

## REQUIREMENTS OF JUSTICE: BETWEEN PUNISHMENT AND REPARATION. THE CONFLICT OF THE CRIME AND THE INTERVENTIONS TO PROTECT THE VICTIM AND MAKE THE OFFENDER RESPONSIBLE

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***Abstract:** The paper highlights how in every crime there is a strong conflict that is either the product of the crime itself or pre-exists it. This conflict makes the relationship very complex and requires targeted interventions. Restorative justice offers the possibility of managing the complexity of the conflict connected to the crime, protecting the victim and promoting a process of empowerment of the offender, through which this latter can then proceed to repair the damage to the victim. The repair of the damage, even if only symbolic, will be an expression of the process of empowerment of the offender. The author thus highlights how, although a retributive and punitive intervention against the perpetrator of the crime is necessary, it is equally necessary to promote and encourage a re-educational and re-socialization process of the offender, which sees the repair of the damage as at least a symbolic manifestation of it.*

***Keywords:** conflict, crime, punishment, reparation, victim, offender.*

### **Introduction**

Conflict is a natural expression of living together and is a relational modality that characterizes all social systems. As an interaction between incompatibilities, it appears, as Luhmann observes, "every time a communication is contradicted ..., every time a contradiction is communicated ... For there to be conflict, two communications that contradict each other must therefore occur" (Luhmann, 1984, 477). Once it has arisen, conflict stabilizes as a system that integrates and aggregates and its destructive force is not produced within it, but rather "in the relationship with the system in which the conflict originated - for example in the relationship with the neighbor, in marriage or in the family, in the political party, at work, in international relations, etc. " (Ivi, 531) in the sense that all resources are absorbed by the conflict.

In this sense, the conflict system will manifest its "parasitism", tending "to absorb the host system ... to the extent that all attention and all resources are absorbed by the conflict" (Id.). The author highlights how in every crime a conflict is created or this pre-exists the criminal conduct. The conflict, in fact, can be the prerequisite of the crime, its original matrix, but it can also emerge as a consequence, as an effect of the criminal event. This must

push us to understand how in order to do justice it is not only necessary to punish, but to intervene with restorative justice tools.

## **1. THE CONFLICTUALITY OF CRIME**

There is a close relationship between crime and conflict, between criminally relevant conduct and that relational dimension, in which there is a conflict of interests and needs between two or more people.

Conflict can be the basis of crime, its original matrix, but it can also emerge as a consequence, as an effect of the criminal event.

Crime is the legal formalization of a conflict.

The conflictual nature of the crime brings with it the fears, anxieties, resentments of those who have suffered and those who have acted.

In fact, conflict presents a complexity that cannot be circumscribed and embedded in a rigid and formal container.

The conflict implies a relational dimension, in which there is a divergence between two or more people, on apparently irreconcilable points of view, goals, needs, values and interests, with respect to which each contender wants to maintain their position.

It requires sharing and coexistence.

The different elements of the conflict constellation, such as a sense of impotence, anger, misunderstanding, disappointment, frustration, sometimes accompanied by physical and moral violence, are often not directly recognized as images and feelings of conflict.

“The most recurrent or common element in the various voices that emerged is the sense of suffering and discomfort: if there is discomfort and suffering, there is conflict, they are unequivocal symptoms” (Palermo, 2005, 7).

In the conflict, what Johan Galtung (1969; Id., 2007; Webel, Galtung (eds.), 2007) calls attitudes, behaviors and contradictions (or conflicts of interest) are intertwined and represent the ABC of conflict. Johan Galtung is considered the founder of modern peace and conflict studies. He has been a member of the scientific committee of the *Rivista Italiana di Conflittologia* since its creation in 2007.

Conflict, as Galtung (2000) observes, can be represented with a triangle, in which vertex C indicates the contradiction, that is, the “object of contention” between the parties, the reason for arguing; the “subjective” vertex A identifies the perceptions, feelings and generally the experiences, originating from the conflict situation or which have contributed to triggering and/or developing it; vertex B (the apex) represents the visible conflictual behavior.

Talking about the elements of conflict inevitably leads us to underline how in conflicts there is always a manifest level (the behavior) and a latent level, represented by subjective perceptions and the object of contention.

In order to intervene in the conflict circuit, it is important to identify this articulation, which is not always recognizable at first sight, and observe the dynamics of this interaction over time.

Discovering the subjective side (A), which, unlike behavior, is not visible, can be essential in order to manage the conflict, precisely because the mechanisms that, contributing

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to increasing mistrust, resentment, hatred, fuel the spiral that leads to violent escalation, often originate there.

“In conflicts, in fact, one of the most significant aspects concerns the affective and emotional dimension: the conflicting person is an emotional man.

This aspect is more relevant in micro conflicts than in macro ones. In conflict, therefore, a series of factors come into play, which favor an alteration of the relational dynamics: from the disfiguration of perception, to the reduction of the emotional sphere, to the increase in the rigidity of the personality up to regressive states.

With the disfiguration of perception, conflicting people tend to develop selective attention, to see only the negative aspects of the other, to narrow the space-time perspective, so that only the "here and now" is relevant, and to distort the image they have of themselves and of others (one is the best and the other becomes the worst).

The reduction of the emotional sphere leads to an inability to perceive the other in his complexity, a difficulty in defining him as a person, which leads to selecting only the negative aspects and characteristics.

As the conflicting person's personality becomes more rigid, his unavailability towards the other increases, to the point of a sort of regression of the personality, which causes him to fall back into previous development phases of his life” (Palermo, 2023, 30).

The conflict, as an interaction between incompatibilities, triggers a negative mechanism of hostility and denial of the other that either involves and becomes entangled in an explosive vortex, thus consolidating in its negative guise, or deviates, becoming the pretext for reorganizing the relationship. The path to follow is, however, often obscured by the feelings that animate the conflict and the choice at the crossroads could be inevitable.

Violence is one of the means that can be used in the conflict, which can, in fact, be conducted simultaneously with different means. Intensity and violence vary independently of each other, that is, there are conflicts of high intensity and low degree of violence and vice versa.

The dichotomy bad/good, right/wrong, is overwhelmed not only by the perspective of the observer, but also by the path that the conflict will follow.

If the attempt to overcome this dichotomy to try to manage the conflict is more easily acceptable where the conflict arises and grows between people linked by relationships of acquaintance, it appears less feasible when the conflict is triggered or fueled by a crime, especially if the perpetrator and victim are two strangers.

In the context of family relationships, for example, when there is strong conflict, the attempt to encourage the resumption of the relationship seems more understandable. Let's think about the increasingly frequent cases of legal separation between spouses and see how the idea of the opportunity to redefine the position and roles of each member of the family, to find a new balance, seems mostly shareable.

Our attitude changes when, leaving this context, we come across conflicts that, *prima facie*, would not require a redefinition of roles and the relationship. When, for example, the conflict is triggered or fueled by criminal behavior, we may not see how and why it might be appropriate to intervene in the management of the offender-victim relationship.

If we share the idea that the crime is the expression of a strong conflict and that this cannot be managed simply and exclusively with judicial dynamics, then we can consider the possibility of proposing a management of it in terms of re-elaboration, recognition and subsequent overcoming.

The conflict inherent in the crime cannot have exhaustive answers from the criminal process, careful to evaluate the responsibility of the person indicated as the perpetrator of the crime. It will be necessary to manage the conflict in its complexity that goes beyond the criminal conduct and involves the perpetrator-victim relationship, in a perspective of mutual recognition and re-appropriation of their lives. Therefore, promoting a dialogue and an interaction between criminal justice and restorative justice, promoting an effective and efficient reorganization of the penal system, could make the management of the conflict connected to the crime more concrete and complete, with important repercussions both on recidivism and on the credibility and reliability of the entire system responsible for intervening in the face of the commission of a crime.

## **2. REQUIREMENTS OF JUSTICE BETWEEN PUNISHMENT AND REPARATION**

In the face of crime, the social reaction has been different and has reflected the debate on the functions of punishment, from the request for punishment/elimination of the offender to the desire for his necessary re-education, from the exclusion of the guilty party to the need for security of the victim.

In ancient societies, the retributive idea, the “*talio*”, prevailed. In the 3rd century BC, Roman law introduced, however, in the formulary process, the possibility for the defendant to obtain acquittal “only if he previously returned the thing of which he had dispossessed the plaintiff or fulfilled in favor of the plaintiff his obligation of a specific thing” (Guarino, 1984, 134), thus sanctioning a recomposition of the social rift.

In truth, the Code of Hammurabi (1700 BC) had already provided for “restitution” for certain crimes against property and the subsequent period up to the Middle Ages was characterized by elaborate systems of “compensation”. The reign of William the Conqueror can be considered the turning point for a transition from a justice centered on restitution to one centered on the State: in 1116 Henry I, son of William, issued laws that assigned the Sovereign control over certain crimes that endangered the king’s peace (arson, robbery, murder) and, therefore, had to pass under his jurisdiction.

Over time, “a new model of crime emerged, in which the main parties were the state and the criminal, while the real victim was deprived of any significant role. This new focus of the penal system ... led, over time, to the attribution of a new primary objective to punishment, that of reducing the probability of further crimes being committed, and this through deterrence, neutralization and, more recently, re-education” (Gatti, Marugo, 1994, 13).

With the Enlightenment, the State takes on the penal aspect: the person who has broken a social pact deserves an appropriate punishment, determined by the outcome of a fair trial. The State must guarantee a fair trial before punishing!

Criminal justice is, therefore, a system that revolves around the perpetrator of the crime, the determination of his possible criminal responsibility and, consequently, the need to punish

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him. It is completely disinterested in the victim and their conflict. The United Nations General Assembly, in resolution n° 40/34 of 1985, defines a victim as anyone, individual or collective, who suffers an injury, including physical or mental damage, emotional suffering, economic loss or a substantial restriction or injury of fundamental rights, either through conduct criminally sanctioned by the individual State (victims of crime) or through acts or omissions that do not yet constitute a violation of national criminal laws but of internationally recognized norms relating to human rights (victims of abuse of power), within the jurisdiction of the International Criminal Court.

From the 1960s onwards, in fact, we have witnessed choices in criminal and penitentiary policy that have favored that attitude that Ponti (1995) defines as "victimization of the offender and scotomization of the victim" and that have allowed us to accumulate large debts towards the victims.

The fears, anxieties, and anguish that animate those who have had an experience of suffering and pain, those who have encountered violence, whether physical or psychological, find no answers, much less guarantees, neither in the socio-family context, nor in the institutions nor in the penal system.

The rehabilitation model, which for years has animated our consciences and inspired the legislation of many countries, has focused its interest mainly on the offender, abjuring the victim, neglecting him, when it has not ignored him or even marginalized him.

The role of the victim has appeared as exclusively functional to the criminal process: it will be enough for the alleged guilty party to appear in court for the victim to be put in the background, retaining only the role of witness rather than protagonist.

Moreover, if we also think about the interest of the media in criminal acts, we realize that, the first and immediate reactions of solidarity and compassion for the victim, are followed by a polarization of attention and interest on the accused and his rights.

"When the guilty party is then put in prison awaiting trial or to serve their sentence, a second and even more intense shift occurs: the prisoner is at the center of attention and concern, and there will always be someone ready to break a lance in his favor, to denounce (rightly) the defects of prison, to ask for more justice for those who have trampled on justice, without remembering the shadow of that victim who is always behind the back of every criminal. Balance and objectivity hardly support these cries, however noble in their intentions; the wrong done, the offense, the suffering, the trampled right are forgotten, they fade with time, the victim "is no longer news""(Palermo, 2023,m41- 42).

This misrecognition of the victim has been defined by victimological doctrine (Saponaro, 2005) using the concepts of "neutralization" and "second victimization". The neutralization of the victim is a process, which emerges in the dynamics of the crime, according to which the criminal, in an attempt to make the criminal action carried out "legitimized" and to overcome any feelings of guilt, empties the victim of all human essence, denying him an identity. Frederick Wertham, in investigating the causes of homicide, believed that it could be explained by violent impulse and rationalization. Rationalization is understood as a mechanism of self-justification of his conduct by the offender, achieved through the original internalization of values that gave rise to generalizations and social

prejudices, some of which allowed the offender to dehumanize the victim. This mechanism was explored and developed by Sykes and Matza.

As David Matza observed, the offender “neutralizes” the norm, denies the existence of a victim, thus making his conduct more acceptable. The neutralization techniques identified are five: denial of responsibility, denial of damage, denial of the victim, condemnation of the condemner and the appeal to higher order loyalties.

‘Secondary victimization’, “second victimization” or ‘re-victimization’ affects the victim and indicates that condition, frequent in the judicial context, of psychological suffering inflicted on the victims by the all too often aggressive methods, to the point of offense, that characterize the operators and the procedural process in general.

The victim, in fact, is often attacked in his reliability and morality and is forced to report on several occasions on the painful episode he has experienced, rekindling each time all the feelings of fear and anxiety he has experienced.

Consider the frequent attempts of the defendant’s lawyer to investigate the victim’s private life, to find even a single episode that can be, sometimes in a distorted way, used to discredit him, making him appear as a “victim more guilty than the criminal”, according to Mendelsohn’s typology. Benjamin Mendelsohn, in identifying the degree of moral participation of the victim, of provocation in the interaction with the criminal individual, proposed the following classification: completely innocent victim (who has no provocative or facilitating behavior); victim who is less at fault than the criminal (who has had negligent or imprudent behavior, placing himself in a dangerous condition); victim as guilty as the criminal (who assisted or cooperated with others in committing the crime, remaining a victim); victim more guilty than the criminal (who instigates or provokes the criminal act); most guilty victim overall (the criminal who, during his action, suffers victimization by the antagonist who responds in self-defense).

The expression "second victimization" is preferable to that of "secondary damage", proposed by Bandini and others, because it is more faithful to the original expression "secondary victimization" and, then, because "it is... a real second victimization and not a damage secondary to the crime suffered, precisely because it is based on an interaction that is completely autonomous and distinct from the first event and with peculiar characteristics and elements" (Saponaro, 2005, 186).

The victim of the crime, observes Riponti (1995, 56 ss.), “is not a ‘party’ of the proceedings except in a restrictive and subordinate sense, lacking in many respects real faculties and powers, subordinately to the purpose of asserting a ‘civil’ right to compensation, which in the best of cases will be satisfied in incredibly long times, but which in most cases will remain unsatisfied in the criminal proceedings”.

Once the criminal proceedings have begun, in fact, the real protagonists become the criminal and the State in a dispute between the need to exercise the right-duty of the latter to “punish” and the need to guarantee the offender.

The core of judicial action “will appear to have become not so much ascertaining the truth, establishing guilt for the harm inflicted and remedying it, as protecting the rights of those who are being judged” (Ponti, 1995, 4).

Over time, attention has been focused on the offender, with criminological research that has favored the spread of attitudes not only of understanding (in some cases shareable) but,

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even, of de-responsibilization and solidarity with consequent "scotomization" of the victim. A part of left-wing political and legal thought, in fact, "has favored a vision antagonistic to the repressive system, according to which the accused was the first victim of adverse socio-economic conditions or in any case of a system of repression that placed him in the role of victim, such that every other became secondary or in any case hetero-determined by conditions of production of deviance not attributable, or not entirely attributable, to the person who was the perpetrator of the crime" (National Coordination of Democratic Jurists, Final motion of the conference: The victim of the crime this unknown, Turin 9 June 2001). If, therefore, the retributive perspective has often been softened by the concern to guarantee the offender (an understandable and acceptable attitude as long as it has not translated into impunity), that of the resocialization of the offender completely ignores that the victim may require equally supportive interventions.

The victim can also suffer a "third victimization", in the case of "unjust" acquittal of the guilty party. This new offense causes the victim further suffering and pain to the point of undermining trust in justice and in society in general.

The involvement of the victim in the criminal justice system ends up, therefore, constituting a traumatic experience in itself, as it is not supported by any aid and support.

The penal system, moreover, does not have as its primary function that of responding to the needs of the victim: it has its own concepts of justice, truth, damage and follows other imperatives.

Thus, as Pavarini (2001, 9) observes, "In the "theater"... the victim cannot have a role other than that of an undifferentiated extra and, as such, also little protected because on that stage another script is represented which is the one originally borrowed from the origin of the modern penal system, the *crimen laesae maiestatis*: there, the actors are the king against those who have violated the precept of the sovereign, there are no social relationships".

On this point, Mendelshon, in underlining the disinterest of the political and social world for the needs of the victim, had already called for a penal system that could be more "victim-oriented".

To the residual role of the victim in the criminal justice system, another factor has been added that has pushed scholars and operators to seek other forms of justice. Over time, in fact, the great promise of law, and in particular of criminal justice, to resolve the social problem of violence has failed. Its inability to dominate the increasingly changing social complexity has been evident for some time now (Beck, 2001; Beck, 1986).

Over the years, in fact, the inability of the criminal justice system to achieve general and special prevention objectives as well as to satisfy the victim of the crime has emerged, weakening the sense of trust in criminal law and institutions in general (Christie, 1977). The Norwegian Christie warned that the law and procedures are far from the lives of ordinary people, observing the experience of some villages in Tanzania, where crimes, from the most minor to the most serious, are resolved through mediation.

The different social reactions to crime, in fact, from the request for punishment of the guilty party to the request for defense and security of citizens, from the isolation of the perpetrator of the crime to the idea of his necessary re-education, no longer provide a

guarantee for the recomposition of the personal and social rift. Over the years, moreover, it has emerged that the main instrument of criminal law, the penalty, has served neither retributive purposes, nor for the reintegration of the offender into society, nor to satisfy the victim.

In order to overcome the reo-centric dimension of the penal system and to promote a process of resocialization of the offender and recognition of the victim as a person, from many quarters (Faget, 1993; Pisapia, Antonucci (eds.), 1997; Ceretti, 1998; Bazemore, Walgrave (eds.), 1999; Mannozi, 2003; Vianello, 2004; Johnstone, Van Ness (eds.), 2006; Gavrielides, 2007; Palermo, 2009) the use of restorative justice has been urged, as a “procedure that allows those who have been harmed by the crime and those who are responsible for such offence (harm), if they freely consent, to actively participate in the resolution of the issues arising from the crime (offence) through the help of a specially trained impartial third party (facilitator)”. Council of Europe, Committee of Ministers, Recommendation CM/Rec (2018)8 of the Committee of Ministers to Member States on restorative justice in criminal matters. We also recall the definition proposed by the aforementioned Directive 2012/29/EU (art. 1, letter d) which defines ‘restorative justice’ as: “any process which allows the victim and the offender to participate actively, if they freely consent, in the resolution of issues arising from the crime with the help of an impartial third party”.

Restorative justice is, therefore, “a process in which all parties involved in a particular crime come together to collectively decide how to deal with the consequences of the crime and its implications for the future” (Marshall, 1999, 5).

The expression restorative justice was coined by the criminologist Albert Eglash (1997), although the first systematic reflections are attributed to some American Protestant movements, in particular, the Mennonites and the Quakers.

Restorative justice, as Zehr, considered its ideologist, has highlighted, revolves around three fundamental principles: 1. the crime causes harm to the victims and harm always generates needs; 2. harming someone creates the obligation of the offender to remedy the situation as much as possible; 3. the need to involve victims and perpetrators in the management of the conflict (principle of commitment): the more you involve them, the better the results. Restorative justice, with its ability to provide adequate responses to the needs of the individual, to his need for recognition and security, appears to be a useful tool also to promote a recovery of the individual-institution relationship.

Restorative justice is, therefore, an “other” justice, which is independent of the definitions and roles that law crystallizes in the criminal process, as well as from the application of punishment. It is a “symmetric” justice - in the most ancient meaning of the term *συμμετρία*, which derives from *σύν* (with, together) and *μέτρον* (measure) - which precisely indicates a relationship of commensuration that allows two or more elements to be put in relation “through the identification of a common measure”, but also, in its more modern meaning, a “relationship of equality between opposing parties”. A justice, therefore, that abandons the victim-offender, winner-loser logic, and deals with relational conflict.

Restorative justice is based on five fundamental principles: relationship, respect, responsibility, repair and reintegration. The principle of "relationship" constitutes the prerequisite for restorative justice: the existence of a relationship "damaged" by criminal



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conduct. Respect is the basis of every restorative program and guarantees the parties involved to live a safe experience. The principle of responsibility refers to the need for each party to be honest with themselves, to look deeply to see if they had a role in the conflict and to take responsibility for it. The principle of reparation concerns the commitment and will of the offender to repair the consequences of his conduct, also to promote the overcoming of feelings of anger and revenge of the victim and the recovery by the offender of respect for himself and for others. Finally, reintegration involves the community, which should allow the person who has caused harm to reintegrate with confidence.

It does not consider crime in the abstract, as an element that disrupts social balance, as an offense against society, which requires punishment, but rather as an expression of a specific micro-conflict, which causes suffering, deprivation and which requires the activation of forms of communication and, possibly, reconciliation and repair, also with a view to strengthening the sense of belonging and collective security.

Promoting dialogue and interaction between criminal justice and restorative justice, encouraging an effective and efficient reorganization of the penal system, could make the management of the conflict connected to the crime more concrete and complete, dealing with both the latent and manifest levels, with important consequences both on recidivism and on the credibility and reliability of the entire system delegated to intervene when a crime is committed.

The idea is thus becoming more and more consolidated that, in addition to a necessary punishment of the person who has committed a crime, it is increasingly appropriate to intervene in terms of reparation for the damage, a reparation that is not only, and necessarily, material, but can also be simply symbolic, a reparation that is, therefore, symptomatic of a process of making the offender responsible, of becoming aware of his conduct and of the effects it has produced on the victim.

## **CONCLUSIONS**

The debate on the function of punishment, always current, and the awareness that today societies are no longer characterized by the use of political strategies imposed from above, but tend towards an "open" policy, and that the penal system, rather than dominating social complexity, finds itself to be complexified have produced further reflections on the need to look beyond.

It is therefore necessary, with Hulsman, to underline "the need to reconsider the issue of crime by examining it from a new perspective, which emphasizes the problematic nature of illicit behavior and considers it as the result of a conflict between two people, with the aim of addressing and resolving it in a constructive way", combining criminal justice and restorative justice, with a view to supporting the intervention of the bureaucratic and repressive apparatus of the State, with an intervention capable of returning the management of the conflict to the protagonists. On these assumptions it is increasingly necessary to intervene towards the offender not only with a punitive perspective, but also with interventions that make him responsible and resocialize him, such as those that, through restorative justice, can lead to the repair, even symbolic, of the damage.

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