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The Postulates of Restorative Justice and the Continental Model of Criminal Law

As Illustrated by Polish Criminal Law

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The Concept of Restorative Justice

The concept of restorative justice has evolved outside of, and at many points in contradiction to, traditional paradigms of criminal law and criminal process. Its sources may be tracked to doubts concerning the roles of many key institutions of penal law. Its founders have questioned the social benefits following the adjudication of criminal penalties and even the notion of crime itself. In addition they have put into question the way the formalised criminal process operates. Last but not least, they have spotted the negative consequences of the professional administration of justice, monopolised by "experts," i.e. lawyers, at the cost of the wronged party and the local community. Restorative justice makes manifest a profound criticism of the criminal status quo. Let us look at the arguments deployed by these critics, as well as proposals for new premises and solutions thought to produce better results. Finally, we shall analyse arguments which challenge this new trend and the potential for certain elements of this model to invade traditional criminal law.

The social utility of criminal punishment has been negated both under the retributive approach, in which a penalty is understood as just requital for a socially harmful act, and in the utilitarian conception, in which a penalty is rendered primarily as an instrument destined to protect the society from the offender and, in particular, as a means to rehabilitate the wrongdoer. While criticising both these theories, adherents of restorative justice also employ argumentation which is advanced by proponents of each of the two paradigms in their mutual disputes. Among other things, it is suggested that retributive penalties are revenge- and past-oriented, proving painful to the offender yet bringing neither relief to the victim nor benefit to the society.[1] It would be a difficult task to measure the affliction caused by this kind of punishment, especially bearing in mind the relatively simple catalogue of penalties prescribed by law, in order to adjust it to the specific circumstances of each case. As far as utilitarian punishment is concerned, critics focusing on the prevention of crime repetition point to the high

1 J. Consedine, *Sprawiedliwość naprawcza* (Warsaw: Przywrócenie ładu społecznego, 2004), p. 161; and "Wyrównanie szkód spowodowanych przestępstwem. Sprawiedliwość Naprawcza i Probacja," *Mediator* 4/2003, p. 6.

costs and low effectiveness of rehabilitation.[2] It is contended that such a penalty impinges excessively on human rights (e.g., with respect to unspecified punishment). With regard to general prevention, it is sometimes pointed out that the mechanism of deterrence by means of punishment might not be as efficacious as expected. In addition, it is doubtful whether the awarding of a penalty can reaffirm social norms.[3]

These arguments, traditionally resonant in disputes about the sense of punishing, are however of secondary importance to the concept of restorative justice. In fact, it questions the traditional indicator of the effects of punishment, namely the return to crime.[4] The problem is not that the criterion is artificial because of the vague number of re-offences, or the fact that crimes may even be perpetrated accidentally as a result of criminal liability by offenders who actually have changed (especially given the ample catalogue of acts considered offences). The foremost issue at stake is that the primary goal in reacting to an offender's action should be, as much as possible, the abolishment of conflicts between the offender and the wronged party and compensation to the wronged one.[5] The hierarchy of objectives is thus constructed in various ways. First of all, the solution sought is a remedy to the consequences of a crime, and not the prevention of future offences. Proponents of the concept of restorative justice put emphasis at this point on the fact that conflicts (which refers also to what are defined by law as "crimes") make up a natural social phenomenon. W. Zalewski, citing Durkheim, stresses that "crime is an inevitable social fact, permanently inscribed in social reality."[6] Crimes are committed everywhere. It is not true that there is a vast group of honest, law abiding citizens.[7] Since the conflicts at play are universal, it seems justified and socially advantageous[8] to concentrate on solving these conflicts and redressing the damage inflicted, rather than actions aimed at preventing future conflicts. A still desired (side-)effect of concrete conflict abolishment is the quantitative reduction of conflicts in the future.

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2 M. Płatek in M. Płatek and M. Fajst (eds.), *Sprawiedliwość naprawcza. Idea. Teoria. Praktyka* (Warszawa, 2005), p. 86; W. Zalewski, *Sprawiedliwość naprawcza – początek ewolucji polskiego prawa karnego* (Gdańsk, 2006), p. 26 ff.

3 W. Zalewski, *Sprawiedliwość naprawcza*, p. 74 ff.

4 M. Płatek in M. Płatek, M. Fajst (eds.), *Sprawiedliwość naprawcza*, p. 7 ff.

5 M. Wright, 'Geneza i rozwój sprawiedliwości naprawczej', in B. Czarnecka-Dzialuk, D. Wójcik (eds.), *Mediacja. Nieletni przestępcy i ich ofiary* (Warszawa, 1999), p. 16.

6 W. Zalewski: *Sprawiedliwość naprawcza*, p. 148.

7 *Ibid.*, p. 156.

8 *Ibid.*, p. 15.

Much like the traditional understanding of penalty, crime in the traditional sense is also not always a source of social benefits. It is a formula which covers strikingly different types of behaviour, both in terms of its category and its concrete circumstances. Instead of describing a particular state of affairs, it functions as a specific stigma. Moreover, because of the fact that crime constitutes a symbol, it may be treated as one of the most significant elements of narrations within contemporary political campaigns. As a sceptre lurking over law-abiding citizens, it becomes in the political life of societies a red herring that does not solve the real problems it hides. As a result, the notion of crime not only fails to render social reality accurately, but also provides grounds for actions which are detrimental to society.

Yet, criticism of the formula of crime is deeper in character. One problem at stake is the nature of legal liability for a criminal offence. It is often argued that legal responsibility for a crime is a matter of the relationship between the offender and the state. In this conception, the wronged party is left out. This ousting can be illustrated well by the famous thesis of N. Christie on conflict appropriation. The author suggests that "the victim of a crime is wronged twice in our society – *not only by the offender but also by the state. This is the case because the victim is deprived of joint participation in his or her own conflict, which has been stolen by the state…*"[9] The problem is that the victim has been left without any possibility to settle the score with the offender. Instead, the state steps in in his or her place, and this state intervention in the prosecution of offenders is, in the views of adherents of restorative justice, detached from the victim's interest as well as irrational.

Furthermore, a crime makes up only a small part of the offender's life. The event itself does not necessarily have to be the most important factor for the wronged party and his or her relation with the offender, or to the environment in which the offender lives. Yet, the formalised criminal procedure is oriented predominantly towards that tiny fraction of life, making it difficult to account for the whole social context or even the circumstances in which the offence was perpetrated. As a result, even factors which are of vital importance to all the parties directly interested in the outcome of the process might not be taken into consideration at all. This leads to a situation in which criminal proceedings are not always an instrument for resolving conflicts in a way that would produce social benefits.

Finally, the conflict is appropriated not only by the state but also by the professionals through whose assistance justice is administered.[10] In the natural course

9 N. Christie, *Granice cierpienia* (Warszawa, 1991), p. 113.
10 *Ibid.*, p. 85.

of events, even when there is no abuse, legal procedures evolve in a way that is convenient to the actors involved in the administration of justice. With this in mind, any fulfillment of the functions of criminal law loses its significance. These functions are primarily declaratory in character. To go even further, a far-reaching thesis is sometimes put forward that penology and the punitive dimension of justice administered would not be able to function in their current shape but for the implementation of certain hidden goals, differing from the functions of criminal law and procedure. If "success" for the criminal justice system and the prisons were a realisation of the functions declared, these institutions would gradually disappear. Once dysfunctional, they would be replaced by other alternatives. This means that other objectives are actually pursued.[11] Distinct from the political dimension, punitive institutions have an economic sense. Penology and the punitive dimension of justice make up an important sector of public services.

Given this harsh criticism of the status quo, it does not come as a surprise that the concept of restorative justice has emerged outside penal law and has become a grassroots movement. Its origins can be traced back to initiatives by the New Zealand Movement Against Prisons. The conviction of the malfunctionality of imprisonment became an incentive for pursuing alternative solutions by the Movement's activists. It turned out that Maori traditions of dispute resolution could provide a point of reference. M. Płatek opposes this method of resolving conflicts within the traditional criminal process, depicting it in the following way:

> In the social space and charming atmosphere of Marahau, whenever a conflict took place its solution was sought—the best and most just one for the wronged party and for the society. All interested persons would gather. The meeting was presided over by the elderly men or women. In this manner neighbourhood quarrels were resolved, and conflicts ending in murder, as well as cases of rape, defilement and theft. The president of the meeting would maintain its order; however, decisions concerning solutions to the most pressing issues were worked out collectively, in the presence of all the society, as long as it was agreed upon how to redress the damage so that the entire community could be satisfied."[12]

It may be added at once that in practice the solutions achieved in the course of such meetings were focused on remedying the damage. This system, having been derogated by the colonial administration of justice, has now been partly restored in New Zealand. Naturally, there appears the question how it happened that the resolutions of such meetings actually become acceptable within the framework

11 M. Płatek in M. Płatek, M. Fajst, *Sprawiedliwość naprawcza*, p. 88.
12 *Ibid.*, p. 10.

of the modern legal system. It proved very helpful that this system originated in Maori culture. At first, it was accepted as a part of an experiment pertaining to juveniles of Maori origin. Its positive outcomes and popularity indicated that the experimentation could provide grounds for the restorative justice conference—this being one of the most vital methods for the new concepts.

On the one hand, there is both an ongoing practice and a general return to the roots, because the Maori procedures for resolving conflicts by the community, as can be easily guessed, are not entirely unique.[13] Similar processes, oriented primarily in the direction of compensation, and catering to the needs of the wronged party and his family, may be observed in most societies at the periphery of the contemporary state. However, this phenomenon does not only involve grassroots tendencies. Campaigners are also supported by science. Criminologist N. Christie forged a novel paradigm in horizontal justice, which differs from the traditional model of vertical justice. It essentially consists of the following:

1. Decisions are locally entrenched. […] What matters is the here and now—taking the past into account and considering the future. This may lead to inequality: "the very same act" may be qualified differently in district A and districts B and C. However, within the districts all must agree unanimously that justice was really done.
2. Questions about proper relations are approached in a manner radically different from what can be encountered within a legal system. An accurate response is considered to be a matter of primary importance, yet within the model of horizontal justice there are no predefined solutions. The proper reaction to a crime is elected in the course of the process designed to come to such a specific response. The correct answer is what participants in the procedure deem correct. Among all interested parties a minimal level of consent must subsist concerning the appropriateness of the chosen response […]
3. Compensation for both non-economic and economic loss appears as much more crucial than the urge for vengeance and the demand to punish the offender.[14]

Restorative justice is a concept in which the main goal can easily be detected as a specific synthesis of the whole movement. It is primarily about reconciliation between the wrongdoer and the wronged party, which is realised by redress to the latter. Should such a rapprochement prove impossible, an honest and frank meeting between the offender and the wronged party with a view to a mutual understanding of their positions is still meaningful. It ought to be emphasised that reconciliation, or even the meeting itself, is interpreted as a merit on its own. Still, it does allow for the implementation of other processes are traditionally

13 M. Wright, op. cit., p. 16 ff.

14 N. Christie, *Dogodna ilość przestępstw* (Warszawa, 2004), p. 82 ff.

associated with criminal law: that is, most importantly, the reduction of crime. In this respect, the authors stress J. Braithwaite's conception of reintegrating shame. M. Płatek, even in invoking this conception, contends that

> societies of the lowest crime indicator are not the ones which have the most severe punishments. The reverse is the case. The lowest crime level is observed where shame and a sense of shame play the most significant roles. If shame is to be effective, a specific type is needed. Braithwaite calls it "reintegrating shame." It stands in juxtaposition to stigmatisation, which is inherent to traditional justice.[15]

Stigmatisation cannot be considered an effective factor in preventing crime, because an educated person is not particularly susceptible to this type of internal stimulus. The effects of shame are also internalised. It may reaffirm the offender's morality, inclining him or her to admit that the act has been committed against the system of values which to which he or she also adheres.[16]

Already at this point it becomes apparent how important it is for restorative justice that the wronged party and the offender meet, or that their conflict becomes resolved. Confrontation by the perpetrator of the victim or relatives who are important to the perpetrator, as well as confrontation of the environment in which he or she subsists, is intended primarily to resolve the conflict permanently, and secondarily to play a purifying role. It may lead to the correction of the offender. What matters is not only the measures applied to the wrongdoer, but also in many cases the process of arriving at those measures. In fact, it may occur to the offender that the act was committed against values professed by him- or herself. It is more difficult to achieve this end by awarding a traditional criminal penalty. In particular, reconsideration is not easy in prison, where convicts tend to experience the opposite processes: denial and rationalisation of crime.

In the traditional paradigm of criminal law legal norms conceal the conflict.[17] With restorative justice, one ought to take into consideration that norms may effectively come into force and demonstrate their functionality or dysfunctionality precisely against the backdrop of conflict. Conflict resolution allows the confirmation of their social utility and significance. In other situations it may, however, point to their uselessness. In this manner, the entrenchment of norms turns out to be deeper than is the case in the traditional model of criminal law, as it is free of any idolatrous character. In addition, it is worth emphasising that adherence to the ideals of restorative justice does not usually bring abolitionism with it, or

15 M. Płatek in M. Płatek, M. Fajst: *Sprawiedliwość*, p. 101.
16 W. Zalewski: *Sprawiedliwość*, p. 182.
17 See also M. Płatek in M. Płatek, M. Fajst: *Sprawiedliwość*, p. 95.

even postulates to completely eliminate imprisonment as a penalty. This concept unveils only that merely servicing a penalty does not "do the trick."[18]

"Redress" refers both to economic and non-economic loss suffered as a consequence of crime. It is not so important to determine the amount of loss precisely. On the contrary, mechanisms of restorative justice seek to guarantee maximal flexibility. The parties involved are the ones to elect the most appropriate method of compensation.

There arises the question of whether there is room for restorative justice with regard to crimes without victims.[19] Attempts to apply the concept under consideration to such instances can be found in published academic work. W. Zalewski cites the example of applying restorative justice practices by the Australian National University:

> In the Canberra model, the goal is to examine the effect of "deterring by shame" potential drunken drivers or, in other words, preventing the phenomenon of driving while intoxicated. This model seems interesting, as it is applied even in situations where the directly wronged party is missing, where there is only a threat to traffic safety. The offender attends a conference in the company of at least six supporters. The role of the actual victims is assumed at the conference by inhabitants of the place where the alleged event took place—individuals potentially harmed. This points to the possibility of applying Braithwaite's theory also to crimes without victims."[20]

In consequence, the question may be raised of whether such occasions are the embodiment of restorative justice, since the offender does not restore anything. Undoubtedly, in such cases it is impossible to redress damage sustained by the wronged party. The offender may, however, assume responsibility for his or her act precisely in the process of coming to a realisation of the meaning of the act committed and may provide a remedy to the community affected by this act (usually the local community). In effect, it seems that one should not reject *a limine* the applicability of the concept of restorative justice to crimes without victims. This example clearly shows that the most crucial features of restorative justice are not compensation but the assumption of responsibility for one's conduct and reconciliation. These elements may be present even in the absence of any specific individually wronged party. On such occasions, the wrongdoer may assume responsibility for his or her act before the community affected by the

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18 J. Consedine (*Wyrównanie szkód*, p. 9) adduces examples of offenders saying "I've served my sentence," and the positions of state authorities, "They have already been punished," "They paid their dues to the society," and emphasises that in such an approach there is no place for either victims or positive change.

19 See. N. Christie, *Dogodna*, p. 87-89.

20 W. Zalewski, *Sprawiedliwość*, p. 194.

offence (i.e., usually the local community). The notion of restorative justice (that is, de facto, responsibility) may thus extend to any action of the offender which can be viewed as a social counteraction combating all or only selected negative social ramifications of the punishable act and, most obviously, to all legal effects imputed by law to such conduct.

To sum up what has been considered thus far, it seems appropriate to say that restorative justice denotes the specifically oriented liability of the perpetrator of a punishable act to bear the consequences of his or her wrongdoing. The offender becomes a person "remedying" the evil following from his or her acts. This does not refer to the activity of the state or of any entities other than the offender who are also in a position to redress damages inflicted as an effect of a crime. Restorative justice is characterised by the following features:

- the wronged party is given a central role in the proceedings, even though benefits are also obtained by the wrongdoer, by the administration of justice, and by society (on a local or a much broader scale);
- the process of eliminating the conflict is a crucial element, not just the result of this process;[21] parties cooperate with one another—they enact the "horizontal model" of criminal process,[22] which also signifies the maximal engagement of the wronged party;[23]
- there is participation by the local community, which is in a way both responsible and harmed, because every individual functions within a group;[24]
- the liability of the perpetrator for the punishable act is specifically oriented, one crucial element being realisation (and admission) by the wrongdoer of the evil done (as well as understanding of the victim's problems);[25]

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21 Which requires a breakthrough with regard to many cultural inhibitions. I. Wróblewska, "Rozważania na temat kulturowo-społecznych ograniczeń dla wprowadzania idei mediacji w Polsce," *Mediator* 3/2003, p. 45-47.

22 P. Szczepaniak, "Mediacja po wyroku – w stronę sprawiedliwości naprawczej," *Mediator* 1/2003, p. 57.

23 Ch. Pelikan, "Sprawiedliwość naprawcza – w poszukiwaniu pokoju i sprawiedliwości. Rola Europejskiego Forum na Rzecz mediacji między Ofiarą a Sprawcą oraz Sprawiedliwości Naprawczej," *Mediator*, 4/2004, p. 13.

24 See J. Consedine, "Wyrównanie szkód spowodowanych przestępstwem. Sprawiedliwość Naprawcza i Probacja," *Mediator*, 4/2003, p. 9.

25 This is why, for example, in the project *The Sycamore Tree*, which was carried out in Great Britain, USA and New Zealand, groups of former victims visit prisons to meet inmates and take part in therapeutic sessions which allow for therapeutic discussion of victims' problems and help the process of improving inmates' awareness.

- restorative justice covers both tangible and intangible harm rendered in statutory definitions of particular punishable acts, as well as harm that follows indirectly from such acts;
- restorative justice does not preclude punishment (or even deprivation of liberty) or contradict the functions of criminal law, although it does significantly affect how the safeguarding function is understood, since it determines, at least ostensibly, the need for its redefinition (an approach different from the one accepted thus far); restorative justice becomes an normal alternative to the punishment inscribed in the administration of criminal justice;
- restorative justice refers also to non-specified "injured parties," i.e. society (but not the state), so under this conception the notion of restorative justice refers also to so-called "crimes without victims," that is offences in which the individual who could otherwise enjoy the procedural status of the "wronged party" is missing;
- in a broader context, the concept of restorative justice (i.e. de facto responsibility) encompasses each intentional punishable act performed by a perpetrator at a stage either preceding or following the offence which can be classified as a socially positive counteraction capable of removing all or some of the negative results of the punishable act;
- criminal law consequences are usually distilled into a "regress of punishment," that is the reduction of the repressive element of criminal liability (or its minimisation).

Forms of implementation of restorative justice postulates

What methods are specifically utilised by the programme of restorative justice in order to accomplish such ambitious goals? Scholars point to: negotiations, mediation, and restorative justice conferences and circles.[26] This indicates that the concept of restorative justice does not prescribe any specific means of response to the offence, but only procedures for determining such measures in concrete situations. There is no catalogue of official reactions to the offence characteristic of restorative justice which would be similar to a

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It must be emphasized that these victims are not victims of the convicts with whom they meet as a part of the program. P. Szczepaniak, "Mediacja po wyroku – w stronę sprawiedliwości naprawczej," *Mediator*, 1/2003, p. 59.

26 M. Płatek in M. Płatek, M. Fajst: *Sprawiedliwość*, p. 19; D. Wójcik, "Rola mediacji między pokrzywdzonym a sprawcą przestępstwa," in A. Marek, ed., *System Prawa Karnego, Tom 1. Zagadnienia ogólne* (Warszawa 2010), p. 360 ff.