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**Is Restorative justice compatible with retributive justice?**  
 — From the authoritarian retributive-deterrent criminal law  
 Towards the free and social democratic criminal law —

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##### *Abstract*

*It is said that restorative justice and retributive justice are not as incompatible as they at first sight appear and have more in common than they have differences. But it is here argued that in fact, they are based on totally different concepts. In order to integrate restorative justice into criminal justice, one needs a new understanding of (criminal) law, in other words, a new criminal justice theory that includes restorative justice. Otherwise restorative justice could be co-opted into the traditional, retribution-deterrence oriented criminal justice or would be allowed to operate only on the margins of the traditional criminal justice system.*

## Introduction

Is restorative justice compatible with retributive justice? Opinion is divided on this question (1). It is said that in the retributive theory, the point of punishment is to right the wrong done by the criminal offense. This is accomplished by focusing on offenders and giving them what they deserve, their 'just deserts', so to speak. Retributive theory is discussed in terms of 'paying back the debt' that is owed to society. The offenders' suffering or loss is what constitutes the 'pay back' to society and to their victims. The 'righting of the wrong' remains an abstract, almost metaphysical, proposition. Somehow the suffering of offender restores the moral balance of the universe. Because of this preoccupation with infliction of harm as the means by which wrongs are made right, the fact remains out of sight that the real injustice of the offense is the loss and harm suffered by the victims. This injustice is not addressed by the suffering of the offender. The retributive theory of criminal punishment is, however, correct in its basic premise - that punishment must be directed at redressing the injustice of the offense. It is also

correct in its insistence that justice can be restored only when offenders are made to take responsibility for righting the wrong (passive responsibility). The strongest aspect of the retributive theory lies in its insistence that offenders be treated as morally responsible members of the community. They are not to be used as instruments for deterring others; neither are they to be treated as if they are sick and irresponsible.

So there is much in retributive theory that is very close to restorative justice. Restorative justice is also concerned primarily with making the wrong right and restoring justice to the situation. It is also concerned with demanding that offenders take responsibility for their actions by actively making things right with the victims (active responsibility in a constructive way) (2).

Therefore at the beginning of the first section of this article I will analyze and assess a few theories that argue that restorative justice and retribution have more in common than they have differences. In the second section I will explore and discuss conventional authoritarian retribution-deterrence oriented criminal law in historical sequence. In the third section it will be shown that conventional criminal law must be radically re-conceptualized when restorative justice as a new concept is incorporated into criminal justice because criminal law cannot wholly be replaced by restorative justice. In other words, criminal law based on the new concept must be adapted to restorative justice. As one sees below (III 3), criminal law and restorative justice could be reconciled by charging the law with the task of establishment and maintenance of legal peace. Otherwise restorative justice would be co-opted into the existing punitive criminal justice system or remain at the periphery of it.

### **I. Restoration through retributive-punishment theory and its critical examinations**

It is *Daly*, *Duff* and *Barton* who argue that society does not have

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to make a choice between restorative justice and retributive justice. In the following section I will examine and appraise their theories.

### 1) Daly's theory

*Daly's* theory begins with the assumption that the accused manifests individual choice (or personal responsibility) in committing the crime and that criminal law contains moral legitimacy. She maintains that it is not appropriate to compare restorative justice and retributive justice in oppositional terms. Further that restorative justice should not be viewed as a 'third way', as representing a break from elements associated with retributive and rehabilitative justice, but as a practice that contains elements of both retributive and rehabilitative justice. Her idea is that in addition to this, restorative justice contains several new elements that give it a unique restorative stamp. Specifically, restorative justice practices do focus on the offense *and* the offender; they are concerned with censuring past behavior *and* with changing future behavior; they are concerned with sanctions or outcomes that are proportionate *and* that also 'makes things right' in individual cases (3).

*Daly* goes on to argue this issue in detail as follows: restorative justice practices assume that mentally competent, and hence morally culpable, actors who are expected to take responsibility for their actions. As such, restorative justice practices embrace the assumptions of retributive justice involving individual culpability; they also embrace ideas of 'reintegrating' offenders back into society (rehabilitation). Thus, restorative justice should not be viewed as in opposition to retributive or rehabilitative justice. Instead, restorative justice borrows and blends many elements from traditional practices of the theory/practices of retributive and rehabilitative justice that were used and advocated in the past century. In her view of restorative justice, victims should take a more central role in the process; the emphasis is on repairing the harm between offender and victim; community members or organizations should take a more active role

in the justice process, working with state organizations. The process involves dialogue and negotiation among the major parties with a stake in the dispute (4).

According to *Daly's* view, there are a few distinctive differences between traditional justice and restorative justice. Firstly, for *scope*, the practices of traditional justice address the fact-finding and penalty phases of the trial for guilty (or admitted) offenders whereas the practices of restorative justice generally focus on the penalty phase alone. Secondly, for the *decision-making processes*, in traditional justice practices, fact-finding is an adversarial process in which the state assumes the role of a wronged individual, and the penalty is decided by judicial authority after hearing the arguments of the prosecution and defense. In almost all restorative justice practices to date, there is no fact-finding phase; consequently, the need for an adversarial process is diminished. Thirdly, with respect to *stated aims*, those of traditional justice (that is, both retributive and rehabilitative) are many and varied, including punishing and reforming lawbreakers; emerging in the 1960s, providing restitution to victims. By comparison, the stated aim of restorative justice is to repair the harm or the injuries caused by a crime to the person victimized, and perhaps also, to the broader community (5).

And then *Daly* says that the processes and outcomes of restorative justice are alternative methods of punishment, not alternatives to punishment. Punishment should remain part of restorative justice. *Punishment practices are anything that is unpleasant, a burden, or an imposition of some sort on the offender.* Compensation is, therefore, a punishment, as is having to attend a counseling program, paying a fine, or having to report to a probation officer on a regular basis. *If this more inclusive definition is used, it will be impossible to eliminate the idea of punishment from a restorative response to crime, even when a meaningful nexus is drawn between the offense and the ways that an offender can 'make amends' to the victim.* The argument of

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criminal justice elites that punishment is an intended deprivation, whereas non-punishment is intended to be constructive, does not persuasively define punishment. Elites of the justice system perhaps delude themselves into thinking that what they intend to do (that is, not to punish) is in fact experienced that way by those at the receiving end (6).

In *Daly's* view, punishment has negative connotations in people's minds because it has historically been and is still today associated with humiliating, harming, or degrading a human being. There is no reason to assume, however, that this must be the case, unless one argues that any sanction imposed by legal authority on a convicted (or admitted) offender is, by definition, harmful or unjust because the criminal justice system is necessarily unjust (7).

*Daly* goes on to say that it is difficult to see how one can distinguish what is punishment from what is non-punishment in traditional or restorative justice practices. She maintains that from the perspective of lawbreakers, there is no difference between punishment and treatment. From the point of view of victims, it denies them not only the legitimate emotions of anger and resentment toward the lawbreaker, but also some sign from him of expiation. From the point of view of the community, certain harmful behaviors may appear to be condoned, and not censured as wrong, if it is not punished (8).

*Daly* intends to remove the negative connotations from punishment and give it positive meanings. This is a legitimate position, but her arguments are not (or less than) convincing:

First, she assumes that moral legitimacy is founded on individual autonomy. However, if individual autonomy means one's free will, that a human being has total freedom of action, and that it involves therefore his individual moral responsibility (culpability), this

assumption has not yet been proved and will most probably never be proved scientifically. A criminal justice system based on such notions would be questionable at best.

Second, she seems to say that the concept of retribution that is founded on one's free will demands deliberate infliction of pain. But this is, as *Wright* says, incompatible with restorative justice as most of its advocates understand it. It is true that restorative actions require effort, psychological or physical, and may be 'burdensome'; but that is not the same as the infliction of pain for its own sake (9).

Third, it is certain that both traditional punishment practices and restorative justice practices contain elements of burden. But it would seem an inappropriate conclusion to draw from it that all sanctions that are combined with burden are necessarily punishments. Traditional punishment is imposed on offenders against or in spite of their will, whereas the process of two-way communication and an outcome agreed by those concerned are essential to restorative justice practices. Both the victims and the offender can recognize this difference through good communication. From the point of view of the community, it is not always true that certain harmful behaviors appear to be condoned, if they are not punished. It is more important that there should be some reaction against lawbreaking and lawbreakers. It can be punishment or other reactions dependent on each case (10).

Fourth, contradictory to *Daly's* view that restorative justice practices are concerned with sanctions or outcomes that are proportionate *and* that also 'make things right' in individual cases, reparative acts by offenders are not necessarily proportionate to the seriousness of the crime if the victim feels so (or does not feel this to be necessary). It is true though that there should be a safeguard against demands by victims for excessive reparation (11).

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Fifth, that a criminal court may in sentencing order/recommend that a case should be referred to restorative justice practices is in *Daly's* view a punishment. Judging from the content of the sentence, this would correspond to a criminal's reaction which *Walgrave* and *Wright* describe as a 'restorative sanction'. Whether this reaction should be called a punishment or a restorative sanction, it is, however, not merely a verbal trick that lacks substantial significance. If the sanction with constructive contents were to be called punishment in the criminal justice system, where the traditional retributive thinking dominates, the idea of restorative justice would be co-opted into retribution and gradually distorted, and punitiveness/punitivity would come to fore (12).

Sixth, she says, for a political and policy maker, it may be a mistake to excise the idea of punishment from the restorative justice process. In fact, it may neither be strategic politically nor comprehensible culturally (13). But this argument is purely pragmatic and not principled (14).

## 2) Duff's theory

*Duff* describes his thesis as follows: our response to crime should aim for 'restoration', for 'restorative justice', but the kind of restoration that criminal wrongdoing makes necessary is properly achieved through a process of retributive punishment. Offenders should suffer retribution, punishment, for their crimes, but the essential purpose of such punishment should be to achieve restoration (15). Restoration is not only compatible with retribution: it also requires retribution (16). In his view, restoration is not an alternative to punishment, but alternative punishments (17).

*Duff* substantiates his argument by saying that any talk of restoration in the context of crime must be sensitive to the fact that the victim of the crime has been not just harmed, but *wronged*; he has suffered a wrongful, as distinct from a natural or merely unlucky,

harm. Crimes concern the ‘public’, as well. These crimes infringe upon the values by which the political community defines itself as a law-governed polity: they are therefore wrongs for which the polity and its members are partly responsible in the sense that it is up to them, and not just up to the victim and offender as private individuals, to make provision for an appropriate response (18).

This brings *Duff* to the question of what an appropriate response would be when crimes have been committed. First, he says, property can be repaired or replaced; physical injuries can be healed; psychological suffering and distress may be assuaged, traumas eventually healed. Punishment-wise, as far as the wrong is concerned, talk of apology, of shaming, even of ‘confession, repentance and absolution’ becomes appropriate. Second, the harm that needs to be repaired cannot be separated from the wrong that was done: for the wrong partly constitutes the relevant harm. The offender has by his crime violated the values that define his *normative* relationships with his victim, but also with his fellow citizens (19).

According to *Duff*, the slogan of the advocate of retribution - that ‘the guilty deserves to suffer’ - does express an important moral truth; and that in the case of the criminally guilty it is the state’s proper task to ensure that they suffer as they deserve. That slogan says, however, nothing about *what* the guilty deserve to suffer. Given that the offender has done *wrong*, there are three kinds of ‘suffering’ that he deserves because of that wrong. First, he deserves to suffer remorse: he should come to recognize and repent the wrong that he has done - which is necessarily a painful process. Second, he deserves to suffer censure from others. This too, if taken seriously, must be painful. Third, there is the ‘burden’ of making reparation to the victim. Again according to *Duff*, reparations *must* be burdensome if it is to serve its restorative purpose (20).

*Duff* continues by saying that ‘criminal mediation’ focuses on the

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offender and his crime: on what he must do to repair the moral damage wrought by his crime. It is intended to be painful and burdensome, and the pain or burden is to be suffered *for* the crime. The traditional process itself aims to confront the offender with the fact and implications of what he has done, and to bring him to repent of it as a wrong: a process that must be painful. The reparation that he is then to undertake must be burdensome if it is to serve its proper purpose. The aim is not to 'make the offender suffer' just for the sake of suffering: but it is to induce an appropriate kind of suffering - the suffering intrinsic to confronting and repenting one's own wrongdoing and to making reparations for it (21). The reparations that the offender undertakes are a species of penal hard treatment (22).

*Duff* criticizes the view that criminal mediation and reparation cannot constitute punishment, since punishment is imposed against or regardless of the offender's will, while mediation and reparation must be consensual. In his view, punishment can be *self*-imposed: an offender who willingly enters mediation and undertakes reparation can be said to be punishing himself. Moreover, most of the punishments imposed by our courts are not strictly 'imposed' in the sense that the offender is simply their passive victim or recipient: more usually, they consists in *requirements* - to pay a fine, to undertake specified community service, to visit the probation officer - which is up to the offender to carry out for herself. Offenders are at times likewise required to take part in the mediation process and to undertake specified reparation (23).

According to *Duff*, it is natural that criminal mediation takes place under the aegis of criminal law and the criminal court because it is punishment (24). The court's central role is as guarantor of punitive justice. Its initial task is to establish whether the alleged offender did commit the crime as charged and, if he is proven guilty, to convict him. If victim and offender agree to mediation, the court

has a role both as protector of each party and as guardian of the public interest. Since the crime is a public wrong, the victim must speak not just for himself, but for the community as a whole; and the offender must speak not just to the victim, but through him to the whole community. This role is best discharged by a court-appointed mediator, who can speak with the voice and authority of the law and of the polity. The court and the mediator must ensure that the offender is only required to discuss, and make reparation for the crime proved against him (25).

*Duff* goes on to argue that it is not simply definitional that criminal mediation and reparation should be seen as punishment: this process can serve the appropriate aims of criminal punishment. First, mediation is a communicative process. The procedure consists in communication between victim and offender about the crime's implications, as a wrong against the victim; the reparation that the offender undertakes communicates to the victim and to others an apology for the crime. But it is a process of *punitive* communication: it censures the offender for his crime, and requires some burdensome reparation for that crime. Criminal punishment must be justified (if it can be justified at all) as a communicative enterprise between the state or political community and its members; criminal mediation is certainly such an enterprise. Second, criminal mediation is retributive, in that it seeks to impose on (or induce in) the offender the suffering he deserves for his crime, and is justified in those terms. Third, the reparation that the offender undertakes is a species of penal hard treatment: it is intentionally burdensome, making demands on his time, money or energies, independently of its communicative meaning. The hard treatment that the reparation involves is the means by which the offender expresses apology to the victim, and is a vehicle through which he can strengthen his own repentant understanding of the wrong he has done. Fourth, although criminal mediation is retributive, looking back to the past crime, it is also future-directed. It aims to reconcile victim and offender,

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through apologetic reparation by the offender. It also aims to dissuade the offender from future crimes (26).

In the end, *Duff* says, where the criminal mediation process of the kind he describes is neither possible nor appropriate, the offender will undergo punishment of a more familiar kind. The sentencing process should as far as possible be a formal analogue of the victim-offender mediation process. The offender's punishment should resemble, in its meaning and purpose, the reparation to which criminal mediation leads (27).

Depending on the principal concept of traditional criminal law that retribution necessarily requires that punishment as a response to crime should deal with suffering, *Duff* tries to divorce the word 'retributive punishment' from its negative connotations and to give it a more positive, constructive meaning. His theory 'restoration through retributive punishment' could be attractive, therefore, to advocates of retributive justice. But on the whole it is basically *top-down structured*. Restorative justice is totally different from what he describes. It is based on *bottom-up* thinking (28).

First, *Duff* does not explicitly make mention of justifying retribution theoretically. His theory is elaborated on the assumption that it is self-evident that retribution should not be stopped. Punishment will not be necessarily required, however, even if retribution can be abandoned.

Second, as *Duff* properly says, the crime entails both the public aspect and the private aspect. But one cannot draw from this argument the conclusion that punishment will be of necessity required. It could be said at most that state supervision is required concerning reactions against crime (29).

Third, *Duff* says that punishment is not only an expressive

means but also a two-way means of communication, and therefore, can strengthen the offender's own repentant understanding of the wrong he has done. Is it really possible? As he says, punishment is *imposed* on the offender. But repentance, if it is to mean anything, has to come from within the offender, inspired by empathy for the victim. Good communication is essential for repentance. This is not the case in a court where confrontation prevails over communication, in front of a judge who will at the end decide upon the kind and degree of harsh treatment. Punitive sanctions are more likely to produce the offender's resistance, resentment and make him attempt to avoid the pain; they inhibit learning rather than promote it (30).

Fourth, in *Duff's* view, suffering should accompany criminal mediation and reparation. Criminal mediation is considered a technique to make the offender suffer morally. But it is generally recognized in restorative justice practices that it is most important that the justice system give serious consideration to the needs of both the victim and the offender. The suffering and burden that accompany these processes are not the intended ends, but only a side-effect. In order to generate repentance, the willingness to apologize and make reparation, it is needed that the pain comes from within the offender, not from without. If *Duff's* view were to be accepted, the victim could be reduced to only a 'tool' in 'treating' the offender. In addition, two-way communication could be blocked by making the offender too afraid or too resentful to speak or even to listen (31).

Fifth, as *Duff* says correctly, the mediation process and its outcomes should be supervised by state authority in order that it may be seen that the legal and human rights of all the parties concerned are not infringed upon and that the public interest dimension in the crime is safeguarded. But *Willemsens* points out rightly that this cannot be true of a court-appointed mediator. Such a mediator should be impartial; he should not represent any party involved. It should not be the role of the mediator to speak as a representative of

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society so that he is never seen to have an interest in punishment (32).

Sixth, according to *Duff*, where criminal mediation and reparation are not possible or appropriate, the offender's punishment should resemble the reparation to which criminal mediation leads. Should sentencing of this kind also be called punishment? If it were acknowledged as a new form of sanction, it is far from the concept of traditional punishment as one-way communication that is imposed on the offender against, or regardless of, his will (33).

### 3) Barton's theory

According to *Barton's* view, it is a mistake to suppose that current practice in criminal justice is essentially, or predominantly, retributive. Further, restorative justice responses often contain in themselves retributive and punitive elements. Therefore, punishment and retribution cannot be ruled out of any system of justice (34).

*Barton* begins his reasoning by saying that the status quo in criminal justice silences, marginalizes, and disempowers the primary stakeholders, i.e., the victim, the offender, and their primary circles/communities of influence and care, in criminal justice disputes. The chief weakness of the status quo is the greatest strength of restorative justice interventions. The strength of the restorative justice responses does not lie in their rejection of punitiveness or retribution, but in the empowerment of communities who are best placed to address *both* the causes *and* the consequences of the unacceptable behavior in question (35).

The reason he gives for his opinion are as follows. The term 'retribution' and its derivative 'retributive' have a standard, proper sense and a corrupted, queer/colloquial sense. In their proper sense, these terms signify the idea that punishment is imposed on a wrongdoer as a matter of just deserts, that he is being punished because he deserves to be punished for his wrongful behavior. In their collo-

qual, corrupted sense, ‘retribution’ and ‘retributive’ are being used to mean nothing more than ‘punishment’ and ‘punitive’, respectively. Ignored is not only the etymology of the word ‘retribution’, which is the Latin ‘retribuō’ (I pay you back), but also a meaningful and important distinction between retribution and punishment (36).

In the area of justification of punishment, *punishment* is a much wider notion than *retribution*, as punishment includes not only desert-based punishment, but also punishment that is imposed on people for instrumental reasons, such as deterrence, correction, or the rehabilitation of offenders. In the proper sense of the word, such punishment is not retributive, but instrumental. It is misleading to characterize just any kind, or form, of punishment as ‘retribution’ or ‘retributive’, regardless of the reasons that underlie its imposition. ‘Punishment’ and ‘punitive’ are not synonymous; neither are respectively, ‘retribution’ and ‘retributive’ (37).

In *Barton’s* view, there are no grounds for the claim that the status quo of the criminal justice system is only interested in giving wrongdoers their just deserts. Laws are predominantly couched in utilitarian, consequentialist language where deterrence, public safety, the protection of people’s rights, and the correction of offenders are the primary reasons and justifications for punishment. Judges giving sentence rarely justify their sentences with reference to the idea that offenders need to be given their just deserts. Their foremost considerations are safety and deterrence in the public interest, rehabilitation and correction of offenders, et cetera (38).

According to *Barton*, the claims that the criminal justice system is punitive and that the punishment provided does not produce the desired results are not well founded either. Many people remain convinced that punishment is, or can be, an appropriate response to criminal wrongdoing, especially where serious wrongdoing is concerned. In fact punishment and its threat play a major role in the

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maintenance of order (39).

*Barton* further argues that, at a conceptual level, if punishment is ruled out as a possible response to criminal offences, it is also far from clear that a criminal justice system is even conceivable. A system that manages, controls and responds to crime without resorting to any form of punishment may well prove preferable to current practice, but it would be a misnomer to refer to it as a criminal *justice* system. It would be more appropriate to call it a crime *management* system, or a crime *control* system. Where criminal justice is concerned, the concept of justice seems to presuppose the idea of a punitive response, if not that of retribution in its proper 'just deserts' sense. Even though, such conceptual points will not settle substantive, pragmatic or moral questions, such as whether punishment is a wise or appropriate response to criminal wrongdoing, we have established practices, social conventions, and traditions that determine, guide, or regulate our responses to criminal wrongdoing on both pragmatic and moral grounds. The acceptability of punitive responses is a reflection of a deeply entrenched tradition that regards punishment as a fitting, and often necessary, response to serious forms of anti-social behavior. What makes such responses appropriate is the *retrospective* responsibility that mature (and intellectually unimpaired) members of society bear for own behavior (40).

In the end, *Barton* criticizes the claim that restorative justice and retributive justice are not compatible. In practice, restorative justice incorporates punitive and retributive measures and elements in what appear to be maximum doses and degrees. Indeed, he contends that the use of alternative dispute resolution processes will never be an accepted practice in criminal justice unless punitive outcomes are allowed to be part of agreements. However, it is a mistake to think that punitive elements of an agreement automatically undermine or weaken its restorative potential. Some appropriate degree and form of punitiveness will or may enhance the effectiveness of the restora-

tive justice response, and that it should often form part of the agreements that are eventually accepted by the relevant parties. That wrongdoing deserves punishment is a fundamental aspect of our reality, even if that reality is, in part, socially constructed (41).

*Barton's* arguments have similar problems to those of *Duff*.

First, he does not fully recognize the unreasonable and unacceptable background of retribution that the modern civilized state becomes involved with.

Second, whereas many people, *Barton* says, are convinced that punishment is, or can be, an appropriate response to criminal wrongdoing, this argument fails to take account of evidence that the public is not as punitive as is often assumed (42). Even if there were such a widely held conviction, it could result from traditional criminal law that knows only the punishment catalogue as sanction against crime. From research we know that many people prefer a reaction with a more constructive form (43).

Third, *Barton* says, the concept of justice should require punitive responses. But this is a very narrow view of the notion of justice that many people will find unacceptable (44). If so, we should require a new concept of justice.

Fourth, *Barton* says, some appropriate level and form of punitiveness will enhance the effectiveness of the restorative justice response. But this argument remains imprecise, needing more explanation and examples.

Fifth, in *Barton's* view, our responsibility for awarding punishment is an ineliminable part of what defines us mature, responsible members of a moral community. In fact, one would think, it is the other way around. Mature and responsible citizens would be more

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likely to require and should require constructive responses, not just suffering (punishment) in return for suffering (crime) (45).

Sixth, *Barton* says, that any punitive response to wrongdoing is complemented by genuine caring, acceptance and reintegration of the person of the offender, as opposed to stigmatizing, rejecting or crushing him. First come stigmatizing, rejecting and crushing the offenders, and only afterwards follows caring, acceptance and reintegration. What a contradiction! (46)

#### 4) Results - author's view

In the author's view, punishment is the pain or inconvenience imposed intentionally or deliberately, and against his will, as a social-ethical denunciation on the offender, legally found guilty of a legally defined offense, by a court using due process (47). The state, or society, acting as punisher, has the intention to inflict suffering on the offender that is at the center of the definition or the very nature of punishment. Punishment is something that is done to the offender and is one-way communication. To carry out many of the agreements reached in a mediation process will surely require a very demanding investment of time or money from the offender, and will require serious, and possibly unpleasant, commitments. Indeed the fact that the offender is confronted directly with the suffering and harm he has caused is an unpleasant, stressful experience. But one should not jump to the conclusion that restorative justice practices are a form of punishment. This would overlook some of its essential features. Restorative justice is a series of voluntarily and constructively oriented processes and outcomes that the offender undertakes. The possible, and highly probable, unpleasantness of restorative justice practices is regarded as a mere incidental side-effect. Pain or unpleasantness is not the reason why restorative justice matters. Its practices are intended to be constructive whereas punishment is the intentional infliction of a deprivation. Therefore, restorative justice interventions are not 'alternative punishments' but '**alternatives to**

**punishment’.**

The basic values on which the organization of justice operates need to be changed dramatically. Every action - from the arrestee's first contact with the police up until the after-care of the inmates on his release from prison - should be geared toward maximizing the possibilities for achieving restoration.

A state authority would always supervise (not participate actively in) the process to ensure that the legal rights of the parties were respected. If an agreement is reached and performed to the satisfaction of both parties before the decision to prosecute, the **public prosecutor** could or should decide to discontinue the case, unless prosecution is necessary for the public interest. If the victim refused to participate in mediation, the offender could undertake community service, work for a charity or for people in need. It is believed that public-interest considerations will, in most cases, be well served by the process and the outcome of informal conflict resolution. By voluntarily accepting participation in an informal conflict resolution, the offender expresses that the crime he committed is contrary to the law. And by accepting responsibility for the wrongdoing and in undertaking amends for it, the offender will be able to express his willingness to live within the law in the future. By recognizing the harm done, the offender confirms the value and rights of the victim, while the victim feels his sense that he has been wronged assuaged. This in turn could make the victim feel less angry, and more likely to accept an apology, sometimes enabling forgiveness (48).

However, if the public prosecutor considers that the public-interest element of the case to be so important, the case may be referred to court and the parties informed of the reasons for this decision. Therefore, the courts would only be needed for those cases in which voluntary reparation was insufficient or not possible. This would include those cases in which the accused denied guilt, the

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parties were unable to reach agreement on the degree of reparation, the victim was unwilling to participate, the accused unreasonably did not uphold the agreement, or the agreement between the victim and offender was insufficient to respond to the public concern at the crime.

**The court** might concern itself first with the public-interest dimensions of the case, for the interests of society may outweigh those of the victim. The state must also consider the interests of potential future victims as well as the interests of the community as a whole. Crime transcends the purely individual: it disrupts public order, is a threat to public values and societal peace, is detrimental to the solidarity and mutual respect which are essential to community life, and it creates feelings of insecurity which by their very nature diminish the quality of life. This means that an official representative of the community will always have the final say in the sentencing of an offender and must judge whether the public-interest requirements have been satisfied. However, the agreement that was reached between the victim and offender before prosecution would always be taken into account, and due weight would be given to it by the court when determining sentence.

Nevertheless, any measure taken by the court would also be oriented toward restoration, or compensation, because informal conflict resolution can take place at any stage before the criminal justice process is completed. Therefore, informal conflict resolution would be a necessary step. If the court confirms that the accused has committed the act as charged, it could refer the case to an organization for conflict resolution. After which, the case will be brought back to the court. If informal agreements are reached between the parties in the mediation process, the court could dismiss the case referred back to it or would add a certain amount of punishment to the agreement. In this way sentencing, as a purely coercive function, could be reduced (49).

Restorative justice aims to significantly loosen reliance on the use of incarceration as the dominant response to crime. But even if imprisonment is imposed on the offender out of sheer necessity, restorative actions, such as victim-offender mediation, family conferencing, or indirect reparation by work with people less fortunate than themselves, should be tried from within **the prison** (50). After long and careful preparation, both the victim and offender could find that communicating or meeting give them deeper understanding (51). The offender's efforts towards restoration should be taken into consideration as a mitigating circumstance to support early release from confinement.

According to the view that recognizes a basic difference between coerciveness and punitiveness, restorative justice includes voluntary processes as well as coercive sanction. Therefore, if a sanction is imposed with the intention of bringing about restoration instead of simply causing the offender to suffer, this sanction can be regarded as a 'coerced restorative sanction'. *Walgrave*, an advocate of this view, says, punitive justice stigmatizes, excludes, responds to violence with counter violence, and does not contribute to either reconciliation or a more peaceful society. Whereas voluntary processes have a higher restorative value, *restorative sanctions that are imposed with a constructive intention* contribute to the repair of the harm, suffering and social unrest caused by the crime, as well (52). However, this maximalist version of restorative justice cannot be supported easily. If one includes court ordered coercive judicial sanctions in the judgment, such as formal restitution, doing community service or doing work for the benefit of a victims' fund, that one assumes to be potentially restorative, this will or may shift restorative justice back to being punitive (53).

The intentional infliction of pain in punishment poses a fundamental ethical problem. This is because it is basically at odds with the principles of a democratic constitutional state, which guarantees

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rights and freedoms to its citizens (54). If it is possible, therefore, to serve the task of criminal justice equally well without punishing, then, this course of action should be the preferred method. Those who commit crime do not have to be subjected to punishment. The first obligation of the criminal justice system is to take full advantage of constructive ways to express censure of the criminal act without punishment.

*Fatić* says that “punishment in principle is morally unjustified”, and “given the initial - and presumably the main - moral concern about punishment, the ideal way of responding to it is not to rationalize, but to eliminate it” (55). But few advocates of restorative justice argue that we should never resort to punishment. They acknowledge that there is room for punishment on consequentialist grounds. Our concerns must be addressed, therefore, to the traditional philosophical issues in the theory of punishment, that is presented in detail in the next section. Here we limit ourselves to presenting an integrated, systemic theory on how best to react to crime.

This needed theory should be one that includes non-adversarial processes that serve the interests of victims, offenders, and the whole community affected by crime, and acknowledges punishment, especially restriction or deprivation of liberty, only as a last resort, and that enables us to eliminate this punishment from the criminal justice system some day in the near future. *Gustav Radbruch* (1878-1949) said that we should try to create a better criminal law only when we find something better than criminal law.

## **II. From conventional authoritarian retribution-deterrence oriented criminal law to free and social democratic criminal law**

### **1) The origin of Legal Positivism and Deterrence theory**

The notions of retribution and general deterrence became scientifically refined in the course of the 18<sup>th</sup> and 19<sup>th</sup> century. The legal thought which began with *Thomas Hobbes* (1588-1679), one of the

spiritual founders of absolutism, who already in the 17<sup>th</sup> century said, “auctoritas, non veritas facit legem” and ended with *Immanuel Kant* (1724-1804) who played an active part in philosophy at the high point of the Enlightenment, made a rigid distinction between law and morality. This distinction was made by the idea of man’s moral autonomy, while at the same time law was in retreat into the formal, external coercive power of the state (56).

According to *Hobbes*, men in the initial state were sensual and mechanical. Their natures were determined to satisfy their own unlimited demands and desires. No matter what they might want for themselves, it was good because they wanted it. There was no absolute or general concept of good (57). The essential point of this natural law is that: “Every man has a right to every thing; even to another’s body.” (58). The consequence of this liberty was of all against all (*bellum omnium contra omnes*) (59). Reason that likewise belongs to nature, therefore, imposed laws of nature on men that limited natural law and enabled a safe existence. The first law of nature was the desire for peace which could be fulfilled, only if and when everyone else took full advantage of it by laying down his other rights and by extending it to others (the second law of nature) (60).

These conditions were only conceivable in a state that was comparable to one of artificial men (61). The owner of sovereignty was an artificially constructed soul, the limbs and functions of which were men. Everyone was subordinated totally to the owner of the highest power. It was a matter of the founding and the strengthening of state absolutism, preferably a monarchy. This came into being through the social contract.

In this contract, men submitted themselves unconditionally to a despot due to unconditional fear for their own person and fear of other men. Every member was, therefore, a ‘subject’ (62). A subject expressed his maximum liberty when he submitted himself

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voluntarily to the despot (63). As man did everything for himself before the foundation of the polity, now the despot might do so (64). If the subject was subordinate to the sovereign, that subject could do nothing against his conscience under a Christian ruler, for he also transmitted this right to judgment to another (65). The state also was the ruler of the church; both were a unity (66).

In *Hobbes'* view, only order and legal stability make up the content of the law. He drew the obvious conclusion from this that no law can be unjust, for truth or justice is not of the law. Only the reasonable thought of those who have the ruling power should count, for there is no absolutely right or correct idea in the question of good and bad (67).

Derived from each person's original right of self-preservation, the state is entitled to punish inhabitants strictly consistent with current laws. The purpose of punishment is not to obtain of justice or satisfaction. Punishment serves exclusively to deter the subject from committing a criminal act and to induce him to act in obedience to orders by imposing an evil on all wrongdoers (68).

## **2) Retributivism of the idealistic philosophy**

Retributivism basically goes back to the two main proponents of this claim, *Immanuel Kant* and *Georg W. F. Hegel* (1770–1831).

According to *Kant*, there is no possibility of objective value recognition as any value recognition is the product of one's own subjective thinking in the field of the world of experience. The expression, 'What should be' itself remains hidden from us and exists only as a postulate of practical reason. *Kant's* natural law is based on concluding 'what should be' from the facts of man's being, which had been allowed before that time, but not afterwards. This was true of the 'what-should/be-commands' of ethics and law, as well. Was law created only to coerce, or to support conditions for human

coexistence, or to allow for the greatest possible freedom? (69) 'Nothing ethical' was added to the law. The law was 'pure and was not mixed with virtue regulations' (70). Ethics became totally internalized as individual morality was made into a private matter. Morality at first laid in the method, namely in the obedience to self-built duty without external coercion, in other words, in 'free self-coercion' (71). Morality consisted of the reasonable use of free will. The content of duty was defined only through universal purpose, namely, to act in order "that the maxims of your actions can be a universal law." (72) This 'universal law' could be called the objective commands for human beings living together, and therefore, social ethics. In *Kant's* view, such commands laid, however, only in the individual will. Ethics as morality meant that the individual made the idea of duty into the motivating force of his action (73). It was entirely up to the free will of each individual whether in this way he would raise the content of laws and regulations to the moral standard of his action (74).

In *Kant's view*, the justification of punishment for law breaking does not flow from only a responsibility for an externally defined law for which internal autonomy had to remain open, but from the free internal decision against the law. However, one should expect punishment that was justified through a responsibility for an externally defined law in accordance with his own external concept of law. Individual morals were viewed as a state matter in punishment. The moral decisions of law breaker are regarded by the state as evidence of guilt. Justice occurred, through the infliction of evil, as compensation for responsibility. The central position which free will had in the responsibility theory of natural law and of Christian doctrine had an effect in spite of the externalization of the law (75).

In this way retributive punishment bridged the gap between the formal positivism with its morality-free concept of law and the traditional judgment of moral responsibility against the offender.

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The classical definition of retribution is as follows: Infliction as compensation for the autonomous decision of the offender to be wicked (76).

As *Moos* points out, two characteristics of this retribution theory should be emphasized. The first one has no effective purpose. Retribution characterizes the essence of punishment, but it does not pose questions about the possible targets or the effects of punishment. Retribution absolutely requires compensation due to the moral responsibility of the individual who receives encouragement from the justice system, regardless of considerations of social utility. Even if the punishment were to provoke the offender to sink deeper into a spirit of insubordination against the law, the punishment would have to be imposed. Even if the punishment were not necessary to deter this offender or other offenders, or satisfy the public's desire for punishment, punishment would have to be imposed. It must be true that just punishment has a preventive effect, but this reflex is may not even play a part as an ulterior motive for punishment. For *Kant*, punishing wrongdoing is a categorical (unconditional) imperative. This means the state has a moral duty to inflict punishment. Retribution by the state does not aim to improve universal morality, but has only justice against the offender in mind. Therefore, several famous statements result: "Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the grounds that he has committed a crime: for a human being may never be manipulated merely as a means to the purpose of someone else ....." (77); "Even if a civil society were to dissolve itself by common agreement ..... the last murderer remaining in prison must first be executed so that ..... the blood-guilt thereof will not be fixed on the people." These statements are only seemingly liberal as it makes human beings into the instrument of the state to enforce its idea of justice inevitably and with no regard for the demands of social necessity or appropriateness (78).

The second characteristic is idealistic or metaphysical. Justice assumes that responsibility can be explained through the free will of the offender in all cases and without reduction, and that such responsibility can and must be reacted to through the infliction of evil. The one evil makes the other disappear. *Hegel* says, “the basis of right is, in general, the mind; its precise place and point of origin are the will. The will is free, so that freedom is both the substance of right and its goal, while the system of right is the realm of freedom made actual, the word of the mind brought forth out of itself like second nature.” (79) Thus what is wrong with crime is not that crime attacks a particular right, but that it is a legal wrong (in German ‘Unrecht’), an attack ‘right as right’ or the very basis of all rights, usually in the form of an attack on a particular person or his property. Crime negates right, so that the state should punish the criminal on the grounds that punishment undoes the negation of right manifested in the attack on the victim. *Hegel* says, “coercion is annulled by coercion; coercion is thus shown to be not only right under certain conditions but necessary, i.e. as a second act of coercion which is the annulment of one that has preceded ....” “A crime, as an act, is not something positive, not a first thing, on which punishment would supervene as a negation. It is something negative, so that its punishment is only a negation of a negation. Right in its actuality, then, annuls what infringes it and therein displays its validity and proves itself to be a necessary, mediated, reality.” (80)

This idealistic philosophy brings the reconciliation of the offender with the metaphysical idea into focus, but does not take notice of any reconciliation with the victim. The offender is surely considered surely as a self-conscious morally responsible person and his rights are acknowledged. But his personality is not perfectly respected. He is only the object of state reaction for his ‘infliction of evil’; he does not have to act positively. Active responsibility, such as contributing to the restoration of harm resulting from crime, does not come in sight. One cannot accept retribution as the aim of

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punishment without which one recognizes the two as empirical realities and gives to the state the right to judge people on such a speculative basis. The state basically claims divine functions for itself (81).

Retribution theory has had a great influence on criminal law around the world because it was underpinned by idealistic philosophy. But on the basis of free and social-democratic principles, the secular state should not put individual moral blame on the offender. The judge's judicial decision should not be "deputizing consciousness judgment on behalf of the offender."

### 3) General deterrence

In Germany, *Paul J. A. v. Feuerbach* (1775–1833) surely took on *Kant's* externalized concept of law for penal law, but not his concept of responsibility. Contrary to *Kant*, *Feuerbach* requires only external free will. In *Feuerbach's* view, there is no internal free will at the time of committing a crime because the offender's actions are dependent on his impulse, but not in an autonomous free choice between good and bad. Those who decide against the categorical imperative (the internal duty) do not act morally free, instead they depend on sensuality. The offense does not touch on the formal concept of morality at all. In his view, neither is it for us to morally judge the offender because we cannot look inside the man. The only thing that belongs to the offender is the sensual motive that comes from the externally, free-changing outside world. *Feuerbach* did not, therefore, speak of responsibility (in German 'Schuld') but only of belonging to (in German 'Zurechnung'). Morality was banished from penal law; therefore, retribution was also eliminated. *Feuerbach* deviated from punishment based on individual morals. What *Kant* wanted to avoid came about, under the name of retribution: punishment that serves only the superficial purpose of external legality and therefore is the practical aim of civil society. To reach legality, society has been forced to use deterrence. From the outset, the threat of punish-

ment should have contributed to the refraining of potential offenders from criminal activity (principle of psychological coercion). If we can say that the concrete offence ‘belongs to’ the offender, then the punishment resulting from it will reaffirm only the general preventive deterrence of the threat of punishment (82). Whereas *Kant’s* image of a human being is at home in the sky of metaphysics, *Feuerbach’s* naturalism starts from the assumption that each citizen is a ‘personalized devil’ (83).

In England, as well, the utilitarians (consequentialists or instrumentalists) such as *Jeremy Bentham* (1748–1832) and *John Stuart Mill* (1806–1873) rejected the theological and metaphysical assumptions of the retributive theory. Instead they considered the idea that suffering can atone for wrong, being simply a rationalization for primitive emotions of revenge (84). In their view, penal law is only acceptable if it serves higher social aims. Whereas the good society should strive for ‘the maximum of happiness for the maximum number of its citizens’, the contribution of criminal justice to it lies in deterring people from breaking the law. “All punishment in itself is evil ..... if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.” (85) If people get pleasure from unacceptable behavior, we must arrange for some pain to outweigh it. The approach is now basically prospective, in that punishment should be justified by its aims to be purchased in the future. If punishment does not reduce the overall existence of evil in society, it is not justified (86).

The utilitarian approach to punishment was considered in its day in the 19<sup>th</sup> century to be radically ‘humanitarian’ because its advocates were the first to call for limitations on punishment, which included their opposition to torture, corporal movement. Nevertheless, the utilitarian deterrence theory retained a preoccupation with pain and suffering as the most effective means of deterring potential offenders from breaking the law. This was because the theory is

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profoundly rooted in the modern theory of the state and law that is usually attributed to *Thomas Hobbes*. This modern theory of the state defines the state as the entity in a society in which a monopoly on the use of force, and in which law is simply the rules or commands of the state backed up by the threat of that force. Modern political and social sciences have largely accepted the legal positivist theory that political and moral order is maintained through the sovereign's threat of force (87). punishment, and capital punishment. They were also leaders in the prison reform

This 'instrumentalisation' of punishment is achieved in two different ways. First, general deterrence contributes to the decision of potential offenders who trend towards committing a crime, but refrain from it after further consideration. Second, special deterrence contributes to the prevention of a second or subsequent crime (88).

Deterrence research, however, clearly shows that the general preventive impact of penal law is limited and is linked to a number of conditions. For example, that the wrongdoer believes that he is likely to be caught and punished, and that the pain inflicted will outweigh the 'reward' brought by the deed. This suggests that the most important consideration in dealing effectively with offenders is how swift and sure the system is able to bring them to account. But such conditions are far from being generally fulfilled. On the contrary, relying on punishment usually leads to more imprisonment, more human and financial costs, less morality, and not last, less public safety. The general proposition that penal law is needed in order to deter (potential) offenders appears, therefore, to be more a doctrine than an empirically sustainable theory (89).

Even if deterrence works, it does so for the wrong reasons: threat and fear. The words 'deterrence' and 'terror' come from the same Latin root 'terrere'. So the word 'deterrence' should not be mistaken for 'prevention' (90). It is difficult to justify ethically the prevention

of crime through fear of pain and deprivation of liberty, and therefore to justify a society based on fear and the threat of harm. We do not want people to act from fear, but from respect, trust, self-control and such incentives to good behavior (91). “If the law and the authorities win” by using legitimate violence, “this is a bad victory, because it is achieved by the very means which are pronounced illegitimate when the other side - the criminals - is using it.” (92)

Of the two meanings of general prevention, deterrence (negative prevention) is now out of favor and seems to have been forgotten. Instead, emphasis is now placed on integrative prevention (positive prevention). It is recognized today that most of us refrain from committing crime, not because we are afraid of being punished, but because we care about and value others, because we realize that we depend on each other, and because we take pride in behaving well (93). But this new aspect will not be fixed in criminal law, free of contradiction, until we have a new concept of law.

#### 4) Legal positivism

*Kant's* externalization of law has been succeeded by the legal positivism of the ‘Wiener school’. One of that school’s leading exponents was *Hans Kelsen* (1881-1973). His ‘pure legal theory’ was a special form of the new Kantianism; indeed, he was remarkably under *Kant's* spell. In his view, the concept of law has nothing to do with the morality underpinning the law. The grounds for the validity of law lie only in the state’s making law that is authorized by the constitution. It is only on this point that the legal system is distinguished from the order of an organized-crime operation (94). Justice is not an element in the concept of law; the law comes, so to speak, from the paragraphs of criminal law, as it is written. Content-wise, the law stands independently as a formal, logically far-reaching, self-completed, exact system of concepts (95). One does not have to examine the validity of law on the basis of ideal principles, such as moral, religious or social justice. The law in itself is thought of as

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value-neutral, namely 'pure'. It is, as it were, a vessel with absolutely no attention paid to content. The in-itself value-neutral law should show that any way of living an ideal would be tolerated so long as it does not violate the law (96).

This superficial concept of so-called '*Pure Law*' does not encourage taking a look at its spiritual background, or asking whether it is the *right law* or about material justice or about ethics in the law.

According to this 'theory of pure law', an answer to the question of how a society should solve its problems and what is morally good or bad at all cannot be found rationally, but only subjectively and therefore relatively and not with universal applicability. This subjective sphere of 'what should be (in German Sollen)' is separated from the objective current system of the law. Any kind of idea, be it one of Christianity ethics, the ethics of natural law, utilitarian social ethics, any of other social theories or individual ethics stand outside the concept of law. It is also true of the politics that are coined through them, or of the economic conditions that also coin consciousness, or as historical traditions (97).

Without ideology, ethics, politics or other ideas, one surely does not expect particular contents of the law. Plus, *Kelsen* himself stood up for a democratic interpretation of these points (98). Nevertheless, he laid decisive value on the norms of law by saying that they are only purely external forms for the contents themselves, and so they cannot be equated with them. The law is nothing other than a way to coercively order human behavior (99). In this way he obtains an absolute concept of law. It can effectively have any content. This is still law according to *Kelsen* (100). 'A norm of law is valid not because it has a particular content', but because it was enacted in a formally valid way (101). Criminal law in particular is only an effective norm of order and coercion. Therefore, the rule of law also means the same as the law for the advocates of this theory (102).

The rule of law is a formal concept that has the efficiency of a norm of coercion, and therefore also carries external legal stability in contents (the formal rule of law) (103). The *equality* of all men before the law is brought about through this external order. The values on which the law is based are only the motives of the legislators in formulating the norms of that particular law. In the factual result, these positively fixed norms surely realize such values. However, the norms do not of course include such values in themselves (104). For this theory, the liberal principle lies in the strict conceptual separation from law on one side and the social, ethical and historical connections on the other. Jurisprudence, *Kelsen* says, is proud of not lowering itself to be the ‘maidservant’ of politics (105).

Plus, according to this theory, the law cannot be filled with content through an over-positive fundamental norm that can be thought as a logical preliminary stage. Such a thing is surely assumed, but it also is only a pure formal concept and a standard of no particular value for positive law (106).

The theory of Pure Law that refuses to carry with it the social norm into the concept of law is conceptual jurisprudence and is based on the legal thought of naturalism. It was the product of purely reasonable and critical thought which separate ‘being’, or reality, from ‘what should be’ epistemologically. In other words, it is the late fruit of the history of German ideas in the end of the 19<sup>th</sup> century. In the view of domestic German politics, it is based on the system of monarchy, the authoritarian state or police state in which the authorities had power over those who had no choice but to yield to the law. Those subjects or citizens do not have to examine the motives or the value attitudes of the legislator, but only to obey. The law allows them only an interpretation of itself; there is no ‘spirit of the law’ with legally relevant norms. So the theory of Pure Law is an empty theory. Plus, when the law is thought of as a norm of coercion for the citizen, that citizen can still assert for his part his freedom

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against the monarch who is still bound by the constitution. Therefore, the national polity is at the center of the theory of pure law. According to *Kelsen*, the ruler and the citizen are in agreement on this point. The 'basis norm' means for the law: "behave so, as the law authoritarian: the monarch, the people's assembly, the parliament etc. so order." (107) When the law is the external coercion norm, and therefore unlawfulness is a violation against the unconditional claim of the authorities, the offender is by no means a discussion partner, but merely a law-breaker and therefore an enemy (108).

## 5) Combining (Hybrid) theories

As we have seen, the retributive theory and the general deterrence theory have in view of their content different conceptions of responsibility and punishment. There is tension between them. Nothing can be done about their **incompatibility** in principle, although both theories are combined with each other in practical daily life. In penalties laid down in law and execution of sentences, retribution has an effect of deterrence because of the necessity of infliction of evil; on the contrary, it can still be thought of as purpose-free. The other way round, deterrence leaves the sphere of concrete punishment corresponding to the offender's responsibility in the sense of retribution, whereas deterrence assumes the guise of determinism. Deterrence has no internal relationship with the responsibility of criminal behavior. Therefore, it goes with the non-deterministic concept of responsibility that practically leads to threatening punishments. Therefore in the final result, there is no more difference between deterrence through the penalty laid down in law and infliction of punishment or execution of sentence. The sentence is effect (109).

At the end of the 19<sup>th</sup> century, Special prevention took the place of general deterrence. *Franz von Liszt* (1851–1919) turned *Feuerbach's* theory of psychological coercion into another penal theory in a much more refined form, namely, the special prevention theory that

distinguished punishment possibilities in accordance with the aims of punishment. It is purely a confession of a determinist. This made man into the object of criminal treatment that remained a decisive fundamental principle of punishment (110).

Together with the retribution theory now stand three punishment theories in confrontation with one another. The conservative retributivists and the deterrence theorists proceed in the same direction, towards the unrenounceable infliction of evil. Whereas, 'the modern criminal law school', or the modern social utilitarians, still fight for the purposive treatment of the offender which more or less does without the infliction of evil, when he is at fault, instead of freeing him from it (111).

In both Germany and Japan, this controversy between the schools has given way to **combining (hybrid) theories**. According to **the traditional 'genuine' combining theory**, retribution, specific prevention and general prevention stand next to each other, with little difference remaining between them. In other words, this theory tries to balance those conflicting values in a compromise. But retribution plays the dominant role. The former Supreme Court of the (German) Reich (before 1945) said, "the standard of punishment is ..... first of all the need for atonement, that is the aim of retributive punishment. Other than that, the aim is probably that of deterrence. Other aims, the aim reformation and of securing society from the offender have receded into the background." (112)

According to **the additional combining theory**, retribution, special prevention and general prevention are regarded as aims of punishment of equal value. If or when needed, this or that aim comes into play. The (German) Federal Constitutional Court says, "We have called it a general task of penal law to protect the basic values of communal living. The offender's responsibility, prevention from further offenses, correcting him, his atonement and retribution

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for having committed the offence are considered aspects of the appropriate punishment sanction.” Criminal punishment is “retribution for injustice resulting from a committed crime, regardless of the tasks of deterrence or correction.” (113)

The retributive combining theory in which both the genuine combining theory and the additional combining theory are brought together makes concessions to the individual offender’s rehabilitation process and to general deterrence.

However, this theory surrenders neither the idea of individual, moralistic justice nor that of retribution resulting from it as basic principles for punishment corresponding to the offender’s responsibility. The relationship between prevention and responsibility remains controversial. At any rate, the retributive combining theory cannot answer whether, or to what degree, the offender committed the crime with free will or non-free will in a concrete case because we have no way of finding that out. On such a non-established foundation, this theory still allows the state to judge individual morality in the *Kantian* sense (114).

Today **the preventive combining theory** is still influential. According to *Roxin*, one of the advocates of this theory, the aim of punishment is exclusively prevention. When general prevention and special prevention are opposed to each other, the latter in principle attains superiority over the former. Retribution is not the aim of punishment. The principle of responsibility (misuse of free will) is the crucial element of the retributive theory, working to limit punishment (115).

This theory could elicit misunderstandings because it calls itself the preventive ‘combining theory’, but it refuses the aim of retribution (116). Apart from this, it has a more fundamental defect. The traditional principle of responsibility has two functions, namely the

function to found punishment (the function to burden the offender with punishment) and the function to limit punishment (the function favorable to the offender). The preventive combining theory gives up the former and maintains the latter. The ‘normative indeterminism’ (117) serves as the foundation of the latter function. But the two functions cannot be separated because what limits responsibility serves as a foundation as well. In other words, ‘both sides of the medal’ matter (118). In addition, it is an open question how the principle of responsibility, assuming that free will, even if normatively, limits punishment in the concrete case (119).

It is required now that the externalized formal conception of law be internalized and filled with values on one side. On the other side, however, punishment will lose its individual moralistic overhang in the *Kantian* sense as well as its total moralistic emptying in the sense of *Feuerbach* (120). Only when the traditional concepts of law and punishment are abandoned, criminal reactions such as voluntary victim-offender mediation and family conferencing would be possible in criminal justice. An overarching criminal law theory that also takes into account the wrong done to the actual victims of an offense should be established. Only then will such a new theory of criminal law fit restorative justice into it. Assisting the victim’s recovery may no longer be only secondary to such a theory.

## 6) Other retributive ideas

Retributivists as well as utilitarians recognize punishment as the dominant paradigm for responding to crime despite socio-ethical, theoretical and empirical counter indications. This may indicate that those believers are, in fact, motivated by a kind of rationalization of the more vengeance-oriented emotions (121). So here we should examine other retributive ideas that justify retribution, but have nothing to do with the retributive theory of idealistic philosophy. These ideas could be divided into two foundations, namely, reasonable ones and unreasonable ones.

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## **A. Reasonable foundations**

Rational foundations include the complex of the formal proof of law.

### **a. The necessity of the defense for the legal order**

If punishment is laid down in law for the breaking of a culpable norm, it must be inflicted when this condition is fulfilled. This *principle of reaction*, one could say, is a requirement of pure consequence of law breaking, which applies to the law not less than in daily life according to motto: “The one who says A must say B as well.” The necessity of the defense for the legal order is combined with this. If the norm shielded by sanction is not defended through the infliction of sanction against its infringement, it will gradually stagnate and die (122).

### **b. Law as pure order norm**

Those who infringe public order must be resisted for order’s sake, which occurs through an appropriate infliction of evil. This power to enforce public order is often magnified into the idea of the *majesty* of the law. More realistically, penal law is an expression of the highest state power. It is a ‘sovereign’ act that each person ‘submits to’. Power which is disregarded by those who are subject to it loses its sovereignty. The law that treads on one’s foot but does not defend itself loses its solemn greatness. Then there is no longer a feeling of *holiness* towards such sovereignty. Etymologically, the word stem ‘sanctus’ is in the concept of sanction. It says that the norm is ‘sanctified’ through the penalty. The penalty moves the norm to the position of highest state approval, dedication and dignity, and makes secure not only its untouchability, but also its staunchness against the norm breaker (123).

### **c. Crime must not pay**

Crime must not pay. Those who benefit through violating other’s rights and are not compelled to accept so many disadvantages

that the offense is not worth their while may mock those stupid enough to keep within the law. When injustice triumphs, the offender puts justice into injustice. The law protects the citizen, so the law must be supported. This is done by the police, but also by the political will of the community. The law would receive even more support if there a *mechanism of compensation* to make sure the law-breaker receives an appropriate evil, but one that moves towards the correction of his error. The offender's benefits are to be thwarted. Therein is justice; the punishment 'merited' (124)

The principle of reaction itself, such as 'the necessity of defense for the legal order', 'law as a pure order norm' and 'crime must not pay', has nothing to do with the responsibility of the offender. When responsibility is also one of the conditions of reaction according to the standard of common sense of the person in the street, the reaction is actually not carried out through responsibility, but through classical retribution. The content of the reaction can be justified by whichever principle the individual prefers (125).

Glorifying the majesty or holiness of the law, together with metaphysical retribution, makes an emotional combination. So long as glorifying the majesty or holiness of the law is, however, refused, there are in principle no counter arguments against the rational foundations of punishment itself from either the aspect of the proof of law or of the theory of the reaction. But the concept of law and state, which are connected to each other, and on which the principle of reaction is founded is to be seen more differentially. Qualifying and pushing back the formal principle of law results from that point. The law must endure so that it can be made more complete and more correct by assuming material meaning. The claim of the law's validity flows from its internal authority to which the external power claim may often take second place in certain cases (126)

## **B. Unreasonable foundations**

Unreasonable foundations that are based on emotion or passion rather than reason include very different assertions. I will begin with the *lex talionis*.

### **a. The principle of *lex talionis***

The advocates of the principle of *lex talionis* would say, 'I should repay you in kind'. They also say, 'Give them a dose of the same medicine', even if it is not taken literally in the sense of the Old Testament 'an eye for an eye and a tooth for a tooth'. It would be too barbarous according to our cultural standard; common coarseness remains still as a measuring principle. Evil should be returned with evil. If you do something to hurt me, I will do something that hurts you (127). However, today it is too barbarous for consideration, according to our cultural standard.

The principle of *lex talionis* does not have any social value. Only because someone hit me, I should hit him back. This is in itself not sensible. The evil just doubled. It is not worthy of an act of the state. In fact, the state puts itself on the same level with the offender. Therefore, any expression that 'evil should be returned for evil' should be refused. For the judge, the coarseness of equal value is not worth striving for. Whether the society must inflict a harsh evil is decided according to the standard that lies only in the severity of the criminal wrong (128). The original meaning of 'restitution' is 'to pay back', from the Latin *retribuere*, to restore or repay. When we closely follow the original meaning 'retribution', it can be more sensible not to pay the harm to the offender, but to have the offender repay the victim, making amends to him (129).

### **b. Private revenge**

Not very different from the principle of *lex talionis*, 'the same is to be done to the man who did it', is an explanation of punishment that the state took from the now-discredited idea of private revenge.

People are capable of feeling anger when they believe evil threatens them, or if it has already wounded their human dignity, their social or material territory, or their physical integrity. In that case, anger is the principle motive and it appears to be more self-interested, rather than ethical. Such emotions may be understandable among people who are victimized and/or threatened, but these emotions are, in fact, sources of revenge rather than of rational punishments. Punishment may be seen as a victim's right. In this view, he has the right of demanding that the criminal be punished for the sake of suffering. The state takes over this right in order to relieve the victim of the burden of private prosecution and in return, punishment acts as an avenue for revenge. Otherwise, feelings of anger will demand satisfaction in socially disruptive ways (130).

In many ancient societies, the impulse for revenge was institutionalized into the practice of the blood feud. But civilization requires us to control spontaneous violence and to suppress many spontaneous human responses received from various stimuli. The state should reduce the use of violence, in other words, by using its power and by depriving the wrongdoing citizen of liberty. Understanding spontaneous reactions does not mean that we should promote them, still less that we should systematize them. Otherwise, governmental powers may seek to dominate the citizens, or worse to control them, by keeping open such a politically expedient appeal to bloodlust (131).

### **c. Private compensation for responsibility**

The wrongfully injured victim has an interest in satisfaction. He may expect that, because his position deemed correct by society was humiliated, he will be satisfied materially for his loss and non-materially for what he suffered as object of the offender's two-fold malice and impulse satisfying. The feeling will at least occur to the victim at least that the offender must atone for all this. At a minimum, punishment should be exacted in part for the sake of

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satisfying the victim (132).

Indeed, seeing the offender suffer may make the victim feel better, but the punishment does not provide the victim with any long-lasting satisfaction. The offender's punishment is the means by which he compensates society for invading the social-ethical values shared by society. However, the loss and harm suffered by the victim is not restored, nor is his suffering compensated. Traditionally, although the state rakes in fines and other duties, the recovery of damages is charged to that part of civil law charged with dealing with private injuries and grievances. Ideally punishment does not serve to give immediate satisfaction to the victim's grievances, but it should to those of society. In other words, it does not serve to replace an unendurable past on the part of the victim with a new image of suffering on the part of the criminal. Therefore, it is important that one should give the victim a central position in the proceedings and seek after better ways of morally satisfying him in a manner that does not necessarily lead to punishment (133) (*See*, below III. 1).

#### **d. Emotional negation**

Like the retributive urge of animals demanding vengeance, society's instinctive rejection or repulsion from the wrongdoer can be carried out through indignation (134).

Even if the indignation itself is justified, and one can sympathize with it, it is difficult to accept this kind of call for punishment. This is because the offender may be the very product of a just society that refuses to turn its collective responsibility into expulsion and ostracism. Plus, he is judged by comparison with an upscale man who may not correspond to his social section. The offender is not held blameworthy for the degree to which his offence raises the indignation of the victim, but neither does it raise that of society (*See*, below III. 2) (135).

### e. Divine retribution

In deeply religious theocratic societies, there is little or no distinction between a moral wrong, or 'sin' and a legal wrong, or 'crime'. Since, according to this view, civil law itself is part of divine law, a legal offense is therefore an offense against the deity. Thus, it is natural that criminal punishment in such societies is indistinguishable from divine retribution. In many religions, a fundamental concept of moral wrongdoing, or sin, holds that the only way it can be atoned for is through the suffering of the offender, or, as in the Judeo-Christian tradition, the suffering of a sacrificial substitute. Hence the principle arises that 'only through the shedding of blood can one remit sins'. Only an eye can atone for an eye, or a tooth for a tooth, because it is primarily the deity who has been offended. If the injustice of an offense is an injured relationship with God, the injury to God cannot be restored except through the exaction of a similar injury - or an act of forgiveness and grace (136).

The responsibility of the offender, that is, the concept of sin, demands punishment, and this punishment deletes, or assuages this responsibility or sin. This thought has not lost its meaning. It is still potent. Pope Pius XII said at the 6<sup>th</sup> International World Congress for Penal Law (1953 in Rome): "nothing is more necessary than the respect for the majesty of the law and the salutary idea that the law itself is holy and protected and that therefore the one who breaks the law exposes himself to chastisements and must shortly suffer." This means that the state carries the sword as the deputy of God and as the instrument of his wrath against the wrongdoer; therefore atonement is to the fore. It only makes understandable the Last Judgment in which "he will give each man the due reward for what he has done." (Matthew 16:27; Romans 2:6). The Pope goes on to say, "The Highest Judge applies solely the principle of retribution in his last judgment. This truth must not be neglected." (the papal message) (137)

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The religious sacrifice and redemption theory that speaks of taking vicariously the evil of punishment from others is based on the unavailability of punishment. It begins with the scapegoat of the Old Testament that symbolically took the sins of people and was freed from these sins when it died in the desert (Moses 16:21, 22). It continues to the message of Christian salvation of the redeemer who suffers vicariously for all sinners and therefore provides God with satisfaction (138).

Having said that, there is also the precept “Never pay back evil for evil.” Or, “Do not let evil conquer you, but use good to defeat evil.” (Romans 12:17, 21; Thessalonians 5:15). There is a serious question to be asked about the transmutation of divine retribution into the realm of civil law and politics. From its theological significance, it would be wrong to infer its relevance or usefulness as theory of civil law and punishment, especially in secular, pluralistic societies (139). **The state is not a religious community.** The state surely trusts that everyone, who using their own faculties, will be able to understand punishment. However, it may not elevate certain religious precepts to universal principles. In addition, the state has no right to bask in any reflected glory of retributive divine justice on earth. This is so firstly, because secular judges do not know what people and their works merit before the Omniscient. Secondly, because according to Christianity, if he believes, the offender will be blessed with grace as well. Earthly justice can take place only within the aims of secular law, otherwise it will be turned into injustice (140).

#### **f. Suppression through superego**

According to depth psychology, the emotional demands of retribution result in compliance of the superego with social-ethical behavioral norms. The offender risks the unconscious, instinctive abandonment by all men. If someone breaks a norm that we accept for ourselves, we still stand on the offender’s side with the uncon-

scious, compulsive part of the mind, while simultaneously we call for harsher punishment for this seductively bad example with the other, more-logical part of the mind. This is of course subject to the individual legal norm that strengthens the suppression power of the superego against the individual's own impulses. In addition, the repression of and displacement of unconscious, illegal desires, that one may label weaknesses, call fourth a defense mechanism. These desires are felt as guilt that is added to this tense relationship between the norm sphere and impulse sphere. These feelings of guilt can press instinctively towards self-punishment. When we do not give vent to this aggression against ourselves, and do not understand the roots of the guilt complex, i.e., do not process them consciously, we try to relieve our consciousness by projecting our guilt on others. One's punishment needs also turns to them. These punishment needs of the individual can be directed towards to society in the point of view of collective psychology. The stricter its members accept the authority of the norms, i.e., the stronger their unconscious, repressed feeling, the more they will call for punishing those who actually break the norms. They do this to satisfy their own identity or protect against their own negative, moral 'shadow'. However, something repressed returns to those others on whom it is projected. Likewise, society will refuse this guilt; it will 'demonize' the offender. In addition to paying the penalty for his real misguided behavior, he will be made a 'scapegoat' for the instincts in others. He receives an additional penalty for the 'wickedness' in ourselves (141).

The explanation of depth psychology for the hidden reasons for punishment springs from humankind's insatiable needs for retribution. But one should not jump to the conclusion that punishment is 'in essence' retribution because of these fundamental requirements. **These base emotions may not be elevated to the maxims of state punishment, but on the contrary, a stop should be put to them by making us aware of them and their reason. The practical profit of psychoanalytical findings lies in the processing of tensions**

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**between the sphere of the norm and the sphere of instinct through reason (142).**

#### **g. Atonement as retribution**

Both religion and the understandings of punishment according to depth psychology demand atonement. For the most of part atonement is used synonymously with retribution in order to soften this hard-edged word, to push back the aspect of revenge to mere formal compensation. As far as the concept of atonement does not include any considerable material profit, it hides the fact that retribution matters. Atonement in the sense of retribution, which the offender should suffer passively, is a matter for the victim, for the 'wrath of God' or for the state to grant. On the other hand, atonement in its independent, meaningful sense is a matter for the offender himself. Atonement gives him a chance to purify himself inwardly and actively through taking on an evil voluntarily and humbly, and as a result, getting things straightened out before God and his own feelings of guilt. Atonement is self-communion. It allows the offender to achieve the moral goal of paying his debt in full, consummating his responsibility, and only just receiving the meaning of retribution from his point of view. Because of this need to suffer punishment, it is incumbent on the state to inflict on the offender an evil of punishment in order that he will have a chance for moral purification because of his need to suffer punishment. Not to retaliate for the offense would mean to deprive him of the possibility of liquidating his responsibility. Not doing it publicly will mean to refuse him the possibility of reconciliation with society. It is a 'legitimate task of the state' to make atonement possible through retribution. Atonement includes the 'individual ethical justification of punishment' for and to the individual (143).

In the end, authentic atonement is only a matter of the offender's conscience, so he must also be ready internally to do penance which cannot be enforced through the infliction of an evil from outside (144).

Usually, atonement cannot be expected from the offender because he rarely has the ability or prior readiness to prepare himself to seek heavy enough to fulfill his need for offense and punishment. Perhaps he does not feel that it is the chance of atonement that is offered, but rather revenge directed against himself (145). Most offenders will not be affected by distant moralizing speeches. Punitive sanctions based on a 'battle model' of winning or losing most probably make the offender think of himself, not of his victim (146). Even if he is sensitive to accounts of the concrete suffering of his victim, the whole legal process discourages him from thinking seriously about the harm he has caused. Instead, he may force himself, as a defense mechanism, to deny, or minimize it. Punitive sanctions tend to provoke resentment, and what compliance there is often tends to be superficial.

### **III. Restoration of legal peace (equilibrium) as a task of criminal law**

— conversion of the notion of law and justice —

#### **1) General task of criminal law as an expression of the social-ethical value-solidarity**

Under the liberal-democratic-social-constitutional state, the law is nothing short of the notion that it, the several branches of the law, should encourage the individual and the public at large to behave rightly.

The law whose foundations is located in culturally-received social ethics, therefore, should not be understood as primarily the formal outer norm of order and coercion where the offender's internal sense of value is of no importance. Instead, it should be understood materially as an expression of the social-ethical value conviction. However, the traditional concept is that the law-as-an-objective-order is an order consists of directives from the authorities to the 'subjects'; this has established itself among criminologists. It has also become well entrenched in almost all stations of life under the influence of the 'theory of Pure Law' of *Kelsen*.

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The formal thinking of law, however, should never be anything more than a supplement to the material thinking of law. The liberal-democratic-social- constitutional state's judicial system is not social-ethically neutral (147), but does require a socially integrated understanding of the law. Crime is no longer an infringement of unconditioned pretensions of the authorities, but a deviation from the value convictions shared by people in society; it is social ethics. The conflict of the offender with criminal law, therefore, should be interpreted as social conflict more than as 'abstract law infringement'.

Criminal law describes those forms of behavior that have socially harmful consequences. Not only individual needs and interests, such as not being killed, injured or swindled, are protected, but collective interests are also protected. Indeed, criminal laws apply to bribery, distribution of pornography and other harmful acts. They formally determine the area of control concerning infringements of elementary individual rights and the interests of society (in German 'Rechtsgüter'). But it is more important that social ethics are in substance at the root of the definition of crime. In fact, **no legal system can exist without a social ethical foundation** (148).

An offense is therefore part of 'social conflict'. Strictly speaking it has both the vertical dimension and the horizontal dimension: the state's conflict with the offender on the one hand and the conflict concerning the victim and the collective (i.e., the society) with the offender on the other.

Criminal law applies to forms of human behavior that severely disturb the peaceful and orderly living together of people in society, and also violate subsidiarily protected elementary rights and interests of those people. **The general task of criminal justice therefore has to be the maintenance of legal peace, and the re-establishment of legal peace intruded upon or threatened after a crime has been committed.** Criminal law is committed not to fighting crime, but to

building legal peace (149). In criminal justice there is no room for a 'war on crime' or a 'fight against crime' that connotes that criminals are external to the community.

Offenders are not monsters or even aliens but members of the community. They should not be demonized. Therefore, it should be judged from the point of 'the sensible, legally thinking citizen' whether, and at what point, legal peace has been broken and afterwards has been restored. Otherwise, the legal process will depend on an intuitive sense of justice or feeling of society, that is, the emotive forces such as the mass media or the attitudes of emotional people (i. e., legal non-professionals) who used the media as their main source of information (150).

The security of the community cannot be seen as the general task of the legal system. If the legal system were to acquire such primacy, the principle of 'blameworthiness (responsibility)' (in German 'Schuldprinzip'), one of the anchored fundamentals of criminal law would have to eventually be abandoned. In place of criminal law, a 'preventive detention' law would come into being, and then a 'safety management' law. This would have a profoundly damaging effect on the quality of relationships within the community. It would also profoundly affect our enjoyment of civil liberties and rights (151). The achievement of order is only one objective of the legal system. If order is excessively pursued, peace will be jeopardized (152). If law and order is extended beyond reasonable need, the citizens may come to distrust and/or fear both the police and the government.

## **2) Responsibility and punishment in the new concept of criminal law**

According to the traditional but still predominant theory in Japanese criminal law, the basis of punishment, as the infliction of evil against the criminal act, is the normative responsibility of an individual act (in German die 'normative Einzeltatschuld'). This is fulfilling the offender's criminal responsibility to suffer punishment.

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Its intentions are an individual-moralistic and social-ethical culpability of the criminal act. The condition of culpability is the consciousness of freedom, that is to say, being not determined. Indeed, on the level of being, namely empirical science, it can be neither proved nor denied. But free will should be postulated because human beings have the consciousness of self-determination from every-day experiences. This is true, except for cases in which an expert proves that a will adverse to a norm is determined by an irrational cause, such as mental disease. This is the law-abiding citizen's firm belief from his every-day life. When one recognizes the possibility of the determination of will in accordance with the norm, culpability is hereby formed and criminal law will have to be engaged.

The offender is to be blamed for his crime because while he actually had the choice of acting either legally or illegally, he chose to act illegally. When the responsibility for a particular act is investigated, the responsibility of the offender is always considered, so far as it is found to be an expression in the offence. This is because the individual's will is tightly combined with the offender's personality at the time of offence.

From this point of view, according to one theory, the punishment appropriate to the offender's responsibility can be or should be understood as retribution. The essentials of punishment are the normative retribution that demands the infliction of evil. This theory recognizes, however, that punishment has various functions, namely satisfying retaliatory feelings, rendering the offender harmless expiation and prevention (deterrence and rehabilitation). However, according to another theory, punishment is a duty placed upon the state that aims to prevent crime, while maintaining public safety in society. Nevertheless, the demand for retribution that the misdeed must be countered with evil, because it is firmly anchored in so-called 'sound popular feelings', should still be taken into considera-

tion. In this view, only retributive punishment will be perceived as righteous by both the offender and the public, and will have general and special preventive effects.

There are fundamental doubts about both the normative requirements of the doctrine of the 'free-willed legal subject' and the individual-moralistic responsibility in combination with the doctrine of the belief in free-will as a matter of the state. Aside from this, it is questionable whether punishment should satisfy, or even should consider, the retaliatory feelings either of crime victims, dependents or the public. The prevailing theory provides that, on one hand, the offender is only an object on whom the judge should impose punishment; while on the other, the victim hardly counts at all in the criminal justice system. Both aspects stay peripheral to the system. That is the main reason why individual-moralistic culpability that leads to retaliation demands that punishment contains the infliction of evil, without apology to or active repentance towards the victims. It empowers neither the victim nor the offender to independently or considerably resolve any unexpected problems. **This theory leaves no room at all for such a social-constructive crime resolution as victim-offender mediation.**

Nevertheless, the above-mentioned, prevailing theory of law (*See*, III. 1), when combined with the experimental, but impossible, practice impossibility of proof of the offender's freedom of choice, compels us towards a concept of responsibility involving criminal law that is not targeted on the inner morality of the offender. That means that his responsibility does not reach as far as individual moralistic culpability is concerned, but only to the realm of social-ethical culpability. The deficiency of the offender's inner norm bond is expressed in the crime. In other words, **the offender's responsibility consists of social-ethical blame that he is short of norm-solidarity, and this is expressed by his act runs in clear contradiction with legally acknowledged values.**

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This is in contradiction with the values acknowledged in the legal requirements of the crime. His responsibility expresses the expectancy that the law has been disappointed because a law-abiding citizen would not have committed the crime (the concept of **the objectified, social-ethical responsibility**). The law violated by the criminal demands that the social-ethical community disapprove of the culpable act and its own validity. Consequently, the primary justification for punishment does not lie in prevention, but in the reprimanding reaction itself. Punishment functions as compensation for responsibility (153).

After a period of certain evil-infliction, criminal punishment, as part of a complete system of law, has come to identify itself by looking back on the gravity of the internal social disintegration. It also works looking forward, in order to strengthen the criminal in his solidarity with the law internally. On one hand, punishment should cause the offender to avoid other criminal acts (so-called **positive special prevention**), and take steps against the disturbance of legal peace caused by the crime. On the other hand, it also acts to restore and confirm the validity of social-psychological power of the social-ethical behavioral norms violated by the criminal (so-called **positive general prevention**). This new conception of the real aim of punishment is called '**integrative prevention**'. In such a way, the concept of responsibility is brought in line with positive general and special prevention (154). Consequently, the sense and the objective of punishment form a unity (155).

### 3) Restorative justice and its relationship with criminal justice

Criminal justice can achieve such a general task of behavior control in various ways. In order to carry out this task, traditional Japanese criminal justice has only a punitive response to an offense. But punishment can be replaced by another unacknowledged reaction pattern, i.e. social-constructive activities by the offender. Although the public dimension of the offense remains essentially in criminal

law, the personal and social levels of the offence from the victim's point of view, the experience of receiving harm and the consequences of the offender's action for the victim and others should be brought back to light. These aspects should be integrated into the process of criminal justice.

This is because **the re-establishment of legal peace as a duty of the criminal law system can be better achieved through restoration of the victim's psychological and physical peace and reimbursing financial losses than by its current concentration on punishing the offender.** Such a change would be much better than retributive punishment. The law as an expression of the general value consciousness of society will re-establish social peace in public consciousness. Besides, taking the victim's interests into consideration will meet the demands of the complete community, in other words, society will move towards the modern 'welfare state'.

Unfortunately, finding somebody to blame formally for past offences seems essential in modern life. The repressive infliction of evil should not be, however, an essential element of modern criminal law. The infliction of evil through loss of life, freedom, or properties as a reaction of the state to crime does not necessarily follow conceptually the awarding of social blame. This is because the inflicting of evil is not by any means necessary to strengthening value validity (156). Here the fundamental principle of subsidiary of punishment of penal law can be realized (the *ultima ratio* character of punishment). The criminal law system should not be equated with punitive-oriented *penal* law.

Criminal acts can be resolved with the help of a mediator because they are social conflicts, as has been mentioned. Several empirical studies show that the public approves of victim-offender mediation. It also offers therefore manifold opportunities for norm affirmation and clarification (**positive general prevention**). On the

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basis of the social learning theory (*Bandura, A. (157)*) and various other socialization theories (*Piaget, J. (158)*, *Kohlberg, L. (159)*, *Tapp, J. L. (160)* and *Gilligan, C. (161)*), one can assume that those forms of reaction to an offense offer the most benefit which induce positive conflict resolution processes. They avoid rendering the offender to pathology and instead treat him with respect and dignity. On the basis of the labeling approach, victim-offender mediation can avoid the continued exclusion and isolation of those labeled criminal by the community. Both conditions can be avoided if a criminal conflict can be settled by mediation and reparation (**positive special prevention**). As a result, victim-offender mediation can be effective for lowering rates of recidivism.

**Nevertheless, victim-offender mediation includes other objectives. One is reaching an understanding of the opponent: the offender comes to understand the victim, and vice versa, the victim does the same to the offender. The other is reconciliation among the criminal, the victim and the community at large rather than the prevention of recidivism.** The aims of victim-offender mediation are, one, the voluntary, informal handling of the case, i.e. communication between the parties involved, whether direct (face to face encounter) or indirect (in writing); two, peaceful settlement and closure of the episode, and three, reconciliation, such as mutual recognition and apology, the awaking of regret and repentance and eventually psychological strength (empowerment). These last named objectives are of a different quality than positive general and positive special prevention because of their socially constructive and interpersonal elements.

**In short, this kind of conflict management is not foreign to the criminal justice system. It is far more suitable to restore the legal equilibrium than merely to punish (162).** Criminal law should give priority to the concept of law, rather than to the concept of punishment. Punishment will lose, therefore, its privileged status.

So 'criminal justice' or 'criminal law' does not necessarily mean 'penal justice' or 'penal law' (163).

The idea of restorative justice is not restricted to 'conflict settlement', i.e. the settlement of conflicts between people in society. Neither should it be equated with victim-offender mediation, although this is the most important part of it. Seen from the point of view of restorative justice, **there are socially constructive responses to the offense that balance the results of the crime, i.e. restore social peace after the disturbance.** When victims are unwilling to accept any reconciliation, or if it is an offense against the general public, restorative justice allows positive counter-activities such as, doing community service (so-called 'symbolic compensation') or it could be arranged (it is here proposed) to allow paying a certain amount of money, not to the government coffer, but instead to public welfare institutions. The suitability of restorative justice is therefore not related to the willingness of the victim to co-operate or to the particular offense concerned. Almost all criminal cases can be handled in some socially constructive way. In this sense, the concept of restorative justice is much broader than the concept of victim-offender mediation.

The key element of restorative justice lies in the offender's voluntary acceptance of responsibility and his social-constructive counter-activities thereafter. If he is able to do this, we can reach the following tentative definition of restorative justice: **Restorative justice is the process by which the offender voluntarily and autonomously accepts his responsibility for the offense and copes with the effects and consequences of the offense in a socially constructive way.** This definition neither denies the idea of managing the harm done and restoring both the offender and victim to their former state, nor excludes the mass of 'victimless crimes'.

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#### **4) The objectives of criminal procedure**

In Japan, 'the Victim Compensation Law' (1980), 'the Victim Protection Law' (2000) and 'the Revised Code of Criminal Procedure' (2000) have been enacted into law. But little attention has been given to how these relate to the objectives of criminal procedure.

One of the principal objectives of criminal procedure is to find out the fullest possible truth about what happened at the crime scene. It seeks to probe the suspicion that an offense has been committed, and to investigate into the material truth.

Procedural law should serve substantive law. Then, beyond the investigation into material truth, one of the objectives of procedural law should be to allow law enforcement professionals to voluntarily pursue positive ends. This is so that the victim's needs and interests can be taken far more into consideration in criminal procedure than is currently the case. Compensation for psychological and material harm caused by the offense should become the focus of attention. Victim-offender mediation provides the victim with the opportunity to reduce his mental trauma and recover from the damage more quickly and in a much more informed way. This means that procedural participation alone is not sufficient to satisfy either the victim's needs or his interests (164).

In victim-offender mediation, the offender is confronted with the consequences of his illegal actions and can eventually take responsibility voluntarily for those actions. Such autonomous and socially constructive conflict resolution is often far superior to formal punishment. This should be the most important objective in criminal procedure. This should provide both victims and offenders who seek victim-offender mediation with the opportunity to take part in it.

Therefore, it cannot be overlooked that victim-offender mediation can be more successfully carried out by extra-judicial bodies or

persons independent of the state, such as the extra-governmentally financed welfare service, social workers, or social education workers who are specially trained with social-work skills. They can play an extremely important role in criminal justice. Dealing with crime as social conflict is not the exclusive domain of public prosecutors or judges. These workers can be especially valuable simply because they are not law-enforcement professionals.

Before trial, the public prosecutor may abstain from pursuing a case if, after successful reconciliation, the social situation that has been disturbed by the crime is restored entirely without the necessity of intervention of the court (**diversionary mediation**). It would not be necessary to separate the criminal from the community for any longer than arrest and detention. In this case, the so-called state's right to punishment is declared null. Therefore, there should be no registration in the criminal records. At trial, reconciliation efforts should have a mitigating, suspending or exempting effect upon the assessment of punishment to be imposed, even if punishment seems necessary to prevent the offender from committing another offense in the future or to prevent other members of the public from committing like crimes. Constitutional subsidiary principles can support these measures. On top of that, in parole cases, when the prisoner has the possibility of being released early, his prior conciliatory efforts should also be taken into account.

By contrast, in Japan, according to 'the Revised Code of Criminal Procedure of 2000' the trial judge is able to allow victims and their families to express feelings, such as hatred, indignation, rage and vengeance to a violent criminal and to the public through the media in a court of justice prior to the judge's statement of conviction. Against the background of the rise of the victim's movement which demands that victims' voices be heard throughout the criminal process, 'the Revised Code of Criminal Procedure of 2007' has also provided for victims and relatives of a deceased victim to attend,

interrogate offenders, and in addition state their desires concerning sentencing independent of the prosecutor's statement of desired sentencing before a criminal conviction (in Japanese criminal procedure the fact-finding or conviction phase and the sentencing phase of the trial are not strictly separated). Now victims have the power to influence sentencing through being granted the right to have their voices heard in criminal procedure: namely, victim's demands for greater punishments can be now transformed easily into harsher sentences (165). In Japan, the victim can now express a view on the extent of punishment considered appropriate, demand therefore the most severe punishment, or even demand capital punishment in his closing statement, independent of the prosecutor. It is of course possible that this may not make any difference in sentencing. In that case, the victim may regard the outcome as unjust, and this dissatisfaction can be directed at the court, but also amplify the anger towards the accused. Although this so-called 'allocution' system is formally defended in the grounds of (potential) victim protection, the justice of this new law is questionable. This is because it is apparent that not only this 'epoch-making' (!) institutionalization is opposed to the ideal of restorative justice (166), it has also opened the gate of the criminal justice system in order to allow victims to vent aggressive drives and passions. This new trend will not contribute to the assessment of 'legal wrong' (in German Unrecht) or 'responsibility', or 'blameworthiness' (in German Schuld or Vorwerfbarkeit) (167). Such criminal procedure allows the victim and the public through their statements to vent feelings of retaliation against criminals. So long as the criminal justice system is predicated on the framework of retribution as the purpose of punishment, it will gradually and surely produce deep harm to the Japanese criminal justice system (168).

#### **IV. Conclusions**

In dealing with crime, the maintenance and re-establishment of legal peace which is essential in a democratic society can be restored without formal conviction or sentencing. The central task of crimi-

nal law will no longer be to impose punishment that is punitive in character, but rather to determine what is an appropriate reaction to the offense. It is more 'social-constructive dialogue and conflict resolution' than 'state power and punishment' that we need. Criminal justice is not synonymous with punishment. Indeed, it can and must be liberated from punishment. Restorative justice can be integrated into a framework of criminal justice, to which a new interpretation or perspective is given. This new idea or paradigm should not simply be grafted onto the existing criminal justice system. Indeed, the criminal justice system needs to be grounded on a new concept of law and justice that has nothing to do with hostility or threats.

Even though restorative justice could be mistakenly viewed as a cure-all panacea for crime or what will have an immediate effect on crime, the Japanese criminal justice system should move towards it. Restorative justice requires new substantive and procedural provisions concerning voluntary reactions, including such institutions as a community mediation board, and the setting-up of a victim's fund financed through fines and donations. In any case, realizing this new system requires a politically decisive initiative, public education, and last but not least the leadership of jurists. **The time has come to change the traditional criminal justice system into a criminal justice system based on the new notion of law and justice.**

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- (131) *Moos, R.*, (fn. 75), p. 297.; *Walgrave, L.*, (fn. 12). P. 25.; *Brunk, C. G.*, (fn. 2), p. 37. As *Pratt* rightly argues, the just deserts theory has such a problem, as well. Just deserts not only is a floating concept which can be inflated and expanded to suit populist demands, but conveys also with their *commonsensical* associations with retribution a sense that something akin to ‘revenge’

should influence sentencing, encouraging the kind of unforgiving mood associated with penal populism. *Pratt, J.*, *Penal Populism*, 2007, p. 128.

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- (133) *Moos, R.*, (fn. 75), p. 297.; *Sarat, A.*, *Vengeance, Victims and the Identities of Law, Social & Legal Studies*, Vol. 6, No. 2 (1997), pp. 163 ff., p. 173. *Kaminer* rightly says, “From the victim’s perspective, the trial is, in part, a therapeutic process. They seek ‘healing’ in the resolution of the case, that seems appropriate to the citizenry of a therapeutic culture. Indeed, the victim’s rights movement partakes of the popular confusion of law and therapy and the substitution of feelings for facts. But if feelings reign, feelings are prejudices in a court of law, which strives for relatively objective decision making. Justice is not a form of therapy, meaning that what is helpful to a particular victim, or defendant, is not necessarily just and what is just may not be therapeutic.” *Kaminer, W.*, *It’s all the Rage. Crime and Culture*, 1995, p. 84.
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  - (161) *Gilligan, C.*, In a Different Voice: Psychological Theory and Women's Development, 1982.
  - (162) *Roxin, C.*, Wandlungen der Strafzwecklehre, in: *Britz, G., Jung, H. & Müller, E.* (edit.), Festschrift für H. Müller-Dietz, 2001, pp. 701 ff., p. 706, p. 709 and p. 714.
  - (163) *Eser, A.*, Schlußbetrachtungen, in: *Eser, A., Hassemer, W. & Burkhardt, B.* (edit.), Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende. Rückblick und Ausblick, 2000, pp. 437 ff., pp. 440 ff.; *Jesioneck, U.*, Das Verbrechensopfer als Prozeßpartei (manuscript), 2005, p. 36.; *Burgstaller, M.*, Aktuelle Wandlungen im Grundverständnis des Strafrechts, JBl 118 (1996), pp. 362 ff., p. 366.
  - (164) *Kaiser, G.*, Ist die Resozialisierung noch ein aktuelles Thema der Strafprozeßreform? In: Festschrift für Th. Lenckner, 1998, pp. 781 ff., pp. 785 ff.
  - (165) As *Murphy* says, prior to a conviction we do not know for sure that we actually have a victim; all we know for sure is that we have an *accuser*. Thus the word 'accusers' rights' would be better. *Murphy, J. G.*, Retribution Reconsidered. More Essays in the Philosophy of Law, 1992, p. 62, fn. 2.
  - (166) Cornwell, D. J., Doing Justice Better. The Politics of Restorative Justice, 2007, pp. 73 ff.
  - (167) *Booth v. Maryland*, 482 U.S. 496 (1987), *South Carolina v. Gathers*, 490 U.S. 805 (1989). In 1987, the U.S. Supreme Court, with Justice Powell writing for the majority, prohibited the use

of victim impact statements during the sentencing phase of a capital trial not only because it put emotionally compelling testimony before the jury and created a substantial risk of prejudice, but also because it did not and could not contribute to an assessment of 'blameworthiness'. In 1989, the Court also prohibited prosecutors from making statements about the victim's character in arguing for the death penalty. The Court stressed in these cases that evidence about the loss suffered by the victim's family or the victim's character was not relevant to determining a defendant's 'personal responsibility and guilt'. In contrast, in *Payne v. Tennessee*, 11 S. Ct. 2597 (1991) the Supreme Court reversed directions of its own death penalty jurisprudence, and held that punishment need not be limited to wrongs, but could and should be meted out differently on the harm that is actually done although victim impact statements do not in general reflect on the defendant's 'blameworthiness'. Cf., *Sarat, A.*, (fn. 133), pp. 163 ff.

(168) *Murphy, J. G.*, (fn. 165), p. 85.