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The normative questions of life imprisonment and capital punishment – morality or legality

ABSTRACT

This discourse examines the interconnected nature of law and morality, focusing on their coexistence and interplay in the realm of criminal law, and explores the differentiation and assimilation of norms in different societies. Historically, law and morality emanated from a common normative source, but societal evolution has necessitated their distinct codification, especially with the establishment of state institutions. Criminal law prominently reflects the convergence of legal and moral norms, accentuating the moral undertones in punishment paradigms. The discussion delves into the philosophical foundations of legal and moral norms, exploring their absolute and relative values and how they relate to individual and societal behavioural modulations. Punishment, being a crucial component of criminal law, is analysed, tracing its evolution from primitive to advanced societies and studying its objectives, ranging from retribution to deterrence. The contrast between law as a representation of cultural fact and value and ethics as the pursuit of supreme good is highlighted, raising queries on the conceptual intersections and the respective societal impacts of law and morality. Continental criminal codes are seen to imbue moral evaluations of conduct, demonstrating the ethical implications embedded within legal structures. The discourse contends with the dynamic between moral and legal norms in shaping societal values, behaviours, and the conceptions of justice and punishment.

KEYWORDS: morality, norms, penal codes, capital punishment, life imprisonment

Introduction

Law and morality – as *classic norms*[1] – are close to each other, in fact, in the past they formed a single system of standards.[2] In archaic societies the life of communities was regulated by a single set of sacred rituals, legality and morality formed one single system.[3] The first historical appearance of the connection between legality and morality was manifested in the normative *mos* rules of Roman law,[4] however, it had several meanings throughout the centuries. Eventually, the *censorial* application of the law gave rise to the autonomous *sui generis* concept of *mos*, which contained social norms that were neither within the scope of law (*ius*) nor religious regulations (*fas*).[5] With the differentiation of society and social needs, there was also a need for a specific and unique differentiation of norms. Thus, the most significant new institution, the state, elevated a part of the norms, thereby creating the category of law.

The common root of law and morality is particularly significant with regard to criminal law. Bertalan Szemere[6] believed punishments must be moral, which finding can perhaps be linked to the prohibition of "inhumane punishment" widespread in modern democratic societies, since Szemere made this statement in connection with the demand for the abolition of the capital punishment and in Hungary, the decision of the Constitutional Court abolishing that penalty raises as an argument the fact that the capital punishment is immoral and inhumane.[7] Alb*ert Irk*[8] also pointed out the connection of morality and criminal law when he writes that "the common origin of legal and moral norms is of course most clearly shown by criminal law (of all branches of law)."[9] According to *Ferenc Finkey*, the most profound element of punishment is the moral element, i.e. beyond retribution, the moral education and transformation of the offender.[10] In one of his writings, *Hans Heinrich Jescheck* records that the traditional approach to criminal law has been that a crime is an act that is morally wrong.[11]

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[1]Cf: Károly József, ZÁMBÓ: *Hatályos magyar jogunk viszonya az erkölcsi és a vallási normákhoz*. Károli Gáspár Református Egyetem Állam- és Jogtudományi Doktori Iskola, Budapest, 2022. p. 9.

[2]Tamás FÖLDESI: *Jog, erkölcs, igazság.* p 2. In Iskolakultúra, Az Országos Közoktatási Intézet folyóirata, IV. évfolyam, 1994/18. volume, pp. 2-11.

[3]ERDŐ Péter: *Jog – erkölcs – manipuláció*. In.: *Erkölcs és jog, szakmai konferencia a Kúrián, a Budapesten megrendezésre kerülő 52. Eucharisztikus Kongresszushoz kapcsolódóan.* Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2020. p. 15.

[4] Imre NÉMETH: *A közerkölcs büntetőjogi védelmének indokoltsága és történelmi előképei a kbtk. Rendszerében.* 110. o. In Pro Publico Bono – Magyar Közigazgatás. 2020/3. szám, pp. 108-117., http://real.mtak.hu/123530/1/07_Nemeth_108-117_PPB_2020_3.pdf

[5] András FÖLDI - Gábor HAMZA: *A római jog története és institúciói*. *Huszonkettedik átdolgozott és bővített kiadás*. Eszterházy Károly Egyetem Oktatáskutató és Fejlesztő Intézete, p. 2018. 26-28

[6]Bertalan Szemere was a hungarian politician, member of parliament, write, jurist, minister of the Interior of the first responsible hungarian government, and then the second prime minister of the Kingdom of Hungary during the 1848-'49 revolution and warof independence. Corresponding member of the Hungarian Academy of Sciences.

[7]Hungarian Constitutional Decision number 23/1990 (X.31.)

[8]Albert Irk was a Hungarian lawyer, criminologist, candidate of political science and law in the first half of the 20's century.

[9]Albert IRK: *A büntetés fogalma*. In Irk Ferenc (szerk.): *Irk albert emlékkötet*. MTA Magyar Kriminológiai Társaság, Budapest, 1981. p. 31-38. 31. „A jogi és erkölcsi normák közös eredetét az összes jogágak közül természetesen a legszemléltetőbben a büntetőjog mutatja." In English: *All the branches of law, the common origin of legal and moral norms is, of course, most vividly illustrated by criminal law."*

[10]Ferenc FINKEY: *Büntetéstani problémák*. Sylvester Irodalmi és Nyomdai Rt. Budapest, 1933. p. 253.
According to Ferenc Finkey, the most profound element of punishment is the moral element, i.e. beyond retribution, the moral education and transformation of the offender.

[11]Jescheck, Hans-Heinrich – Norton, Jerry: *Criminal law*
https://www.britannica.com/topic/criminal-law (15.08.2023)

Tamás Földesi emphasizes that a considerable part of the rules of criminal law applies to moral crimes in addition to legal crimes,[12] *Károly Bárd* also states that criminal law imposes moral prohibitions.[13] According to *Andrea Domokos*, moral education is an essential part of raising a child.[14] Related to the previous examples, *Garrath Williams* writes in a study that "above all, criminal law issues moral prohibitions".[15] Ferenc Nagy also attributes the increase in the number of offences to a moral crisis.[16]

As far as Roman law is concerned, *delictum*[17] was also permeated by morality, by the fact that "behaviour contrary to good morals" (*adversus bonos mores*) also appears in the case of *iniuria* and "acts against the community" and it must be interpreted as the commendable morality of the state that is the commendable morality of the community. The violation of these good moral principles essentially constitutes "endangerment to society". In connection with Roman law, Finkey[18] brings up *capitis deminutio* as an example when discussing the category of moral punishments.[19] According to the legal moralistic view, the state can declare certain acts to be punishable simply on the grounds that the given act is immoral. Moralistic legal paternalism, on the other hand, seeks to protect the offender from his own moral damage through criminalisation.[20] Sociologically speaking a criminal statute is simply the formal embodiment of someone's moral values.[21] Whether in preventive or punitive mode, the criminal law speaks with a moral voice.[22]

Punishment is an integral part of criminal law, serving as a response to the committed wrongdoing. *Malum passionis quod infligitur propter malum actionis.*[23] According to Grotius punishment is the suffered detriment due to the committed wrongdoing: one who has done

[12]FÖLDESI: op cit. 3. pp
[13]Károly BÁRD: *Erkölcs és büntető igazságszolgáltatás – a hallgatás joga*. In *Dolgozatok Erdei Tanár Úrnak*. ELTE Állam- és Jogtudományi Kar, Budapest, 2009. p. 12-26.
[14]One of the manifestations of the decisive role of morality in criminal law is child education, because ethical education is an important guarantee of crime prevention and resocialization, as well as an essential means of protecting juveniles who are especially prone to crime from crime. Lásd: Andrea DOMOKOS: *A büntetőjogi felelősség erkölcsi vonatkozásairól*. In *Kre-Dit: A Kre-Dok Online Tudományos Folyóirata*, 2019. http://www.kre-dit.hu/tanulmanyok/domokos-andrea-a-buntetojogi-felelosseg-erkolcsi-vonatkozasairol/ *(2023.08.07.)* and Andrea DOMOKOS: *Református jogtudósok a bűnelkövetők neveléséről, valláserkölcsi tanításáról*. In Madai Sándor – Pallagi Anikó – Polt Péter (szerk.): *Sic itur ad astra - Ünnepi kötet a 70 éves Blaskó Béla tiszteletére.* Budapest, Ludovika Egyetem Kiadó, 2020. p. 141-150.
[15]Williams, Garrath: *What is Fundamental in Criminal Law?* In Criminal Justice Ethics, 2022. Vol. 41, No. 3, 278-290 p.
https://www.tandfonline.com/doi/epdf/10.1080/0731129X.2022.2144059?needAccess=true&role=button (2023.08.15.)
[16]Ferenc NAGY: *Gondolatok az életfogytig tartó szabadságvesztésről*. p. 503. In Acta Universitatis Szegediensis: acta juridica et politica, 2013. 75. volume, pp. 493-503.
http://acta.bibl.u-szeged.hu/30666/1/juridpol_075_493-503.pdf (2023.08.16.)
[17]As terminus technicus, *delictum* and *crimen* were used to designate the concept of crime. See.: Imre Molnár: *Az ókori római jogi bűncselekmény-fogalom ismérvei. p. 566.* In Acta Universitatis Szegediensis: acta juridica et politica, 2010. 73. issue, 1-64. volume, p. 565-590.
http://acta.bibl.u-szeged.hu/7465/1/juridpol_073_565-590.pdf (2023.08.15.)
[18]Hungarian jurist, university professor, academic, crown prosecutor in the first half of the 20th century.
[19]FINKEY: op. cit 253 pp.
[20]NÉMETH: op. cit. 111. pp.
[21]Fuller, Richard C.: *Morals and the Criminal Law*, 32 J. Crim. L. & Criminology. p. 624 (1941-1942)
https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=3103&context=jclc (2023.08.17.)
[22]Ripstein, Arthur. *Equality, Responsibility, and the Law*. In Cambridge: Cambridge University Press, 1999.
https://www.cambridge.org/core/journals/economics-and-philosophy/article/equality-responsibility-and-the-law-arthur-ripstein-cambridge-university-press-1999-xii-306-pages/EBB849DC71B39E239C750F26D8B09F59 (2023.08.17.)
[23]In addition to Hugo Grotius, St. Augustine and St. Thomas also profess this.

wrong must bear the consequences of their wrongdoing.[24] About what is good, and what is bad in a given situation, ethics seeks the answer. One definition of the Roman law states that law is the "art of good and fair" (*ars boni et aequi*). [25]

Continental criminal codes also possess their own ethics, as a substantial portion of punishable acts is based on the judgement that certain behaviours are morally wrong, and the law attaches negative legal consequences to their commission. In this regard, the ethical content manifests in the "protected legal object", which is the value that the perpetrator's behaviour violates or, in certain cases, endangers. The protected legal object, alongside its ethical implications, also serves as a reminder of the *ultima ratio* nature of criminal law, as the protected interest often embodies some fundamental human or civil rights. Due to its *ultima ratio* nature, criminal law is capable of restricting individual, fundamental rights, often in the most severe manner compared to other legal fields, frequently justified by the necessity to protect another fundamental right.

In a given state, there exists a type of law that encompasses coherent rules, while at the same time numerous potentially conflicting moralities may be present. Theoretically within a primitive society where a substantial consensus exists regarding moral values, the prevailing public opinion enforces a set of shared customs that essentially form the unspoken criminal regulations[26] within the tribe. In this scenario, actions deemed immoral are inherently regarded as criminal. In societies beyond the primitive stage, where societal changes are minimal, the realm of criminal behaviour not aligned with morality remains limited. However, in advanced societies characterized by a scarcity of shared values and an abundance of conflicting behavioural norms, the domain of actions unanimously perceived as wrongful gradually diminishes as the society becomes more complex and differentiated.[27]

[24]GROTIUS HUGO: *A háború és béke jogáról*. Pallas Studió – Attraktor Kft. Budapest. 1999. I-II. kötet. II. kötet 19-84. Also see Domokos (2019). *http://www.kre-dit.hu/tanulmanyok/domokos-andrea-abuntetojogi-felelosseg-erkolcsi-vonatkozasairol/*

[25]ERDŐ: op. cit. 15. pp.

[26]See: The death penalty, for example, was one of the oldest "punishments" used by ancient societies. The reason for the quotation mark, as in the part of the main text referred to, is that punishment - and the penal code - presupposes a kind of organised society: it is a prerequisite for the emergence of the state, which would have put in place a legal framework for the private revenge and blood revenge that existed in the primitive communities and which is not yet the case in the primitive societies See: Péter Balázsy: *Velünk élő tálió – a halálbüntetés napjainkban*. p. 2. In MTA Law Working Papers 2018/7. and Zoltán J. Tóth.: *A halálbüntetés az ókorban*. In Jogelméleti Szemle, 2004/4. volume.
http://real.mtak.hu/121512/1/2018_07_Balazsy.pdf (17.08.2023)
http://jesz.ajk.elte.hu/tothj20.html#_ftn1 (20.08.2023)

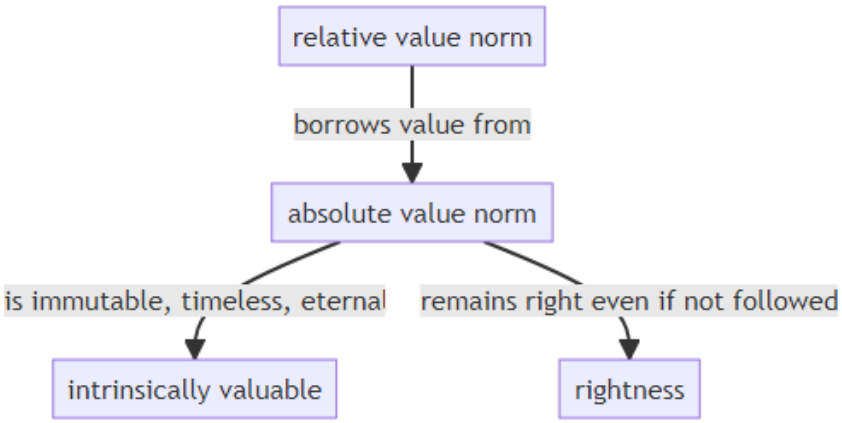
[27]Fuller: op.cit.
https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=3103&context=jclc (17.08.2023.)

I. Distinction

In the words of *Gustav Radbruch*, law is nothing more than a cultural phenomenon closely linked to social values. The concept of law can therefore be defined as something that "desires" to be just, regardless of the extent to which the goal can be realised in our world. In contrast, the goal of ethics is the so-called supreme "pursuit of the good", which is a continuous process of discovering the norms that are to be followed because they have absolute value "absolute value is something that is valuable in itself, not because it is a factor in something more valuable than itself".[28] However, law is a set of rules *(praescriptio) which* must be followed at a given time *(in toto)* and in a given place *(in situ) – hic et nunc*.

The absolute value of the *norm is* immutable, timeless and eternal. In this sense, a norm is absolutely valuable if its existence does not depend on anything (not even on individuals), and more precisely, an absolutely valuable norm does not have to be followed in order to exist, because it is right even if no one in the world follows it, and it remains right even if there is no one to follow it, and is therefore intrinsically valuable.

A *relative value norm* has a borrowed value that it borrows from an absolute value norm.



Source:
Balássy, Ádám Miklós (2023)

Jurisprudence deals with law as a cultural (social) fact, and philosophy of law as a cultural value.[29] Thus, in clarifying the notion of norm, a clear distinction must be made between legal and ethical rules and social rules such as positive morality or ethics.[30] In this way, the distinction between law and ethics – or, more precisely, between legal and moral norms – can be understood in terms of the differentiation of their subject matter. At the same time, if certain legal norms should not be established because they do not correlate with the morality of society, and other legal norms should be established for the same reason, then we can say that the moral norm system determines the legal norm system. But if morality determines these legal norms, then it is legitimate to ask what determines morality itself.

[28] Ákos PAULER: *Bevezetés a filozófiába*. Budapest, Pantheon Irodalomi Intézet Részvénytásaság, 1920. 118-119. pp.
[29] CF: *The Legal Philosophies of Las, Radbruch, and Dabin.* Translate: Kurt Wilk, Cambridge, Massachusetts, Harvard University Press, 1950. XXXII.
[30] George Whitecross PATON: *A Textbook of Jurisprudence.* Oxford University Press, 1948. 67. pp. *A definition of law should establish clear distinctions between rule of law and rules of ethics, and between rules of law such social rules as those of positive morality and of etiquette.* Original footnote: N.M. Korkunov: General Theory of Law 41. et.seq.

At the same time, there are other forms of distinction; the scope of the legal norm is not the individual as an individual in itself, but the individual's conduct, character and social relations. The law thus deals with the social relations of individuals intersubjectively,[31] which influence their character and behaviour in such a way that the legislator imposes negative (sanctions) – either through physical coercion – or positive consequences (legal effects) for non-compliance with certain behaviours. In contrast, the focus of ethics is not on society as a whole or its behaviour, but on the individual as an individual. Ethics must therefore take into account the formal and material criteria of action when constructing a value judgement of action.[32]

Identifying an ethical action, it is necessary to distinguish when we are talking about an action, i.e. what criteria it must meet in order to be the subject of an examination of moral action. Accordingly, the *formal criteria for* examining a moral act are as follows:

Ad 1. *volitionality,* when the activity is undertaken when it is free from external or internal compulsion,

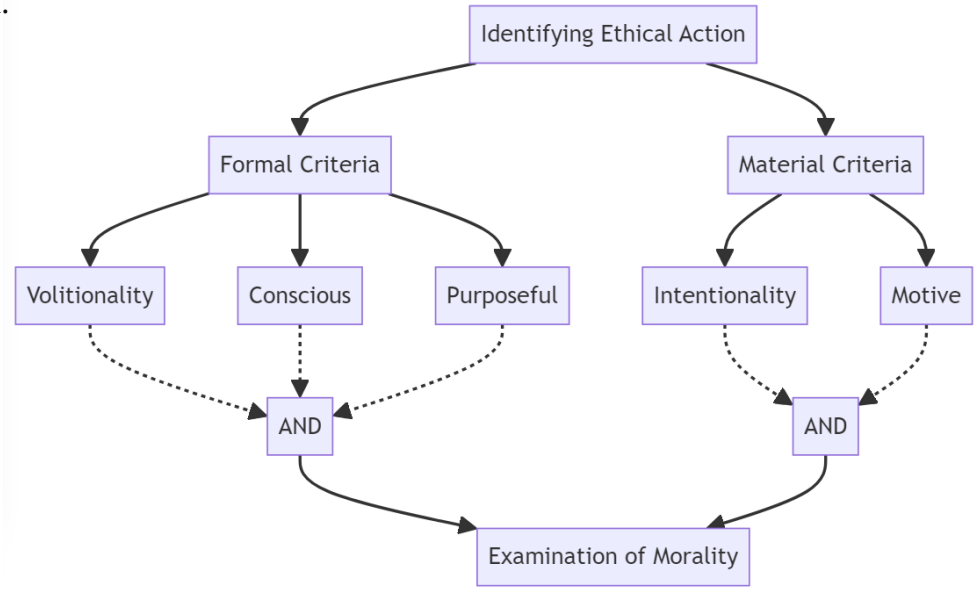
Ad 2. *conscious*, if my consciousness embraces the act, and

Ad 3. *purposeful, implies* knowledge of the purpose, i.e. the judgement of whether or not the purpose is worth pursuing.

However, the fact that an action may be the subject of an examination of morality does not tell us anything about the "morality" of the act of the individual who acts. Accordingly, in addition to the *formal* criteria, it is also necessary to examine the material aspect of the act of the individual "who acts". So the the *material criteria:*

Ad 1. in *intentionality*, we look at the individual side of what the actor's purpose, content, is to achieve by the act (i.e. the act itself), so it must be "noble, good" for an act to be moral, and

Ad 2. the *motive* is the emotion by which the actor (subject) himself desires to attain the goal, i.e. the emotion that motivates the act – i.e. the motive must (also) be noble for the act to be moral.



Source:
Balássy, Ádám Miklós (2023)

The *material criteria*, like the *formal* ones, are conjunctive, since an act is not moral if it is done intentionally, and it is not moral if the motive of the subject who does it is noble. In

[31] ERDŐ: op. cit. 17. and 18. pp.
[32] Károly BÖHM: *Ember és világa.* III. Kolozsvár, Axiológia, 1906. IX. pp.

the one case, we would say, as Machiavelli's writings reflect, that "the end justifies the means";[33] in the other case, we would say that "a noble motive is a value in itself, independent of its consequence".

Thus, in order to qualify an action as moral, the act of the subject must satisfy both *formal* (*volition, self-consciousnes*s and *purposefulness*) and *material* criteria (*intentionality* and *motive*) conjunctively.[34]

II. The purpose of punishment

In the early days, in primitive societies, when we could not speak of punishment in the modern sense of the word, the two most common "sanctions" were capital punishment and exile,[35] and the aim was revenge, i.e. the instinctive satisfaction for the injury suffered by the victim, or by his relatives, or perhaps by his tribe or tribe, through the outburst of pain, anger, passion.[36] Thus, the institution of community revenge for acts that had offended a member of the community was widespread, and could involve a series of revenges and counter-revenges that could last for generations. When the transformation of previously loosely connected communities into a state began, state organs of supreme authority were established for the effective administration of justice. Thus, the customary forms of revenge had to be adopted by the state, otherwise there would have been no tacit recognition of the law-giving functions of state organs. And the "sanction" for most offences was the death penalty, so that it was, by definition, widely used by the emerging states.[37] The next significant stage in the organic development of the purpose of punishment was the retribution proclaimed as the sole purpose by the classical school of criminal law in the 19th century.[38] The classical school's doctrine of punishment is individualistic and formalistic, because the wrong, the individual wrong, and the degree of punishment are adapted to the individual guilt of the offender and the gravity of his act.[39] The core of punishment in this case is "an attribute of the idea of justice". It is worth noting that one of the most common arguments among those who advocate the death penalty is the millennia–old criminal law principle of justice itself, that the death penalty is necessary because it is the only punishment that is proportionate to the act committed, in the case of a serious homicide. The seemingly simple conceptualisation of justice in this case is based on a now obsolete interpretation of Aristotle's "divide-and-justice", i.e. "an eye for an eye, a life for a life".[40] What is retribution?

Reciprocation, "retribution", the "eye-for-an-eye", the "retribution" of the criminal offence, the "punishment" of the wrong, the retribution of the wrong with a similar wrong, which basically takes into account the external wrong done by the offender, the extent of the offence, and therefore, as Finkey writes in the first half of the 20th century, does not satisfy our moral conception, which sees more and higher criteria in state punishment.[41] At the same time, however, many intellectual giants of law and philosophy saw retribution as the main goal of

[33] Note: which is a rather debased line of thought that never left Machiavelli's lips
[34] See PAULER 1920; Ágnes Heller: *A szándéktól a következményig.* Budapest, Magvető, 1970. 169-189 pp.
[35] See Zoltán J. Tóth. 2004.
http://jesz.ajk.elte.hu/tothj20.html#_ftn1 (20.08.2023.)
[36]Finkey: op. cit. 24. pp.
[37] See Zoltán J. Tóth. 2004.
http://jesz.ajk.elte.hu/tothj20.html#_ftn1 (20.08.2023.)
[38] Albert IRK: *A büntetés fogalma*. In Irk Ferenc (szerk.): *Irk* Albert emlékkötet. MTA Magyar Kriminológiai Társaság, Budapest, 1981. 31-38. 31. o. „A jogi és erkölcsi normák közös eredetét az összes jogágak közül természetesen a legszemléltetőbben a büntetőjog mutatja."
[39]Irk: op. cit 40. pp.
[40] See Zoltán J. TÓTH*: Halálbüntetés: pro és kontra.* In Jogelméleti Szemle. 2003/2. n.o.. FINKEY: 61.pp
https://jesz.ajk.elte.hu/toth14.html (15.08.2023)
[41] Cf: Finkey: p. 13.

punishment: the doctrine of "*malum passionis quod infligitur ob malum actionis*", which originated with St. Augustine and was later carried on by St. Thomas and Hugo Grotius, the natural law and reason law schools of the 17th and 18th centuries, but also the 19th century and the 19th century. Kant, who, according to the absolute theory of today, believed that punishment is always retrospective, looking backwards, proportional to the crime committed in the past and aimed at just retribution:[42] *"Hat er gemordet, so muss er sterben"*, or Hegel, who also started from a just perspective, but he also accepted the relative aspect.[43] It is worth mentioning that Beccaria considered the justice of punishment as the fundamental aim of punishment,[44] but Beccaria also considered social protection and general prevention as important aims,[45] and regarded them as coexistent, equal aims which, if they are in accordance with the principles of justice, can even justify the death penalty:[46] "The death of a citizen can be considered necessary for only two reasons. The first is when the person, even deprived of his liberty, has connections and powers that are not indifferent to the security of the nation..." the second is, according to Beccaria, when the death penalty is justified if the perpetrator: "his death is the only real deterrent to deter others from committing crimes,"[47] Beccaria's view, therefore, is in line with contemporary relative punishment theory, which holds that punishment is forward-looking in its purpose.[48] Retribution, though an inseparable element, is wrong to be treated as the sole purpose of punishment, since, as Finkey writes, punishment that only punishes, only hurts, only destroys, fails to meet the standard of rightness because it lacks the deepest content, the moral element. The "barbarism" of criminal law can be broken down if the punishment, alongside the punishment,[49] is capable of purging the offender of his moral defects.[50]

Several of the "new trends" that emerged at the end of the 19th century reject retribution as the primary aim of punishment, and see punishment primarily as a preventive tool in the hands of the state.[51] The third major school, known as the "mediating school", sees retribution as a theoretical goal and social protection as a real goal, a distinction which highlights an important point: the need to distinguish between the purpose, content and form of punishment. The content of the punishment, its main characteristics and features, the purpose of the punishment, the practical purpose of the system of sanctions, the state and social tasks to be achieved by it, and finally the form of the punishment, its external manifestation. The purpose of the punishment is therefore the practical realisation of the content of the punishment.[52] According to Albert Irk, punishment is retribution in its content and prevention in its effect: it is a legal punishment containing a moral disapproval and serving the purpose of social

[42] Zoltán J. Tóth: *A halálbüntetés a XVIII-XIX. századi német filozófiai gondolkodásban*. In De iurisprudentia et iure publico – Jog- és politikatudományi folyóirat. 7. pp.
In De iurisprudentia et iure publico - Journal of Law and Political Science. Volume III 2009/3-4. http://dieip.hu/wp-content/uploads/2009-3-08.pdf (15.08.2023)
http://dieip.hu/wp-content/uploads/2009-3-08.pdf (15.08.2023) Also see: Op.cit: Finkey., 253. pp.
[43] Zoltán J. Tóth: 2009. 7. pp.
[44] Beccaria, Cesare *A bűntett és büntetés, Révai Leó Kiadása*, Budapest, 1887. pp. 74-75.
[45] Ibid.
[46] Zoltán J. Tóth: 2003.
https://jesz.ajk.elte.hu/toth14.html (15/08/2023)
[47] Beccaria, Cesare op. cit. 47 and 111. pp.
[48] Zoltán J. TÓTH:. 2009. p. 2. http://dieip.hu/wp-content/uploads/2009-3-08.pdf (2023.08.15.)
[49] The malum, or punishment, in Finkey's interpretation of the correct moral conception of punishment is psychological punishment, i.e. the exertion of psychological and psychic influence on the offender to make him feel the disapproval of society and the inevitability of retribution. See Finkey, ibid.
[50] CF: Finkey op. cit: 15. pp.
[51] The study does not go into detail on the different schools of criminal law. See Zoltán J. Tóth 2003 https://jesz.ajk.elte.hu/toth14.html (15/08/2023)
[52] Finkey: op. cit. 12. pp.

protection.[53] According to Ferenc Finkey, the general aim of all forms of punishment is deterrence, satisfaction of the state and the victim, education and moral reinforcement.[54]

III. The pre-state period, revenge

Community life, even in its rudimentary form as it existed before the state, has rules which must be accepted and obeyed by its inhabitants. It is the common interest that guarantees predictability and security. Jean Pinatel[55] distinguished between two major categories of conflict: intra-community and intercommunity conflicts.

In a communist society, rules were set by past experience, community traditions and rituals, and became unwritten norms over time. Breaking these rules could not go unpunished and would have been dangerous for all members of the community. Although written norms did not exist at that time, interdependence generated a strict set of rules, the breaking of which could have had serious consequences.

Within families, the use of severe sanctions was not common, since blood or perceived blood ties prevented in most cases the commission of more serious offences against the community, so in the case of guilt the aim was not to eliminate the guilty party, but merely to express that the unwritten rules of the community were binding for all, and that their violation would have inevitable consequences.

Going beyond the narrowest form of community, tribes are now faced with a wider range of sanctions, primarily aimed at protecting the safety of the tribe. Thus, cruel punishment was meted out to those who betrayed their own tribe, established relations with hostile tribes in their own interests, and caused harm to their community. In the absence of state justice, particularly in the case of inter-tribal conflicts, the role of ensuring that members, learning from the punishment of others, did not commit a crime that could later endanger the existence of the tribe as a whole was perhaps even more important.

According to Pinatel's classification, the other form of conflict in this period was intercommunal conflict. It can be argued that one of the most significant challenges was the management of these conflicts, as there was no authority independent of the tribes and above them to do justice in these cases. Csaba Kabódi and Barna Mezey, in their study on the history of punishment,[56] point out that during this period, especially in the case of inter-clan conflicts, the instinctive reaction of contemporary society, revenge, was meant to replace the presence of the punitive power. Vengeance was just and compulsory, involving the whole of the offended clan, and its guarantee nature ensured that retaliation was inevitable. The settlement of disputes between communities usually entailed many victims, and not infrequently led to the total destruction of a community. Revenge was generated by the community's sense of justice, respect for tradition, resentment and desire for justice. Private revenge, and later vendettas, were unfettered and cruel, and the establishment of a central, predictable criminal power was therefore more in the interests of the perpetrator than the victim.[57] It is perhaps not an exaggeration to say that it was also the ignition point for the emergence of a new type of social order and the creation of state criminal law.

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[53] Irk: op. cit. 45. pp.
[54] Finkey: op. cit. 16 and 17. pp.
[55]Pinatel, Jean.: A büntetésvégrehajtás válsága In: Horváth Tibor: Büntetésvégrehajtási rendszerek – büntetésvégrehajtási jog, Rendőrtiszti Főiskola, Budapest, 1980. pp. 123-146.
[56] Csaba KABÓDI - Barna MEZEY*: A büntetés históriája* In.: Módszertani füzetek 1985/2. szám, Szikra Lapnyomda Budapest, 1985. 46-57. pp.
[57] Ferenc NAGY: *Régi és új tendenciák a büntetőjogban és a büntetőjog-tudományban* Akadémia Kiadó Budapest, 2013 13-14.pp.

IV. The death penalty in ancient times

It was in everyone's common interest to end the blood feud, to build up the penal power and to create a uniform system of punishment. Tribal warfare was not only a human cost, but also a heavy economic one. It was therefore necessary to create a system of punishment that was not so disproportionate to the crime committed. It was the task of the state and the law to devise such a system, but this was not a simple task: the methods had to be adapted to the historically based conflict management practices of the society, which were very different from those of today: it was important that the new system should be morally acceptable to a wider and wider group of people, since the systems with which the nation could identify would become its own. The challenge for the leaders and philosophers of the time was to make a society socialised on blood revenge accept a system of centralised justice. One obvious solution to this problem was the introduction of the death penalty, whereby the offence was punished with the same consequences as blood vengeance, and it was not uncommon for the execution to be authorised by the victim and merely supervised by the state.

The development of European penal systems was marked initially by the emergence of the principle of the tally, and later by the principle of compensation. Their relatively rapid adoption was due to the fact that both principles were based on previous practice, were not very far removed from the norm and were therefore easier to achieve social acceptance.

The principle of the *Talio* was created as an alternative to the blood revenge between tribes and nations, which is no longer aimed at the whole community, but is limited to the perpetrator. In its application, the perpetrator suffered the same injury as the victim, thus creating a semblance of justice, and the people quickly and easily accepted this form of punishment. Moses III. Exodus 21-27: *an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot, a burn for a burn, a wound for a wound, a bruise for a bruise. If a man hits his male or female slave in the eye and the eye is blinded, he must let the slave go free to compensate for the eye. And if a man knocks out the tooth of his male or female slave, he must let the slave go free to compensate for the tooth.*

In 1755 BC, Hamurapi's Law 196 states: "If a free person puts out the eye of another free person, that person's eye shall be put out."[58]

Although the principle of the Talio was easily accepted, in practice it had several drawbacks: it could not take into account the history of the offence, the motive, the identity of the offender and other circumstances relevant to the offence. Moreover, it could only be applied to offences against natural persons, not to offences against society. The State, in its power, initially abolished the use of private revenge and later the use of the talio. By the time of the Laws of the XII Tables, the institution of private vengeance had been completely abolished and the *talio* was beginning to be superseded, giving way to the administration of justice by property.[59]

Compositio is a specific form of bearing individual responsibility, the essence of which is that revenge no longer takes the form of corporal punishment, but of material compensation. Its origin is presumably derived from compensation based on an agreement between the offending and the injured party. The Latin term reflects the essence of this new legal instrument: compensation. Punishment, used primarily in the area of crimes against the person, was now centred around economic interests, and it was recognised that compensation in crops, animals, valuables or even persons was more beneficial to both the individual and society than simple

[58] Ferenc Nagy, in Old and New Trends in Criminal Law and Criminal Jurisprudence, points out that the similarity between Hammurabi's Law and the Law of Moses is probably not accidental, because research shows that the Jews took their laws from the Babylonians, and thus in many cases they are identical.
[59] Imre MOLNÁR - Éva JAKAB: *Római jog*, 8th átdolgozott kiadás, Szeged, Diligens Bt, 2019., 328. pp.

revenge (for example, when the family of the victim received another young person of vigour in exchange for the murder of a vigorous youth). *Compositio* shows the progressive thinking of the time, and is a precursor to the development of later state criminal law.[60]

In Roman law, punishment was originally a form of satisfaction, and in the case of damage or injury, if the victim consented, it provided for the payment of predetermined compensation, which could be paid in money or in kind (e.g. in goods). This concept was carried forward in the compositio procedure for penalties. The possibility and the level of the penalties imposed were significantly influenced by the class of the offended party, and the penalties imposed on different social classes were not equal. Its guarantee was in line with the social expectations of the time: in the event of non-payment, the victim acquired the right to blood revenge, and in areas where state criminal power was already institutionalised, the most severe punishments – corporal mutilation, capital punishment – were imposed on those who did not fulfil the conditions imposed by the compositio.

As the number of goods owned increased, the composition became more uniform, more predictable, and the average rate of compensation accepted became more and more uniform. Thus the generally accepted uniform tariffs for the different punishment genders emerged, marking a major milestone in the history of punishment.

In the case of *talio* and *compensatio*, the aim of the punishment is to compensate the victim for the harm he has suffered, but the compensation is no longer achieved by the victim himself, but is provided by the state. This also means that these punishments have been applied primarily to crimes against the person, among free citizens. The fact that, over time, the composition of what was originally a purely citizen-citizen relationship has been extended to include a share for the sovereign, which is no longer intended to compensate but to punish. Subsequently, the sexes of the punishments imposed and used by the state for its own defence against crimes against the state were developed, and the purpose of these punishments was explicitly to deter as well as to avenge. Accordingly, in these cases, severe punishments such as the death penalty or mutilation were imposed.

Starting from the most ancient form of punishment, blood revenge, with the practical application of *talio* and then *compositio*, justice was transformed, its initial private character disappeared and was replaced by public justice.

Social transformation has greatly contributed to the generalisation of the death penalty, making it an everyday sanction. The former conflicts between communities have been replaced by conflicts between groups and individuals, based on their different interests. The property interests of the individual and those of the community were often in conflict, and the state was called upon to protect the interests of the community in such cases. What was needed was a radical instrument to facilitate the subordination of the free members of the community and to assert their disenfranchisement. The slaves and serfs had little to lose: with no property or honour, and physical abuse being part of their daily life, the threat of resistance could only be broken by the threat of taking their lives.

The hectic social life of the time also contributed to the common practice of capital punishment: slave revolts, rebellions, wars for the throne often created situations that called for decisive action by the state, a swift crackdown on those who defied the authorities. It was obvious and sufficiently deterrent in such cases to punish any dissenters with immediate death.

[60] The book by Imre Molnár - Éva Jakab points out that the state already in this period took jurisdiction over the administration of justice for certain acts. In such cases, the state initiated or conducted retaliatory proceedings through special criminal courts.

IV.1. Greek city states

By this time, in the Greek city-states, the above-mentioned transitions in the development of punishment had taken place, with the presence of talio and compensation in the punishment systems, and the role of private justice being increasingly dominated by public justice. The limitation of private revenge and the role of the state in this process were the first in history to raise the age-old question to which philosophers, jurists and criminal lawyers have tried in different ways to find the best answer in different ages: what is the purpose of punishment and what level of punishment is necessary to achieve it?

In the case of the Greek justice system, thinking about ideal punishment was far from coinciding with thinking about law: it was strongly influenced by the moral and religious norms of the time. "Even the most advanced ancient Greek society, that of Athens, had not reached the point of a law that was essentially distinct from religion and morality."[61] The great thinkers of the time, Plato and Aristotle, dealt with punishment not as a legal question, but primarily as a moral, ethical question, identifying the evil inherent in crime with moral evil.

The Greek city-states developed a well-developed state life: "The Athenian slave-owners boasted proudly that in their country, instead of a system of certain bodies or privileged classes or persons based on violence, the law ruled."[62] At first, law was merely a means of sanctioning national customs, and later, as social life and class conflicts became more acute, it was transformed into legislation in its own right.

It should be noted here that legitimation by the legal system – i.e. the transformation of custom into customary law – can take several forms, either explicit or implicit. These patterns of social behaviour are not explicitly adopted by the state, but are unquestioningly followed by individuals, of whom the state is one. However, the fact that individuals are convinced of the binding nature of a long-established custom does not lead to the conclusion that the state apparatus, which is supposed to be responsible for protecting rights, should enforce it. The enforcement of the written law is the sole task of the executive. It follows that they have no jurisdiction to determine, at their (individual) discretion, which "customs" they enforce and which they do not. That is, the executive can only enforce the "right" of those individuals whose 'right' is guaranteed in positive written norms. It follows that in order for customs to have legal binding force, they must be incorporated into the legal system, thus gaining legitimate enforcement authority.[63] Nevertheless, there is no doubt that customary law existed long before the creation of nations and states. For this reason, no distinction was initially made between the substantive and formal sources of law, which apply to individuals (small groups) and society (as a sub-set).[64] Thus, according to the later division, the material source of law is considered to be individual customs and traditions , while the formal source of law is considered to be laws, regulations and all instruments that regulate behaviour at some level, which are expressed in a positive, formalised way.

However, in the case of substantive sources of law, we must distinguish between customs *(Sitten),* which determine the behaviour of a large group of people in society, and traditions *(Bräuche),* which influence the behaviour of small groups – families, communities. In the case of the former *(Sitten),* the fact that a fixed practice has developed in a country is decisive. For example, a certain type of contract is regularly used, or a certain *terminus*

[61] György ANTALFFY: *Állam és alkotmány az athéni demokráciában*. Közgazdasági és jogi könyvkiadó, Budapest, 1962.158. pp.
[62] Ibid.:157. pp.
[63] Cf. Hans von NAWISKY: *General legal doctrine as a system of basic legal concepts.* Einsiedeln-Cologne, Verlagsanstalt Benigner & Co. Ag., 1941. 30.pp.
[64] HOLLAND: op. cit. 57-58. pp.

technicus is regularly used in wills. In such cases, one can speak of custom, but there is no state enforcement. However, in order for a custom to become a "customary right", the custom must satisfy two further specific requirements. Ad1: the established *"custom"* must be maintained over a long period of time *(longa consuetudo, diuturna consuetudo);* and Ad2: there must also be an unconditional binding conviction of society *(opinio necessitatis).*[65]

It was then that the conflict between the written and unwritten laws, based on the authority of morality and religion, which could not be challenged by the state, emerged. However, the fact that there was agreement between the two directions on fundamental principles made it possible for both to be enforced in parallel.

It was at this time that the two trends that have determined the development of penal theories to this day were outlined. The relative theory of punishment is concerned with preventing future crimes and sees punishment as a deterrent, while the absolute theory sees punishment as a means of retribution and restoration of the social order that has been disrupted by crime, while the absolute theory sees it as a means of justice.

IV.2. Capital punishment in ancient Rome

Generally speaking, the legal thinking of ancient Rome was permeated by a system of ideas developed by the Greeks. "Because of their practical approach to life, the Romans did not cultivate legal theory to nearly the same degree as they developed the legal norms (both in content and form) that governed social relations. (...) As a result, and because these ideas nowhere else permeated the law as organically as in Rome, there obviously developed an idea of the state and the law which was deeply rooted in practical life and closely connected with the life of the state and the law. Accordingly, certain legal views and ideas may have developed, which we can find in our specific law, their laws and their legal institutions. Our conclusion can only be supported by the fact that Roman political legal thought contains many of the tenets of Greek philosophy, since the Romans transplanted the doctrines that best suited their own ideas from the intellectual heritage of Greek culture..."[66]

Roman criminal law was originally based on the principles of *talio* and *compositio*, as in Greek. The treatment of personal and property claims was a private matter for the victim and his family, who could decide whether to take revenge or accept satisfaction, the state being involved only in the transaction in so far as it fixed the amount of reparation and immediately retained a share of it. The principle of the Talio was later limited to mutilation by the Laws of

[65] NAWISKY: op. cit. 28. pp See Oskar BÜLOW: *Heitere und ernste Betrachtungen über die Rechtswissenschaft,* Lepzig, 1901, 72-73. pp.: "Noch jetzt steht jene ganz dem Geiste der Romantik entstiegen Gewohnheitsrechtstheorie ausrecht da, obwohl es an vereinzelten Besuchen, sie ins Wanten zu ringen nicht gesehlt hat und die praktischen Juristen nie recht gemusst haben was mit ihr anzusingen und auszurichten fei, auch die Gelehrten Felber über das Wesen des Gewohnheitsrecht durchaus nicht ins Klare kommen konnten. Gehen doch ihre Umsichten über die Hauptpunkte und die Durchführbarkeit dieser Duellen Theorie, namentlich über die Frage, wie die Entstehung einer gewohnheitsrechtlichen Hegel in Wirklichkeit vor sich gehe, ob sie die Puchta lehrt, schon doch die Volksüberzeugung, allein entstehe und doch gewohnheitsmäßige Anwendung bloß kundgegeben werde oder ob sie erst durch die letztere im Bunde mit jener Überzeugung zur Entstehung gelange, – wie die »Existenz« [the term Eristenz is used] eines Gewohnheitsrechts beweisbar sei, wie es sich mit dem Erfordernis und dem Beweise *der opinio necessitas* , der diuturna consuetudo, dem Reservat der, Rationalität verhalte Jets sogar noch viel weiter auseinander, als es schon beim Auskommen dieser Theorie der Fall gewesen ist, so das, die Lehre vom Gewohnheitsrecht nunmehr verworrener und dunkler als je zuvor ist und noch lebhafter die Erinnerung an jenen wunderbaren, die Gedanken wirrenden Nachtgesang wachruft." He then goes on to say that it is precisely this theoretical obscurity that makes the theory of customary law so attractive to research.

[66] György Antalffy: *Állam és demokrácia*. Közgazdasági és Jogi Könyvkiadó, Budapest, 1967. 64. pp.

the XII Tables. In this law, the private and public elements of punishment were still mixed, and the law mentions eight different types of punishment.[67]

By the time of the Republic, the penal system had clearly become a public law system. Two categories of unlawful acts emerged: A public crime was an act committed against the state or the authority, or against the universal interests of the ruling class. It also included the most serious acts against a private individual, such as murder or assault. The punishments for common crimes were as severe as those for misdemeanours, such as capital punishment, severe corporal punishment, forced labour, exile or deprivation of the exercise of civil rights. However, the degree of the offence was not the same for members of different social classes, with much harsher punishments for those in lower social classes. Torts against private interests were called delictum, and included theft, trespass, tort, damage to property, etc. These cases were decided in private lawsuits and prosecutions were also civil.

By the time of the Principate, and especially during the imperial period, the gender of punishment and the way it was carried out had changed considerably. In Rome, from a city-states to an empire over time, the purpose of punishment was no longer to redress the balance and compensate the injured party, but to become a means of exercising power, with the power of intimidation to deter subsequent offending. The sacral character of punishment has disappeared, and its justification is retribution and deterrence.

The textbook on criminal law, edited by Csaba Kabódi - József Lőrincz - Barna Mezey, provides a vivid example of the spectacular change in the imposition and execution of punishment in ancient Rome over time: In Republican Rome, the death penalty was carried out by the lictors, the execution was public, it was carried out with a baton, later with a sword, and it was always accompanied by a sublime mourning, worthy of a sacrifice to propitiate the gods. In the imperial period, the carnifex (the "butcher") would have executed the guilty in a closed place with a noose, or it could have been a "food" for wild animals in circus games.[68]

V. Middle Ages

In terms of the history of punishment, the early Middle Ages did not bring significant changes. Although the process of public justice in feudal states declined somewhat from that of the Roman Empire, a new ideology, Christianity, had a significant impact on the criminal justice system in the following centuries. The Church sought to reduce blood vengeance and to spread state and ecclesiastical punishment. The main punishments did not change much, the death penalty and various corporal punishments remained, but penitential prisons also appeared in the sanctioning palette of ecclesiastical justice at this time. Initially, the Church sought to reduce the death penalty to a single sentence, but later, as the power of the clergy grew, it increasingly accepted the use of the most severe penalty in order to protect its own ends.[69]

One of the most important features of medieval law with regard to the death penalty was that, as in antiquity, it was regarded as an ordinary punishment (*poena ordinaria*). In this period, it could be imposed for most crimes, not just those against life or against the state; everywhere in Europe, for example, fornication, slander and even false accusations were punishable by death.[70]

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[67] Tibor Horváth: *A büntetési elméletek fejlődésének vázlata.* Akadémia kiadó, Budapest, 1981. 29. pp.
[68] Csaba Kabódi - József Lőrincz - Barna Mezey: *Büntetéstani alapfogalmak*, Rejtjel Kiadó, Budapest, 2005. 29.pp.
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[69] Csaba KABÓDI - Barna MEZEY: *A halálbüntetés diadalútja az ókorban és a középkorban* In.: Módszertani füzetek Szikra Lapnyomda Budapest 1985/3. 44. pp.
[70] Ibid: Ages stresses that, in relation to feudalism, the general spread of cruel forms of capital punishment is characteristic only of the decaying period of the mode of production, of the widening of the absolute monarchy. It was also a typical sanction for a range of crimes that included attacks against feudal rule and crimes of iniquity

The first characteristic we encounter when looking at the punitive practices of the Middle Ages is the cruel way in which executions were carried out. It is incomprehensible and incomprehensible to modern eyes why it was necessary not only to carry out the sentence, but also to use a variety of torture methods to increase the suffering of the condemned and deprive him of his remaining dignity. However, a deeper examination of the belief system of the time and the importance attached to life as a value makes the contemporary practice of carrying out punishment more comprehensible.

First of all, it appears that at this time the most severe punishment was not only applied to the most serious cases, but to a wide range of offences. In Europe, in addition to manslaughter, capital punishment was also given for poisoning, robbery, highway robbery, high treason, treason, treasonable treason, infidelity, rape, kidnapping, arson, perjury, perjury, false accusation, forgery and wilful failure to pay taxes.[71] However, it should be seen that at a time when the average age was only 35-40 years due to deadly epidemics and diseases, and more than half of children did not live to adulthood, life as a value did not mean much. The picture is further clouded by the religious attitude of the time, which saw death as a salvation that would bring eternal happiness after a miserable life on earth, in the form of a new afterlife free from want. Seen in this way, death is not in fact a punishment, but a redemption for the sinner.

At this point we must also mention the cruel methods of execution. The Church teaches that only through suffering can one be cleansed from sins committed in life, so that in the case of greater sins the suffering must be greater for the damned soul to enter heaven. The cruelty of the execution thus in fact helped the offender to be forgiven and to have the possibility of going to heaven.

The late Middle Ages and the early modern period saw the exclusive rule of the state and the complete abolition of private revenge. The diversity of thinking on the purpose of punishment, which began in antiquity, was then everywhere aimed at deterring the offender and making it impossible for him to repeat the crime.

However, as an indirect objective, general prevention through public executions has also clearly emerged. The publicity of executions was of particular importance in this era, and Zoltán J. Tóth identifies three related aims:[72] Firstly, the deterrent effect mentioned above: it was believed to be truly effective when people not only heard about the execution, but experienced its horrors with their own eyes. The author also points out that the death penalty, when used too often, can have the opposite effect: it becomes a habitual, everyday part of life, rather than a deterrent, and its deterrent effect is reduced. Secondly, the publicity of the execution legitimised the sentence, thus making it part of the justice system. Thirdly, public executions provided society with a guarantee that justice had been done and that the offender had received the punishment he deserved.

Another characteristic of absolute theories is that they focus on the crime committed and not on the perpetrator. By ignoring the person of the perpetrator, the judgement of intentionality and recklessness, as well as motive and purpose, the character of the perpetrator, his state of mind, or other mitigating circumstances that might arise, were ignored by the judiciary.[73]

The period was also characterised by legal uncertainty, as there was no uniform law, and each landlord was free to create his own specific regulations for his own territory. This

(murder, robbery, pillage, arson, serious cases of violence). Apart from these, rebellion against exploitation (refusal to work, desertion, defying orders, etc.) was rarely punishable by death. The landlord did not want to lose his serfs, the working hands who tilled his land.

[71] Zoltán J. Tóth: A halálbüntetés szabályozása a középkorban, különös tekintettel a Német-Római Birodalomra – Jogtörténeti szemle 2006/4. issue, 71. pp.

[72] Ibid: 70.pp.

[73] Ibid: 68-75 pp.: points out two exceptions: recidivism was always punished more severely, and the social status and personal status of the offender influenced the nature of the criminal responsibility.

often created a situation where an act was legal somewhere but punishable a few kilometres away. This was further exacerbated by judicial arbitrariness, given that judges were employed by the lord and therefore often deviated from the rules if his interests required a different ruling.

During this period, the collection of facts and evidence relating to criminal cases was the least objective of criminal proceedings. In purely formal proceedings, superstition and religious tradition determined the evidence. According to their belief, the perpetrators of the crimes had also sinned against God, and therefore God would declare Himself in the course of the defined procedures, giving a clear indication of who was guilty and who was innocent.[74] The perpetrators were subjected to so-called "judgments of God" in order to prove their guilt. This method came under attack from lawyers and philosophers of religion as early as the 12th century, yet the practice continued for a long time. Finally, Pope Innocent III banned this method in 1215, by the Fourth Council of Milan. And the predecessor of factual evidence was linked to the inquisitorial procedure, also established by this Council – but only applicable to canon law proceedings.

Pardoning was also a common practice at the time, because although it was important to send a deterrent message to society, the work done by the convicts was also needed, so some of the sentences were never actually carried out, especially for minor offences, because it was no longer in the interest of society. For more serious crimes, mercy consisted simply in allowing a more lenient execution instead of a painful or humiliating one. [75]

VI. Abolitionism, abolition of the death penalty

In the XVI.th and XVII.th centuries, the economically empowered bourgeoisie became increasingly vocal in its attack on the ideology of feudalism, and the resulting Reformation brought about significant social changes in criminal law and punishment. The bourgeoisie created its own ideology, the Enlightenment.

By promoting new ideas and exaggerating the flaws of the old system, the Enlightenment laid the foundations for the revolutionary mood that later led to the achievement of their goals. The aim of the movement was to break with the ideology of feudalism and the religion dominated by the Roman Catholic Church. They sought to shape social morality through a series of reforms, to disseminate scientific advances and ultimately to prepare for the overthrow of the feudal order and the triumph of the bourgeois revolutions. The ruthlessness and inconsistency of the criminal trials of the previous centuries provided the perfect opportunity to spread a reformist idea that would gain support among a wide section of society. One after another, the great philosophers of the time set themselves the goal of reforming the system of equality before the law, arbitrary punishment against punishment, and the former

[74] Ibid: 68-75 pp.:, he gives an example of the jurisprudence of the time relating to the death penalty: If the rope was broken during the hanging or the plank struck three times and the condemned was still alive, the execution had to be stopped and he had to be set free, because God did not want him to be executed, or if an unmarried woman offered to marry the condemned (even risking her life) and agreed to live with him, the guilty person had to be given another chance to reform.

[75] For example, instead of quartering, wheeling, or impaling, they ordered hanging; instead of "simple" but humiliating hanging, they allowed the prisoner to choose beheading; they dispensed with torture and humiliation prior to the execution of the death sentence (flogging, flogging, being dragged through the city on horseback, mutilation, branding, etc.) , and the use of dishonourable post-execution provisions (prohibition of burial of the body, hanging or other public display of the corpse, etc.). It was considered a mercy even if the person condemned to be burnt at the stake was strangled with a garrote before the stake was lit, or if the heart of the person buried alive was pierced with a spear, or if the burning at the stake, the immersion in water or the breaking of the wheel was carried out merely on the body of a person who had already been killed (hanged, beheaded) in some other way. (Zoltán J. TÓTH.: A halálbüntetés szabályozása a középkorban, különös tekintettel a Német-Római Birodalomra – Jogtörténeti szemle 2006/4, p. 70)

system in general. The time had come to reform criminal procedure, to lay down principles consistent with the aims of the movement.[76]

In the early Enlightenment, the focus of interest was on the question of the legality of punishment, which was understandable, since the denial of feudal despotism was a denial of the relationship between the new, even conceivable, civil state and its citizens. Having found a solution in the theories of the contract state, their attention turned increasingly to the definition of the purpose of punishment.[77] For the representatives of feudalism, the idea of abolishing the death penalty proved to be an excellent means of appealing to and mobilising the bourgeoisie. The movement against the death penalty began in Western Europe and was sparked by the Calas affair.[78]

It was only 2 years later that Beccaria was commissioned by the Verri brothers to write his essay *Dei delitti e delle pene* (Crime and Punishment). His work does not stop at a critique of the criminal law of the time, but also proposes solutions, putting down on paper ideas that would fundamentally determine the practice of criminal law in the following centuries and are still among its founding principles today. His ambition to make the system of punishment clear, transparent, predictable and just is clear, and he supplements his theory with concrete practical steps to achieve the goals he has outlined. One chapter of the thesis was on the death penalty and this became the basis of the abolitionist argumentation. It should be noted here that Beccaria did not completely reject the legal institution of the death penalty, but argued that it should be imposed only when the means to be applied in the public interest (specific and general prevention, i.e. deterring both the criminal and others from future offences) require it.[79] The Enlightenment's major thinkers were not united on the question of the most severe penalty, with major reformist thinkers opposing the abolitionist position: *Filangieri, Lombroso, Garofalo, Liszt* all voted in favour of maintaining the death penalty.[80]

The abolitionists portrayed the death penalty as a manifestation of tyrannical rule, immoral and useless for society. Today, after examining the statistical results, there is no consensus even among experts as to whether the deterrent effect of the death penalty can be measured at all.[81] Fear of re-offending should not be a reason for the death penalty either, because abolitionists believe that the risk of re-offending is much lower for serious crimes. They believed that the social need to punish the guilty was perfectly satisfied by a sure and severe punishment, without the need for a public and merciless execution. With regard to judicial practice, it is considered problematic that no further distinction can be made within a given penalty category, even though offenders deserve different degrees of punishment

[76] Michael Foucault (1926-1984) presents a unique but thought-provoking view on the changing nature of punishment in the era, arguing that the humanisation of punishment was merely a cover for a system of power that exercised total control and stigmatised.

[77] Csaba KABÓDI - József LŐRINCZ - Barna MEZEY: *Büntetéstani alapfogalmak.* Szerkesztette: Kabódi Csaba Lektorálta: György Vókó Budapest, Rejtjel kiadó, 2005. 32.pp.

[78] In Voltaire's Treatise on Patience on the Death of Jean Calas (1763), he describes a criminal trial in which a father, Jean Calas, is suspected of murdering his son, who is presumed to have committed suicide, and then executed in the absence of any evidence (and even though the evidence is in favour of the father), under terrible torture and with heavy sentences for his family members. Voltaire was a fierce and committed advocate of religious tolerance, defending the innocent, and it is no coincidence that at the time of the Calas affair he was living in exile in the Swiss village of Ferney. Even before the Calas affair, he was already a renowned celebrity, sensitive to social problems, but his work was mainly confined to the literary sphere, less concerned with public affairs or the personal problems of oppressed minorities. It was in this context that the Calas affair marked a turning point in Voltaire's life, to the extent that he became one of the standard-bearers of the struggle for human rights.

[79] Zoltán J. Tóth: *Halálbüntetés pro és kontra 2.* kiadás HVG Orac Lap és könyvkiadó kft. 2019. 94. pp.

[80] Csaba KABÓDI - Barna MEZEY: *Az abolicionizmus kora* In.: Módszertani füzetek 1985/4. szám, Szikra Lapnyomda Budapest.

[81] Zoltán J. Tóth in his work Death penalty pro and con presents in a separate chapter the studies conducted to prove or disprove the deterrent effect of the death penalty.

according to their personality, motives and criminal record. With regard to the purpose of punishment, abolitionists stress that the death penalty does not promote either general or specific preventive objectives.

The impact of the struggle of those opposed to the death penalty was not yet seen in the complete abolition of the penalty, but rather in the significant restriction of its use.

A significant change in the application of the legal instrument occurred in the second half of the 19th century. Some countries abolished the death penalty, such as San Marino (1848), Romania (1867), Portugal (1867), the Netherlands (1870) and Italy (1889), while in others the death penalty remained possible but was not applied by the courts. In Belgium and Finland, the head of state regularly exercised his right to pardon the penalties imposed. [82]

In those countries where the death penalty remained in force, it became an exceptional punishment, its frequency was reduced, there were disqualifying factors (the mentally ill or pregnant women could not be executed), executions were no longer carried out in public and qualified forms of execution were abolished.

Before the First World War, at the beginning of the 20th century, the number of states abolishing the death penalty continued to grow, with several cantons of Switzerland abolishing the death penalty in 1904, Norway in 1905, Uruguay in 1907 and Colombia in 1910. However, the First World War and the economic, social and political crisis that followed did not help abolitionists in their aims. In the period between the two world wars, anti-capital punishment efforts were concentrated in countries outside Europe, with the abolition of the death penalty in Argentina and two Australian states in 1922, in Dominica in 1924 and in Mexico in 1931.[83]

After the Second World War, major international scientific organisations spoke out against the death penalty and made proposals to Western countries to abolish it. In 1948, during the UN debate on the draft Declaration of Human Rights, the Soviet Union submitted a draft resolution to abolish the death penalty[84] and although this did not meet with clear support, the adopted Declaration of Human Rights included the provision that the death penalty could only be imposed by a court constitutionally empowered to do so, under a law expressly providing for it.

On 28 April 1983, the "Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty" was submitted to the members of the Council of Europe for signature in Strasbourg.[85] The treaty was signed by 12 states. Austria, Belgium, Denmark, France, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the Netherlands, Sweden and the United Kingdom. They were later followed by Greece, Iceland and Italy. The treaty entered into force when at least five signatory countries ratified it. The ratifying states were Austria, Denmark, Spain, Luxembourg and Sweden, and in the meantime France ratified on 18 February 1986.

The Protocol reads as follows: "The member States of the Council of Europe, signatories to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, considering that the developments in the various member States of the Council of Europe reflect a general trend in favour of the abolition of the death penalty, agree as follows:

Article 1: The death penalty is abolished. No one shall be condemned to death or executed.

Article 2: The State may, by law, impose the death penalty for acts committed in time of war or imminent threat of war: this penalty may be imposed only in the cases prescribed by

[82] KABÓDI-MEZEY (1985/4): op. cit. 58-59. pp.
[83] Ibid.
[84] Csaba KABÓDI - József LŐRINCZ - Barna MEZEY*: Basic Concepts of Criminal Law*, Rejtjel Kiadó, Budapest, 2005. 62. pp.
[85] Ibid.: 63. pp.

law and in accordance with the provisions of the law. The State shall transmit to the Secretary General of the Council of Europe the relevant legislation."

By 2001, all Council of Europe member states except Turkey had signed (if not yet ratified) Additional Protocol 6. The abolition of the death penalty raised the practical problem of alternative final sentences.[86] By the early 2000s, Russia and all the other European successor states of the Soviet Union had introduced life imprisonment as a final penalty. The same happened in Poland, the Czech Republic and Slovakia, as well as in Albania, Bulgaria and Romania. In Hungary, the death penalty was simply abolished, and years later, Act LXXXVII of 1998 introduced the de facto life imprisonment on 1 March 1999.

VII. Hungary

Capital punishment is not only the oldest form of punishment[87] but also one of the earliest and ongoing legal institutions. Today, nearly one-third of states still retain the possibility of the death penalty, primarily among developing nations. The "developed," Western-style countries have completely abolished it in recent decades, with the exception of the United States and Japan.[88] Capital punishment stands as the most severe form of punishment and is most often considered an extraordinary penalty, sharing common traits with life imprisonment, as at the apex of the sanction system, either one of the two penalties is typically present. Naturally, this observation also admits exceptions.[89]In Hungary, the Constitutional Court, through its decision numbered 23/1990, ruled on the unconstitutionality of the capital punishment and abolished it on the grounds, that the provisions of the Penal Code regarding the capital punishment conflict with the prohibition of limiting the essential content of the right to life and human dignity. The provisions on deprivation of life and human dignity by means of the capital punishment not only limit the essential content of the fundamental right to life and human dignity, but also allow the complete and irreparable destruction of life and human dignity, as well as the right that ensures it.[90] Prior to this, the 1978. Act IV. governed the capital punishment as the principal punishment, permitting its imposition only in exceptional cases: "The capital punishment may be imposed exceptionally and only if – considering the exceptional danger of the criminal act and the perpetrator to society, and the particularly high degree of guilt – the protection of society can only be ensured by applying this penalty."

Life imprisonment has a long tradition in Hungary – which is not a widespread phenomenon in Europe – it was provided for in the 1843 Criminal Code, the 1878 Csemegi Code, Act II of 1950, Act V of 1961, Act IV of 1978[91] and the current Penal Code. Life

[86] Zoltán J. Tóth. Tóth's summary work, Death Penalty Pro and Con (Second, updated edition, HVG-ORAC Lap és Könyvkiadó Kft., 2019), elaborates in detail and presents the position on the death penalty in the philosophical thought of each era, and in a separate chapter on contemporary theoretical debates, he elaborates the system of arguments and counter-arguments.

[87] See Zoltán J. Tóth. 2004.
http://jesz.ajk.elte.hu/tothj20.html#_ftn1 (20.08.2023.)

[88] Zoltán J. Tóth: *A halálbüntetés intézményének egyetemes és magyarországi jogtörténete*. Századvég Kiadó, 2010. 7. pp.

[89] In Portugal, the death penalty was abolished at the end of the 19th century, and shortly afterwards life imprisonment was abolished, citing its anti-human nature. See Nagy 2013. http://acta.bibl.u-szeged.hu/30666/1/juridpol_075_493-503.pdf (16.08.2023.)

[90] See: Hungarian Constitutional Court Decision number 23/1990 (X.31.)

[91] Act IV of 1961 originally omitted life imprisonment, but Decree-Law No 28 of 1971 introduced it. See Nagy 2013. http://acta.bibl.u-szeged.hu/30666/1/juridpol_075_493-503.pdf (16.08.2023)

imprisonment is essentially an alternative to the death penalty.[92] In the old Penal Code it was the latter, in the new Penal Code the former is the most severe penalty and both codes have made it or make it applicable to offenders aged 20 or over at the time of the offence. In contrast to the death penalty, apart from the specific method and means of execution[93] , life imprisonment has a wide range of forms, perhaps simply because it is the opposite of the death penalty in terms of "time", since the sentences are the longest and shortest in both cases[94] and, in the case of life imprisonment, because it is accompanied by an active subject. The current Hungarian Penal Code regulates life imprisonment as an indeterminate term of imprisonment in addition to a fixed term of imprisonment, since it lasts until the death of the sentenced person, the date of which is indeterminate.[48] In Hungary, life imprisonment is carried out in the most severe degree of imprisonment, the prison degree, and the judge may impose parole for a maximum of 25 years and a maximum of 40 years, which must last for at least 15 years and may be excluded in the case of the most serious offences provided for in Article 44 (e.g. genocide, crimes against humanity, terrorist acts). In the latter case, we can speak of life imprisonment for life, when there is no possibility of parole. Within the European democratic legal order, imprisonment is differentiated in a number of ways. Some States apply only a fixed term of imprisonment (Portugal, Spain, Norway), while others also apply life imprisonment (most European States), with different sentencing ranges, parole options or even different degrees of enforcement and their characteristics. There are even differences in the types of penalties, for example, life imprisonment in Switzerland is not a punishment but a measure, or compulsory treatment under the current Hungarian Criminal Code, which can last up to life imprisonment if necessary.[95]

The nature, introduction, maintenance or abolition of punitive gender is not only a question of criminal law, but also of legal philosophy, culture and politics[96] . According to József Földvári, for example, "the question of abolishing or maintaining the death penalty is a political question."[97] Sanctions – according to specific principles of criminal law that have become generalised – are laid down in law: *nulla poena sine lege.* The laws are made by the legislature, in accordance with the principle of the separation of powers, which is a substantive requirement of the rule of law in democratic states, and which in most cases consists of directly or indirectly elected parliaments. Parliaments may, by a majority, enact laws of any content within the framework of the Constitution and international and EU commitments.[98] In some

[92] The ACLU of Washington, in an undated article, "Replace the Death Penalty with Life Incarceration," available at aclu-wa.org and accessed on 17.09. 2021. https://deathpenalty.procon.org/questions/is-life-in-prison-without-parole-a-better-option-than-the-deathpenalty/(03.09.2023)

[93] For example: hanging, firing squad, electric chair, gas chamber, poison injection.

[94] However, it is also worth emphasising the criticism of the death penalty, which has been levelled at the "waiting period", the - often unrealistically long - time between the pronouncement of a sentence and its execution. Ferenc Nagy: *A hosszú tartamú szabadságvesztés büntetőjogi kérdéseiről rövid hazai áttekintés és nemzetközi kitekintés alapján*. In Börtönügyi Szemle, 2005, Vol. 21, No. 2, pp. 7-18.

[95] Large 2013. http://acta.bibl.u-szeged.hu/30666/1/juridpol_075_493-503.pdf (16.08.2023)

[96] Ferenc Nagy writes that the rise in crime can also be explained by a moral crisis. The media exaggerate and distort the crime picture, which increases society's fear of crime and its need for security, even at the cost of legal restrictions. This need is exploited by politics, Nagy argues, to dysfunctional effect, with the promise of security and tightening up the criminal law. See Nagy 2013. http://acta.bibl.u-szeged.hu/30666/1/juridpol_075_493-503.pdf (16.08.2023)

[97] Punishment objectives can be used to justify both the retention of the death penalty and its abolition. It is easy to cite punitive objectives that prove the unnecessary nature of the death penalty, but it is also easy to cite objectives that may justify the definition of the death penalty. For example.

[98] The study does not attempt to describe the system of separation of powers in different democratic states. The essence of separation of powers is the balance of powers, the balance of power, the balance of power so that no one can gain "over-power", which can have, in addition to the Constitution and international, EU commitments, many and varied guarantees, such as the Constitutional Court, the Head of State, the institution of no-confidence motions, etc.

cases, the constitution falls outside the scope of the factors that keep legislative power within limits, since, in the case of Hungary, for example, the Fundamental Law can be amended by a sufficient parliamentary majority in a quasi-legislative procedure, in constitutional terms, a flexible constitution. The picture is further complicated by the fact that, in many cases, members of parliament are members of political parties: in Hungary, for example, 106 of the 199 seats are allocated from individual constituencies, where voters can vote for specific individuals, and 93 seats are allocated from party lists, where it is possible to vote for parties, and the political parties determine the candidates on the list. Thus, for example, in the Hungarian Parliament, there are few individuals but rather parties, not to mention the "factional discipline", which in short means that a Member of Parliament subordinates his or her own convictions and interests, or those of those he or she represents, to those of his or her faction (or, in practice, his or her party). In democratic states, including Hungary, the principle of the free mandate and the institution of immunity apply to members of parliament, which means that they cannot be recalled and, with certain exceptions, cannot be held accountable (including for their electoral promises). The "worst" that can happen is that they are not elected for the next term, which is a challenge in systems such as Hungary because, as already mentioned, MPs are mostly members of a relatively popular political party and voter engagement is mostly with the party rather than the MP.[99] Where the legislature includes the death penalty or life imprisonment in the sexes or abolishes it – *de lege lata* there is no room for debate as to its legality. The system of penalties, with its aims and its gender, is created by the state[100] and the theoretical and practical purpose and objectives of the state can be influenced by the electorate. The latter deduction from a constitutional law perspective may seem inappropriate here, but it is also the point that the paper wishes to make that, while there is no discussion of the nature of the different genders of punishment, the purpose of punishment and the means of achieving them, there is already a strong presence of the issue of moral responsibility potentially affecting criminal law in relation to those who elect decision makers, and to the elected themselves, collectively and individually.

[99] See: Zsolt ENYEDI - András KÖRÖSÉNYI: *Pártok és pártrendszerek*. Budapest, Osiris kiadó, 2001.
[100] Finkey: op. cit. 253. pp.

VII.1. Hungarian criminal codes between 1961 and 2023

In the past half-century, the Hungarian legal system, sometimes continuous and at other times redefined, had a very similar, almost identical purpose for punishment. The 1961 Act V and the 1978 Act IV declare in determining the purpose of punishment that punishment, as a legally defined legal disadvantage, aims to protect society and serves specific and general deterrence. The current Penal Code, while not explicitly in the normative text, addresses in the justification that punishment, as a legally defined disadvantage, and similarly to its predecessors, precisely establishes the functions of societal protection, specific, and general deterrence in almost verbatim accuracy in section 78 §: *"The purpose of punishment is to prevent the perpetrator as well as others from committing a crime, in the interest of protecting society."* The primary objective, therefore, is the protection of society, a goal which the realisation of two additional normative (sub)objectives serves: specific and general deterrence.

The sanction must be imposed in such a way that the offender refrains from committing further criminal acts in the future. Moreover, it should also convey a message to the whole society, especially potential offenders, that they should refrain from committing punishable acts, as not only the imposition of punishment but also the execution of proportionate punishment appears as a realistic outcome. Specific deterrence can be realized in three ways. The first and most ideal is rehabilitation, meaning the moral re-education of the offender and their reintegration into society. This is a corrective and educative process that, in the best-case scenario, positively influences the offender's personality. They recognize the wrongfulness of their actions, feel remorse and condemnation for them, and transform into a law-abiding citizen. The second, less ideal but still in line with the goal of societal protection, is deterrence. In this method, the offender doesn't undergo an internal change, doesn't necessarily perceive their actions as morally wrong. However, the fear of the sanction still deters them from committing further crimes.[101] The third – in order of the ideal realization methods – is rendering the offender harmless, which, in the case of the capital punishment, signifies the most drastic form: physical annihilation. In the case of life imprisonment, it involves the isolation from society.[102]

Three methods can also be listed in relation to the achievement of general prevention. Firstly, the prospect of punishment, i.e. the threat of punishment, secondly, the actual imposition of punishment and thirdly, the actual execution of the punishment imposed. All three steps can be traced back to "deterrence", by which general prevention is similar to the second way in which specific prevention is implemented.[103] Two additional goals of punishment, not explicitly mentioned in criminal codes but worth noting in this context, are retribution – meaning retaliation, and restitution – the restoration of the social order disrupted by the criminal act and the application of principles of justice for the victims.

[101] Zoltán J. Tóth 2003
https://jesz.ajk.elte.hu/toth14.html (15.08.2023)
[102] IRK: op. cit. 40. pp.
[103] Zoltán J. Tóth 2003
https://jesz.ajk.elte.hu/toth14.html (15.08.2023)

VIII. The capital punishment and life imprisonment

Of the three forms of special prevention, the first two can automatically be rejected when talking about the death penalty, since the resocialisation of the dead and the creation of a future "criminal barrier" to deter the commission of criminal offences cannot be understood. In the case of capital punishment, we come straight to the third form of special prevention, i.e. the rendering harmless of the perpetrator, and its most serious form, physical destruction, the method of which may raise further moral dilemmas.[104] For this reason, those in favour of the death penalty reject the possibility that the most serious crimes can be resocialised at all.[105] On the contrary, the position of those who oppose the death penalty is that it can and should be based on the punitive objectives set out in the penal codes,[106] which draws attention to the reference to the importance of the decision-makers and their choice, as discussed in the previous chapter of this study. The situation is similar for the variant of life imprisonment where there is no possibility of parole or pardon. In this case, too, the only specific form of prevention that can be considered is that of rendering the offender harmless.

What is the more moral punishment? It is either debatable whether to opt for the death penalty – which, contrary to popular opinion, is more costly in the USA, for example,[107] than life imprisonment[108] – or to argue in favour of a potentially fundamental rights – violating method of execution, potentially violating fundamental rights, imprisoning the offender for life with no hope of release, but with the possibility of escape at any time – in the words of József Pálinkás, condemning the offender to a "prolonged, but not nearly as humane execution". Although both death penalty advocates and abolitionists exclude resocialisation in the case of the most severe penalty[109] for the latter, life imprisonment – it should be noted that the current Hungarian legislation may differ. In Hungary, the current Criminal Code distinguishes between life imprisonment, which is subject to parole at the earliest after 25 years and at the latest after 40 years, and life imprisonment, which is not subject to parole. However, even actual life imprisonment is not "actual" in its entirety, since after 40 years there is a mandatory pardon procedure which may allow release – on parole. On this basis, in Hungary, even in the case of the most severe punishment, actual life imprisonment, special preventive measures can be applied, since there is hope of release, and this may also eliminate the popular argument against life imprisonment, namely that in systems where this punishment is at the top of the sanction system, the prisoner can do anything, and in the enforcement institution can kill anyone, because no more severe punishment can be imposed.[110]

The other sub-goal of protecting society, in addition to specific prevention, is general prevention, i.e. to ensure that the imposition of a penalty also deters other members of society

[104] The study does not go into detail on the methods of execution of the death penalty, given the limitations of the provisions.
[105] CF: Finkey:
[106] Zoltán J. Tóth 2003
https://jesz.ajk.elte.hu/toth14.html (15.08.2023)
[107] See: https://deathpenalty.procon.org/questions/is-life-in-prison-without-parole-a-better-option-than-the-deathpenalty/ (03.09.2023)
[108] It should be made clear that human life cannot be weighed in economic terms, even though this type of argument is constantly present in the literature on the death penalty. See ZOLTÁN J. TÓTH. 2003 https://jesz.ajk.elte.hu/toth14.html (15.08.2023). It should also be noted that the type of argument that sees the tax-funded punishment as a means of social self-defence cannot be rejected. Just as a man pays for his safety equipment, society pays for his safety.
[109] Zoltán J. Tóth. 2003 https://jesz.ajk.elte.hu/toth14.html 15.08.2023)
[110] The most that can be done in such a case is to take measures within the institution of corrections to make the sentence imposed relatively more severe, certainly more severe.

from committing offences. Finkey established in the first half of the 20th century that general prevention is the right goal and that it has an undeniable deterrent effect. However, he also pointed out the danger of overestimating the value of general prevention, since if prevention is the only aim, the idea of Feuerbach's theory of psychological coercion, the principle of deterrence, applies. If the sole aim of punishment were to deter as many people as possible from committing offences, there would be a real danger of introducing ever more severe and cruel forms of punishment and methods of enforcement.[111] What is worth noting about deterrence is that it already rules out a significant spectrum of offending, which is none other than offences committed in a state of reduced consciousness[112] (sudden start, high stress, under the influence of alcohol or drugs, mental illness, etc.). In such cases, the offender's state of consciousness is reduced, he is temporarily unable to control his emotions and he cannot fully control his behaviour. When it comes to sudden impulse, it is of the utmost importance to understand the meaning of the term "sudden", which refers to the fact that the offender reacts immediately to an external stimulus by an impulsive act, so that the behaviour is spontaneous and impulsive and the possibility of prior reflection and consideration of the potential consequences is excluded.[113] In the criminal codes of the past, which included the death penalty, it was regulated as the most severe form of punishment, thus overtaking life imprisonment in terms of severity.[114]

It would therefore seem logical to reason that the death penalty should certainly have a greater deterrent effect. Conversely, Beccaria argues that a smaller but unavoidable sentence has a greater deterrent effect than a larger but potentially avoidable sentence. According to Albert Camus, the deterrent effect is a priori only on the timid, those who would not commit an act punishable by death anyway.[115] Finkey argues that deterrence is unnecessary against the intelligent and morally superior, and that the threat of the most severe punishment is totally ineffective and futile against the criminal or "professional" offender.[116] The *argumentum a minore ad maius*, and those who are committed to the crime and are not deterred by less severe punishment will not be deterred by much more severe punishment. And this argument can be extended to a wide spectrum of cases, to put it simply: someone who wants to commit a serious act, potentially punishable by death, with premeditation and taking into account the possibilities, is likely to attempt it.[117]

[111] Finkey: op. cit. 2. pp.
[112] A reason for optimism is that the Hungarian Penal Code presents the crime of manslaughter committed in a violent agitation as a privileged case of homicide in a separate criminal act.
[113] Zoltán J. TÓTH: 2003
https://jesz.ajk.elte.hu/toth14.html (15.08.2023)
[114] This position is also controversial, with József Pálinkás, for example, saying that "life imprisonment is nothing more than a time-delayed execution, only not nearly as humane".
[115] Camus, Albert: *Reflections on the death penalty*. In *On the death penalty*. Medvetánc füzetek, Magvető Könyvkiadó, Budapest, 1990, pp. 7-74.
[116] Finkey: op. cit. 18. pp.
[117] Zoltán J. Tóth. 2003
https://jesz.ajk.elte.hu/toth14.html (15.08.2023)

Conclusions

The study has shown the close relationship between law – especially criminal law – and morality, and its common origin. From this, the aim of punishment, and then its relevance to the specific class of punishment, was explored. It can be seen that, like the law as a whole, the class of punishment and the objectives pursued by its implementation have a customary origin, which has evolved from the customs of the community and is thus closely linked to morality, which is the set of customs and rules accepted by the community.[118] In ethics, there are theories that say that the motive[119] of action is determinative, while there are moral philosophies that say that its consequence is determinative. Deontological ethics (intentional ethics) states that the right (to be followed) decision in ethics is determined by the intention of the individual acting, while another (consequentialist) school of thought[120] states that the rightness of an action is not determined by the intention of the individual acting, but by the result (consequence) of his action. The primary function of a legal norm is to impose certain requirements on individuals and, except in certain passages of criminal law, it does not generally address the intentions or motives of individuals. It would be wrong, however, to say that ethics is concerned only with the individual and his or her intrinsic integrity, while law is concerned only with the moments that materialise in the world, since ethics must take account of the consequences of actions when judging the act, and thus cannot analyse the ethical obligations of man without taking account of his or her obligations to society or his or her role in society.[121] Furthermore, ethics is not only about what actions people do, but also about the type (kind) of people who do them.[122] However, *George Whitecross Paton* argues that it would be wrong to limit such an analysis to the *"external"* factors of law alone, to the exclusion, explicitly or implicitly, of the importance of intention, motive and the ends people seek to achieve. The argue that law is more concerned with the social consequences of actions than with their impact on the personality of the person who acts. Even when law bases responsibility on intent, it tends to infer intent from conduct and to look at the problem from a somewhat outside perspective. In developing the norms of law, one should not try to impose the pursuit of the "greater good" as such a behaviour, but 'only' always balance the alternatives caused by obedience – thus by the benefits to be secured (positive legal consequence) and the mere means of coercion (negative legal consequence). At the same time, there are many ethical rules whose observance is voluntary, i.e. the value lies in the choice of the individual. There are, however, other norms whose observance must necessarily be enforced by law for the good of the community. Paton's summary statement is that ethics therefore perfects law. *In marriage, so long as love persists, there is little need of law to rule the relations of husband and wife – but the solicitor comes in through the door, as love flies out of the window.*

Just as the painter without a brush cannot create an *opus magnum*, so the soldier without a weapon cannot fulfil his duty. Thus it can be seen that society cannot disregard eternal norms, because it is impossible to establish moral laws *(lex moralis)* without faith and religion. In the context of moral laws, it is necessary to determine what obligation is imposed on the individual in the execution of these laws, i.e., what are the conditions under which, in the course of these obligations, the moral laws or human free will can be brought under control by the individual.

[118] Nándor Birher: *Bevezetés az etika alapjaiba*. In Birher Nándor (szerk.): *Etika mint normarend*. Budapest, Patrocinium kiadó, 2022. 5. pp.
[119] https://plato.stanford.edu/entries/ethics-deontological/ (29.11.2022)
[120] https://plato.stanford.edu/entries/consequentialism/ (29.11.2022)
[121] CF: Paton 1948, 67. pp.
[122] See Holland 1917, 27. pp.

The future challenge for criminal lawmaking is to re and expand a stable moral framework, to prepare society and to achieve the goals of criminal law in a consistent way, as the relatively crisis-free period of the past decades on the European continent has been and is being threatened by a series of regional and global crises in recent years, which, according to historical experience, always leads to the catalysing of the barbarism of criminal law,[123] to the loosening or even extreme distortion of moral principles, because the gender and aims of punishment are also adapted to the cultural state of society, which can be influenced by politics and the media. Thus, in order to *prevent the* negative effects of potential crises, the primary task of moral reinforcement of society is *education,* culture and, justifiably, criminalisation.

[123] See Finkey, and Zoltán J. TÓTH: 2003 https://jesz.ajk.elte.hu/toth14.html (15.08.2023)

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