IDEA OF PRIVATE PRISONS – THROUGH THE PRISM OF GOALS OF PUNISHMENT

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INTRODUCTION

The present paper aims at bringing about reasonable arguments around the idea of private prisons discussing it through the prism of the goals of punishment. The idea is relevant since Georgia has been experiencing problems regarding its system of corrections, at least during the last decade. For example, in 2012 prisons in Georgia were so terribly overloaded that the Parliament of Georgia approved prisoner amnesty for the purposes of improvement of the situation. Unfortunately, this has caused a rise of crime rate in the next couple of years.[1] The number of prisoners in Georgia is still higher than average.[2] On the other hand, what can be said about the states, having even the worse situation? How do they handle it? The state, having the largest prison population in the world, is the United States of America.[3] The most straightforward solution that the U.S. implements, is to bring elements of private administration into the justice system. Particularly, there are three types of this approach:

- Private management of a new state prison: a state is in need of prison infrastructure. Thus, the state builds a prison and on the

1 Rise of crime rate by 11% by the end of 2013. See: www.idfi.ge
2 260 prisoners per 100 000 of the state's population. See: www.prisonstudies.org
3 Total number of prisoners is 2 121 600 that makes the rate of 650 prisoners per 100 000 of the state's population. See: www.prisonstudies.org

basis of the contract, handles management of the prison to the private company. The state and the company agree on certain service fees, which the state has to pay to the company. On the other hand, the company is taking the full responsibility for managing the prison and providing for the necessary security guaranties;

- Private management of an existing state prison: the prison that is already functioning is handled to the private company for management;
- Private prison and private management: a private company builds up a prison, the company is granted the special permission from the state and on the basis of the contract manages the prison. This may also include an agreement on redemption of the prison from the private company.[4]

At the first glance, it seems logical – if the government is unable to regulate the situation while the private sector is capable of, why not delegate the power to the private sector? The idea seems interesting and even alluring. It has been discussed among the Georgian scholars. Nevertheless, the Georgian model of corrections does not include private prison industry and there is only insignificant delegation of non-sovereign activities within the prison system. The aim of the present paper is to comprehend critically this solution.

METODOLOGICAL BASE

The question − whether a government should authorize individuals and the private legal entities to manage penitentiary and correctional facilities (prisons, jails etc.) – has been a matter of discussion for a long time. The idea of private prisons arisen in the criminal justice system has a large number of supporters in states of common law jurisdictions, while it is less popular in the states of civil law jurisdictions. Debates among legal scholars, acting lawyers and government officials are not usually fruitful. Each party usually present their arguments but neither of them can come up with a decisive one.

The reasons might not be the lack of the arguments, but rather – the fundamental problem of the methodological base for either of the parties. The issue is that the idea of private prisons is usually discussed through the prism of penitentiary law.[5] Although it seems logical to discuss an issue around penitentiary facilities through the prism of penitentiary law, actually it is by no means a good idea. Penitentiary law, although being the primary field of law responsible for the regulation of penitentiary system, it can hardly serve as a methodological base for this matter since it lacks deep and elaborated ideas, principle, concepts, etc. about punishment. What can serve as a methodological base – is criminal law, namely, its general part (punishment) that can provide reasonable amount of base knowledge applicable to the subject matter of the discussion. Present article is a humble attempt to comprehend the idea of private prisons through the prism of criminal law, namely, the goals of punishment.

From ancient times, a crime was associated with the punishment in the first place. The scientific term itself – "criminal law" – is interchangeable with its synonym – "penal law". In German it is called "Strafrecht" (literally − "law on punishment"), similarly, in French − "droit penal", etc. In Georgian it is called "სისხლის სამართალი" that literally means "law of blood" and comes from "blood price" that was an ancient measure for punishment in Georgia.[6]

For a long time, retribution had been the main and certainly the only purpose of criminal punishment. That literally meant to punish the offender for what he had done, to take a revenge against him. The approach became a foundation for the so called "absolute theories", developed by Hegel and Kant.[7] They had used morality as

4 Dolidze T., 2019. General Legal Overview on the System of Private Prisons. Law and the World, №11

5 Dolidze T., the work cited.

6 Team of authors (editors: Nachkebia G., Todua N.,), 2018. Criminal Law. General Part. Textbook (Third Edition). "Meridiani" Publishing house, Tbilisi, p. 20.

7 Roxin, Arzt, Tiedemann, 2013. Introduction to Criminal Law and Criminal Procedure Law. 6th edition. C. F. Müller, pp. 4-5.

the methodological base. According to this approach, a criminal offense is a violation of moral norms while punishment is a fair retaliation for that violation. A perpetrator had been considered as having his personal will against the common will of the society and therefore had breached the law. Thus, the punishment had been considered as a measure necessary to be taken in order to restore what had been breached.[8] Hegel rejected the idea of threat of punishment in terms of crime prevention, as well as, the idea of correction of a perpetrator. He argued that an intelligent human being has a free will. As a result, threatening him, punishing him with the aim of his correction would mean to treat him like an animal.[9] On the other hand, Kant insisted on "an eye for an eye" principle and argued that a perpetrator must be punished only because he committed a crime. Any kind of a practical utility of criminal sentence was rejected from the very beginning and the issue was solved purely on the basis of morality.[10] That's why the absolute theories of punishment are frequently called theories of retaliation. The complete rejection of utilitarian reasons means that a perpetrator should be punished only because it is fair, regardless whether it is socially beneficial or not. Accordingly, the perpetrator always gets punishment proportionally to the offender's blameworthiness.[11] The punishment compensates the offender's culpa and therefore restores the justice. In this regard the absolute theories are oriented on the past, on what already has happened.[12]

As a result of the further scientific comprehension, new ideas about the goals of punishment have been developed. According to them, punishment must serve social benefit in the first place. These theories are often recalled as "relative theories of punishment" or "utilitarian theories of punishment" and as a methodological base they use utility, instead of morality.[13] According to Bentham, criminal punishment should be oriented on crime prevention in the first place rather than punishing a perpetrator. In this regard "utilitarian theories" are oriented on the future – on prevention of what has not happened yet.[14]

The theory of "special prevention" was developed by Liszt.[15] He argued that the goal of punishment is to influence a perpetrator in such a way that ensures his rehabilitation and resocialization. Development of these ideas resulted in important innovations such as parole, probation etc.[16] The theory of "general prevention" was introduced by Feuerbach.[17] He mainly stressed on the threat of punishment that convinces potential perpetrator not to commit a crime. It means that comprehending the example of a perpetrator being punished, others will become less self-assured and will eventually dismiss the idea of offence. Apart from the direct threat, the idea of general prevention is also based on educative role of criminal law. The most important is to influence on those members of society that are already thinking about committing crime but have not made the final decision yet.[18]

Not surprisingly, all of the abovementioned theories had been subject to critics. The problem was that none of them could solve all of the important issues. Discussion around them is still actual. The goals of punishment are usually divided into non-utilitarian and utilitarian goals.[19] But as a result of this controversies instead of choosing what is better, scholars choose to combine both non-utilitarian and utilitarian goals. Eventually the so called "uniting theories" have been developed.[20] Their main idea is to balance the goals

8 Tskitishvili T., 2019. Punishment and Sentencing. "Meridiani" Publishing house, Tbilisi, p. 20.
9 Dvalidze I., 2013. General Part of Criminal Law. Punishment and Other Legal Consequences of Crime. "Meridiani" Publishing house, Tbilisi, p. 17.
10 Vacheishvili A., 1960. Punishment and Measures of Social Protection. Stalin Tbilisi State University Publishing House, Tbilisi, pp. 28-31. (In Georgian)
11 Goh J., 2013. Proportionality – An Unattainable Ideal in the Criminal Justice System. Manchester Student Law Review. VOL. II. December, pp. 46-47.
12 Turava M., 2011 Criminal Law. General Part. Concept of Crime. "Meridiani" Publishing house, Tbilisi, p. 42.
13 Vacheishvili A., the work cited, p. 31.
14 Turava M., the work cited, p. 44.
15 Roxin, Arzt, Tiedemann., the work cited, pp. 5-6.
16 Turava M., the work cited, p. 44.
17 Roxin, Arzt, Tiedemann., the work cited, p. 6.
18 Dvalidze I., the work cited, p. 19.
19 Team of Authors (Editor.L Nachkebia G., Todua N.,) the work cited, p. 477.
20 Roxin, Arzt, Tiedemann., the work cited, pp. 6-7.

of retribution, special prevention and the general prevention of crime since none of those goals can give a desirable result on its own. They try to combine all three ideas and make them to balance each other's week points. It is a hard task since at the first glance those goals contradict each other.[21] By sentencing, the state must, on the one hand, punish a perpetrator, retaliate him, but on the other hand, take care of him, ease the punishment, if needed, and thus use the small chance of rehabilitation that is still available. Even though they only seem to contradict each other. In reality, the goals of punishment create dialectical unity and contribute to each other.[22]

Georgian legislator has also supported "uniting theories" of punishment, when in article 39 section 1 of the Criminal Code of Georgia, adopted in 1999, he established that "The goal of a sentence is to restore justice, prevent repeated commission of a crime and re-socialise the offender".

PRIVATE PRISONS – CONSISTENCY OR CONTRADICTION

Since both legal science and legislators recognize importance of all three goals, every single issue around introduction, sentencing and serving of punishment must be comprehended through the prism of retribution, special prevention and general prevention of crime. These goals are the proper methodological base for rethinking the matter of private prisons. No matter whether it is about private management on new state prison, private management on existing state prison or private management on fully private prison. Since these goals are so deeply comprehended and largely recognised, one can easily assume that every decision that makes it easier to achieve them is acceptable, while every decision that makes it more difficult to achieve them is unacceptable. This methodological base is what criminal law can offer and what penitentiary law unfortunately lacks.

Not surprisingly, private interest in penitentiary system is about profit. The owner of a prison that is a typical businessperson has the primary goal to earn money. The actual sum of money that he earns is in direct correlation with the number of prisoners in his prison. The more prisoners he houses, the more money the state will pay to him. If the number of prisoners goes down, the business will become less and less profitable and eventually become bankrupt. Of course, the owner will lose the investment he has done years ago. Thus, this is completely unacceptable for the private prison owner. But wait! This is exactly what special prevention requires − the punishment must be imposed in such a way that it supports rehabilitation and resocialization of a perpetrator. However, if more and more perpetrators are rehabilitated and re-socialized, and they never commit crime again, less and less people will get into prison. This is a nightmare for the prison owner. As mentioned above, his direct interest is the following: he wishes to be imprisoned as many people, as possible. Thus, the goal of special prevention really contradicts to the goal of the private prison owner. That is an obvious conflict of interests. The instrument (private prison) contradicts the goal (special prevention) which it should serve in the first place. And it is a fundamental contradiction. The goal of special prevention itself is very difficult to achieve. Everything in prison − from living conditions to legal and psychological aid, cultural events and educational opportunities, must be concentrated on a prisoner and convince him never to commit a crime again. The hardest part of the task is to make him realize that being a law obedient member of society is better than being a person who breaches the law. No doubt, it is very difficult to achieve. Therefore, a rhetorical question arises: is it wise to trust solution of such a complicated task on a person who is directly interested in failure? Of course, no.

The most important sub-goal of special prevention is to prevent recidivism among prisoners.

21 Turava M., the work cited, pp. 45-46.

22 See further: V. J. McGill and W. T. Parry. The Unity of Opposites: A Dialectical Principle. Science & Society. Vol. 12, No. 4 (Fall, 1948), pp. 418-444.

It is vital since a recidivist is a person who is not afraid of punishment any more. He has already been in the prison and is ready to return there again. Being convicted is nothing special for him. It is even part of his life in some way. Thus, the general prevention does not really affect him. So, it is vital for penitentiary system to convince normal perpetrators not to become recidivists. However, the interest of the private prison owner is in incresed number of recidivists since those will repeatedly be convicted, thus making his income stable. This is not about a person, this is about the nature of business. Thus, there is an obvious contradiction between the idea of private prisons and the goal of special prevention.

However, there are more issues to be mentioned. One of the most important parts of general perevention is the operative activity, in other words, gathering information and analytical activity that for analyzing the information. That is done by the state authority in order to be informed about criminal activity before it is committed. It is a science on its own.[23] Among others things, it includes:

- interview of a person;
- collection of information;
- surveillance;
- recruitment of secret informants;
- examination of objects and documents;
- setting up an undercover organisation, etc.

The abovementioned must be done during 24/7 in order to control prison and prisoners. Otherwise general prevention of crime within the prison becomes impossible. Yet Another rhetorical question arises: who is going to handle operative and analytical activity in private prison? Private security guards? Of course, no.

The most important sub-goal of general prevention within the prison, is to prevent increasing criminal authority among prisoners. Gang leaders and other high status criminals usually never stop criminal activity after being sentenced. On the contrary, they continue to command their subordinates that are outside the prison. They try to recruit new members for their criminal organisations, turning ordinary criminals into professional ones. Without wisely established operative and analytical activity, the prison might easily turn into a factory that produces crime. Thus, there is an obvious contradiction between the idea of private prisons and the goal of general prevention.

CONCLUSION

I hope, that the present paper has brought some light over the idea of private prisons. At least the importance of the proper methodological basis has been demonstrated. The idea of private prisons that looked interesting and aluring at the first glance now seems contradictory to the fundamental goals of punishment that it should serve in the first place. Namely, they are as following:

1. An obvious conflict between the interest of a private prison owner (profit) and the aim of special prevention of a crime
2. Inability of the private prison personnel to carry out operative and analytical activity that makes the goal of general prevention unachievable.

Thus, there is a hidden contradiction between the goals and the instrument that is to be taken into account. It has become apparent solely because of criminal law being used as methodological base instead of penitentiary law. Of course, the question – whether the implementation of the private prisons is acceptable − may be a subject of larger discussion, mainly dependant on empirical arguments. The present paper on its part presents arguments regarding the most fundamental principles solely.

23 Alferov V., Grishin A., Ilin N., 2016. Legal framework of operative-search activity. Tutorial. 3rd Edition. Saratov Social and Economic Institute (branch) REU Saratov. (In Russian)