



Constitutional and legal sustention of imprisonment punishment and criminal prosecution when the imputed conditions significantly change¹

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Regulations which give Fundament to the punishment:

National laws:

- Article 18^o Constitution: "...The prisons of the Nation will be healthy and clean, for the security and not for the punishment of the convicts detained in them..."
- Law N^o 24.660, Article 1^o.: "The execution of the custodial sentence, in all its modalities, is intended to make the condemned acquire the capacity to understand and respect the law endeavoring his accurate social reinsertion, promoting the society's comprehension and support. The prison system will must use, according with the circumstances in each case, all the interdisciplinary treatment means that result appropriate for the stated purpose."

International laws:

- Constitutional rank:
 - International Covenant on Civil and Political Rights (**ICCPR**). Article 10.3: "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status."
 - American Convention on Human Rights, (Pact of San José) Article 5.6: "Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners."

It can be seen, in these regulations, that what they seek is the subject's rehabilitation / resocialization / readaptation to the coexistence rules that the society imposes.

¹ Nevertheless the discussion which can be stated about the so called "Re" ideologies

What is resocialization?

A search in the dictionary gives the following definition:

- **Socialization:** the process by which people, especially children, are made to behave in a way that is acceptable in their society
- **Socialize:** to spend time with other people in a friendly way
- **Re:** (From the Latin re-) pref. re- again. 'Repeat'.²

The aforementioned legislations interprets the penalty as treatment, it seeks the subject's transformation by means of the reeducation toward the dominant values. The culprit is considered as a "deviant" who must be conducted. The means for the behavior transformation to a more socially accepted one must be provided.

If we analyze the term "security" from the article 18, it gives foundation to the penalty as special negative prevention that seeks the offender's neutralization, to isolate him in order to avoid the possibility that further acts are committed. It is intended, by this mean, to separate the subject from the rest of the society. It is the community right to exclude anyone who has generated an injury to the established relationships, to protect itself.

In this same article the possibility for the penalty to be a punishment for committed act is excluded. The penalty is not an aim itself, it does not seek expiation, the expiation or balance between penalty and offense.³ It is intended to avoid that the penalty acquires the characteristics of talion. Even though the punishment as a retribution can't be avoid, it isn't its direct aim.

² <http://www.longmandictionariesonline.com/>

³ Absolut theories of the ius punendi (the fair penalty); it has its own fundament, it is fair to pay an evil with another evil.

What would happen if the conditions of the imputed significantly change?

If the life conditions of the imputed significantly changed, from the act committing until the imputation (and why don't ask ourselves until the custodial sentence culmination), that would turn the treatment unnecessary, because this conditions changes would cause the effect of resocialization.

As an example, I refer to the circumstances aroused in the Lucas Viatri⁴ case (although to the date of creation of this article, his probation has been suspended and he must fulfill community service) who after committing the imputed act gets to play in the Argentinian football league first division, which has not only implied an improvement in his economic situation but also an higher time occupation; to the effects of resocialization, he gets a well remunerated job, practices a sport, occupies his time in activities that the society considers valuable.



Lucas Viatri

Photo: FotoBAIRES La Nación News

This case is an example; infinite circumstances can be given which make change the subject circumstances leading to a resocialization externally to the penal system

In this context: Does the foundation of penalty remains?

To my understanding the execution of a penalty would result an injustice bigger than what is intended to be remediated. But if the treatments carried out in the penitentiary establishments are considered, a few times they achieve good results. The jails work as criminal stereotypes reproducers and they generates the effect opposite to the one they seek.

In this case the penalty would work as a punishment, an aim itself, to punish by punish; a fact of revenge executed by the State against the act of a particular subject.

It also can be thought that under this circumstances the subject won't commit a felony again, either because he won't economically need it, because his activities fulfill his idle time or because whatever made his circumstances change worth enough so that the subject decides not to risk himself

Therefore I argue that the implementation of a custodial sentence remains without legal foundation in these cases.

⁴ Bear in mind that there is no direct knowledge of the case, but it's simply known through communication medias http://www.lanacion.com.ar/nota.asp?nota_id=1071369; http://www.lanacion.com.ar/nota.asp?nota_id=1103351; <http://www.canchallena.com/1153002>.

If the penalty lacks of foundation, is the prosecution necessary?

The guilty plea exceeds the custodial sentence's implementation. Additional penalties can be established, such as disqualifications and fines, not counting the obligation to civilly compensate for the damage occurred.

That is why the prosecution is still needed even though the custodial sentence isn't applicable.

Conclusion:

If a subject changes the lifestyle, and by those conditions spares the state's need for social rehabilitation, there are not reasons for punishing by deprivation of liberty.

However, the unnecessary requirement for a sentence of imprisonment or confinement, accessory penalties are not affected and should be applied.

Also civil indemnities maintain their full force regarding this subject.

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