Punishing (Non-)Citizens

If sociologists are to be trusted, reflexivity, focused on itself and devoid of any religious or at least ideological framework, leads to the weakening of control mechanisms. Such changes are accompanied by the polarization of social classes and by the exclusion of the so-called underclass (which certainly includes a vast majority of criminals) from the civil society. In the doctrine of criminal law of “mature modernism”, within the framework of a liberal-democratic state, the civil society, together with the idea of communication, is supposed to constitute a central reference point in the research on criminal liability. Reflexivity brings up new problems. New citizen-oriented criminal law is being shaped, based upon mediation and communication (e.g. restorative justice, Expressive Theory). The civil society does not include the area of politics or political nature of things, where the problem is not the justification of the punishment but the effectiveness of mere spatial isolation. In this sense, it is difficult to talk about the merits of the emancipation of an individual from the limitations imposed by the society. The weakening of any external authority and of political duties owed to the state is replaced by self-control proper to reflexive modernity only in cases where the individuals have adequate intellectual and ethical predispositions. Disappearance of the influence of external rules and values together with the mechanism of exclusion from the civil society results in the weakening of self-control and in selfish care only about one’s own perspective (but also in repressive subordination by the state). Such a state of affairs creates favourable conditions for objectifying criminal liability, abandoning the concept of guilt, and for attempts to provide an ethical justification of penalty – which are concepts taken from the “world of citizens”.

Keywords: reflexivity, criminal law, philosophy of law, restorative justice, resentment, CLS

1. Introduction

The article constitutes an attempt at a critique of restorative justice as an alternative to the widely comprehended traditional penal law (i.e. classically retributive or

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sociologically and anthropologically oriented approaches to criminal law). The tool serving for the critique shall be the category of reflexivity. Restorative justice has not arisen in a scientific and intellectual void – it is deeply rooted in the Age of Enlightenment, in liberalism, and utilitarianism. Contrary to the views of the apologists of the ideal of restorative justice (among whom punishment contesters may be counted), it is not a solution leading to the acknowledgement of subjectivity and concern of the perpetrators, victims, and the community, but a manifest of the farthest-developed commercialization of social relations so far. In order for the mechanism of restorative justice to function properly, its implementation must be preceded by social reforms ensuring fair social order, i.e. fair distribution of goods and burdens.

Restorative justice counts for nothing if there is no sense of community or if a particular group of people is virtually excluded from participation in the life of the community. Ironically, a significant majority of criminals come from this exact group – at the same time constituting a somewhat natural object of the legal penal reaction. Such a state of affairs gives rise to a strong sense of resentment, which does nothing to resolve social issues (such as crime), and may even exacerbate them (the exclusion of the perpetrators of crime and their families increases; it is a specific mechanism of alienation).

It should be emphasized that the purpose of these deliberations is to criticize not the idea of restorative justice itself, but rather the manner of its implementation, which often does not correspond to social reality and is not preceded by appropriate social reforms and social guarantees. In practice, criminal law is still the most inexpensive tool for influencing social phenomena, not contributing, however, to the solution of social problems – as these cannot be resolved by means of criminal law, even if the instruments of restorative justice are implemented.

2. The Enlightenment and the intellectual and axiological foundations of modern criminal law

The Enlightenment rationalism with the related glossary of terms and concepts seems to dominate in the contemporary doctrine of criminal law and criminal policy. On the basis of the philosophy of state and law supreme concepts of this dictionary include contemporary notions of liberal democracy, deliberative or participatory democracy and citizenship (being a citizen). The institutions of deliberative democracy and citizenship

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were both made to measure according to perceptions or ideas of Modern Era liberals and utilitarians – John Locke, Jeremy Bentham, John Stewart Mill. At the same time the modern dictionary of legal (and social) doctrine was created by a revolution that destroyed the social order of ancien régime, the continuation of which (its continuation was the modernist program) was defined as progress. Progress leading to the emancipation of humanity (and to increasing the autonomy of equal and free citizens) was, in turn, supposed to justify social changes, political decisions and their consequences.  

In criminal jurisprudence, “progress”, in this understanding, took on two characters. First, the concept of deliberative (participatory) democracy and of the citizen enticed the representatives of criminal jurisprudence to promote the idea of humane treatment of offenders. It is interesting how humanitarianism took the shape given to it by the creators-reformers in the declaration of human rights. However, the word “humane” in this case means primarily “according to the scientific knowledge of man”. The Enlightenment brought the idea of progress as an end in itself. Progress in all areas of human (and social) life was to be guaranteed by science, or more broadly, by the intellect or the human mind. Scientific knowledge was not, at the time, particularly strongly underpinned by methodology, and oscillated between a philosophical and a religious vision of the world, due to the attachment to the Aristotelian-Thomistic tradition – although, of course, the first traces of scientific thought could already be observed in the ideas of Archimedes. Progress as an end in itself, was, in turn, supposed to lead to improving the fate of humanity. Man became an instrument of progress; a tendency which in modern times (the twentieth century) reached its climax. There are more examples of subordinating social order to the idea of progress: for instance, the devastation of the environment is a result of industrial development and consumption (industrialization leads to improved living conditions, thus maximizing the happiness of the masses, so it is useful). In criminal law, such subordination found expression in the anthropological theory of Cesare Lombroso or in the ideas of resocialization. It was the complete opposite of the pre-Enlightenment world and thinking, in which the utilitarian, practical or instrumental categories remained in the background or were insignificant (although, of course, instrumental rationality in ethics was, as it were, “invented” by Thomas Hobbes).  

The Middle Ages treated man as a spiritual being and the punishment could be cruel if only it was to save the human soul. It was the spiritual that justified the means (although there was no lack of abuse on the part of rulers, as the monarchs otherwise enjoyed the royal anointment and ruled “of the will of God”). The Modern Era in turn, at least since Helvetius, has treated man as essentially a malleable being, susceptible to educational and preventive influence and impact from the external environment.

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