

NEW SANCTIONING PROSPECTS FOR THE PROTECTION OF THE VICTIM IN PENAL LAW

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Recently published data furnished by the statistical service of Criminalpol and relating to the first six months of 1992, show a general and tendential reduction of the crime rate in Italy². These figures are, however, liable to being interpreted in slightly different ways, depending on the theme of interest.

This is particularly the case with some of the crime figures, even of a certain importance, for which the table of Italian Institute of Statistics (ISTAT) with data relative to the same period in 1992 shows a net increase in percentage terms³. As a general rule it is possible to affirm that we are witnessing a success in controlling crime, but it is a positive trend which is inevitably and dramatically bound to further enlarge the ranks of the present prison population of around 48,000. Certain situations of total degradation in prison living conditions, which have already proved to be particularly dangerous for the maintenance of public order⁴, may be seen as the other side of the coin to the successes referred to, since they can lead to grave problems in the long, if not indeed in the short term.

Is it not then possible to reduce recourse to the prison solution - effective only in the short term - by means of the introduction of alternative sanctions which do not limit personal freedom? Taking account of the interesting cues to be found in the comparative field, the Italian legislator, perhaps taking advantage of the reform taking place in the criminal code, could attempt to guarantee the protection of the rights of the victim through the use of instruments provided by the systems of alternative sanctions, as well as those to be found in the present penal system⁵.

All of this would permit, primarily, the proper articulation of the timing of the intervention itself, in the sense of not prejudicing the successes, or outcomes so reputed, in the immediate term.

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² According to the document, murders decreased by 24% as compared with the same period in the previous year, while serious robberies, bag-snatchings, thefts and assaults show a level of decline that go from 5% to 25%; see Arlacchi, P. (1992) "Sorpresa, si uccide di meno" *L'Espresso* 25 October, pp. 45-48.

³ This is the case with associations of a "mafia-like" nature (49.5% increase), or criminal association (+31.5%), extortion (+40.3%), rape (+12.1%); a summary of and comments of these figures can be found in "Criminalità, il '92 sotto il segno del calo" *La Repubblica* 25 October 1992, p. 20; for more general information on this matter see the chapter by Antonio Cortese.

⁴ See "Detenuti in forte aumento dietro le sbarre un terzo in più", *La Repubblica*, 4 November 1992, p. 20. This might also explain the recent address by the Prime Minister of Italy, Mr. Giuliano Amato in relation to the introduction of norms which should, as far as possible, avoid imprisonment for drug-addicts. It is well known that drug-addicts represent a large proportion of the total number of inmates.

⁵ Paliero, C.E. (1992) "Metodologie de lege ferenda: per una riforma non improbabile del sistema sanzionatorio" in *Rivista Italiana di Diritto e Procedura Penale* 12, pp. 510 et seq. and p. 542.

Given the substantial failure, in practice, of alternative and substitutive measures which represent efficient substitutional instruments to detention, and the expected inefficiency of pecuniary sanctions where these are not brought within the structure of "day fine" or even better "in installments", the jurist's analysis focusses on the compensation for damage incurred.

Following a general crisis of the retributive function of the penal sanction⁶, and the related growing need for both general and specific deterrence⁷, penal jurisprudence has over the last few years opened-up to adapted forms of sanction taken from other branches of the system. The experience with decriminalisation of administrative offences, although not completely positive, has certainly reinforced the belief in the possibility of introducing alternative sanctions from other branches of the law. This aspect has, for a long time, been considered in civil jurisprudence with reference to compensation⁸.

When applied in the penal sector, compensation can perform an important role in reducing the number of cases going through the criminal justice system. This reduction can be particularly effective when it concerns crimes against body and limb, for which a pecuniary assessment of the loss is more difficult to establish and, therefore, the punitive aspects are more evident⁹. Compensation as an alternative to imprisonment can also have a significant function within the criminal justice system.

Projects dealing with the decriminalisation of shoplifting and other misdemeanors committed within the working environment¹⁰ ("Alternativen-Professoren") - have not been received with enthusiasm, notwithstanding the fact that they probably represented the most important and concrete proposal (fully shared by the author) for the use of compensation as a decriminalisation tool. Therefore, compensation gets some recognition in the international debate only as an independent alternative sanction, and this is true both *de jure condito* and *de jure condendo*.

The British experience with compensation orders is certainly important. It consists of a series of norms which are particularly sensitive towards the protection of victims' rights. Compensation orders envisage the possibility for the court to impose the offender's restitution/compensation to the victim. Although this practice

⁶ The shift from independent functions to mere internal regulation criterion in which only the necessary principle of proportion between crime and punishment is maintained; in this respect see Bricola, F. (1984) "Tecniche di tutela penale e tecniche alternative di tutela" Funzioni e limiti del diritto penale, pp. 3 et seq. and 43 et seq., Cedam, Padova. It enhances the need for proportion as a guarantee of the retributive concept; see Gallo, M. (1976) "Conclusioni" Orientamenti per una riforma del diritto penale, pp. 93-95, Jovene, Naples.

⁷ See Romano, M. and F. Stella (eds.) (1980) Teoria e prassi della prevenzione generale dei reati, Zanichelli, Bologna.

⁸ Compensation has been defined "private sanction" by Grossfeld, (1961) Die Privatstrafe, Frankfurt a.M., (reprint in 1990: Müller, Heidelberg). In the penal literature, on this topic see Bricola, F. (1985) "La riscoperta delle 'pene private' nell'ottica del penalista" *Foro Italiano* 12, V:6 et seq.

⁹ In this respect, see Manna, A. (1989) Beni della personalità e limiti della protezione penale, pp. 702 et seq., Cedam, Padova; Musco, E. (1979) "Onore formale ed onore reale come oggetto di tutela" Tutela dell'onore e mezzi di comunicazione di massa, pp. 97 et seq., Feltrinelli, Milan.

¹⁰ On this issue, as regards Italy, see Paliero, C.E. (1985) "Minima non curat praetor" Iperprotezione del diritto penale e decriminalizzazione dei reati bagatellari, pp. 596 et seq., Cedam, Padova.

has obtained valid results, it does not appear to have the capacity to solve the problems (even of constitutional character) related to the imposed - and not freely chosen - nature of restitution¹¹.

Also through the so-called *taetige Reue*, a sort of "working repentance" envisaged by Paragraph 167 öStGB in the Austrian penal code, compensation assumes an imperative nature, almost a "third way". This sanction is certainly valid in practice, but it would appear that its limitations lie in the very small number of offences for which it is applicable¹². Compensation as an independent sanction appears also in some projects regarding new penal provisions, such as the Swiss *Vorentwurf Schultz* (*Pre-project of the Penal Code prepared by Professor Schultz*), in which article 55 deals with *Wiedergutmachung* (*reparation*), or the interesting Dutch project of the *Terwee Commission*; although the latter appears to be too extreme since it classifies compensation as a criminal sanction *stricto sensu*, and thus difficult to fully concur with¹³.

In concluding this comparative overview on compensation as a "third way",¹⁴ mention must be made of the German experience which has become even more significant following the recent publication of the complete *Alternativ-Entwurf* (alternative projects) on *Wiedergutmachung*.

The use of compensation in criminal law has a relatively long tradition in the German literature, which has now developed in two main directions.

The first one, which is linked to the above-mentioned "Alternative Projects" on shoplifting and misdemeanors in the working environment was oriented towards a process of decriminalisation through the introduction of a sectorial-type justice characterised by the application of strictly civil sanctions¹⁵. Following the failure of these projects¹⁶ this procedure was abandoned and it was, therefore, possible to move on to the second direction oriented towards the integration of compensation as an independent penal sanction in itself¹⁷.

¹¹ As regards "compensation orders" in the Italian literature, see Gambini Musso, R. (1988) "Discrezionalità del giudice penale e tutela della vittima nei "compensation orders" *Indice penale*, pp. 699 et seq. (with additional bibliographical references).

¹² See Roxin, C. (1990) "Neue Wege der Wiedergutmachung im Strafrecht-Schulssbericht" in Eser, A., G. Kaiser and L. Madlener (eds.) *Neue Wege der Wiedergutmachung im Strafrecht*, pp. 367 et seq., Max-Planck-Institut, Freiburg.

¹³ This is because it appears extremely difficult to consider compensation as a real form of punishment; in so doing there is a risk of devaluing the civil origin of the sanction. For further information in this respect, also with reference to the above-mentioned projects, see Manna, Beni..., op. cit., pp. 696 et seq.

¹⁴ For example, as a third model for penal sanctions, beyond punishment *stricto sensu* and preventive measures, see Roxin, C. (1987) "Risarcimento del danno e fini della pena" *Rivista italiana di diritto processuale e penale*, pp. 3 et seq.; by the same author, see also (1992) "Zur Wiedergutmachung als einer 'dritten Spur' im Sanktionensystem" *Festschrift für Baumann*.

¹⁵ On this topic, see Paliero, Minima..., op. cit.

¹⁶ In particular, the *Alternativ-Entwurf* on shoplifting was the object of deep discussion within the penal section of the 21st *Juristentag*, which took place in Stuttgart in 1976. The project was not received with favour by the vast majority of the German jurists: as many as 128 voted against, while only 18 voted against, and 8 abstained. Criticism expressed by W. Nauke in *Gutachten* was, therefore, accepted.

¹⁷ See (1992) *Alternativ-Entwurf Wiedergutmachung (AE-WGM)*, pp.1 et seq., Beck, Munich.

This orientation of compensation has not only an attenuating function, but it also represents an alternative to imprisonment. This increases the already strengthening power of the victim in the context of the criminal trial produced by the *Opferschutzgesetz* (law for the protection of the victim) in 1987¹⁸. However, it should be noted that the scant results obtained through the application of the procedural law led to the many contradictions highlighted in recent research¹⁹. In addition, from a substantive point of view, other contradictions concerning this particular use of compensation have been underscored by those who have individualised in it a substantial change in the nature of penal law²⁰.

What is particularly criticised is the undefined boundaries between penal and civil law and the difficulty of placing the victim in the midst of the traditional punitive relation between the state and the offender which characterises the criminal trial. These are, however, extreme objections which do not take sufficient account of the need to support the victim in the criminal process; a fact that entails important functions both as general and specific deterrence²¹. This, however, has not hindered the recently completed Alternative Project on compensation of which an extremely summarised version of its most significant aspects is presented below.

Paragraph 4 deals with Wiedergutmachung, establishing its applicability for all those cases in which the court deems unnecessary the infliction of a sanction; for example, when compensation is sufficient to restore the *pax juridica* (Paragraph 1). However, this clause is not well defined, thus imposing on the court a difficult settlement with the risk of turning it into "case by case justice".

Another disposition in Paragraph 4 makes the substitutive sanction compulsory in the case of a sentence to imprisonment that does not exceed one year, thus establishing a link with Paragraph 7, which allows the court to decide whether or not to suspend under two-year sentences to imprisonment if the offender pays compensation for damages.

In order to counterbalance the generic formulation of the principle, the law envisages some specific sanctions which contribute towards greater certainty when applying compensation instead of imprisonment.

Other norms that could be mentioned are to be found in Paragraph 5, which regulates the hypothesis of the mere attenuating effect of Wiedergutmachung; in Paragraph 16, which envisages a real legal process for compensation; and in the

¹⁸ On this topic, see Weigend, T. (1989) *Deliktsoffer und Strafverfahren*, pp. 377 et seq., Duncker & Humblot, Berlin.

¹⁹ See Kaiser, M. (1992), *Die Stellung des Verletzten im Strafverfahren*, Max-Planck-Institut, Freiburg, who notes, in the context of an empirical survey carried out by Max-Planck-Institute for Foreign and International Criminal Law, how law provisions to protect the victim in the penal process has been better accepted by defenders than by court judges. It appears that most of the latter are still of the opinion that a penal trial involves two parts only: the State and the offender. The effects of the *Appellfunktion*, meant to reinforce the victim's position, have so far been modest. This law needs more diffusion, especially among lay persons.

²⁰ In connection with this interpretation, in particular, see Hirsch, H.J. (1991) "Il risarcimento del danno nell'ambito del diritto penale sostanziale" *Studi in memoria di Pietro Nuvolone* 1, 1:275 et seq., Milan.

²¹ See Frehsee, D. (1987) *Schadenwiedergutmachung als Instrument strafrechtlicher Sozialkontrolle*, Duncker & Humblot, Berlin.

final paragraphs where consideration is given to some executive norms that regard "offender-victim compensation" .

It is, of course, too early to assess reactions to the project, although many authoritative adherents have already expressed appreciation with regard to the use of compensation in the framework of a new "law for social intervention". It would represent the ultimate model to aim at in the effort to modernise criminal law by taking into account resocialisation and by using some existing tools, such as "prevention councils"²². It is also too early to affirm that "something better than criminal law" has been achieved - which has already been proposed by Radbruch - although the impression is that there is something that has not yet been defined which somehow recalls abolitionist models of the early 80s²³. It is, above all, evident - especially when dealing with restitution of damage - that the new proposals do not make a clear distinction between the different branches of the law; this, instead, could be much better obtained through a courageous decriminalisation action that would also include the field of civil offences²⁴.

The Italian legislator, possibly stimulated by the wide international action in the area of compensation, appears to begin to show signs of an opening towards the possibility of adopting compensation as an independent penal sanction. This new position of the Italian legislator has been made clear mainly through the recent law dealing with bank cheques²⁵.

Compensation has traditionally been used as an additional sanction to imprisonment. In fact, the recent widening of its role by Italian legislators in matters regarding cheques, was prompted by the trend towards the independent use of compensation as a criminal sanction. It is, therefore, clear that there was no intention to decriminalise such an offence, as was effectively accomplished by the French legislator²⁶.

Nevertheless, this does not appear to be very negative because, even if the new law does not exclude penal responsibility, payment of compensation has, in practice, the effect of avoiding access to a penal trial. The final effect of this is deflation in the number of trials dealing with cheques that have not been honoured.

Undoubtedly, this law has the merit of supporting the most recent indications proposed by international legislative policy; in addition, it could also constitute an interesting "pilot-experiment".

²² In this respect, see Lüderssen, K. (1992) "Perdita di legittimazione del diritto penale", paper presented at the seminar on "Modernizzazione del diritto penale?", 30 October - 1 November 1992, and Hassemer, W. (forthcoming) "Perdita di legittimazione del diritto penale" presented at the same seminar.

²³ Some effective criticism to such models has been expressed by Marinucci, G. (1981) "L'abbandono del codice Rocco: tra rassegnazione ed utopia" *La questione criminale*, pp. 297 et seq.

²⁴ This would consent a drastic reduction in penal law intervention, which appears to be the only situation that would restore a real, and not only symbolic, effectiveness to criminal law. See Musco, E. (1993) "A proposito del diritto penale comunque 'ridotto'" in Pepino, C. (ed.) *La riforma del diritto penale - garanzia ed effettività della tutela*, pp. 173 et seq., Franco Angeli Editore, Milan.

²⁵ See Fiorella, A. and A. Sereni (1992) "Prime riflessioni sulla nuova disciplina dell'assegno bancario", *Rivista trimestrale di diritto penale dell'economia*, pp. 37 et seq.

²⁶ For a comparative overview on this matter, see Dolcini, E. (1991) "La tutela penale dell'assegno bancario: modelli attuali e prospettive di riforma" *Studi in memoria di Pietro Nuvolone (op. cit.)* II:513 et seq.

It would appear that the proposal that compensation be foreseen as an independent sanction in the formulation of a future criminal code has been accepted, albeit partially, by the draft law for the reform of the penal code. Although the only explicit reference is to offences against a person's reputation, article 80 envisages compensation of damage as a substitutive sanction according to the modalities contained in Paragraph 7²⁷. The same approach can be found in article 51, in which at Paragraph 4, compulsory compensation is envisaged "even in the absence of action on the part of the victim". Compulsory compensation is envisaged even when the victim of the offence is not identified; in this case payment is made to a solidarity fund in favour of the victim of the offence²⁸.

All these aspects, therefore, are testimony of a trend towards giving more attention to victim protection, in addition to the presence of some clues regarding compensation as a "third way", which do not, however, consent the dismissal of some criticism to the draft law because it does not operate an adequate regulation of the relation between fine and compensation of damage. Both sanctions appear to have many structural similarities, mainly in the phase of execution which, in particular, weighs upon non-patrimonial damages²⁹. In spite of the similarities, these sanctions have very different roles. The fine does not appear to go beyond the limits of the traditional "intimidatory" and deterrence functions, while compensation can also assist in providing some guidance to the parties involved, including important pedagogical effects³⁰, at least as regards "offender-victim compensation".

The main difference rests with the function of victim protection that both sanctions can perform, keeping in mind that only compensation can offer immediate satisfaction to the victim.

The absence of a clause clearly establishing that compensation prevails over the fine is, therefore, worrying and not having been reposed in the final version of the *AE-WGM*, gives a negative connotation to all other legal systems, both at the level of existing codes and at the project level.

Having highlighted the crisis which other alternative measures to imprisonment have undergone, the conclusion of our short overview, conducted mostly from a victimological perspective, is clearly in favour of compensation of damage.

This outcome conforms with the most recent orientation in international criminal law and, at least as a trend, the Italian legislator has started to fall in line with it. Compensation is starting to be seen as a possible "third way" which might work satisfactorily, especially in the area of crimes against property or, with a decriminalising function, for crimes against the so-called personality rights.

All of this is especially important at a time when the trend is towards the recognition of a more general need for the effective protection of victims, and when the draft law on the adoption of the *extrema ratio* principle as a pre-condition for

²⁷ See the draft law published in *Documenti Giustizia*, op. cit., p. 356.

²⁸ *Documenti Giustizia*, op. cit., p. 356.

²⁹ For a deeper analysis of the relationship between fine and compensation, see Manna, Beni..., op. cit., pp. 633 et seq.

³⁰ On offender-victim compensation and comparative perspective of its effects, see Dünkel, F. and D. Rössner, (1987) "Täter-Opfer-Ausgleich in der Bundesrepublik Deutschland, Österreich und Schweiz" in *ZStW* 99:845 et seq.

imprisonment³¹ is being introduced as one of the inspiring principles of the penal code, or even as the centre of gravity of the entire system³².

This policy clearly states that "functions and limits of punishment should be submitted to the need of protection of juridical rights"³³, with the aim of restituting "the supremacy of legality to a matter strongly dominated by praxis"³⁴.

While asserting such a principle, - with which, in theory, the author agrees - a practical doubt cannot be avoided concerning the modalities through which the criminal policy expressed by the new code can be harmonised with the one in act at present. There is a suspicion that the Italian legislator has been moving too fast and will encounter many problems in the application of the new code. Will it be possible for the new criminal code - the way it has been formulated - to find application in the Italian society which has usually privileged repressive issues?

Has the reference to *extrema ratio* been the consequence of a real need, or is it only a very civil, but abstract slogan?

In fact, it would appear that this matter lacks the necessary link with empirical data. This is an essential aspect if in the future only choices of ideological or symbolical nature³⁵ are to be avoided. This would increase the risk of presenting a law reform which is doomed to remain *lettera morta* since it is not supported by a social system which is ready for it.

The gap between the present policy and that which presumably will replace it in the future, leads us to the conclusion that it probably would have been better to avoid making statements while still in a project phase. Instead of this, it would have been advisable to move on to determining in detail concrete examples of offences in which the *extrema ratio* for imprisonment is applicable. More effectiveness would, no doubt, have been guaranteed with the punctual regulation of the offences punishable with pecuniary fines and, when possible, with the adoption of compensation as a substitutive sanction.

The above-mentioned doubts, the requirement of effectiveness, and the need to guarantee real protection to the victim, all lead to a request for further and much broader use of compensation. It is earnestly hoped that this will also be possible in Italy, even within the narrow limits of the draft.

³¹ Thus defined in the report of the project; on this see Ardizzone, S. (1992) "In tema di discrezionalità penale", paper presented at the ISISC Seminar on prospettive di nuovo codice penale. I - La parte generale, Siracusa, 15-18 October 1992.

³² *Documenti Giustizia*, op.cit., p. 328.

³³ See Article 2.2 of the draft law; on this see Ardizzone, In tema..., op. cit., p. 4.

³⁴ Ardizzone, In tema..., op. cit., p. 9 (our translation).

³⁵ The same criticism on the regulation of sanctioning emerging from the draft law was expressed by Larizza in her intervention at the 3° *Congresso Nazionale del Diritto Penale*, Cagliari, 17-20 December 1992. In it she highlights the fact that despite assertions of principle, there is a risk that imprisonment remains *prima ratio*, because no clear limits have been foreseen for conditional suspended sentences.

