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PUNISHMENT AND ITS EXPEDIENCY

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Why punish?

When an individual chances violate the generally accepted rules to in the community, he has caused a conflict. For some time the conflict might remain hidden and stands only in the frustration of the balance between a man and the rule and if a person himself has accepted the rule as the right one, also in the corruption of his inner balance. Yet, as he has hurt also the beliefs of the others and thus thrown off the balance the community peace — shalom —, he has to count on the frustration of that community. See frustration might take either the form of fear or anger, but it also the form of rationalized disapproval. Mostly the kind of disapproval is expressed in sanctions towards the person who has who has caused the conflict. Yet these sanctions must not be meant as a punishment or received as such.

Both Sootak and Hattenhauer have expressed the positions as if in clan and in other archaic communisations later on, there had never reacted on the social conflict with a punishment. The main problem is that both in as well as in Greek mythology and in the preserved data about European barbarians there are a lot of data about sacrificing for reconciliation of the gods. In case of the sacrifice of redemption, it was brought to silence the gods' anger, but in case of sacrifice of thanksgiving, to express and experience the gratitude. People were sacrificed too and quite often the sacrifice of reconciliation was the person, who had brought about the conflict (Sootak, 1994, Hattenhauer, 1995). Today we would call him the convict. But there are also the authors, who speak about the term guilt being taken into use much later, and the authors who claim, that the word crime is rather recent. Hattenhauer locates the formation of the concept of punishment in High Middle Ages (Hattenhauer, 1995, p 44). In one way or another, one thing is for sure. Sacrifice is not punishment.

The above mentioned deserves separate discussion, but let us bring it forth here in order to support two arguments. The first: punishment is not the only possibility of reaction in case of criminal conflict and the second - criminal law has always carried religious aspect. To that religious aspect adds also the principle of compensation, that vividly passes through the justice of Old Testament. But also silencing the rage of people by sacrificing somebody or something, executing on e man for the others; or for frightening or satisfying the others – the whole

sophisticated mass psychology, that we will not dwell on here, involve always religious aspect and tinge, that seems ghastly and somewhat adversatively to support the argument of religiousness of human being.

The urge of every living organism is to react on pain has brought forth revenge and that in its turn blood vengeance. If we see as an organism a certain group that carry common consciousness, becomes clear the widening of blood vengeance obligation from victim to family and from family to tribe and clan. The circumstance, that in addition to the ability to escape and attack, a human being was also able to negotiate and agree on something, is supported by the existence of compensative system. The god's likeliness of a man appears in the superiority of mercy and ability to forgive.

In addition to blood vengeance, compensation and sacrifice the conflicts were mitigated and solved by exile. Exile was applied both in case of the individuals and the families. And although in rough conditions the exile could mean sure death, Sootak still finds it possible to handle it not as a punishment but as forsaking of it (Sootak, 1994, p 13). Despite of the dozens of places where New Testament tells us about blood and death penalty, from the basis of the Old Testament with its talion, in my faithful hart will still sound Jesus' promise to teach us the meaning of the statement that God prefers mercy to sacrifice. Through his death Jesus has made that demand dreadfully close and understandable.

I currently can not spend more space on apologetics of abolition of sacrifices and punishments, yet I admit that it would be interesting and tempting too. I only note that there always have existed other possibilities as well and using them would be more in harmony with the spirit of New Testament.

The substance of punishment is mostly limitation of benefits and causing sufferings. Nowadays the main criminal punishments are fine and imprisonment. Though it is not in accordance with the correspondent documents of UN and EU the punishment usually brings along humiliation as well. Assumably it is not a purpose in itself. But when we remind of pillorying, scattering one's private life in the course of process and in media, searches, tearing naked and inhuman treatment that in the course of preliminary investigation experience most of the defendants, it gives the impression that humiliation and shame are the essential components of punishment that a person is subjected to already before criminal conviction.

Namely that fact does not allow handling humiliation as a punishment in legal sense.

Legally the punishment can be imposed only in by a court proceeding and on the grounds of moral and legal decision of the essence of the act, the damage caused by it and the sanctions imposed. Punishment expresses the assessment that court gives to the offence. The aims of punishment are:

1. Retribution or revenge. As the crime causes someone harm and sufferings, popular belief among the theoreticians of punishment is that justice could be restored by causing harm and damages to the person who is found guilty in causing damages to the victim. The limits of damage and pain, causing of what in case of that approach is considered fair the court decides within the limits of law. Usually here holds good the proportionality principle of the Old Testament.

2. Rendering harmless or prevention of future crimes. Assumedly the convicts can not be dangerous for the others while under state control.

3. Frightening. Here it is meant that fear of punishment makes the convict as well as the other people belonging into the jurisdiction of the same law, behave law-abidingly.

4. Rehabilitation. The punishment serves the aim of changing the convict.

As to the legalized killing in the form of death penalty in many countries, there I have repeatedly explained, that death penalty can not be considered a punishment at all, for it liquidates the object of punishment. Let alone the inadmissibility of killing, immorality, man's tendency to widen the scope, of damages and sufferings that are caused to the folk of the condemned one and the executors of the sentence. There are many others, but I confine here to the reference to my earlier writings on the same subject and explanatory memorandum to the draft Act on abolition of the death penalty.

Wide use of fines and incarceration derives from two circumstances. Firstly, both money and freedom are clearly handled as benefits; forfeit of them is clearly understandable as punishments to the punishable and the community. Secondly, it is easiest to divide the duration of penalty and the fine rate into portions. Hence the reasons are simplicity and clarity that are at least assumingly in accordance with the main principles of justice.

In addition to legal and moral aspects in dosing the punishment, the pragmatic aspect should be taken into consideration as well, so that the punishment would not loose the effect that was supposed to achieve and the achievable would not be even contradictory to the aims and public good. The public - the more, the better – does not apply to here. When due to too

high fines there will be big arrears, and most of the persons fined can never pay them, in further perspective rises a new problem on the level of both state and society. The state has to incur expenses in order to keep up the collection apparatus that often works non-effectively. As to imprisonment, the inefficiency and harmfulness is widely known, and more and more all over the world they are looking for alternatives to imprisonment. Long-term imprisonment ruins the ability of initiation and managing and changes a person a care-needer. Psychic pressure that domain in prisons deforms and ruins personality. Criminal subcultures in prisons impose antisocial values that are not easy to get rid of. The whole society changes too, but into another direction than the prison commune and therefore a person released from penal institution does not manage on his own sufficiently. That causes new crimes.

In case of short-term (to one year) and medium term (to three years) imprisonments we can speak about punishmental effect with minimal negative side effects. In case of long term punishment the deformation of personality is in most cases irreversible (Raska, 1991).

Yet I'd like it more to discuss the alternatives of punishment, first of all we have to focus on alternatives of imprisonment. Imprisonment is inhumane; thereat the most expensive and from point of view of crime regulation the most ineffective form of punishment. General Secretary of *Penal Reform International* Vivien Stern: "It means bad usage of the resources in the countries in economical difficulties. If penal reform is possible in the countries in economical difficulties then the priority must be sharp diminution of the number of people to be sent in prison and taking into use the cheaper, but no less effective common sanctions" (Stern, 1999). Diminution of imprisonments presumes change in the way of thinking and in penal policy, also legalization of alternatives. The most usable alternatives are probation or criminal surveillance or probation supervision, community work, participation in different correction programs, using open prison, electronic surveillance and monitoring. Of course, the alternatives bring along its problems, but there is no world without problems. What could be the desirable solutions and what could be the role of the church in it?

Restorative and retributive approach by Howard Zehr

Many authors of Anglo-Saxon cultural and legal system (Zehr, Van Naess, Umbreit, Yantzy, Marshall, Hilborn, Wright) claim the necessity of new view angle on crime and justice.

Tony Marshall gives an overview of the development of restorative justice model and suggests Barrett, who in 1977 has discussed victim offender mediation, the author of the concept (Marshall, 1998).

I can not agree with him, for according to Van Ness (Van Ness, 1997) the honour of first saying it belongs to Albert Eglash, who in the same 1977 distinguished in his article three types of justice: retributive, distributive and restorative (Eglash, 1977). It has to be checked, if Van Ness is mistaken too, for Bazemore gives as the year of publication of the same article "*Beyond restitution: creative restitution*" 1995 (Bazemore, 1998). At the same time both Bazemore and Van Ness agree with Marshall that a consistent and thorough discussion has appeared from Howard Zehr. At first as a booklet in 1985 and as a thorough and pleasant-reading book in 1990. To Zehr belongs also recommendation to change the angle and lenses while observing crime and penal power. Changing lenses has come to use as a term and the author of the term presents restorative justice as an alternative paradigm to retributive justice as follows.

Retributive justice

Crime is violence against state, and is appointed as legal offence and guilt. Justice provides humiliation and imposes sufferings in accordance with the competition (directed by systematic rules) with offender.

Retributive model

1. Crime violates the state and its laws.
2. Justice focuses on establishing guilt, so that doses of pain can be measured out.
3. Justice is sought in court conflict, in the course of it the offender is opposed to state.
4. Rules of procedure outweigh outcomes.

Restorative justice

Crime is violence against people and relationships. It rises obligations to get things right again. In it participate victim, offender and society, looking for solutions that encourage healing.

Restorative model

1. Crime violates people and relationships.
2. Justice must be aimed at identifying needs and obligations, so that things could be right.
3. Justice encourages dialogue and exchange of information, giving central roles to victim and offender.
4. Outcome is judged by the extent to which responsibilities are assumed, needs are met; and healing of individuals and relationships is encouraged.

According to Zehr crime is an act of harming people and relationships. The damage must be compensated and if possible the harmed to be healed. Barely punishing does not actually solve anything. For that purpose it is necessary to work with damages, people and relations. In the process of finding the solution legal system must treat all the parties as it partners (Van Ness, Crawford, Strong, Zehr, Bazemore). Van Ness considers the focus of the process compensation of caused damage and integration of both the victims and offenders (Van Ness, 1989; Van Ness & Strong, 1997). It should be mentioned, that the obligation required to offender carry beside moral and practical benefit also the aspect of restoring the offender's subject. The offender is not only the object of punishment, but a human being as well.

Zehr brings forth the paradigms of legal systems.

Old paradigm

Retributive justice

1. Crime is defined as violence against state.
2. Centred on blame-fixing and past (did he do that?)
3. Norms are hostile relationships and processes.
4. Imposition of pain in order to punish and prevent (individual and in general).
5. Justice is defined through intention and process: "*right rules*".
6. Interpersonal, conflictuous nature of crime is hazed, oppressed; conflict is seen between individual and state (the crime is individual problem).
7. A form of social wrong is replaced by another (that is considered necessary and justified).
8. Community remains aside, its abstract representative is state.
9. Competitive, individual values are encouraged.

New paradigm

Restorative justice

1. Crime is defined as violent behaviour of one person towards the other.
2. Focus is on solving problems, on responsibility and obligations, on future (what should be done?)
3. Dialogue-normative.
4. Restitution is the means of mutual restoration, aiming at reconciliation.
5. Justice is defined by right relationships, decisive is outcome.
6. Crime is seen as interpersonal conflict; conflict is acknowledged (crime is social problem).
7. Focused on repairing social injuries.
8. Community role in restorative process is contributory.
9. Mutuality is encouraged.
10. Roles of victim, and offender are recognized both in case of problems and solving them:

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| <p>10. Action has moved from state to offender:</p> <ul style="list-style-type: none"> - victim is ignored - offender is passive <p>11. The offender's responsibility is seen in receiving the punishment ("if you cannot take punishment, do not commit crime).</p> <p>12. Offence is defined pure juridically – lack of moral, social, economical, political dimensions.</p> <p>13. "Debt" before state and society is abstract.</p> <p>14. Response centres on the offender's behaviour in the past.</p> <p>15. The stigma of committed crime can not be erased.</p> <p>16. Repentance and forgiveness are discouraged.</p> <p>17. Proxy professionals are the key factors.</p> | <ul style="list-style-type: none"> - victim's rights/needs are acknowledged; offender's responsible behaviour is encouraged <p>11. Offender's responsibility is seen in recognizing of consequences of his behaviour; help is offered to decide, how to repair injuries.</p> <p>12. Context relevant: considering moral, social, economical and political dimensions.</p> <p>13. Admittance of debt/responsibility before victim.</p> <p>14. Response based on negative consequences of offender's behaviour.</p> <p>15. The stigma of crime can be is possible to erase through restorative activities.</p> <p>16. Repentance and forgiveness are encouraged</p> <p>17. Immediate inclusion of participants.</p> |
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Crime victims have several needs and rights that do not receive necessary attention in traditional legal practice. The rights of defence; the right to receive and give information; the right for hearing; the right to ask questions about the course of the process, punishment, about the place of serving the sentence, the condition of the offender and the time of his release. The need to express the feelings, to get feedback, find appreciation, support and reflection; the need to talk and be listened to; to present one's own version; to get confirmation of the sustaining of one's self-esteem, to be treated as wholesome and respected person, not as a screw in the machine of legal system. Let us describe the needs of crime victims in detail on the next level, handling the practical work with clients.

Restorative justice admits that crime is wrong and it should not occur, but it also brings to notice the dangers and possibilities that accompany the crime. The risks are that the people and the community may come out of the conflict even more disaffected, more frustrated, having lost respect and faith, feeling less secure and developing less cooperativeness. The

options are seen in confessing wrong, restoring justice by compensating victims the damage and recognizing their dignity by the offender. The parties will thus be more respectful towards each other and the community, possessing deeper control and ability of regulation over their lives; they are also more cooperative (Claassen, 1996).

The department of juvenile justice and criminal prevention of the American Law Institute has elaborated the balanced and restorative justice model. The idea of that model lies in mutual balance of rights and needs of the target groups. According to the principles of restorative justice the target groups are victims, offenders and community. The damage caused to victims must be compensated and the offender has to be made responsible in front of his victim. As the needs of offender mainly are seen development of pro-social skills, attitudes and values. For the community must be guaranteed the certainty that justice works and the risk of recidivism decreases. Legal system should also protect the community. That model does not go all the way, remains the specific role of the state or federal government.

Restorative justice views the conflict of the parties as demanding solving, but does not consider justified solving that conflict by state as a superior third one. That estranges people and community from each other and also of understanding of the occasion. Nils Christie has written about stealing the conflict (1977) from the parties to whom the conflict actually belonged. I think that like an illness should be suffered, also the conflict should be solved on your own in the limits of the possibilities. If necessary the mediators may participate, but the person him(her)self should not turn into means in the hands of mediators.

An important term in restorative way of thinking is forgiveness. Only forgiveness gives the idea to the punishment. Without forgiveness there is no punishment says Polish professor of criminology Michal Porowski. At the same time is understandable the resistance to that, in my mind central concept, from the victim support movements and feminist criminology. Young sees in it the pressure to the victims (Bazemore, 1988), and victim support associations - focusing at the offender. Yet there is no alternative to forgiveness. Forgiveness works even more in the benefit of the forgiver than in the interests of the one to be forgiven. In order to be healed one has to forgive.

The representative of feminist criminology M. Kay Harris provides for the future: "The whole idea of restorative model reflects deep interest, not only for repairing the damage caused in the past but also striving for better future, where people live in right relations with one

another in the material, social and spiritual meaning. Stressing the future demands dedication to serious investigation of contributory factors of crime, conflict and injustice and to relieving and eliminating these factors” (Harris, 1989). In Harris’s standpoint we can see the sociality of feminist critical criminology and meet the phraseology of Marxist Utopism. Looking back further we see that it is the modification of Origenes’s false doctrine, yet at the same time it is impossible to deny the connections between crime and poverty, unemployment and other social factors.

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