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THE VICTIM AS A FORGOTTEN FIGURE IN THE JUSTICE SYSTEM – A FEW REMARKS IN THE LIGHT OF PAST FORMS OF PUNISHMENT

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ABSTRACT

This article focuses on selected problems regarding the evolution of the punishment process. The starting point remains the assumption that regardless of the historical period, every palpable form of injustice related to a violation of a certain area of goods has resulted in an intervention approved at the given moment in history. The study notes that in the early pre-state period, seeking a remedy for wrongdoing was a private matter of the victim (or their family or clan) who could in that wayavenge on their own the injustice they had suffered. The process of publicising criminal law that began at the end of the Middle Ages has marginalised the process role of a victim in the possibilities to seek the remedy. However, the vertical criminal law relationship has, over time, changed to some extent. The privatisation of the justice system – especially noticeable nowadays – makes it possible to see that consensual methods of resolving conflicts caused by an offence essentially contributed to the reversal of a certain historical process. That reversal was certainly intended to "reveal" the victim, and thus to return the conflict resulting from the offence to its "owners," i.e. the perpetrator and the victim.

Key words: victim, evolution of forms of punishment, consensual methods of resolving conflicts.

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1. GENERAL REMARKS

The article focuses on the historical roots of the legal position of the victim in the criminal procedure. First, a reference is made to the oldest forms of punishment pursuant to which seeking a remedy for wrongdoing was, in fact, a private matter of the victim. Later, it is noted that this punishment paradigm underwent a significant change at the end of the Middle Ages. Due to the concept of publicising criminal law, the role of the victim in seeking the remedy was, in a way, marginalised. Applying the above historical factors to the today's criminal procedure supplemented with certain private law elements which focus on the position of the victim, the article attempts to emphasise the evolution that is significant in that regard and *de facto* leads to a certain revaluation of the role of the victim in resolving a criminal-based conflict.

2. THE ROLE OF THE VICTIM IN THE LIGHT OF THE EARLIEST FORMS OF PUNISHMENT

Whatever the historical period, each clear form of injustice involving an infringement upon certain rights, was met with a reaction perceived as acceptable in a given historical period. Undoubtedly, this "action" was a kind of a guarantee of future order, security and a method of shaping relations between people[1]. As early as in ancient times, one may find legal codes which contained provisions of criminal nature (*the Code of Ur-Nammu, the Code of Lipit-Ishtar, the Code of Hammurabi or the Code of Twelve Tables*)[2].

[1] N. Guyau, *Zarys moralności bez powinności i sankcji*, Warszawa 1960, p. 253; J. Kochanowski, *O przekształcaniu się odpowiedzialności karnej*, „Państwo i Prawo" 1978, no. 6, p. 23 and following; Z. Gostyński, *Karnoprawny obowiązek naprawienia szkody*, Katowice 1984, p. 13.

[2] G. F. Kirchhoff, *Wiktymologia. Historia i koncepcje. Wprowadzenie*, [in:] E. Bieńkowska (ed.) *Wiktymologia w Europie. Materiały pierwszej międzynarodowej konferencji na temat wiktymologii w Europie Wschodniej i Zachodniej (Konstancin k. Warszawy, 1-22 marzec 1991)*, Warszawa 1993, p. 27 and following; J. Klima, *Prawa Hammurabiego*, Warszawa

The fall of the Roman Empire (476 A.D.)[3], which was one of the reasons why the western world became dominated by barbarians[4], started a period of a significant decline in criminal law codifications. During this period, the criminal law was mostly based on customs and in fact started its evolution once more from the beginning[5]. Because of the non-institutionalized system of justice prevailing at that time, punishing an individual who did a certain wrong, was in fact non-formalized and strictly direct[6]. For this reason, there is little doubt that in the pre-state period based on crude organization[7], conflicts between different groups were eliminated first by the spontaneous reaction of irritated members of the society[8] and subsequently by the power of authority of a certain family[9]. The latter decided,

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1967, p. 308; C. Kunderewicz, *Kodeks Ur – Nammu*, „Czasopismo Prawno-Historyczne" 1958, no. 2, p. 13; *Idem*, *Kodeks Lipit Isztara*, „Czasopismo Prawno-Historyczne" 1959, no. 2, p. 32.

[3] Cf. B. Lesiński, W. Rozwadowski, *Historia prawa*, Poznań 1978, p. 180.

[4] W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2010, p. 48; cf. also A. Dębiński, *Ustawodawstwo karne rzymskich cesarzy chrześcijańskich w sprawach religijnych*, Lublin 1990, p. 24.

[5] M. Kulik, [in:] M. Mozgawa (ed.), *Prawo karne materialne. Część ogólna*, Kraków 2006, pp. 44-45.

[6] St. Strycharz, *Wybrane problemy karania na tle tendencji depenalizacyjnych*, Warszawa 1982, p. 17-19; K. Koranyi, *Powszechna historia prawa*, Warszawa 1971, p. 21; M. L. Klementowski, *U źródeł kształtowania się postępowania przeciwko „ludziom szkodliwym" (novici terrae) w średniowiecznym prawie niemieckim*, „Annales Universitatis Mariae Curie-Skłodowska, Sectio G" 1988, no. 35, p. 56 and following.

[7] E. S. Rappaport, *Polityka kryminalna w zarysie*, Łódź 1948, p. 32; P. Horoszowski, *Kryminologia. Wybrane zagadnienia*, Warszawa 1958, p. 12; *Idem*, *Od zbrodni do kary*, Warszawa 1966, p. 10; S. Grzybowski, *Dzieje prawa*, Wrocław-Warszawa-Kraków-Gdańsk 1981, p. 29; M. Hendelsman, *Kara w najdawniejszym prawie polskim,* Warszawa 1908; J. Makarewicz, *Zbrodnia i kara*, Lwów 1922, p. 60. Cf. also S. Kutrzeba, *Dawne polskie prawo sądowe w zarysie*, Lwów 1921; J. Haytler, *U źródeł prawa karnego*, Warszawa 1934; R. Taubenschlag, *Prawo karne polskiego średniowiecza*, Lwów 1934; B. Malinowski, *Prawo, zwyczaj, zbrodnia w społeczeństwie dzikich*, Warszawa 1939; J. Kurczewski, *Prawo prymitywne – zjawiska prawne w społeczeństwach przedpaństwowych*, Warszawa 1973.

[8] J. Makarewicz, *Prawo karne ogólne*, Kraków 1914, p. 239; *Idem*, *Zbrodnia i… op. cit.*, p. 89.

[9] B. Sygit, *Historia prawa kryminalnego*, Toruń 2007, p. 22; J. Makarewicz, *Wstęp do filozofii prawa karnego w oparciu o podstawy historyczno-rozwojowe*, (ed.) A. Grześkowiak, Lublin 2009, p. 233 and following.

at a later historic period, on an appropriate intervention (which took the form of a vendetta)[10] if one of its members was harmed[11]. A reaction, which was often an instinctive one, usually took the form of a revenge which affected not only the offender but also his closest relatives[12]. Strong family ties meant that redressing a wrong was considered to be a private matter[13] of the victim (or, in the alternative, his kinsmen or people), which could by themselves avenge the harm done to them. One of the most severe forms of punishment included killing the offender or excluding them from a given community, thereby ridding them of the necessary sense of security and the possibility of further existence[14]. At this point, it is worthy of note that for an individual who was not aware of their own individual existence, the last "sanction" was in fact equal to death, as in their mind there was a strong belief that they existed only because they were a part, an element of a certain community[15].

The above remarks show that a traditional manner of solving conflicts in former social structures consisted in a blood feud, which in fact remained unchanged for many centuries[16]. In the most distant past such

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[10] J. Makarewicz, *Zbrodnia i… op. cit.*, p. 88 and following; J. Warylewski, *Prawo karne. Część ogólna*, Warszawa 2007, p. 71.

[11] A. Dziadzio, *Powszechna historia prawa*, Warszawa 2009, p. 377.

[12] T. Maciejewski, *Historia powszechna ustroju i prawa*, Warszawa 2015, p. 311.

[13] It is worth mentioning, however, that already in the clannish-tribal period there were very few crimes of public character, pursued by the general society, e.g.: betrayal of the tribe, cowardice at war, moral offences or religious crimes. J. Walachowicz, [in:] *Powszechna historia państwa i prawa*, Poznań 1993, p. 348-349; B. Lesiński, W. Rozwadowski, *Historia…*, *op. cit.*, p. 180, p. 253.

[14] J. Warylewski, *Prawo…*, *op. cit.*, p. 71.

[15] K. Sójka-Zielińska, *Historia prawa*, Warszawa 2003, p. 17.

[16] In the considerations undertaken in this work, this author stated that: "Revenge, as a psychic experience, is not a feeling or emotion limited to itself, closed within defined limits and content, but rather a predisposition for negative feelings and actions. Characteristic moment of this predisposition is striving to satisfy negative feelings, which can last for a long time, not necessarily emerging immediately after the occurrence of the predisposition (silent revenge), it may be satisfied with a negative action taken by other entity towards the subject of revenge, as long as it is concrete". In the field of describing the form of punishing at that time, B. Wróblewski stated his belief that: "When talking about bloody revenge, we mind mainly the very moment of revenge, which (...) they saw, is iterative but irrelevant to the very course of reaction. Moreover, "bloody" in conjunction with revenge

blood feuds were family-based because the closest relatives of the victim were obliged to engage in them[17]. Further, it is worthy of note that the most characteristic feature of early medieval cultures was that the victim was considered to be a subject of a certain conflict who could assert their rights on their own.

However, this paradigm[18] was subject to gradual changes. Important changes in the family and tribe system occurred when the then society became divided into groups. This caused new conflicts which could not have been solved by methods used thus far. Former methods of asserting rights were gradually replaced with reactions by the state institutions. Breaking the existing convention was related to preponderance of the public law principle which was becoming more and more popular – not only due to a growing number of offences prosecuted *ex officio* but also in the context of growing publicization of penalties imposed[19]. However, this change was not automatic[20], as for a long time rules rooted in family traditions and some norms sanctioned by newly-formed authorities co-existed beside each other. It was in this manner that the most important division

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may mean revenge for blood or revenge that is bloody by its nature. The first does not correspond to reality, since the intergroup reactions in type of bloody revenge do not only include incidents of bloodshed, while the second is not specific for it, as blood is symptomatic to every war, from the forms of which we derive the bloody revenge. Thus, it is more accurate to use the formal definition – "intergroup kinship reaction", which emphasises those characteristics that were determined as significant when considering the bloody revenge". Cf. B. Wróblewski, *Penologia – socjologia kar*, Wilno 1926, p. 21 and following.

[17] K. Sójka-Zielińska, *Historia… op. cit.*, p. 17.

[18] T.S. Kuhn, *Struktura rewolucji naukowych*, Warszawa 2009, p. 32; J. Skorupka, *Paradygmat współczesnego polskiego procesu karnego – próba ujęcia*, [in:] J. Skorupka, I. Hayduk-Hawrylak (ed.), *Współczesne tendencje w rozwoju procesu karnego z pespektywy dogmatyki oraz teorii i filozofii prawa*, Warszawa 2011, p. 15 and following.

[19] J. Walachowicz, [in:] *Powszechna historia…*, *op. cit.*, p. 350-351.

[20] As indicated in the literature, complete formation of a state penal system was not quick and without resistance. The primary advantage of private penalties was first replaced by the coexistence of composition with a public punishment, which then gained the advantage in the system of used solutions, finally it became the exclusive solution in the system of penal reactions to crime. Cf. W. Zalewski, *Historyczne przekształcenia idei kompensacji w ramach odpowiedzialności karnej*, „Palestra" 2002, no. 3-4, p. 50; M. Patkaniowski, *Wina i kara – elementy rzymskie i germańskie w prawie karnym statutów miast włoskich*, Kraków 1939.

for the future criminal law was formed, namely a division of offences into those which violate a general social order and those which infringe upon rights of an individual and their family. In the latter case, a victim and their family could assert their rights both before a court of law and by taking the matter into their own hands, i.e. family revenge whose bloody aspect was in time replaced with a system of monetary (compensatory) fines. The substance of this private penalty, which was in fact a kind of a redress for the harm suffered, was mostly to restore order and reconcile feuding parties[21]. To be precise, at this point it is worth noting that in the contemplated period criminal and civil liability were not distinguished, which meant that the liability, based on the above-mentioned idea of ransom money, was mostly compensatory[22].

Further modifications of the then system of punishment were intended to limit the number of offences which were prosecuted by victims. To this end, the list of offences against the general public and therefore punished by the state was extended. Even more importantly, some personal, time and place limits on personal revenge were introduced[23]. As a consequence, more and more acts were considered to be committed against the established public order.

3. THE POSITION OF THE VICTIM AND PUBLICIZATION OF THE CRIMINAL LAW

The victory of the public law principle is clearly noticeable in the 16th-century regulations, especially in *the Constitutio Criminalis Carolina* published in 1532 which confirmed that each offence (directly or indirectly) violates public order and as a consequence should be addressed by the state's system of justice[24]. The above-mentioned *Constitutio Crimi-*

[21] W. Zalewski, *Historyczne przekształcenia idei*…, *op. cit*., p. 49.

[22] K. Sójka-Zielińska, *Historia...*, *op. cit.*, p. 160.

[23] K. Sójka-Zielińska, *Historia prawa. Od wczesnego średniowiecza do wieku Oświecenia*, Warszawa 1979, pp. 130-132; T. Maciejewski, *Historia*…, *op. cit*., pp. 320-322.

[24] T. Maciejewski, *Historia*…, *op. cit*., p. 448.

nalis Carolina no longer provided for private penalties or a possibility to "buy out of" responsibility (public punishment)[25]. At the same time, it should be noted that even the final acceptance of the public law character of offences (which occurred in modern criminal codes)[26] did not end the division of prohibited acts into those against the public and private interest, respectively. The latter were pursued in civil proceedings[27]. It is worth mentioning that the victory of the public law principle, which was based on the belief that each offence is an act against public interest, caused a lot of consequences both with respect to substantive and procedural law. In the former case, the respective change included mostly a limitation of the role of the victim with respect to their right to prosecute offences and impose penalties. In turn, as far as the procedure is concerned, the prevalence of public law principle meant gradual replacement of proceedings based on a complaint by inquisition proceedings, instituted *ex officio*, in most cases of secret and written character[28]. In the context of the public law definition of an offence, the most important assumption was not so much the idea of the damage caused to the victim but the realization that such acts violate abstract legal order[29].

The above-indicated process of publicization of the criminal law, which had started at the end of the Middle Ages, diminished the procedural role of the victim with respect to asserting their rights. In fact, the role of the victim was limited to being a personal source of evidence giving testimony or providing forensic evidence[30]. In this manner, criminal law was intended to be rationalized, "de-dramatized" by taking away from the victims their right to revenge and, most of all, eliminating unnecessary

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[25] K. Sójka-Zielińska, *Historia*…, *op. cit.*, pp. 181-182.

[26] J. Walachowicz, [in:] *Powszechna*…, *op. cit.*, p. 355; S. Salmonowicz, *Prawo karne oświeconego absolutyzmu. Z dziejów kodyfikacji karnych przełomu XVIII/XIX w.*, Toruń 1966, p. 17 and following.

[27] K. Sójka-Zielińska, *Historia*…, *op. cit.*, p. 298.

[28] J. Walachowicz, [in:] *Powszechna*…, *op. cit.*, pp. 356-357.

[29] Z. Radwański, *Zadośćuczynienie za szkodę niemajątkową. Rozwój i funkcja społeczna*, Poznań 1956, p. 34 and following.

[30] W. Zalewski, *Tak zwany kompleks cywilnoprawny w prawie karnym po nowelizacjach*, [in:] M. Bojarski (ed.), *Problemy współczesnego prawa karnego i polityki kryminalnej. Księga Jubileuszowa Profesor Zofii Sienkiewicz*, Wrocław 2015, p. 384.

emotions of the parties, in particular the victim[31]. In this manner, public *ius puniendi* demonstrated the power of the state which no longer needed "help" from the victim to bring the offender to justice[32]. Vertical criminal law relationship included, on the one hand, the offender and, on the other hand, the state, leaving out the victim[33], thereby making them a "forgotten figure" in the criminal justice system ("*vergessene Figur in der Praxis des Strafverfahrens*")[34]. The consequence of this strong emphasis on the public aspect of the criminal law was that the state, one might say, "stole" from the victim their conflict and their claims, thereby marginalizing the position of the victim in the criminal justice process[35]. By taking control over this conflict, the state made itself a party to it, making the victim play distant second fiddle[36]. In the approach presented above, the criminal law relationship was defined, on the one hand, by state *ius puniendi* and the obligation of the offender to suffer punishment and, on the other hand, the obligation of state authorities to punish the offender and the right of the citizen to demand that the authorities enforce the punishment imposed upon the offender[37].

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[31] K. Seelmann, *Paradoxien der Opferorientierung im Strafrecht*, „Juristen Zeitung" 1989, no. 14, p. 671.

[32] W. Zalewski, *Tak zwany kompleks cywilnoprawny w prawie karnym po nowelizacjach*, [in:] M. Bojarski (ed.) *Problemy…*, *op. cit*., pp. 384-385.

[33] L. Lisiakiewicz, *O normie i stosunku prawnym karno-materialnym*, [in:] St. Ehrlich (ed.), *Studia z teorii prawa*, Warszawa 1965, p. 372 and following.

[34] J. Herrmann, *Die Entwicklung des Opferschutzes im deutschen Strafrecht und Strafprozessrecht – Eine unendliche Geschichte*, „Zeitschrift für Internationale Strafrechtsdogmatik" 2010, no. 3, p. 236.

[35] N. Christie, *Conflicts as property*, „British Journal of Criminology" 1977, Vol. 17, p. 1-15; Cf. also A. Karmen, *Crime Victims. An Introduction to Victimology*, Australia-Brazil-Japan-Korea-Mexico-Singapore-Spain-United Kingdom-United States 2012, p. 7 and following.

[36] A. Marek, [in:] A. Marek (ed.), *System Prawa Karnego. Zagadnienia ogólne. Tom I*, Warszawa 2010, p. 20; C. Kulesza, *Prawa podmiotowe pokrzywdzonego a instytucja mediacji w sprawach karnych*, [in:] L. Mazowiecka (ed.), *Mediacja dla każdego*, Warszawa 2010, pp. 42-43.

[37] In the presented consideration, the author expresses at the same time the opinion that the relation between the state and citizens is not a legal relation, but an actual or sociological relation. The addressees entrusted with the application of sanctions are in fact specific state authorities, and it is between them and the perpetrators where legal relations

4. SUMMARY

Gradual introduction of compensatory instruments and consensual methods of resolving conflicts arising out of offences into the substantive law and criminal procedure undoubtedly reversed a certain historic process[38]. This reversal was marked by "reemergence" of the victim and returning the conflict arising out of an offence to their "rightful owners", i.e. the offender and the victim. According to this policy based on *restitutio in integrum*, the state would only be an arbiter ensuring fair trial and guaranteeing a satisfactory result[39]. Growing position of the victim requires, in particular, that the relations between the public interest and private interest in the criminal law be considered[40]. In the context of this problem, especially meaningful is the Greek origin of words *crimen* and *poena* (*poine*), which contrary to popular belief were not used to describe an offence and a punishment but meant, respectively, a complaint, private

arise. In conclusion, the author stated that committing a crime therefore entails actual relation between the state and the individual, and additionally, such circumstance is the cause of the criminal and procedural legal relation. E. Bierling, *Strafrechtsverhältnis und Strafprozessverhältnis*, „Zeitschrift für die gesamte Strafrechtswissenschaft" 1890, Bd. X, p. 281-282; K. Binding, *Handbuch des Strafrechts*, Leipzig 1885, p. 189; *Idem*, *Die Normen und ihre Übertretung*, Leipzig 1872, p. 13 and following. Cf. also L. Lisiakiewicz, *„Ius puniendi" czy metafizyka*, „Państwo i Prawo" 1963, no 8-9, p. 221-232; *Eadem*, *O normie i stosunku prawnym karno-materialnym*, [in:] *Studia z…*, *op. cit.*, p. 364 and following.

[38] Cf. P. Hofmański, *W sprawie tzw. kompleksu cywilnoprawnego w procesie karnym. Nowe propozycje*, [in:] P. Hofmański, K. Zgryzek (ed.) *Współczesne problemy procesu karnego i wymiaru sprawiedliwości. Księga ku czci Profesora Kazimierza Marszała*, Katowice 2003, p. 135 and following.

[39] M. Filar, *Pokrzywdzony (ofiara przestępstwa) w polskim prawie karnym materialnym* [in:] St. Waltoś, B. Nita, P. Trzaska, M. Żurek (ed.) *Kompensacyjna funkcja prawa karnego. Księga poświęcona pamięci Profesora Zbigniewa Gostyńskiego*, Kraków 2002, p. 27.

[40] "Restorative justice perceives a crime as a conflict of a perpetrator with a victim and the environment, in which the crime was committed. The aim is to eliminate this conflict while engaging both the perpetrator and the victim, as well as the environment. Above all, the philosophy of restorative justice seeks to eliminate the exclusive power of the state as a holder of justice". Cf. A. Zoll, *Podmiotowość obywatelska a wymiar sprawiedliwości*, [in:] L. Mazowiecka (ed.), *Mediacja*, Warszawa 2009, p. 18.

claim raised by one citizen against another and the compensation intended to resolve a criminal conflict[41].

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[41] H. Bianchi, *Justice as Sanctuary. Toward a New System of Crime Control*, Bloomington and Indianapolis 1994, p. 9.

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