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The philosophy of punishment: from natural law to liberal liberty

Summary

Contrary to what one might expect, the problem of the justification of punishment is relatively new. It was the explanation of the role of punishment that was problematic, not the issue of the state's legitimization of punishment. The issue of punishment has been greatly influenced by the evolution of liberal and positivist philosophies and particularly by the marginalization of concepts of *ius natural*. This article describes the evolution of penal law philosophy and its influence on the state of the modern science of penal law as well as reforms of the penal law in Poland. The penal law of the 18th century was influenced by the idea of natural law – it perceived punishment as a necessity following a certain natural order. The philosophy of the penal law of the second half of the 19th and the beginning of the 20th centuries emphasized that punishment was necessary because of a vision of the society supported by science. The second half of the 20th century brought a challenge to the classical concept of punishment, the development of a liberal view of the social contract and the trends of restorative justice or communication concepts of punishment. These trends are the subject of reflective analysis in this article. All changes in a spirit of social defence or restorative justice blunt the moral dimension of the penal law as an instrument which serves to protect particular values. In spite of appearances, it is neither liberal freedom nor “ethics without codes” but the establishment of a catalogue of values requiring strong defense that leads to penal minimalism which means actually treating the penal law as the final rightness. Apart from that, the idea of an ahistorical social contract in its classical form does not constitute grounds for punishment. The majority may impose certain rules of behaviour, or defend a particular moral stance. There is no reason in this pluralistic world why we should accept the superiority of Locke's or Mill's liberalism over Burke's or Tocqueville's conservatism. In this article I propose to move the emphasis to the other side, as it would seem that in the reality of our legal culture it is, or may be a more accurate approach.

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