal law ideas which is based on the aims' of punishment and proceeds from the assumption that there cannot possibly be 2 absolutely identical crimes and criminals. "Individualization" etymologically originates from the word "individual". However, as A.S.Gorelic rightly notes, "it cannot be reduced to taking into account a personality and includes the consideration of the properties of the action, for the personality of the doer is always displayed in the deed".[69] At the same hime individualization means the process of choosing a punishment for a definite personality. I.l.Karpets defined the individualization of punishment as a principle included in the consideration of the nature and degree of social danger of the committed crime, the personality of the guilty, extenuating and aggravating circumstances.[70]

In the final analysis, individualization is the synthesis of all circumstances, and the court introduces a considerable portion of sub-jectivism into this process. Therefore, the problem consists of searching for the optimum correlation of formally definite and estimating indications in the process of the individualization of punishment.

The difficulties of the individualization process of punishment are connected with the facr that the court, proceeding from the aims of punishment must base its judgement on the estimation of the subsequent behaviour of the convicted person, whereas the individual behaviour does not lend itself to exact prediction either by the court or by the convict himself.

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[69] A.s.Golerik. "Punishment As a Unity of Crimes and Sentences". Krasnoyarsk University Edition, 1991,
P-[22]-

[70] I.l.Karpets. "The.Individualization of Punishment". Moscow, 1961, p. 10-12.

Fixing the kind and degree of the set punishment the court must concretely estimate not only the degree of social danger of the crime and the personality of the criminal, but it must also make a concrete conclusion concerning the determined kind and degree of punishment and the volume of reformatory influence which is enough to achieve the aims of reformation and re-education of the given convict, general and special prevention. It means that legal judgement concerning punishment is intended for the future and therefore it is necessary to consider it, *first of all* as a judicial order to place the convict in such conditions, within the limits of which the reformatory influence fixed by the court would be more expedient and enough to achieve the main aim of punishment - re-education and reformation; *secondly*, as a means of preventing the convict as well as other people from committing crimes. The prediction aspect of punishment fixing is included in these 2 features. Therefore, the fixed punishment is a probabilistic logical judgement, i.e. prognostication.

Layosh Nad writes: «*The fixed punishment is a prediction, syllogism, deduced from the motives existing at the given times in respect of consequences which must ensue in the future, it is a prevision that the punishment fixed at present may lead to the realization of its aim in the future, that is, it will guarantee the reformation of the convicted person and prevent of crimes»*

The predictive essence of punishment lies in the fact that its main aim is not to punish the criminal, but to reform and re-educate him, and also to keep him and other members of society from committing crimes. This conclusion is based on the assumption that all aims of punishment - the reformation and reeducation of the convicted person, special prevention are directed to the future.

Therefore, while setting the punishment fixing problem, i.e. while choosing the kind and degree of punishment, the court first of all proceeds from the fact that punishment contains not what there is, but what there must be.

Layosh Nad is quite right to emphasize:
"Though punishment is fixed on the basis of facts corresponding to reality, with observance of the demands of law and justice, it is only a conclusion concerning the future, prognosis done more or less accurately and finally, having a probabilistic nature. The conclusion is made by means of moving between the motives (factors of personality, surroundings, etc., causing the

crime, and the personality of the criminal in the past and present), and the ability of legal judgement to achieve all aims of the criminal punishment (the court takes into account the information concerning the future results of punishment)". But the court, fixing a definite punishment, its kind and degree can take into consideration only the nature and stage of social danger of the committed crime, the personality of the convict and circumstances of the case, extenuating and aggragating the amenability during the pronouncement of a sentence. As to the conditions in which the convict will serve his sentence and which will naturally affect the effectiveness of reformatory influence, they are not practically taken into account when the sentence is pronounced. The court does not conceive by which motives the defendant will be guided in places of confinement in the course of 5 or 7 years.

Consequently, even when the sentence is pronounced, the court- does not know whether the aim of reformation and re-education will be attained, because the corresponding information concerning the future behaviour of the defendant under some conditions or other, is missing.The result of general prevention is not known either. Thus, it appears that the court possesses no information concerning the future results of the adopted judgement when pronouncing sentence. Therefore, judges, using only the past and present information about the crime and the defendant, confine themselves in their activity only to a "simple" fixing of punishment which takes into consideration "purely" juridical demands indicated in the law. However, practice shows that these general legislative principles are not enough for a maximum expedient choice of the kind and degree of punishment. For the kind and degree of a concrete punishment fixed by the court to be maximum effective in achievement of all aims of punishment. It is necessary, at least, to provide the court with sufficiently substantiated, reliable and authentic information concerning: a) the motives of the future behaviour of the convict during the process of punishment realization and after it; b)the degree of preventive influence of punishment on citizens.

It goes without saying that the court can never and under no conditions get a concrete and exact answer to all these questions. Nevertheless, even in the present conditions it can be attained the conclusion about punishment, which the sentence contains, would be

nearer to reality to a maximum degree. We think that this can be achieved by means of the prognosis of criminal punishment results.

§2. THE IMPORTANCE OF ETHIC CATEGORIES IN FIXING A PUNISHMENT

I. Justice. The obligatory condition of the objective definition of the notion of punishment justice is the study of those notions of what is just and unjust which predominate in the moral consciousness of population. The idea of justice as one of expressions of the moral consciousness and social essence of man appeared in a definite stage of the development human society and consequently, has a historical nature.

Z.A.Berebeshkina notes that *"...justice as an idea, norm, standard and value having a concrete historical nature appeared in a definite stage of development of human society".'* It is strange that though the notion of justice problem is disputable even now, this ethic category appeared in the consciousness of people long ago. I.Kant wrote: *"A man of natural simplicity acquires the sense of justice very early, but very late or never acquires the notion of justice".*[71] However, it has never been an obstacle for the man to distinguish between what is just and unjust. Once swiss theorist-lawyer Eckelof said: *"General conception of justice is analogous to the notion of God - everybody speaks about it, but nobody knows what it is".*[2]

Justice, being a category of ethics finds its use in all spheres of social life without exception, just like ethics as a whole does. In the history of ethical doctrines justice is mainly considered as a unit of moral vieros and demands. As a matter of principle, this understanding is right. It is not without reason that scales are the symbol of justice.

P.Lafarg wrote: *"A blow for a blow, compensation, equal to the done harm, equal shares in the distribtion of foodstuffs and land - such are the only notions of justice accessible to the first men; notions expressed by Pythagoreans in the form of an axiom which consisted of keeping the balance of scales'*[72].[1] He distinguishes between 2 kinds of justice:

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[71] Z.A.Bcrebeshkina. "Justice as a Social- Philosophical Category". Moscow, p.30.
[72] P.Lafarg. Selections. Vol.III. Moscow-Lenin- grad. 1931, p.82.

"rendering" based on the feeling of revenge and "distributive", based on the sense of equality. The meaning of the "rendering" justice consists, in his opinion, of proportioning compensation to damages as precisely as possible.

In ordinary inderstanding, justice manifests itself first of all as a quantitative measure of recompense and demand. Therefore, justice is often considered as a purely legal category. It is particularly felt in the lexical units. Thus, the words "justice" and "fairness" are synonymous in Latin. In German the notion "justice" means "following the law", whereas in French the notion "low" means "fairness", "legality". Thus, justice is a complicated ethic category, covering a large sphere of both personal and social human relations. Being chiefly an estimating category it is characterized first of all by such features as objectivity, truthfulness, disinterestedness, impartiality, benevolence and self-criticism. These diverse features included into the notion of justice do not simply co-exist, but mutually presuppose one another, they are interrelated and the presence of one of the features leads to the development of another.

Justice, which is of great importance in the spheres of economy and policy is widely used in the law as well. B.S.Pazenoc notes: *"The notion of justice is many - sided. The estimation of justice is spread over economic relations, legal regulations, science of law and moral categories, the notion of morals and also concrete actions of separate persons as well as whole groups, nations and states".*[73] Of course, the criminal law notion of justice must not be separated and all the more opposed to that notion of justice which is worked out by philosophy.

Different authors treat differently the manifestation of justice in criminal law policy. Thus, Z.A.Berebeshkina, while defining the scope of the notion of justice considers that it is rightful to distinguish and analyse 3 elements: l)the measure of recomense; 2)measure of demand; 3)lawful - ness of estimation.[74] A.I.Ko- robeyev indicates 2 spheres of manifestation of the justice - law - creating principle and

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[73] B.S.Pazenoc. "Socialism and Justice". Moscow. 1967. P.23.

[74] A.M. Yakovlev. "The Principle of Social Justice and Foundation of Criminal Amenability". Sov. State and Law. 1982, M>3, p.93.

" A.Mitskevich. "The Conformity of Punishment to the Crime and Personality of the Criminal is the Most Important Demand of Justice". In the book "Perfecting Criminal Legislation and Practice of its Application. Krasnoyarsk, 1989, p.92.

law - using activity.[75] V.N.Kudryavtsev and S.G.Ke- lina suppose that there exist at least 3 levels of manifestation of justice in criminal law of determining sanctions and justice of forming a circle of criminal acts.[76]

Life shows that the observance of defined criminal law regulations is more effective when the belief of the members of society in their conformity to the principle of justice is higher. This principal proposition has especially great significance in determining the conformity of the punishment severity to the weight of the committed crime. A.M.Yakovlev writes: *"Criminal justice would be powerless without compulsion and inhuman without education. However, justice would no more exist without fairness".'* The content of justice is closely connected with conformity of punishment to crime in ethics, in criminal law, legal practice and in the moral ideas of population.

The following statement by A.Mitske- vich is quite right: *"In fact, the conformity of punishment to crime and the personality of the criminal is a special case of manifestation of justice as an equivalent exchange of values (anti-values) between the personality and society. The breach of conformity of between the crime and punishment not caused by the demand of correspondence of punishment to the personality of criminal will be unjust either with respect to society or with respect to the criminal".*[2]

Thus, the justice of punishment manifests itself, firstly in the obligatory reaction to the crime by the criminal law means and se- condly, in guaranteeing the proportionality between the crime and the measure of criminal law influence (punishment). The deviation from the demands of the justice of punishment may be manifested in excessive mildness and also in an unwarranted severity of punishment. But how to make punishment as just as possible, i.e. conforming to the weight of the crime? Is there any possibility forjudges to secure the fixing of a just punishment in every case, do they posses corresponding "scales" and are these scales precise? The law demands a thorough complete and objective investigation of the circumstances of a case. The main task of any legal proceedings is to find the truth. All judicial procedures, all guarantees given to the defendant must obey this task: to facilitate the search of the truth, to guard the judges

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[75] A.I.Korobeyev. "Soviet Criminal Law Polisy", p.41.

[76] V.N.Kudryavtsev, S.G.Kelina. "On the Principles of Soviet Criminal Law - Problems of Soviet Criminal Policy". -Vladivostok, 1985, p.9-10.

from preconception, subjectivism and from anything that may hinder the triumph of justice. An unjust estimation is the result of the misrepresentation by the judge of the true sense of criminal behaviour; one-sided, incomplete consideration of the motive of the crime, the personality of the. criminal, "his is sometimes done premeditatedly and intentionally. Therefore, the truth is indespensable element of a just estimation of the crime and personality of the criminal.

V.G.Belinsky wrote: *"...The truth demands a placid and impartial investigation, it demands that its investigation should be approached with respect...*

Justice, being an estimation becomes the criterion of activity and actions of people when they have conviction in their righ ness. Particularly, it concerns judges. A judge convinced in the rightness of punishment estimation must uphold the justice of punishment straightforwardly and boldly,, forgetting his own self, despising timid reservations and ambiguous hints, and taking care-only of the truth and not of what will be said about himself. It is necessary to bear in mind that the indispensable condition of the justice of punishment is incurruptability and disinterestedness of the judge. Democrit noted that "accessible to bribery cannot be just" and F.Bacon made these words more precious "Erudition befits judges more than wit, restfulness becomes them more than skill residence and circumspection - more than self - confidence. But their main virtue is incurruptability".

Thus this impossible to manage without the category of justice where the settlement of the problem depends on the testimonial of the personality of the guilty. Diversity of features characterizing a person does not make it possible to state them in the form of normatively appointed dear critieria. Therefore, while using norm of this kind, the moral category of justice acquires a particular importance. This category should be leaned on, when estimating the nature and degree of the danger of the personality. The punishment fixing regulations are put in the forefront among these norms.

What are the criteria for - estimation of justice of the delivered judgement? We think that it is one of the most intricate questions concerning the problem of fixing punishment. One court may deliver a judgement concerning a case (for instance, to fix a punishment consisting of 6 years of imprisonment), whereas another may disagree

with it and fix a punishment for 8 years. And each of them will think his judgement is right. It is quite a natural phenomenon. But which of these judgements is, in fact, more just? In many cases the answer to this question exerts a substants influence on the kind and degree of criminal punishment. It is one thing when a man is in prisoned for 6 years and quite another when it is done for 8 years. It may not hav^ a principal importance for judges, but the difference is great for the convict. Every judge always seeks to find the substantiation of he deliver I judgement. Therefore, the opinions of judges may not coincide in many cases.

II. Humanism. The term ***«humanism»*** is of Latin origin. It means *"human», "hu-mane»* in this language. One of the bases of existence of the humanity principle is the acknowledgement of the absolute value of man by humanism. Therefore, everything concerning man and his most proportitous development is dete mined by the general notion "humanism". "*Humanism is a moral attitude expressing the acknowledgement of the value of man as a personality, respect for his dignity, aspiration fo*r *the good of man as the aim of social progress".*[77] This means that humanism is the relation; hip between society (state) and personality. Therefore, we can speak about double nature of humanism. One of its sides manifests its lf in respect of society and consists of protecting state, social and personal interests from criminal infringements. Humanism, understood in this way conforms to severe punishiment of criminals.

Thus, E.A.Sarkisova states: *"Humane ideas of protection of socialist society and all soviet citizens from criminal actions require severity, irreconcilability towards criminality and especialiy towards those which encroach on the objects protected by the law*". The other side of humanism of directed to the criminal and means a human attitude to his personality, denial of a cruel punishment, taking into account extenuating and aggravating circumstances, etc.

Formulating "a plan of Criminal Laws", Jan Paul Marat aspired to reconsile the mildness of retribution with its reliability and humanity with security of civil society without infringing either justice or freedom".[78] Ch. Becary wrote: *"only such punishment should be used*

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[77] V.N.Kudryavtsev, S.G.Kalina. "The Principles of Soviet Criminal Law". Moscow. 1988, p. 147.

[78] J.P.Marat. "Selected Works", Moscow. 1956. Vol.I. p.213.

which... would make the strongest impression on the souls of people and would be least agonizing for the body of the criminal".[79]

I.I.Karpets assumed that severe punishment of criminals in the interests of the protection of society from dangerous encroachments is not humanism towards society but a forced deviation from the consecutive realization of this principle. P.P.Osipov notes that this position reduces the essence of humanism to one of its sides-humanity towards the criminal.[80] In a generally accepted sense the term "*humanism*" denotes the acknowledgement of the value of man as a personality, the consolidation of the good of man as a criterion for the estimation of social relations. Consequently, humanism can refer not only to a concrete person and is in modern sense understood as humanity and mercy. The protection of the interests of society by means of doing harm to a concrete person even if it is caused by a necessity and conforms to social interests cannot be considered humanism, because harm and humanism are incompatible notions.

The principle of humanism is connected in criminal law only with the personality of the criminal and consists of treating him humanely. In this connection a question naturally arises: should humanism be reduced to the fact that a minimum punishment must be fixed for the person which committed a crime?"

A.S.Gorelic notes that the fixing even the mildest of all possible punishments can be termed humanism conventionally to a considerable extent. Every punishment is retribution, and retribution and humanism are antipodes... Generally speaking, punishment cannot be more or less humane; it would be more precise to speak about a more or less inhumane punishment, i.e. not about the degree of humanism, but about the degree of deviation from it. One should keep it in mind when using the given term".

We think that humanism as a principle of legislation and law using activity must be filled with meaning, first of all derived from the general theory of humanism. Humanism is no all-forgiving, compassionate attitude, but high exactingness. Our morals must be alien to revenge and imprudent anger. But a just requital is one of the principles of humanism.

' Ch.Becary. "On Crimes and Punishments".

[80] I.i.Karpets. "Punishment. Social, Law and Criminological Problems". Moscow, 1973, p.87.

§3. SUBJECTIVE FACTORS INFLUENCING THE FIXING PUNISHMENT

I. The judicial sense of justice. The individualization of punishment provides that in pronouncing sentence the court is guided by the sense of justice. Consequently, taking into account of different factors influencing punishment is possible and necessary in their analysis; in the end, individualization is a synthesis of all circumstances, and the court introduces a great deal of subjectivism into this process.

As it is rightly noted in juridicial literature, the many-sidedness of juridical practice defines the specific conditions of forming the sense of justice and conditions the specific nature of the sense of justice of investigators, public prosecutors, judges, lawyers, etc. Each juridical profession introduces its specific character into the sense of justice of its representi- ves, it acts as a basis for forming a special kind of the sense of justice, characteristic of all representatives of these juridical workers or others.[81] The professional consciousness of lawyers differs from the feeling for law and order of other citizens not so much in the elements of structure as in their content, profundity, quality and direction of relations between them. The knowledge of lawyers in the sphere of law is, naturally, considerably detailed and more perfect that of other citizens and reaches a high expert level.[82] Among the feelings for law and justice of lawyers one can distinguish the sense of justice of judges which has its own features.

Judicial activity of fixing a punishment has a conscious nature and is realized in definite conditions. Factors which do not depend on the will and consciousness of the judges, circumstances under the determining influence of which the process of preparation, delivering and realization of the sentence belong to the conditions mentioned above. The conscious nature of judicial activity is imparted by the subjective factor, within the limits of which the most important role is carried out by the judicial sense of justice, re-making the incoming, and to a considerable extent, predetermining the out-going information. Therefore, simplifying the situation a little, the subjective

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[81] A.S.Gorelic. The Mentioned Book, p.83.

[82] N.Sokolon. "The Sense of Justice of Lowyers: Notion, Essence, Content". "Soviet State and Law", 1983, Net0, p.20.

factor can be reduced to the judicial sense of justice.

The important role of professional sense of justice of judges is emphasized by the legislator himself, binding them to be guided by the demands of law and sense of justice in their activity. The main element of the sense of justice of judges is the conscidisness of necessity of a complete, detailed investigation, study and estimation of the material of the case and personality of the defendant, responsibility for fixing a just punishment on behalf of society and the consciousness of one's duty as well. It is possible only in the case when the professional conscieousness of judges is characterized by professional competence, justice, strrict conformity to the principle of legality, responsibility and sense of a high professional duty before society and citizens.

The judicial sense of justice is of great importance as a factor working in the mental process, which is the basis for delivering a judgement in punishment fixing. An essential feature of the mental activity of a judge is in the consciousness of the aim and purposefulness. Within these limits the activity, connected with punishment fixing (choice of the kind and degree of punishment) is ruled by the sense of justice during the mental process concerning a concrete case. When determining the kind and degree of punishment, the sense of justice of the judge is subject to a substantial influence of other factors as well, and particularly economic, moral, political relations, etc.

The practice of judicial activity concerning the fixing of a punishment persistently demands to raise the theoretical level of judicial sense of law, to inculcate in it integral (systematic) and sufficiently concrete notions of the whole complex of social demands and objective factors, due to be taken into account in punishment fixing. The practice also shows that a wrong choice of the kind and degree of punishment is to a certain extent conditioned by the defects of the judicial sense of justice and first of all, by his particular professional purposeful understanding. Thus, in certain conditions the sense of justice proves to be a powerful means of the right approach to the knowledge and estimation by judges of certain facts in their legal and moral content. The sense of justice plays an important part in the formation of inner judicial conviction which is the result of the total of the judicial activity in the investigation of a case. It determines the content of the judicial sentence.

II. The Inner Conviction of the Judge. Inner conviction denotes such state of mind, consiousness and being in which the judge considers the fixed punishment the most individual, just and raising no doubts. Inner conviction cannot be instinctive, spontaneous and arbirtary, based on purely subjective incentives. Inner conviction as state is not simply an activity expressed in the feeling and estimation. It appears not as the result of momentary impressions. Undoubtedly, activity expressed in meditation, confrontation, weighing separate evidences and thorough self criticism of the model of a possible judgement, after it the verification of correctness of all conclusions anl finally, the establishment of logical causative - consecutive relations between the facts which underlie the judgement, serve as elements of the forming of rational inner conviction along with necessary prerequisites.[83]

The presequisite of the rationality of inner judicial conviction consists of the fact that the judge realizes self-control on the basis of approach to "the project" of the kind and degree of punishment formed mentally as well as the model created in consciousness. The most important element of self - control is a doubt. Every judge, choosing the type and degree of punishment is guided by his own moral motives. It should be mentioned that the system of philosophic, legal, common to all mankind views of the judge play an exclusively important part in the just and expedient fixing of punishment. Political and ideological principles must be alien to the judge.

The demand for the judicial judgements to be based on "the personal conviction" of judges, the motives of free estimation of the evidences was proclaimed in France by the law of 16 September, 1791. At the same time, disregarding the pact that within the limits of law the judicial conviction if free and it cannot be arbitrary. Some uniformity of conditions, general principle allow the judge to overcome subjectivism in his estimating judgements, and the estimation of the fixed punishment and attitude of public opinion to it can serve as an orientation. How is the inner conviction of the judge formed? This question is of great um- portance both from theoretical and practical points of view. The inner judicial conviction in fixing a punishment is formed on the basis of the analysis of the degree and nature of the

[83] Layosh Nad. "Sentence in Criminal Process. Moscow, 1982, p.92.

social danger of the committed crime, the personality of the guilty, extenuating and aggravating circumstances. But judicial conviction is not only the circumstantial analysis of these features, but also the ability to rightly estimate their significance in accordance with the aim of punishment in legislation.

In the case in question we speak not only about the aims in general, but also about the way the judge realizes his views on these aims and settles every concrete case and the problems of prevention. Undoubtedly, the sense of justice, emotions, etc. also take place in the process of forming of judicial conviction. The judge as well as any other person perceives the surrounding outer world as depending on his experiences influencing and having an effect on his will. In the end they determine the judgement delivered by him, and the content of his convictions. Thus, the justice and expendiency of a punishment depends, to a great extent, on the inner conviction of the judge. What this conviction will represent and how it will find its reflection in the sentence depends to a considerable degree on the personal staff of judges and on their general and legal grounding. That is why many defects of judicial activity of punishment fixing (choosing the kind and degree of punishment) depend on the selection and grounding of judicial workers (professional judges) and assessors.

One of component features of the inner conviction of a judge is the consciousness of his independence. Unfortumatelly, at present, the court is not an independent body which performs its specific function in society. Instead of the functions inherent in the nature of judicial power (to settle legal disputes), the court executes the tasks imposed from without to please the achievement of definite political aims and conservation of political dogma. The court represents an ordinary state body expressing the will of the governing structure. The mechanisms of influencing the court of legal bodies of executive power are preserved. Justice has not become to be used for expressing "the interests of law". Judges do not apprehend themselves to be a part of corporation missioned to assert rights, laws, and justice.

The interdependence of judges does not afford an opportunity for the principle of justifiability to become reality in court examination. Owing to this, the court does not occupy the post of impartial arbiter in the argument of sides possesing equal fights. Unfortunately, the adopted courts and judges law of Azerbaijan of 1997 legislatively

consolidates the dependance of judges on the Executive presidential power.

Independence and freedom of judges is first of all determined by the mechanism of the assignment (selection), and also the ceasing of their activity on the basis of article 94 of the law, judges are nominated by the president of the country. According to the meaning of the law, it appears that the president also makes the final decision about the ceasing of the activity of judges. Thus, one power-executive forms the other power-judicial and this contradicts the principle of the theory of the division of powers. Forming the judicial branch of the country, president as the head of executive power irrespective of his wish, places under his subordination the third power, which, naturally, cannot be free and independent in this situation.

According to the law (article 96), judges are appointed for the term of 5 years. One may ask: can a judge feel to be free and independent if he is to render an account before executive power in 5 years? We consider that such a principle of forming the judicial branch should be established, which would not give an opportunity to one power or another to decide the fate of judges on the basis of some formalities in accordance with their desire. For instance, judges may be elected by people as it was before. Another way can be chosen: 2 other powers - executive and legislative take part in the formation of judicial branch. But the main point is not even in the way a judge is appointed (elected) but in the way how, in which cases and who can relieve him of his post. Therefore, it would be right if judges were elected (appointed) for life or, at least, for long terms - 20-25 years. The order of the ceasing of their activity must be so complicated that it would be impossible even if the head of Government wants it. For instance it's without the concent of 2/3 members of Parliament.

The independence of judges presupposes a special order and special conditions of their being made disciplinary answerable. It should not be forgotten that it is the third power all the same. The passed law (article 111) makes provision for making judges disciplinary answerable even for the breach of labour discipline. For instance, a judge comes to work not at 9.00, but at 1000. The analysis of articles 111, 112, 113 allows us to make a conclusion that judges are more easily deprived of bodies. It is quite abnormal and does not conform to the essence of the principle of the independence of judges.

Chairman of the Supreme Court, the corresponding Executive body also have the right of inciting disciplinary execution on the basis of article 112. First of all, it is not properly understood: what is this "corresponding Executive body"? Who created it? What are its powers? Secondly, what logics makes the Executive body competent of inciting disciplinary execution against the 3^{d} power? Can the judicial power be called a power, after all? The Chairman of the Supreme Court as the supreme official of the judicial system can be granted this right. Making judges dependent on the Executive body, we deprive them of self - dependence and freedom by it.

III. Judicial judgement. Investigations show that in different regions of Azerbaijan the punitive practice of courts concerning the use of punishment and particullarly imprisom- ment is essentially different. There is no uniformity in the use of punishment in other countries of CIS as well. The judicial practice in our conutry shows that it is not seldom for the court to fix different kinds and terms of punishment for the crimes identical according to their nature and degree of social danger when the characteristic of the personality of the criminal and the cireimstances of the case in criminalistic sense are quite identical. Scholars of law explain the reason of this position in different ways. Some of them connect it with the lack of theoretical principles of the activity of using a punishment.[84] Some others connect it with the personalities of judges considering the case.[85] The third group of scholars base their views on the existing practice of the forming of too large corpus delicti with gaps of their sanctions.[86]

It is natural that subjectivism is inevitable in the use of punishment by judges. In this connection we come across the problem of correlation of the "operation scope" granted to the court with the aims and tasks set before punishment by the legislator himself. In other words, we speak about the validity of those limits which the acting system of the sanctions of criminal laws provides for the

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[84] "The Effectiveness of Criminal Law Application". Moskow, 1973, p. 101; M.I.Yakovlev. "Optimal Correlation of what is Formal and Estimating in Criminal Law". - Soviet State and Law. 1973, N<_>11, p.70.

[85] V.L.Najimov. "Justice of Punishment - the Most Important Condition of its Effectiveness". In the book "Problems of Judicial Organization and Realization of Justice". Kaliningrad, 1973, vol.II, p.5-10.

[86] S.I.Dementyev. "Imprisonment. Criminal Law and Reformatory Aspects". Rostov University Edition, 1981, p. 112.

judicial judgement. How to minimize subjectivism in the present state after all? There is a point of view proceeding from the assumption that it is expedient to define the limits of judicial judgement more precisely to form conditions, reflected in the law, which would impede the transformation of the delivered judgement into an arbitrary and subjective judgement.[87] Different ways of such reasonable limitation of judgement are proposed. Thus, according to S.Y.Kelina, these are of great importance among them: a perfect classification of crimes and fixing in the law of the legal consequences of the committed crimes of a definite category, the forming of legal regulations which provide for the cases of obligatory strengthening within the limits of the sanction of punishment if there are certain circumstances.[88] V.L.Naji- mov suggests concretizing the legal importance of the circumstances extenuating and aggravating amenability Other authors recommend to restrict the sphere of the judicial judgement by means of exact definition of the estimating notions by the supreme court in order to avoid the manifestation of the elements of subjectivism in the use of punishment.

Thus, V.L.Chubarev writes: "... *Development must follow the rational narrowing of the limits of judicial judgement. One of the methods of such narrowing is to define the lowest bounds of sanction as precisely as possible"*.[89]

As it is known, the juridical limits of the fixing punishment are defined by the law. Judges are provided by the law for the right to define the kind and degree of punishment in accordance with inner convictions and within the limits of the defined general and special parts of Criminal Code so that they conform to the aim of punishment when there are some deliberately or generally indicated circumstances. Thus, the law itself leaves some certain limits to the official or body, using it in accordance with their judgement.

V.V.Glazirin and V.l.Nikitinsky write: "Expediency" of the use of

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[87] V.L.Najimov. The mentioned book, p.5-10; S.G.Kelina. "The Measures of Amenablity Provided for in the Criminal Law. and Principles of their Application". Soviet State and Law". 1982, JVQ5, p. 106.

[88] See: S.G.Kelina. The mentioned book, p. 106.

[89] V.L.Chubarev. "General Danger of Crimes and Punishment". Moscow, 1982, p.57.

[89] V.V.Glazirin, V.l.Nikitinsky. "The Effectiveness of Legal Acts". Soviet State and Law, 1984, • № 2, p. 13.

norms affording the law - user an opportunity of judgement may exert a considerable influence on the achievement of the aims of the norms.[1] Therefore, from our point of view, opinions, concerning the narrowing of the limits of judicial judgement are erroneous and short-sighted. As it is known, criminal legislation gives the court the right to define punishment within the limits of the criminal law sanction fixed for this crime or the other. This means that the legislator abstained from working out an absolutely definite and detailed system of sanctions and gave judges the opportunity of judgement in using the law. It is quite natural, because it is practically impossible to fix in the law a concrete kind and degree of punishment for a concrete crime. It should be mentioned that our code gives the court a large scope for the selection of this measure or another, this term of imporisonmentor another, and for the combination of repressive measures. It is necessary to bear in mind that - the legal regulation of public life must be alient to the substitution of a judgement for the law under the pretence of expediency as well as the opposition of legality to the just and expedient use of legal regulations.

The law and the judgement of its use are 2 sides of legal regulations of public life, requiring a certain combination, which must retain the leading role of the law as the basis of legality and judicial judgement.

Proceeding from the assumptions stated above, we suppose that the legislator must proceed along the considerable broadening of the limits of judicial judgement. This viewpoint is supported by- some other scientists. [90]A.A.Jijilenko wrote: "The principle of the punishment individualization is based on the confidence of the legislator in judicial body". [91]A.B.Sakharov sharply opposed this point of view, putting forward 3 arguments: first of all, he assumes that the tendency to broad the judicial judgement in defining a punishment does not conform to the historical perspective of the gradual reduction of criminality and narrowing of the sphere of criminal repression application. Therefore, from his point of view, criminal legislation must follow not the path of broadening, but that of narrowing a judicial judgement, because it is only in this way that the reducation of

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[90] G.A.Zlobin, S.G.Kclina, A.M.Yakovlev. "Soviet Criminal Policy: Differentiation of Amenability", "Soviet State and Law", 1977, M>9, p.60.

[91] A.A.Jijilenko. "Essays on General Theory of Punishment". 1927, p.70.

criminal repression and its substitution for other forms of the influence on the transgressor can be guaranteed. He asserts that the history of criminal law development is the evidence of the tendency to narrow the scope of judicial judgement on the part of the legislator. Secondly, A.B.Sakharov supposes that the broadening of judicial judgement contradicts the most important principle of criminal policy as well, because it inevitably weakens the authority of the law and together with it the authority of the judigial judgement itself, the main basis of which is the law. And at last, thirdly, the large scope of judicial judgement in fixing a punishment is the consequence of the inexactness of the definition of corpus delicti features. When the intensification of the differentiation of their simple, qualified and "privileged" kinds is made more precise, the limits of sanctions inevitably narrow, and the judicial judgement also narrows.[92]

A.B.Sakharov's view - points can hardly be accepted, because the criminal law presents the generalization of the typical situation in which a criminal action was committed and contains the abstract formulation of the corpus delicti. The kind and comparatively definite limits of punishment are determined by the law but the law[7] is general, whereas the actions and personality of the criminal are concrete. That is the reason why the individualization of the resposibility is impossible without a definite scope of the judicial judgement, for which the law makes provisions.

This scope, when applied to a single fact presents an indispesable individualization of the responsibility of a concrete person for the committed criminal action. It is necessary for judges and leaders of judicial system to attain the right understanding of those possibilities guarantuing the achievement of the aims and observance of the punishment fixing principles. They are reflected in the content of different kinds of criminal law influence in order to raise the effectiveness and validity of the judicial activity and planning of a more optimal condition of punistive practice. And this, in its turn, presupposes the presence of corresponding scientific classifications of legislative sanctions.

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[92] A.B.Sakharov. "The Perspective of Soviet

§4. FORMALIZATION OF REGULATIONS IN FIXING PUNISMENT

I. Dependence between the punishment and the crime. As is is known, social danger of the committed crime and the personality of the crimilan exerts a substantial influence on the degree and kind of punishment. That means there must be a definite dependence between the nature and degree of social danger of the crime and personality of the criminal on the one hand, and punishment on the other. But any dependance must have its own specific units of counting, where there is no unit of counting, there are no measures, no taking into account and consequently, a primitive, unfounded, irresponsable measurement rules. In any case, even in a judicial one, the skill of exact weighing and measuring of detalis is the pledge and guarantee of the possibility to decide the case justly. For instance, the doctor, prescribing drastic medicines, gives instruction concerning the dose, necessary for the patient. If he recommended instead of it: "To take little by little", it would have sad results. It concerns the judicial activity on fixing a punishment in full measure. The nature and degree of the social danger of the committed crime and the personality must be subject to the reflection, measurement and estimations about the aims and principles of fixing a punishment. Certainly, we cannot obtain absolutely exact mathematical data concerning the comparative weight of different crimes and required correlation between the corresponding crime and the definite degree and kind of punishment for it. It is also evident that such estimations and comparison are made in general form both in the criminal legislation and judicial practice, though not always it is done blamelessly.[93] Therefore, we cannot agree with these authors who consider the quaranteeing of the proportionality between the crime and punishment to be "empty abstraction" and "scholastic exercises".

Proceeding from these assumptions, the possibility of commensurability of the nature and degree of the social danger of heterogeneous crimes as well as the comparative estimation of the crime and punishment is generally denied. As the result of it, a

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[93] P.P.Osipov. "Theoretical Principles of Forming and Applying Criminal Law Sanctions (axiological aspects)". Leningrad, 1976, p. 118.

conclusion is formed that a just punishment is a punishment which is expedient, and justice can be expressed in nothing else.[94]

The search of practical methods of settling the formalization means of punishment fixing regulations has begun long also. N.D.Oran- gereyev, an engineer by profession, in his book "Crime and punishment in mathematical depen- dance", published in 1916, noted that the court has the same basis in sentence setting methods of punishment as it had a thousand years ago and it has made almost no progress in this respect.

The absence of a uniform method of taking the elements and factors into account results in the process of punishment "being very much like fortune - telling by the coffee - grounds.

In order to overcome it, the author suggested turning to mathematical confrontation of the circumstances substantial for the determination of the culpability. It is necessary for the crimes to be attached the importance of the quantitative equivalents in conformity with the sanctions and to work out special coefficients for the account of different variants for instance, in complicity the coefficient of the main accomplice is 1,0, of the instigator - 0,90, the conclear - 0,75; the degree of the quiet when realized fully is estimated as 1,0, weakened - 0,9, affect - 0,7, etc. Then the individual sum of coefficients can be calculated and, taking into consideration the equivalent of the given crime we can obtain the degree of punishment due to be fixed.[95] As we see, the essence of N.D.Orangereyev's supposition consists of the method of scaling. Supporting this idea, V.l.Kurlandsky recommends to evaluate in number a definite measurement unit of punishment on the one hand and the importance of criteria for its fixing, concerning the action and the personality, on the other. The deviation of member sum obtained in the result of criteria estimation into the quantity of number in which the punishment measuring unit is estimated, will be the index which could become a subsidiary instrument faciltating the activity of judges in delivering judgement and helping to avoid gross errors in fixing of a punish' ment.[96]

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[94] Sec: A.L.Remenson. "Individualization of Punishment and Criminal Law". Tomsk, 1967, № 33, p. 100.

[95] The mentioned book, p.8-9,40, and the folloving.

[98] V.I.Kurlyandsky. "Criminal Policy, Differcnition and Individualization of Criminal Amenability. The Main Trends of Struggle Against Criminality". Moscow, 1985, p. 123-125.

V.L.Chubarev assumes that the algorithm of transition from quality (the weight of the action and the danger of the personilaty) to quantity (individual punishment) is not known, but it can be estimated by comparing the quantitative expression of the social danger of a crime as an argument with the quantity of punishment, performing the part of the derivative. In order to settle this problem V.L.Chubarev estimated in numbers a series of social danger indices of actions, personality and circumastan- ces under which the crime was committed, and confronted the obtaind results with the punishments fixed in concrete cases. As it turned out, in a number of cases with the same number sums basically different punishments were fixed. It testifies to a high level of vagueness in pronouncement of sentences.[97]
D.O.Khan - Magomedov proposed to expose with the help of computers the degree of the social danger of different crimes in quantitative expression and in this way to find the optimal extents of sanctions for them using the form discerning method.[1]

Norwegian scholar N.Cristie points out the possibility of the use of computer technology for the formalization of punishment fixing regulations. He writes that if the command is given properly, the computer always fixes identical measures for identical cases quite independently of a number of factors taken into account, and the judge must do nothing but press the button.[2]

A.S.Gorelic is not convincend in the use of punishment fixing regulations: "Any case and every personality is characterized by individual features and it is impossible to program them completely and the gain from strictly formalized regulations can turn out to be slighter than the loss, because of the impossibility to take into account some significant peculiarities of the action and personality".[98] There are also some patent opponents of the use of mathematics and computer in legal proceedings. Thus, I.M.Galperin writes: "Justice and arithmetic are antipodes, as I should say. To fix a price-list of the type: "a year for stealing 300 roubles, 2 - for 600 roubles" means to exterminate the principles of justice. Therefore, it is quite possible that reformatory labour will be fixed for one criminal who has stolen state property,

[97] V.L.Chubarev. "General Danger of Crimes and Punishment". Moscow, 1982, p. 15,23-29; V.L.Chubarev. "Measurement in Criminal Law. Criminology and Criminal Policy", Moscow, 1985, p. 123-125.
[98] A.S.Gorelic. The mentioned book, p.33.

and imprisonment for another, causing the same damage. Both sentences may be quite just in these cases".[99] It should be mentioned that certain legislative limits of the sanctions and the rules of their use have been theoretically defined by the legislator and within their limits judges are given the opportunity of choosing concrete variants.

However, A.M.Yakovlev rightly notes that on the one hand, no regulations are able to embrace the variety of facts causing the use of criminal law, and on the other - the freedom of the judgement of the court, exceeding definite bounds is fraught with the danger of pronouncing wrong and even arbitrary sentences, i.e. life has proved the inadmissibility of both extreme positions.[100] All this being taken into account, some attempts were made to work out a system of recommendations for courts in fixing punishments. Thus, V.P.Najimov suggests distinguishing the main extenuating and aggravating circumstances, taking into consideration the degree of social danger. Then according to the circumstances, sanctions must be divided into severeal stages, and passing from one stage to another it is necessary to define more or less broad boundary lines within the limits of which punishment should be fixed in accordance with the consideration of other (not main) extenuating and aggravating circumstances.[101]

L.L.Kruglikov also admits the necessity of distinguishing the main (special) extenuating and aggravating circumstances, but suggests using another way of their influence on the degree of punishment: to determine their influence measures, relative to the maximum of the sanction, for instance, under some special extenuating circumstances not more than 3 fourths of the maximum degree of the sanction of the article.[102]

According to A.S.Goreilc, it would be more fruitful for the punishment fixing to be determined not by absolutely precise settings, but by an approximate orientator as it was done for petty larceny.

p.309.

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[99] "Justice and Arithmetic".News, 1986, august 15.

[100] A.M.Yakovlev. "The Principle of Social Justice and Criminal Amenability Basis". Soviet State and Law. 1982, №3, p.91.

[103] V.P.Najimov. "Justice of Punishment - the Main Condition of its Effectiveness. The Problems of Organization and Realization of Justice in the USSR". Kaliningrad, vol.2, p.5-10.

[102] L.L.Kruglikov. "Extenuating and Aggravating Circumstances in Criminal Law". Varonej, 1985, p. 140- 141.

Consequently, criteria for the influence of circumstances on the degree of punishment must combine formalized of punishment orientators with the possibility of their deviation within the limits of "boundary lines", the breadth of which depends on the scale of the orientator itself and deviations are allowed when there are some concrete circumstances having obligatory motivation in the sentence. This method corresponds to the fluctuating within some limits relative nature of the objective truth of the degrees of punishment and can be used for the individualization of punishment both for one crime and for the total sum.[103]

Some authors aim at creating qualification of uniform crimes according to their nature and degree of concording to their nature and degree of concrete social danger. There are 3 main approaches: some authors suggested using legislative sanction[104], others - expert estimation[105], the third group-social content of the committed crimes as criteria for estimating the truth of judicial consideration of the nature and degree of social danger of the crime.[106]

But at present we dispose no complete conception on the problem in question. The procedure of estimation basically depends on the properties of the commensurable object. As some authors rightly note, it is hardly possible because of the diverse nature of crimes and absence of identity of the indices determining the measurement method of the latter.[107] Therefore, the empiric measurement possibility of the social danger appears to be expedient regarding every concrete corpus delicti.

The nature and degree of social danger reflecting the qulitative and quantitative sides which find their summary expression in the measure of social danger, can be used as criteria for its measurement.

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[103] A.S.Gorelik. The mentioned book, p.35. A.S.Gorelik. "The Fixing of Quantiative Orientatiors as the Method of Formalization of Estimation Indications in Criminal Law. Realization of Criminal Amenability: Criminal Law Problems". Kuybishev, 1987, p.62-69.
p.309.

[104] D.O.Khan - Magomedov. "Sanctions of Legal Regulations and Practice of Punishment Applications. - Problems of Struggle Against Criminality". 25 Edition, Moscow, 1976.

[105] Y.D.BIuvstein. "On the Estimation of the Degree of Social Danger of Crimes. - Problems of Struggle Against Criminality". Moscow, 1972.

[106] A. B. Sakharov. "On the Classification of Crimes -Problems of Struggle, Against Criminality". Moscow, 1972.

[109] "Complex Study of the System of Influencing Criminality". P. 104-105.

Therefore, we should proceed from the assumption that the nature and degree of social danger cannot be subject to their estimation in isolation. That is why it is wrong to suppose that the degree of social danger is what can be measured and expressed mathematically, whereas the nature is determined by indeces (armed - unarmed, premeditated - unpremeditated, etc.) not subject to the quantitative measurement.[108] These criteria can be measured both qualitatively and quantitatively, but only in their sum total. Therefore, at present the main task of the theory of judicial activity consists of working out theoretically right and practically realizable indices with the help of which judges can determine the social danger of the crime with a view to individualize punishment as much as possible. One cannot certainly do without mathematics here. This problem can be settled only with the help of this science.

II. The role of cybernetics in fixing a punishment. The possibility of cybernetic investigation and application of cybernetic methods to other sciences including the science of state has not been paid due attention.

"At present it is quite impossible to estimate even approximately the effect which will be brought by comprehensive inculcation of cybernetic methods and means of electronic automatic machinery into all spheres of human activity", - noted academician Berg, the chairman of scientific Council on cybernetics of the Academiy of Sciences in the former USSR.[109] And just like the criterian of the steam - engine augmented the physical abilities of man, made him many times stronger, the appearance and development of cybernetics reinforced his mental abilities and, one may say, made him cleverer. It is difficult to find such branch of the mental activity of man which would not be set to machine completely or partially.[110]

The mentioned tendency correlating the functions of man to automatic devices in the systems of control determines the actuality of raising the problem of application of cybernetics in the law realization activity and the necessity of experiments in this direction.[111] The fact that business contacts are established between jurisprudence and

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[108] See the same, p.97.
[109] Nova mysk. 1961, p. 15-84.
[110] Sec: V.Abehuk. "The Torped of Captain Nemo". Leningrad, 1980, p. 158.
[111] "The Principles of Cybernetics Applicatioc in Science of Law", Moscow, 1977, p.203.

cybernetics in a number of points and that these contacts get firmly established testify to the organic unity of the law with modem spheres of knowledge and practical activity.[2] At present it is considered to be generally accepted to direct attention to the fact that computers can be used as man's assistants in realization of the legal regulations. The conclusion made by a computer should be considered not as a final judgement, but only as the "opinion of a higly qualified "consultant", able to meet the demands of state bodies and institution.

It should be admitted that the investigation possibility of the use of cybernetic methods in jurisprudence is necessary, real and perspective. It can be carried out either in collaboration with other specialists or only with lawyers on specific problems of state and law, for instance, such as the problems of legislative technique, legal procedure, primary investigation operations, etc.

Academician V.M.Glushkov wrote "There are no doubts, however, that in the nearest future cybernetic methods and machines will play a more substantial part in the practical work of lawyers. Now mathematicians, sociologists, philosophers, economists, workers of the court, public prosecutor bodies and officials of home affairs take part in working out the cybernetic application problem in science and practice of law together with scholars of law. And it is no coincidence, because the cybernetic achievement inculcation into the practice of legal institutions is a very difficult task and requires a considerable preliminary work".[112]

In fact, we speak about 3 quite different and unequal questions when settling the problem of application cybernetic method prere-quistites in judicial activity on punishment fixing. On the one hand it is a question of the application possibility of cybernetic methods in this sphere. On the other it deals with those bounds which cybernetics cannot exceed in judicial activity, finally, it is a question con cerning the benefit of cybernetic methods application in the process of punishment fixing, i.e. the problem is not whether they may be ge-nerally used, but whether this use may be effective, useful and will not turn out to be the end in itself and whether such use of cybernetic methods will be justified. Investigations in the cybernetic application

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[112] "The Principles of Cybernetics Application in Science of Law". Moscow, 1977, p.3-4.

[112] See: "The Principles of Cybernetics Application in Science of Law". P.209.

sphere in legal procedure and particularly, in punishment fixing is in its embryo and in the present situation the broad use of its results in practice is a distant perspective.

In the given case this investigation proceeds from the requirements of development of this problem demanding first of all the settlement of difficult theoretical and methodological questions. The attempts to start investigating the application possibility of cybernetic methods in judicial activity concerning punishment fixing presupposes the necessity to reveal the results and methods of cybernetics which can be used here, the extent to which their use is possible and the form in which this can be done. The application of cybernetics in judicial activity is not the application based on ready formula. It is not the passive use of the achieved results of cybernetic investigation but, on the contrary, this application is, to a certain extent creative, enriching not only the sphere of punishment application where the cybernetic investigation methods and results are used, but it also can lead to some new estimations in cybernetics itself. The application of cybernetic investigation in judicial activity and especially the leading of general and theoretical propositions and conclusions to their concrete use in practice presuppose a broad collaboration of lawyers, scholars of logic, mathematicians, cyberneticists, technologists, etc. Even the 1st approach to these problems shows that the settlement of the question concerning the possibility of application of cybernetic methods in punishment fixing practice will require quite difficult labour and intensive logical analysis.

A question arises is this connection: is there any possibility of the existance of a so- called "electronic judge"? In many respects the machine has much greater potentialities than man. Thus, for instance, it is characterized by impartiality, ability for having colossal amount of information and solving difficult logical tasks, skill to quickly orientate itself in the given situation and so on. Certainly, all these qualities are indispensible for the judge, but cybernetics cannot substititute for the thinking man who is given the task of judging the actions of other people.

Why?

First of all, because the trial is not a technical mechanism, but a real sphere of life and susceptible organism, in which persons taking

part in the case establish definite, temporary relations regulated by the norms of the law. It must be organized so that anybody able to reason soundly about the phenomena of the surrounding life could also judge a trial without difficulty. A trial is a process not only legal, but also psychologic and pedagogical, where not only people with different rights and duties, but often with diametrically opposite characters, life positions, outlooks, fates, etc. are brought together. In the process of judicial investigation the judge comes across many psychological questions which leave their traces on the whole judicial activity and demand from him a certain knowledge in the sphere of psychology. The judge may have a good knowledge in the sphere of jurisprudence but if he cannot work with people, has no psychological tact and does not know not principles of pedagogics, the relations between the participants in the court will be broken and conflicts are due to arise. Psychological tact is the skill to establish quickly right relations with the participants of the process which would promote the achievement of the aims of justice in the best way. The judge must try to define quickly the psychology of people, reveal the motives and aims, inner state and character of the man without unnecessary questions in order to take the right line of his conduct. He must be observant, resourceful, able to change the line of his conduct quickly and resourcefully depending on outwardly barely visible peculiarities of the behavour of those under interrogations and find psychologically right methods of the conduct of a case. All of those present in the hall we'll control every movement of the judge in some way or another. Even the most complex and perfect electronic system is unable to penetrate into the human's state of mind. Only man is able to gain an understanding of it and pronounce his judgement it is his colossal advantage over machine.

People are people. And it is inadmissible that their relations should be investigated by machines.

Secondly, "electronic judge" will not be able to fix a just and expedient punishment.

"Electronic judge" can easily determine, that, for instance, punishment in the form of imprisonment from 8 to 15 years or for life should be fixed for actions falling under art. 94 of Criminal Code of Azerbaijan. Such deduction of machine will be right in conformity with the rules of formal logic.

The formal logic deduction is aimed at establishing relations between hypotheses and sanction of regulations, i.e. between a crime and an abstract criminal punishment (from 8 to 15 years of imprisonment). But one formal logic deduction is not enough to realize practically the content of the law. General principles of the fixing of punishment demand a dialectical deduction, i.e. individualization of criminal amenability. This means, that the norms of the crime provided for in the hupothesis cen- tainly cannot be the only promise in the concrete fixing of punishment in judicial sentence. Here other circumstances which, to be exact, would also be referred to the hypotheses of the norm, will of social danger of a conrele action, the personality of the criminal, extenuating and aggravating circumstances. Formal logic itself can lead "electronic judge" with confidence only to the decision of an abstract criminal sanction of law, i.e. possible limits of punishment. Contrary to the decision of a concrete punishment fixing within the limits of sanctions is the problem not only of formal logic, but of dialectical estimation of all circumstantances. If "electronic judge" has fixed a punishment, for instance, in the form of imprisonment for a term of 5 years, his conclusion is logical, but that does not mean it is right and consequently, the validity of the sentence is put under doubt. It is possible in the given case when estimated dialectically rightly, the punishment should have been fixed for the lowest limit of term: 2 years of improsonment or on the contrary, maximum punishment. The trouble is that "electronic judge» has access to formal logical relations without limitations. As far as dialectical relation are concerned, they are practically unknown to him. That is why a machine cannot substitute the man-judge, because the application of dispositions and sanctions of legal regulations is an exclusively prerogative of man, the result of his will, his rational and estimation activity.[1]

M.S.Strogovich is right to note that any mechanization should be excluded in the judicial settlement of the problem concerning the guilt and degree of amenability of the persons involved in the case... function given to the computers, partial or preliminary, to answer the questions whether it is proved that the accused is guilty in commitment of the crime and bears the responsibility for it and what is the degree of his responsibility.[113]

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[113] M.S.Strogovich. "A Course of Soviet Criminal Procedure", vol.I, Moscow, 1968,

The statement about the possibility of creating cybernetic machines substituting for the judge to at least some extent was critisized by D.A.Kerimov, I.I.Murhin.

In judicial activity on the fixing of a punishment the machine can render an exclusivity great help in receiving, keeping, re-making of information concerning the future result of a criminal punishment as is known the information is re-made on quite different levels, by quite different means and methods. The main task of the computer in the process of prognostication consists of providing the judge for the information about the future result of punishment. Thus, an information interaction is established between the judge and computer. Being no substitution for the judge, electronic machines can provide him with working material and sometimes even preliminary results which should be considered as the opinion on the case of a highly - qualified consultant. "The creative work of man reinforced by the electronic brain, requires a new height owing to the fact man is freed from the performance of routine operations, he gets an opportunity to check those hypotheses and mental experi- ments or other directly in the course of the settlement of administrative and other tasks, and amend the train of his thoughts and actions", - notes V.L.Afanasyev.[114] In the end the whole work with the information concerning the future criminal punishment which is done by computer is directed to the judge, who is do make a decision. It is the court that fully bears the responsibility for the made decision and it cannot be passed to the computer. The main point is that the mat hematic formula of the model lets man involve of the analysis of the future an unprecedented excellent assistant, the name of which is computer.

In the end a whole system of "court-computer" is formed. It is able to settle the problems which neither the court, nor the machine are able to settle perfectly by themselves. It should be especially emphasized that most wonderful progress of electronic computer technology can belittle the role of man. Man was, is and will always be the central link of the system "man-computer" no matter how perfect the computer is. It is man who created machine. Man programmes the machine, controls variants of actions and chooses the best of them. Man imports a legal juridical force to the decision.[115]

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[114] V.L.Afanasyev. "Social Information and the Government of Society". Moscow, 1975, p.308.

[115] Sec: V.L.Afanasyev. The mentioned book,

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