

DALLA COMUNITÀ INTERNAZIONALE

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Some extracts of the history of Hungarian Criminal Law, Criminal Policy

SUMMARY: 1. Reforms in the Past, in the Present. – 2. Issues of Criminal Policy. – 3. Purposeful Criminal Policy.

1. Reforms in the Past, in the Present

Dombóváry¹ said of the Hungary of the early 19th century: «the air was filled with ideas on how criminal law should be reformed»². Both in Hungary and internationally, we are witnessing the emergence of major criminal policy reforms. In the countries of the common law, I believe, criminal policy is characterised by the co-existence of a punitive spirit and the policy of “tough hands” on the one hand, and restorative justice on the other. The trend of criminal policy primarily focusing on persuading (potential) voters has become increasingly important. This holds very much true of Hungary’s criminal policy as well, as László Korinek pointed out wittily, before long, politicians will be using the Penal Code as a “message book”, trying to get their messages through to voters.³

In the United Kingdom, the government has proclaimed the principle of “tough justice” on the one hand, but on the other hand, they also emphasise the need to develop victim and witness protection, and to support the establishment of community justice as widely as possible.

Under the current criminal policy, criminal justice focuses on the victim. Criminal offenders, on the other hand, have to reckon with a strong and effective criminal justice system that will take firm action against them, clearing up crime cases and inflicting just punishments on criminals. Leng said that the traditional British criminology has accepted uncritically a view of crime as involving the lower classes preying upon the more prosperous middle classes. The new view (“Tough on crime and tough on the causes of crime”) recognises that it is the lower classes who bear the burden of crime as victims.⁴

¹ Dombóváry (1874-1938) was a lawyer and he worked for legal journals (Büntetőjog Tára and Jogtudományi Közlöny).

² DOMBÓVÁRY, *Fenyítéljárás és börtönügyi adalékok vármegyéinknek XIX. Századeleji gyakorlatából. Angyal szeminárium kiadványai*, Budapest, 1931, 3.

³ Remark made on April 8, 2006, at a conference organised by the Faculty of Political Science and Law of Eötvös Loránd University.

⁴ LENG, *The Remoulding of Criminal Justice in England in the 1990s*, in *Kriminálpolitika és büntető*

The strategic plan for the period until 2009 continues to lay great emphasis on fighting crime and antisocial behaviour. The argument is that the population is still living in fear. As László Korinek said, the term “security” becomes more important at times when people are overcome with fear and anxiety. Thanks to the influence of the media and politics, there is a growing “moral panic”.⁵

Therefore, it is a priority in the United Kingdom to persuade law-abiding citizens that they are safe.⁶ The opportunity to take part in delivering justice, for example, can boost citizens’ confidence. Cost-cutting is a key argument in favour of introducing community justice. Compensation for the damage caused by the offence is also a fundamental idea in the new trends.

Katalin Gönczöl believes a paradigm shift has taken place in the criminal policy of the United States as well.⁷ In the US, zero tolerance has divided both experts and the general public. Some believe this is the only way to act against crime. There are more moderate views, however, claiming that this is no way to prevent antisocial behaviour or fight crime. It remains questionable whether the “get tough” trend should continue. Becket and Sasson claim that the US criminal justice system is nothing but a system of “injustice”.⁸

Wacquant⁹ says today’s US criminal policy is offensive. «Through the eyes of the lower classes, banished to the periphery of the labour market and let down by the welfare state, (the main targets of the policy of “zero tolerance”) the gross imbalance between high-level police activity and the excessive amount of funds spent on police efforts on the one hand, and the work overload of the courts and their crippling lack of funding on the other, strikingly resembles a well-organised disregard of justice».¹⁰

The time of the welfare state’s welfare policy is over, the welfare state is withdrawing and yielding its place to the criminal state. Earlier, the “underclasses” received aid, now the state must strike down on the “criminal lower classes” with an iron fist. The justice system does not need to deal with the causes of crime, it is meant to «(...) punish the offenders, compensate the innocent and protect the interests of law-abiding citizens».¹¹

igazságszolgáltatás Nagy-Britanniában a 90-es években. *Bíbor Kiadó*, Miskolc, 2000, 34-48.

⁵ KORINEK, i. lecture.

⁶ Delivering Justice, *Rights and Democracy. DCA Strategy 2004-2009*, Department for Constitutional Affairs, www.dca.gov.uk/dept/strateg/dcastratch4.

⁷ GÖNCZÖL, A nagypolitika rangjára emelkedett büntetőpolitika *Kritika*, n. 12, 2001, 116-21.

⁸ BECKET, K- SASSON, *The Politics of Injustice: Crime and Punishment in America*. Thousand Oaks, CA, Pine Forge Press, 2000.

⁹ WACQUANT, *A nyomor börtönei*, *Helikon*, Budapest, 2001, 50.

¹⁰ WACQUANT, *A nyomor börtönei*, *Helikon*, im., 35.

¹¹ WACQUANT, *A nyomor börtönei*, *Helikon*, im., 46.

Vivien Stern says that everywhere the market society is producing more crime. More acts are being defined as crimes. More people are classified as criminals, and more are being locked up in prison. With globalization, the crime and punishment problem is no longer insulated from pressures beyond national borders. The rich may retreat behind their expensive security into gated communities, but the poor are more and more at the mercy of criminals and corrupt policing.

Vivien Stern argues that the trends towards more criminalization and more imprisonment are not making for more effective crime control or safer communities. She shows how the poor are criminalized and how commercial interests now shape society's response to crime.¹²

Katalin Gönczöl¹³ says there is also a confidence crisis surrounding the philosophy of the welfare state and criminal policy in particular. In the United States, criminal policy has risen to the level of the emotionally overheated high politics.

Nils Christie quotes Mauer: «Although there is no doubt that the United States has a high crime rate, there is a lot of evidence suggesting that the recent increase in the number of the incarcerated is not due to a rise in the number of offences, but to the impact of the more stringent criminal justice policy of the past decade»¹⁴.

This trend is supported by the latest figures as well. Research conducted in 2004 shows that the number of the incarcerated is rising in the United States despite falling crime rates.¹⁵

2. Issues of Criminal Policy

Criminal policy tries to find answers to the questions of what and how should be punished. The term “sanction” (*sanctio*) originally denoted “sanctifying” or “consecration”, which meant responding to any kind of human behaviour. Good deeds were sanctified with rewards and bad behaviour with punishment¹⁶. When defining the aim of punishment, the way the individual's

¹² STERN, *Crime and Punishment in a market society. How just is the criminal justice system*, Lecture to British Institution of Human Rights 9th, February 2006.

¹³ GÖNCZÖL, *Szolgáltassuk az igazságot!*, in *Egy élet az igazságügyi statisztika szolgálatában. Ünnepi kötet a 70 éves Vavró István tiszteletére*. ELTE Állam- és Jogtudományi Kar, Budapest, 2006, 47-55.

¹⁴ CHRISTIE, *Büntetésipar*. Osiris kiadó, Budapest, 2004, 110.

¹⁵ *New Incarceration Figures: Rising Population Despite Falling Crime Rates. The Sentencing Project*, www.sentencingproject.org.

¹⁶ This is the way *Angyal* defines the concept of sanctifying (*sanctio*): «The teleological presentation of the consequences of any human behaviour relating to the subject of that behaviour». «State or legal sanctifying manifests itself in representing the consequences linked with the act by regulations. The representation of good consequences is rewarding and that of bad ones is punishment and compensa-

responsibility is judged by the legislator is a key issue. In a determinist conception, the individual will forever bear the stigma of being determined to commit criminal offences for either genetic, biological, psychological or sociological reasons. If somebody is regarded as a person who will remain a criminal anyway, the state response will focus on elimination or isolation. This is the case when the individual bears no responsibility in the classical sense since how could he/she be responsible for his/her actions when they are determined by external or internal factors. While the criminal's responsibility is not established, they do not relieve him/her of this responsibility, arguing that society must be protected from these determined offenders. This conception does not put offenders into an easy position either, as confinement for indefinite, but possibly very long periods keeps them in uncertainty.

In an indeterminist conception, the uncertainty is removed as the individual, having chosen the illegal road out of his/her free will, shall receive predictable punishment, in direct proportion to the crime committed.

Beccaria says punishments are perceivable motives that keep power-thirsty and law-breaking people from sinking the laws of society back into primary chaos.

Carrara claims that «the aim of punishment is not to allow justice to prevail, or to avenge the offended party, or to let those who suffered win compensation for the damage, or to intimidate citizens or to improve the offender. These can be by-products of the penalty, some of which may be desirable, however, the penalty would still be incontestable without any of these results»¹⁷. The aim of punishment is nothing else but to restore the order of society. Crime results in moral damage as it disturbs the sense of calm in everyone. This damage is what punishment must set right, by restoring order. Carrara says criminal law is based on the fact that the rights of the people must be protected, and it is limited by justice.

Speaking of the principle of reprisal, Bibó emphasises its emotional nature. «Reprisal, even in the rationalised and rigid form of legal procedures and institutions, is a legal consequence resulting from and glowing with indignation. This is the reason why we are unable to accept a punitive system set exclusively on practical defence. Such a system, we feel, is indifferent, too understanding towards the crime, lacking solidarity with the indignation of the offended person and the offended community, a characteristic feature of all

tion» ANGYAL., *A jogbölcselet alaptételei*, V ed., Pécs, 1926, 94.

¹⁷ CARRARA, *A büntet jogtudomány programja. I-II. Magyar Tudományos Akadémia Könyvkiadó Hivatala*, II, Budapest, 1878, 74.

forms of institutional reprisal»¹⁸.

Today, ideas saying that crime should not necessarily be followed by punishment are gaining ground. Efforts to increase enforcement of the principle of opportunity have been increasing in importance. Tibor Király¹⁹ regards the principle of legality as a theoretical mirror of equality before the law, which means that all are equal before the law and all offenders shall receive punishment for the crime they committed. In the principle of opportunity, the state renounces the punishment for practical reasons, reasons of economic efficiency of the proceedings, either omitting or postponing it. Ákos Farkas²⁰ says the principle of opportunity seems to be taking over the prime role from the principle of legality. Therefore, it is no longer obvious that crime must be followed by punishment. Criminal jurisdiction does not always impose a penalty, sometimes it will just threaten with punishment.

There are two major alternatives of criminal policy: a restrictive criminal policy and a restorative one. The advantage of the first alternative is that the criminal justice system can build on citizens' sense of law based on traditions. It is possible to obtain public support for conventional and strict penalties.

For citizens, the state guarantees that it will not tolerate infringements of the norms and is ready to use force in order to protect the law. This improves citizens' sense of security and boosts the image of a strong state. A strong state enforces its will by orders in prevention, criminal investigation and law-enforcement.

It is considered a drawback of the restrictive alternative that it has difficulty in giving quick responses to new developments. It makes the population unable to face the fact that delinquents are part of the same society that the majority belongs to. Criminals do not receive assistance or a model to follow on how to settle conflicts in line with society's majority expectations and why they are also personally interested in respecting the majority norms.

The advantage of the restorative alternative is that it is based on the conception which says crime is a product of society, therefore, criminals are responsible for their acts. However, in judging criminal offences, the background that inclined the individual to follow norms different to those

¹⁸ BIBÓ, *Etika és büntet jog*, in BIBÓ ISTVÁN, *Válogatott Tanulmányok*, 1935-1944, Magvet, Budapest, 1986, 161-182.

¹⁹ KIRÁLY, *Bizonyítás a készülő büntetőeljárás kódexben*, in *Kriminológiai Közlemények*, 54, Ed. DOMOKOS, Magyar Kriminológiai Társaság, Budapest, 1996, 90-103.

²⁰ FARKAS, *A büntetőeljárás reformja és a bűnmegelőzés*, in *Büntetőpolitika, bűnmegelőzés. Elte Szociológiai Intézet Szociálpolitikai Tanszéke*, Budapest, 1994, 9-29.

accepted by the state and the majority of society must be taken into consideration.

It requires active cooperation from society, which means citizens will learn to use the key defence methods and tools, whereby it relieves the whole of society of a large part of the – much higher – costs of external policing, and reduces the public's fear.

Norms can only be partly enforced by central principles and mechanisms. Infringements of norms and the causes of these tend to have local characteristics as well. These can be effectively influenced by using local methods and tools. Local achievements result in a better local sense of security.

A drawback of the restorative alternative is that a policy based on the unconditional protection of the individual can count on less community support than conventional criminal policy.

It is not always possible to enforce national criminal policy ideas. It can prove far more difficult to coordinate various crime-prevention institutions than with central control. It can incline the state to become lazy and try to get rid of some of its key central commitments as well.

There is tendency all over Europe that favours alternative punitive sanctions. Arguments besides mediation are the following: «Mediation is a flexible method, more effective in problem solving. All parties must participate in the criminal procedure intensely. The sense of responsibility of the offenders has to be increased»²¹.

According to Lahti although criminal policy of the Nordic countries is not unified, one can argue for the existence of a “Scandinavian criminal policy” characterized by several common features: the differentiation of criminal policy strategies (e.g. social and situational crime prevention, cost-benefit thinking, criminal law policy, sanctions policy). Discernible tendencies towards more unified or, at least, more harmonized criminal policies on the international and European level are also examined. Active participation in this developmental process is encouraged to ensure that the fundamental principles of Scandinavian criminal policy are properly utilized.²²

Anttila also deals with the common principles of Sandinavian criminal justice.²³ She writes about the need, that the time in prison should be utilized

²¹ The Ministerial Committee of the Council of Europe defines the basic requirements mediation in the Recommendation (99) nr. 19.

²² LAHTI, *Towards a Rational and Humane Criminal Policy – Trends in Scandinavian Penal Thinking*, *Journal of Scandinavian Studies in Criminology and Crime Prevention* Routledge, Vol. 1, Number 2 August 1, 2000, 141-155.

²³ ANTILA, *Criminal Justice and Trends in Criminal Policy*, in *The Finnish Legal System* (edited by J.

as effectively as possible. The conditions in the penal institutions should be arranged to correspond as far as possible to the living conditions in society in general. A sentence must be enforced in such a way that it does not needlessly hamper but instead, as far as possible, promotes the placement of the prisoner in society. The disadvantages caused by the loss of freedom must as far as possible be prevented.

Today, there is a lot of talk about the importance of social control, and the responsibilities of small communities. Károly Bárd pointed out in the eighties that it is impossible to operate a justice system without social support and acceptance. «Criminal jurisdiction, as we know very well, is used as a weapon by the state, however, if it expects to be appreciated by the community in the longer term, it must not content itself with the availability of the enforcement apparatus, but it must operate in a way that allows the community to identify with jurisdiction and consider it as a personal matter».²⁴

In Britain The Crime & Disorder Act 1998 placed an emphasis on partnership working to tackle community safety. Since its introduction in the summer of 1998, each local authority in Britain has been obliged to «formulate and implement a strategy for the reduction of crime and disorder in the area» within their boundaries. Furthermore, the Local Government Act 2000 imposed a duty on local authorities to consult key stakeholders and prepare a community plan to promote or improve the economic, social and environmental well being of their area and contribute to the achievement of sustainable development.²⁵

Stern writes about project in Britain: «Prisoners working for the benefit of others» which began in 2000 and continued until 2004. It had two main objectives. The first was to generate debate about the purpose of imprisonment and prisons. The second was to encourage practical changes in the way prisons are run. To achieve this, the project has defined change under four headings or “pillars”. These were: a) fostering a new relationship between the prison and its community; b) providing opportunities for prisoners to work for the benefit of others; c) raising awareness among prisoners about the sufferings of victims of crime; d) creating a new basis for resolving conflicts in prisons.²⁶

UOTILA) *Finnish Lawyers Publishing Company LTD*, Helsinki, 1985, 232-242.

²⁴ BÁRD, *Társadalomtudományok és büntet igazságszolgáltatás*, in *Kriminológiai Közlemények*, 26-2, ed. KEREZSI K., Mta Magyar Kriminológiai Társaság, Budapest, 1989, 5-19.

²⁵ Building Relationships between Prisons and Local Government, papers from a conference held in Middlesbrough on 9 July 2003.

²⁶ STERN, *Prison and their Communities: testing a new approach. An Account of the Restorative Prisons Project*, 2000, 4.

3. Purposeful Criminal Policy

Ferenc Irk says that a paradigm shift is necessary in criminal policy as, he believes, the rules of criminal law look like they were designed to serve the reality of the 19th century or the first two-thirds of the 20th century. Whereas, «(...)there has been a continuous change in the past 25 years in the priority of what is considered as dangerous to society. Nevertheless, this has left criminal policy unaffected even though Hungarian law has a tradition of 150 years of successfully adjusting theoretical principles to practical requirements».²⁷ I believe it is undisputable that there is a need for change. A large number of publications have been published concerning the matter. It remains to be seen whether the reform impetus will be sufficient for a paradigm shift, and particularly whether the ideas fitting the reality of the 21st century will appear in the new criminal code.

József Trócsányi pointed out that as all regulations fulfil social needs, so do morality and law as well. And the final aim is to maintain social life.²⁸ All norms are meant to force people to follow rules in some way or another, but while society tries to use psychological pressure to make people behave morally, law-abiding behaviour is enforced by the state, through its “mechanical compulsive power”, using *Jhering’s* term.

Ákos Pauler, in the early 20th century, criticises the legal system – including the criminal justice system – for failing to create ideals. He claims that «any correct law must see its sanction in the respect for human beings». By correct law, Pauler means ideal law. «Thus, the state, when guiding its citizens to realising proper culture, will also appear as a state founded on the rule of law as it will also want to meet the requirements of law as much as possible».²⁹

Today, advocates of community punishment and community policing are criticised for being Utopians. At the turn of the 19th and 20th centuries, Liszt was accused of abandoning the classic path of criminal law for the romantic pastures of criminal policy. Finkey defended Liszt from his contemporary critics, saying there is also a need to investigate the practical issues of criminal law.³⁰

Mátyás Vuchetich, the author of the first scholarly work of criminal law said the legal basis for punishment is the threat of punishment. «A counter-motive

²⁷ IRK, *A társadalmi-gazdasági változások és a bűnözés kapcsolata. A kockázat-társadalom kriminálpolitikája*, in *Globalizáció és kriminálpolitika*, Okri (ed. IRK), Budapest, 2006, 36-48.

²⁸ TRÓCSÁNYI, *Eerkölcstelen ügyletek*, Grill Károly Könyvkiadóvállalata, Budapest, 1909.

²⁹ PAULER, *Az ethikai megismerés természete*, FRANKLIN, TÁRSULAT, Budapest, 1907, 228.

³⁰ FINKEY, *A XX század büntetési rendszerének reformkérdései*, At the general meeting of the National Association of Judges and Prosecutors in Kaposvár, on September 15 1935, Budapest, 30.

needs to be created against the desire to commit the crime». «Punishment can never be an aim in itself». The immediate aims are “*quia peccatum est*” and “*ne peccetur*”, the more distant aim is to protect law and order and to preserve the authority of the law and the state.³¹

Wlassics is a supporter of the classic school, though not following it rigidly, but accepting the necessity for changes. «However, wherever any new trend of criminal law attacks the guarantees of the constitution and its moral and legal foundations, that we shall never sympathize with».³² For example, he rules out the possibility that a criminal justice system should be based on indefinite punishment. That can only be a special option for certain types of offenders.

Eötvös and Lukács say, in connection with correction by imprisonment, that punishment is aimed at repression and correction. Lajos Kossuth wrote an editorial on the issue on August 14, 1842, calling upon Szemere to develop the foundations for imprisonment penalty, which must have determent as its aim in addition to correction. Deák-Hertelendy says in his deputy report for 1840: «Punishment loses its aim as to the general public when it is inflicted on offenders as retaliation only, but not as correction, and where prisons are only places of suffering, but no attention is paid to moral reform. Neither strictness of punishment, nor the certainty of its quick infliction will be sufficient to reduce the number of offences because fear without better morals will not guarantee the respect of law for the general public». «Prisons have so far (...) largely been schools of crime».³³

An example to the early emergence of practical points of view is Balla's idea, which shows that ideas of opportunity and expedience did not first appear in the second half of the 20th century. Balla suggests that the costs of building more modern prisons providing more humane accommodation to detainees could easily be covered by setting up lotteries. «They are immoral, but there is no pure morality in real life. Politics can only be governed by moral means as long as they prove useful, and it is beyond doubt that lotteries are not as bad morally as the horrendous damage, or in fact, jeopardy, which comes from the current prisons».³⁴ This peculiar idea of prison reform might provoke a smile today, however, we have to admit that there was no shortage

³¹ MADARÁSZ, Vuchetich Mátys, in *Büntet jogász professzorok a Pázmány Egyetemen*, Budapest, Angyal Szeminárium Kiadványai, 1942, 24.

³² PRONIEWICZ FERENC, Wlassics Gyula, in *Büntet jogász professzorok a Pázmány Egyetemen*, Budapest, Angyal Szeminárium Kiadványai, 1942, 88.

³³ DOMBÓVÁRY, *Fenyít eljárás és büntetési rendszer Pest megyében a XIX század els felében*. Rényi, Budapest, 1906, 272.

³⁴ DOMBÓVÁRY, *Fenyít eljárás és büntetési rendszer Pest megyében a XIX század els felében*. Rényi, im., 278.

of pragmatic ideas in the late 1800's.

With first-time offenders of smaller offences, some trends place great emphasis on not even reprimanding offenders in order to avoid social stigmatization. A paper by Dombóváry from 1918 illustrates how much this is not a brand new idea at all: «In one case, with regard to the low degree of the guilt, the court will establish that the crime was committed, but will not inflict the punishment. With regard to the existing mitigating circumstances, the culpability is of such a low degree that even the usual reprimanding procedure is neglected». In this case, «remittal of punishment (...) is based on forgiveness», which again corresponds to the position of the most recent criminal law.

In 1935, Finkey urged for a purposeful criminal policy. He said more severe penalties should be inflicted on offenders committing grave acts of crime. On the other hand, he considered it necessary to introduce lighter types of punishment to be inflicted on those committing lesser offences and for pardonable reasons. The need for differentiation could hardly be formulated more practically today.³⁵

In international criminal policy, expectations include creation of social peace, differentiation of the system of sanctions, and application of community punishments as widely as possible. Recalling ideas from the late 19th century and the early 20th century, we can see that «there is nothing new under the sun» in criminal policy, certain ideas keep recurring as reform processes are launched and carried out. The ultimate aim for Hungary's criminal policy cannot be anything else but to create a "fair and intelligent" criminal justice system. Act C of 2012, the new Criminal Code declares a return to a criminal policy calling for punishments that are proportional to the gravity of the offence. This, however, does not mean more stringent regulations in general; the code maintains individualization. It primarily brings tougher action against repeat offenders. The tried and tested, useful elements of restorative criminal justice policy continue to be part of the criminal justice system.

³⁵ FINKEY, *A XX század büntetési rendszerének reformkérdései*, im., 31.