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Scarf and Scales: Variations on Probation Order in the History of Juvenile Penal Law

Standing before a statue representing a blindfolded woman holding a set of scales, we would do well to guess that it is the Roman goddess Iustitia, although we could also be on the right track if we think of her Greek colleague, daughter of Zeus and Themis, Dike. Both personify justice, but Iustitia is more celebrated, owing to the legal system of her nation. The head scarf symbolizes impartial sentencing, while the two pans of the scales refer to the guarding of the balance, the completion of inequality.¹ But our question is whether it can be also a contemporary statue, or could it do with some updating?

The Pendulum of Criminal Law

A metaphor describes the struggle against criminality as a pendulum swinging between the classical and positivist theories.² The classical one was created by citizens in the second half of the XVIIIth century.

The achievements of the great French Revolution influenced the writers of European penal rules, requiring precise and detailed rules which concern every single person. The philosophical background to this is indeterminism: individual responsibility is based on free will.

This kind of penal law – just as Iustitia – endeavoured to be objective: do not focus on anything but the crime, and be deliberately insensitive to the personality. Punishment serves to restore the wounded justice and legal system, so it must be proportional to the crime.

The positivist theory (situated at the other end of the pendulum)

1 The scarf and the scales recalled to me also the types of justice written about by ARISTOTLE in his *Nicomachean Ethics* – as if the scarf would refer to “distributive justice” based on equal distribution, while the scales would symbolize “rectificatory justice” correcting the differences. About the idea of equality in the field of penal law, see HELLER Ágnes, *Beyond Justice*. London, 1987; and HELLER Ágnes, *Igazságosságon túl (Beyond Justice)*. Budapest, 1990.

2 CHRISTIE NILS, *A fájdalom korlátai (The Barriers of Pain)*. Budapest, 1991.

does not focus on the restoration of justice, but rather on the prevention of new crimes. According to this theory, crime is not the result of a free and rational choice, but instead is rooted in biological, psychological or social causes: it is the doctrine of necessity.

The main question of positivist criminology is not the responsibility, but the *causes* of criminality. One of the most famous achievements of positivism is the treatment theory, which began spreading in the 1950s.

According to this, crime is only a symptom indicating the social or psychical problems of delinquents. Punishment is to change, to cure those parts of the “patients” which motivated them to commit a crime, and to help them to reintegrate into society.

The proportional punishment of Iustitia was not convenient to the treatment programs, since at the beginning of the treatment it could not be known how much time was needed to improve the personality.

Therefore they inaugurated punishments that could be delivered for indefinite periods of time. Apart from the numerous practical difficulties of the treatment programs, there are also many important matters of principle.

Is it just to punish people differently who committed the same crime? Can we impose such punishment which is not proportional to the crime? Can the duration of the penalty depend on psychologists’ decisions? Aiming at more individual punishment, can we neglect such principles as equality and proportionality?³

So What About the Scarf and Scales?

Concerning the scarf, we have to admit that Iustitia often had a bias towards the offenders: even in the time of classical criminology she punished some people differently than others, especially the juveniles.

It was the positivist theory which put an end to this bias – pulling down the headscarf and taking down the scales – ordering the judge to pay attention to the offender, as we have seen above.

Up until that time youth were not punished so strictly as adults, but generally with the same sanctions. As a consequence of positivist criminology, the sanctioning system of juveniles was enlarged, for example with the probation order, which was enacted at that period of time.

3 About juvenile sanctioning systems in the world, a comparative study can be found in WINTERDYK John A., *Juvenile Justice Systems*. Toronto, 1997.



Even an executable judgment does not make us exempt from the commandment of love. On the contrary, Jesus often exorcises our vengeful nature by turning to guilty people with caring and tender love.

Following the Christian example, a great number of believers, deacons and deaconesses consoled prisoners. In 325 the synod of Nicea instituted an official called the *procurator pauperum* (attendant of the poor), who is regarded as the prefiguration of the probation officer.

Despite that auspicious beginning, it was not until the XVIIIth–XIXth centuries that the probation order was enacted – more than seventeen centuries later. Why the delay? On one hand, patronage was regarded as a social and not a state task.

On the other, at this period of time there were no prisons as there are nowadays: penal systems were based on corporal punishment and the death penalty, so the states did not have to organize support for released prisoners.

It was the movement for prison reform which brought the cusp: prisons took the place of subterranean holes and dungeons, and corporal punishments were replaced by institutional punishments focusing not on the body, but on the soul of the criminal.

During these centuries, the nature of patronage changed: it came

to mean not only the support of prisoners, but also a part of the penal procedure. It stands on the boundary of punitive and social policy, including means of both.

It gives a “second chance” to delinquents: the judge – suspending the process – puts the accused person under the supervision of a probation officer, who from then on controls and helps them.

If supervised people keep the rules during the probation period, they can be exempted from other sanctions. In this enlarged meaning I will call this process – as in the title – *probation order*. Depending on the phase when the procedure is suspended, several types of probation have evolved.

a) The Anglo-Saxon version: the heart of the probation system existed already in medieval England as the *Surety of the Peace*. In the case of less serious crimes, judges were entitled to allow convicted criminals to remain free on the condition that they make a promise they will not commit crimes again.

This practice indicated that the judge was not, or not only, for making sanctions, but was regarded as the *Conservator of the Peace*. This practice of the courts came up in XIXth century Birmingham, where youthful offenders were supervised by a reliable family or patron instead of jailing them.

It was in Massachusetts, though, where probation – as we know it nowadays – was born. The inhabitants, a flock of Puritan immigrants, preserved the British traditions of common law and unwritten law.

In this way, the judge also carried a broader scope of authority for preserving the peace. Although the probation officer might have come into being without the contribution of a certain shoemaker, we will add a stone to his cairn.

He was Rufus R. COOK, *Uncle Cook*, who visited trials with great interest, beginning in the early years of 1870. Especially in the cases of young people he tried to persuade the judge to suspend the procedure and – instead of sentencing them to jail – to give them a second chance.

He and his friend Augustus undertook the supervision of the released's behaviour. Their success was admitted in 1878, when at first Boston, and after that the whole of Massachusetts, institutionalized the *deferred sentence* and established the status of probation officer.

b) In the French–Wallonian model, differing from the Anglo-Saxon version, the court suspends not the trial, but the enforce-

ment of the punishment – a *suspended sentence* – and they do not order an overseer for the released.

c) The third form of probation is connected to gradual imprisonment, which developed also in Britain in the middle of the XIXth century. The basis of the system is that during detention the rules may become more and more abated, depending upon the the jailed person's behaviour.

In 1857 the imprisonment was divided into three parts: firstly the completely solitary detention; after that, daytime labour with solitary detention at night; and finally the *parole* of the sentenced person.

During parole the released people (the parolees) are supervised by the police. From the birth of probation, legislators have continually improved and changed its rules according to the current criminal policy.

If the “criminal pendulum” swings towards positivism, the treatment of the offender's problem comes to the forefront; when it moves in the opposite direction, the process becomes standardized and contains more punitive measures.

Probation Order of Juvenile Offenders

The most important components of moral retention are *disapproval* and *integration*. The first one shows the community's opinion about good and bad; the second one enables the person to be sensitive about her or his expectations.

Belonging to a community is positive dependence, where the members feel they are appreciated and recognized. The more they rely on the community, the less they dare to risk their position in it, so they try to meet the requirements. Those who have broken the law are not interested in keeping it, because they have lost the appreciation and positive dependency.⁴

The advantage of the probation order against the other sanctions is that it can include not just the penalty, but also several methods which strengthen the juvenile's connection with the community.

In this way probation is not just a possibility to avoid the imprisonment, but – with many programs, trainings and personal aid – it can enable the offenders to remain or become a member of a community.

In addition, the probation officer is not the only one who supports the juvenile, because other sectors are involved in the pro-

cess, such as child protection, communalism, labour policy and voluntary organisations.

Probation officers can apply so-called “restorative” processes, which try to make amends for the crime. Their goal is not the equality of pain (the victim's and the offender's) as in the retributive model, but the balance between damage and recompense.⁵

Now let us see the main differences between the two disciplines. In the *retributive model*, the focus is on blame; regret and forgiveness do not substantially affect the procedure; the state and the offender are the focus; the offender is accused; there are winner–loser positions; and the connection between the offender and the community weakens.

In the *restorative model*, the focus is on the search for a solution; regret and forgiveness play an important role during the process; the victim, offender and community are the focus; the harmful act is the topic; there are winner–winner positions; and the offender's integration into the community strengthens.

As a consequence of the restorative theory, several new sanctions have been coded in Western countries, like restitution and mediation (reconciliation between the offended and the offender).⁶

In these countries the work penalty is one of the most frequently delivered punishments in juvenile cases. They prefer social work – such as caring for old or disabled people, painting their flats, maintaining playgrounds and parks, repairing toys – so as to strengthen the offenders' self-respect and connection with the local community.

Apart from the work penalty, the courts often sentence juveniles to probation on the condition that they try to compensate for the damage they have caused. Western countries involve probation services in the whole procedure. Here are the typical charges of probation services grouped by phases of the process:

a) *Diversion from the criminal procedure*: In many countries different experts are gathered to work in teams figuring out ways to avoid legal procedures.⁷

b) *Before the sentencing*: Probation officers are charged to make a study for the court giving information about the juvenile offender and the crime, and suggesting a penalty.

5 GyÖRFI Éva, *Konfliktuskezelés szemtől szembe (Conflict Resolution Face to Face)*. Család, Gyermek, Ifjúság 4. Budapest, 2002.

6 Austria is famous for her diversion process: about two-thirds of juvenile offenders' cases are finished like this, successfully applying reconciliation out of court. See SCHROLL Hans Valentin, *A bíróságon kívüli kiegyezés Ausztriában (The Reconciliation outside the Court in Austria)*. Büntetőjogi Kodifikáció 2. Budapest, 2002.

4 SZABÓ András, *Igazságosan vagy okosan? (Justly or Wisely?)*. Budapest, 1993.

c) *Enforcement of sanctions*: As we have seen, probation can belong to several kind of sanctions, such as parole, deferred sentence, suspended sentence, community service, restitution, mediation, training courses and complex punishments (eg. deferred sentence with community service).

During probation, juveniles have to keep rules ordered by the law and the judge. These rules concern work, study, relations with officers, spare time, participating in programmes and trainings, attending probation centres, and staying in probation hostels.

d) *Aftercare*: It begins even in the prison and reformatory. Probation officers try to protect the prisoners' interests as much as possible and to help them remain in contact with their relatives.

They speak about the crime, organize therapies and cooperate with the officers-to-be. After the release they try to help the juveniles to find jobs and accommodation. In Western countries – especially in Britain and the Netherlands – a large number of voluntary organisations support these aftercare groups.

In line with the coding of new punishments, legislators – focusing on juveniles and other less serious criminals – endeavour to frame a gradual system of sanctions so as to avoid the deprivation of freedom:

Informal settlement out of court (eg. reparations); finishing the procedure by admonition of police or state attorney (with or without preconditions); probation order, social training with requirements and injunctions (eg. fining, community service, injunction from driving vehicles); probation order; intensive probation order (with a requirement to stay in a probation hostel or attend a probation centre); and as a last resort, imprisonment for as short a time as possible.

This way the modern Western penalty systems look like a “funnel”, which grows narrower and narrower as the procedure moves from the action of police towards the enforcement of punishments, so the majority of offenders can avoid imprisonment.

7 For example, the “gatekeeping” method and “case referral penals” in Britain; the “family conference” in Ireland. See DÉR Mária, *West Yorkshire Probation Service. Kriminológiai Közlemények 47*. Budapest, 1993. KRÁLNÉ SZABÓ Piroska, *A pártfogó felügyelet helyzete és funkciója Magyarországon és Angliában (The Situation and Function of .Patronage in Hungary and in Britain) Család, Gyermek, Ifjúság 1–2*. Budapest, 1992.

8 IRK Ferenc (ed.), *Társadalmi átalakulás és bűnözés (Social Transformation and Delinquency)*. In Magyar-német kriminológiai szimpózium. Budapest, 1995.

9 KERÉZSI Klára, *Koncepció a Büntető Törvénykönyv szankciórendszerének átalakításához, különös tekintettel a hazai pártfogó szolgálat működésére (Concept on the Transformation of the Sanctions in the Penal Code)*. Kriminológiai és Kriminálisztikai Tanulmányok 33. Budapest, 1996.

Meanwhile the Eastern system looks like a “pipe”: those who get in cannot be punished otherwise than by imprisonment.⁸ The Magyar penal system resembles more a funnel than a pipe, as probation is provided to a large number of juvenile offenders, but it does not contain many of its essential parts.⁹

The penal law do not involve the probation officers into the preparation of the sentence. In this way, the courts do not have enough information about the offender, so they do not order special requirements.

Regarding the other part, the probation officers do not organize therapies or trainings for the offender. The intensive form of probation (staying in a probation hostel or attending a probation centre) cannot be enforced, as there is no place for it.

The supporting and penal side of the probation is not balanced because of financial difficulties. The community service order does not contain the idea of reparation or compensation. It could be quite a long list. Fortunately, the system is under reform.

The Contemporary Iustitia

It is a mercy that statues are not updated, so the battles of words about criminology do not concern Iustitia. I – however – try to imagine how she would look like nowadays, if she symbolized the judge of juvenile offenders.

The society aims to return the offender – both adult and juvenile– from the guilty way and to deter others from committing crimes. Just as in juvenile cases the first aim is regarded as much more important than the second, so is individual prevention as compared to general.

Owing to the many new punishments and processes, a wide range of sanctions is at Iustitia's disposal. Therefore she must pay attention to juveniles so as to get enough information to choose the most adequate punishment. This task would require rather glasses than scarf.

Suggested Reading

CHRISTIE Nils, *A fájdalom korlátai (The Barriers of Pain)*. Budapest, 1991.

DÉR Mária, *West Yorkshire Probation Service. Kriminológiai Közlemények 47*. Budapest, 1993.

GYÖRFI Éva, *Konfliktuskezelés szemtől szembe (Conflict Resolution Face to Face)*. Család, Gyermek, Ifjúság 4. Budapest, 2002.

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WINTERDYK John A., *Juvenile Justice Systems*. Toronto, 1997.

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