

SOCIAL EXCLUSION AND HUMAN RIGHTS: THE NEW CHALLENGES OF CRIMINAL POLICY

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*“The good society, in short, is both strong on duties
and strong on rights, and especially strong
on duties that protect rights”*

John Braithwaite¹

As other Eastern-European countries, Hungary has been an active participant in the democratic changes that have been taking place in this region over the last 15 years. We have realized fundamental constitutional reforms and the system of checks and balances has been functioning for a long period of time. Personally, both as a lawyer and a criminologist, and between 1995 and 2000 as the first Human Right’s commissioner of the Hungarian Parliament, I am proud of having been able to take part in the change of the system, i.e. in the restitution of the prestige of human rights. Allow me to share with you some of my experiences and conclusions which I have acquired in my most recent position.

Crime Control within the Principle of the Rule of Law

Upon its creation, the new republic aimed at reconciling crime control with the rule of law. In the interest of this reconciliation, the legal guaranty system of the criminal, criminal-procedural and penitentiary laws have been subject to the continuous supervision of the Hungarian Constitutional Court. In dealing with these issues, the Court’s starting point has been that human rights must be treated as a social reality when drafting the criminal law, in criminal procedure and in criminal justice.² We have followed the very same principles in connection with criminal policy reform. As one of the most important aspects of the reform, in 2003 we worked out the National Strategy of Community Crime Prevention. We did not forget these principles when we carried out essential changes in the probation service nor when we established the victim support and victim-compensation service, which has been in operation since January 1st 2006.

Every part of the reform may be regarded as an attempt to reach a higher level of public security. Since public security is a common value reached by self-restrictions and external restraints, a fragile balance must be achieved among the various interests that are working against one another. Even the smallest external restraint means an intervention into the life of the individual or a small community and entails the restriction of liberty. The balance of individual autonomy and state control can only be created successfully on the basis of proportionality. What we have in mind is that the punishment should stigmatise the criminal offence, but it should not stigmatise the criminal offender and under no circumstances should it stigmatise the victim himself. The intervention of criminal law is limited by constitutional requirements, as well as by the guarantees provided by international law and national legislation. Measures which make use of coercion or which entail stigmatisation may not be applied as a tool of crime prevention. On the contrary, crime prevention and crime control can not result in social exclusion.

We have agreed that the restraining of crime is a socially accepted purpose. However, we should also bear in mind that given the effect of measures aimed at this purpose, and also due to the fear of crime itself, the social exclusion of certain groups may increase as a result. The preconceptions harboured against young offenders, persons in prison, drug dependents, the homeless, the poor, the Roma and immigrants may be strengthened. However, criminal policy reforms must follow the principle of social justice. Consequently, when enforcing the interest in public security, all attempts must be made to avoid prejudice and social exclusion.

Today we have come to regard a victim support policy as a constitutional obligation of criminal policy. The new act expresses the desire on behalf of the state to provide help on the basis of equity and solidarity to those whom it could not prevent from falling victim to the harmful effects of criminal offences. The state undertakes solidarity with the victims, who have suffered physical, psychological or social damage. The new system enhances the ability of such persons to exercise their rights both in and outside criminal procedure. Full-scale provision of information, enhancement of interest representation, legal aid in judicial procedures, financial support of a first aid nature and mitigation in accordance with EU standards is provided to the victims of crime. However, the use of such services may not be made obligatory. On the other hand, in the course of criminal procedures the victims can suffer no further stigmatisation or harm; secondary victimisation must be avoided.

I believe that work on the aforesaid issues has been carried out on the basis of a consensus within the profession. The reform has been launched. Now the third government action program, aiming at the implementation of the community

crime prevention strategy, is being drafted. In the last three years the reformed institution of the probation service is becoming increasingly suitable for extending the sphere of punishments which can be executed within the community. The victim support and compensation service got off to a good start in January 2006. However, the principal reform of the democratic state has not yet been completed.

During the ongoing codification work with respect to the criminal law, a certain kind of professional and political consensus has been emerging regarding the implementation of some parts – for example mediation – of restorative justice. An accord has evolved in the expansion of the range of punishments to be executed within communities and in the diminution of the role of imprisonment. However, a certain kind of aversion can easily be noticed towards the complex conception of restorative justice, both on the side of the politicians (the lawmakers) and the practitioners. This mistrust is quite understandable. Those who would like to carry out reforms have to confront professional routines and established attitudes. A new method of communication must be developed and for their implementation both a suitable professional and political atmosphere are required. This task is more difficult than the mere introduction of rules of procedure, which can indeed be more technically and financially efficient, like for instance the use of electronic monitoring. However, many of us believe that the undesirable effect of crime control, namely that of social exclusion, can only be eliminated through the application of the concept of restorative justice. This is how crime control can be carried out within the principle of the rule of law.

Hereafter in my paper I will present the arguments, which seem to me as most convincing with respect to support for the philosophy of restorative justice. I will deal with the problem of crime control as a conflict solution. Finally, I will explain my position upon the effect that a good society should strive more courageously for a moral consensus.

Crime Control as Conflict Solution

A few decades ago I was principally against a criminal policy based on retaliation. I regarded retaliation as an attempt to restore a spoiled harmony, in which the outdated, inefficient and irrational talio (eye for an eye, tooth for a tooth) principle survives. I accepted the saying attributed to Gandhi, namely that the eye for an eye principle eventually makes everybody blind.

The crisis of a social welfare based criminal policy was declared at the end of the seventies. The disputes within the profession concerned the causes of the crisis, and thus the basic values of criminal policy. At the time I read the study

of István Bibó written in 1938. The values of the study were recognised by me even at that time, but I did not understand the real message.³ Later on, in the course of dealing with restorative criminal justice, I realised that retaliation is an integral and indispensable part of a sanction system, and that this is based on a legal system which is legitimate and consequently for the most part founded on public consensus.⁴ Therefore even the complete reparation of the damage caused does not fulfil the expectations attached to the punishment. As István Bibó wrote: "Retaliation is primarily characterised by its definitive and undoubted emotional feature. Retaliation is a legal consequence originating from and heated by indignation even in the rational and rigid forms of legal institutions. That is why we are not able to accept a penal system which is based only on rational defence; we regard such a system as too insensitive and too liberal concerning crime; the solidarity with the indignation of the offended person and the offended community is missing from this, which is a characteristic feature of each institutional repressive measure."⁵

Like every human activity, the commission of a criminal offence is an action motivated by rational and emotional episodes. Passion, indignity, horror, rage, revenge or hate may all be both the source and result of the criminal offence. They may characterise both the offender and the victim at the same time, as well as their respective surroundings. The indispensable task of criminal policy and crime prevention is the 'maintenance' of such emotions, the reduction of dramatic tension, the restoration of the moral values to be followed, the conciliation of the victim and the injured community.⁶ A punishment free of emotional effects and purely built on practical aspects is not generally followed by a sense of guilt and regret. Such sanction is not suitable for evoking the conscience of the offender, and no solidarity with the victim will evolve from it. The unsolved conflicts damage the 'connective tissue' of the society, they cause damage to the community itself, reduce the self-defence ability of the community and thus the chances of effective crime prevention as well.

The always changing but never abandoned human, community and social need for retaliation was even neglected by the organically developing democratic societies. It became obvious at the end of the 20th century that criminal policy rather represses the emotions caused by tension than maintaining and repairing them. This is due to the fact that the modern state has from its inception had to restrain revenge, lynch mobs, anarchy and unlimited indignation. The increasingly developed legal guarantees aimed precisely to counterbalance these tendencies. Under the pressure of the guarantee system used by the state and the professional knowledge supporting it, the common culture of symbolic gratification had by the 20th century been almost totally destroyed. In prehistoric or in today's tribal cultures the offender may placate the injured community by giving a traditional present (livestock, jewellery). In these procedures the emphasis

is not on the volume or value of the 'retaliation' given, rather on the placation itself. Such ritual is therefore not only about the restoration of the alleged truth or compensation for the damages, but rather about a process of reaching active and passive placation from the choreographic, symbolic expiation. Thus, the said ritual is organically tied to the community, and in that the community provides for its self-defence and the survival of community values by not despairing and excluding neither the offender nor the victim. Huxley has written about the customs ruling in African tribal cultures.⁷ By the beginning of the 21st century both offenders and victims alike have become participants of a neutral procedure that lacks any emotional content. Yet, it seems that the proper course of action, which is dictated by rationality, while it is necessary, it is not a sufficient element of criminal policy.⁸

The stakes involved in the criminal policy and crime prevention reforms that have been going on for two decades are remarkably high. There is a crisis of trust concerning the philosophy of the welfare society and within this concerning criminal policy. In democratic states the means of control have become increasingly emphasized and the elements of restraint have gained more and more space. Criminal policy – particularly in the United States – has since the early 80's stepped up to the rank of emotionally heated high politics.⁹ This process was characterised not only by the never before seen rise of prison population's, but also by the application of the *zero tolerance* principle, which quickly became the source of much controversy. Since then in the US the political illusion of the 'war on crime' has also had to be phased out. The *blitzkrieg* did not provide long-term results. A permanent war is not suitable, even for the modern civilisation. However, the belief in control as the organizing principle of the society proved to be permanent, and nowadays institutionalised control has intruded even into the private sphere. It is more and more difficult to avoid security cameras. This control, which covers almost the entire network system of society, is based on society-wide fear or distress caused by the lack of or dysfunctions in the self-defence capacity of organic communities. The system of public cameras has become the symbol of this new order. As Földes wrote: "The control of cameras within their sphere slowly dissolves the instinctual balance of the society. While the urban public order is traditionally and primarily maintained by routine, natural attention, the intervention of the people, the security system built on cameras erodes this self-regulating system by offering the false promise of security and refers the maintenance of order exclusively to the sphere of the police. Thus the enforced order will take over the spontaneous order."¹⁰

The control over conflict solution, which has been elevated to the level of high politics, has been simplified. Such solutions tend to increase the feeling of defencelessness among the people, since it is through powers beyond their control

that promise them protection against non-desired harmful events. Emotions turn to distress, but can easily get out of control. State provided permanent security can only be realised through more policemen, more prisons, more and more spaces controlled by cameras.¹¹ I believe that the democratic state does not have any other choice than to continuously maintain the connective tissue of the society. If there is nothing but control, the connective tissue may be temporarily and physically protected, but the immune system will not be fostered. On the contrary, control weakens the essential elements of the tissue, such as ties, solidarity or loyalty. Simultaneously it increases defencelessness, fear, distress and undermines trust. However, without trust no democracy can exist. Thus the 'risk' of partnership with the communities of various cultures and conflicts of interests must be accepted.¹² Trust evolves through the living and continuous connection among co-operative partners. Trust is built on the self-confidence of the co-operative partners and strengthened by actions. The state of trust is the connection of co-operative persons, of smaller or bigger communities filled with conflicts but still characterized as harmonic. Thus, we are wrong in thinking that a criminal policy serving viable public security can be created by engineering, economic and mathematical means. We must realise that public security and order cannot be serviced to the society and justice cannot be distributed for the clients.

In a Good Society, the Criminal Policy Strives for a Moral Consensus

The philosophy of restorative justice is almost as old as civilisation itself, and its development and transformation can be observed in moral culture. Even tradition based everyday culture has answers to questions like "what we punish and how we punish". Atonement, placation of the aggrieved and the affronted communities, forgiveness did not develop under the rubric of the state-monopolized criminal justice, but instead under the experience of social cohabitation in the family, in the school, and among friends and colleagues in the neighbourhood. That approach to criminal policy, namely crime control, which attempts to align itself with the model of restorative justice, which is itself based on the tradition of the moral culture, is one that is searching for consensus at the same time. After all, criminal policy is trying to bring closer their norms and their punishment, developed in the state regulatory machineries and in the world of ultima ratio with the continuously functioning rules developed in moral culture. It holds to account the value judgements and moral reactions of multicultural communities and builds upon them. These are considered by it to be real challenges when selecting the means of power and regarding the development of professional culture and knowledge.

Andersson, in the annual report of the Swedish National Council for Crime Prevention 2005, expressed his worry that within criminal policy pragmatic values are giving more and more place to moral values, indeed that the latter are actually capturing the former¹³. Personally, I think that nowadays the true danger resides in that fact that in a concept based on technocracy and pragmatism, basic democratic values are being severely shaken. The indispensable communication among the people involved is severed, or it functions on a very low level. Individual human rights become endangered. The alienated “machine” is able to pragmatically supply the “required” order only for a short period of time. Order and security are not merely ends in themselves, but provide the essential conditions for the functioning of democracy, that is to say for cooperation.¹⁴ Existing common values, and within these moral values and those processes which are closely linked to the everyday culture of the community, can be integrated in the model of restorative criminal justice. This order and this security may perhaps be considered as common achievements.

Perhaps I see the danger more clearly because I myself went through it and together with others think that we have yet to overcome it. John Braithwait (1989) very precisely illustrated the signs of danger which arise from crime control to become a looming threat to a functioning democracy. “... societies that lack the capacity to exert community control over breaches of duty, and to exert community control to protect freedoms, will lose their freedom. This is so first because freedom can never be protected if encroachments on freedom cannot be sanctioned. Second, if citizens’ persons and property cannot be secured by moralizing against criminals, than political demands for a repressive state will prevail. To the extent that moralizing social control collapses, a vacuum is created that will attract the most brutal, repressive and intrusive of police state.”¹⁵

For me, Braithwaite’s message is that power based on public morals is not interchangeable with moralizing power. The latter moralizes only as a technique of the exercise of power, while in the former public confidence itself can be realized. The latter, sooner or later, falls into the trap of populism or leads to dictatorship.

I understand the strategy of mass imprisonment to be a moral instrument, used as a technique in the exercise of power. I agree with David Garland (2001), who considers this strategy to be an instrument of social exclusion, which is why he opposes with such conviction the use of criminal policy over social policy. “The strategy of mass imprisonment might be a feasible solution to the problem of social order, but it is a deeply unattractive one. The marginalized, criminalized poor may lack political power and command little public sympathy, but in aggregate terms they have the negative capacity to make life un-

pleasant for everyone else. And, of course, the policies that we adopt towards such groups define “us” as much as we define “them.”¹⁶

I strongly believe that modern civilisation has enough both moral and intellectual capital to integrate and to spread the philosophy of restorative justice. Moral and financial reparations and the aspiration for placation seem to me to be suitable means for the resolution of conflicts and emotional tensions, which arise out of modern multicultural circumstances. In this case, defencelessness, fear, dread and hate would gain less ground. However, punitive social control can not take the place of moralizing social control. But a criminal justice system must be capable of dealing with worst-case scenarios, because they are the very scenarios that threaten its legitimacy. Yet imprisonment will be needed to protect the community first of all from organized criminals and among them from terrorists.

In the practice of restorative justice, which strives for a moral consensus, community crime prevention steps into a new dimension. „Restorative justice can remove crime prevention from its marginal status in the criminal justice system mainstreaming it into the enforcement process. It can deliver the motivation and widespread community participation crime prevention needs to work.”¹⁷ We believe that already in our lives community crime prevention will become an integrated part of social policy.

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- ¹³ Andersson, Jan (2005) Swedish National Council for Crime Prevention: a Short Presentation. *Journal of Scandinavian Studies in Criminology and Crime Prevention*. Vol.6, p. 87.
- ¹⁴ "Although personal security is a very good thing, it can easily become a fetish, if we desire it so much. A secure life is not necessarily a happy life. ... Security, itself, is just a negative purpose, inspired by fear: successful life has to have positive purpose, inspired by hope..." Russel, Bertrand (1960) *Authority and the Individual*. Beacon Press, Boston.
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SUMMARY

**Social Exclusion and Human Rights:
The New Challenges of Criminal Policy**

KATALIN GÖNCZÖL

As a criminologist and ministerial commissioner of the Hungarian Ministry of Justice, the author was entrusted to prepare three major reforms of criminal law between 2002 and 2006. During 2003 a network of probation officers in charge of implementing alternative sanctions began its operation. In the autumn of the same year the Hungarian Parliament adopted a National Strategy of Social Crime Prevention. A national network to assist crime victims came into operation as of 1 January 2006 on the basis of a law adopted in 2005. The essay sums up the experiences of those reform efforts.

The first part of the study is devoted to the practice of crime control as based on the rule of law. In the second part crime control is described as an instrument of conflict management. The author enumerates the arguments that justify the enforcement of restorative justice in criminal policy. The third part discusses the criteria for maintaining the momentum of the reform process. In a well-functioning society – the author argues – the practice of crime control always needs to seek a moral consensus. That is the optimum way for doing justice to the victims and aggrieved communities. Indeed, that is the only way for crime control to ease rather than exacerbate the undesirable consequences of social exclusion. To accomplish that, the entirety of the philosophy of restorative criminal justice needs to be enforced – it is insufficient to include in a criminal reform only some of its techniques. Creating restorative justice that seeks to resolve conflicts and is based on the rule of law poses a new intellectual and professional challenge both for actors in criminal policy and mainstream general governance.

RESÜMEE

**Soziale Ausgrenzung und Menschenrechte:
Die neuen Herausforderungen des Strafrechts**

KATALIN GÖNCZÖL

Als Kriminologin wurde die Verfasserin in ihrer Funktion als Ministerialkommissarin des ungarischen Justizministeriums zwischen 2002 und 2006 mit der Verwirklichung von drei äußerst bedeutenden strafrechtlichen Reformen beauftragt. Als Ergebnis der Reformbestrebungen begann im Jahre 2003 der für die Durchführung von Alternativsanktionen verantwortliche beschützende Aufsichtsdienst seine Tätigkeit. Im Herbst 2003 verabschiedete das ungarische Parlament die nationale Strategie der gesellschaftlichen Kriminalprävention. Das landesweite Netzwerk zur Unterstützung der Opfer von Verbrechen wurde am 1. Januar 2006 gemäß einem neuen Gesetz geschaffen. Die Verfasserin hat ihre Studie auf Grund der Reformenerfahrungen verfasst.

Im ersten Teil der Arbeit gibt sie die Praxis der Verbrechenskontrolle kund, die auf dem Grundprinzip der Rechtsherrschaft basiert. Im zweiten Teil stellt sie die Verbrechenskontrolle als Instrument der Konflikt-handhabung vor. Sie gibt einen Überblick über diejenigen grundlegenden Argumente, die die Anforderung der Geltendmachung der wiederherstellenden Gerichtsbarkeit in der Kriminalpolitik belegen. Im dritten Teil werden die Kriterien der Aufrechterhaltung des Reformprozesses detailliert aufgezeigt. Die Verfasserin ist der Meinung, dass die Praxis der Verbrechenskontrolle in einer guten Gesellschaft stets darauf ausgerichtet sein muss, einen moralischen Konsens zu schaffen. Auf dieser Grundlage kann den Opfern und den verletzten Gemeinschaften Gerechtigkeit geübt werden. Dies ist im Übrigen auch die einzige Möglichkeit, dass die Verbrechenskontrolle die unerwünschten Folgen der gesellschaftlichen Ausgrenzung nicht verstärkt, sondern eher lindert. Um all dies zu erreichen, muss die Gesamtheit der Philosophie der Strafgerichtsbarkeit zur Geltung gebracht werden; es genügt nicht, lediglich einige Techniken dieser in den Prozess der Kriminalreform zu integrieren. Die Schaffung der wiederherstellenden Gerichtsbarkeit, die auf der Rechtsherrschaft basiert und auf die Konfliktlösung gerichtet ist, stellt sowohl für die Akteure der Kriminalpolitik, als auch für die der „großen Politik“ eine neue, intellektuelle und berufliche Herausforderung dar.

