

Mercy and Justice: An Uncomfortable Pair in Penal Law

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Keywords: conflicts between ethics and laws; religion, theology and the law; reconciliation and reparations

Introduction

As Pope Francis proclaimed the Holy Year of Mercy, he stretched the relationship between justice and mercy as of “two dimensions of a single reality that unfolds progressively until it culminates in the fullness of love”¹. Yet by pointing out this relationship he admits the fact that both terms are spontaneously felt as a uncomfortable pair. Within this framework of questioning the relation of both terms I will put and defend the thesis that a penal law which is not based on mercy as ethical principle becomes injustice.

I first will put the question systematically starting by what penal law is about (1). Then, secondly, I try to put in evidence the emotional indications of experienced injustice and requested justice (2). Thirdly I clarify how ethics always focusses on future, which makes mercy to become a ethical principle (3). Finally I show the catholic canon law as a example of a on mercy based human penal law (4) and raise the question about religion as presumption for such a mercy based human penal law (5).

(1) What is penal law about?

The question raised by catholic and protestant ministers in service of prisoners in 1972-73 in Germany while expecting a reform of penal law has been put in a typical way by high court judge Ernst Benda and lawyer Eduard Naegeli². Benda represents the classical position of penal law being first of all an instrument of punishment, whenever it should be a multilateral instrument to serve other aimes as well. Naegeli is a protagonist of abolishment of the current penal law and votes in favor of a so called law of measures (Massnahmenrecht). The classical position says: punishment is necessary to react at non tolerable behaviour as far as it does harm other people, but the punishment has to be limited by the human dignity of the criminal, who as human being has the right of freedom. The new way of looking starts with the circumstances in which one person is harming the other, asking how this behaviour could have been possible and what to do to change the circumstances and prevent the criminal from repeating what he has done. This difference is based on what values are decisive in judging the seriousness of the crime, and this judgement has to do with the emotions caused by the crime. Which feelings arise at serious offences and what do they mean?

1 Pope Francis, *Misericordiae vultus*, 20.

2 S. die Diskussion in Balthasar Gareis/Eugen Wiesner (Hrsg.), *Hat Strafe Sinn?*, Freiburg-Basel-Wien 1974, 15-54.

(2) Justice fed by feelings?

Injustice first of all is a matter of feelings. People are hurt by the harm other persons are afflicting. The main feeling is to be outraged by what happened. Indignation, emotion which point towards the moral fact, i.e. the discrepancy between the reality suffered and the reality which should be. So injustice is a reality felt, suffered and therefore to be blamed as far as it has been shaped by human doing or failing. These feelings seek to be softened, need to be moved away by acts which causes other feelings that satisfy the hunger of justice, of putting right what has been done wrong. This hunger of justice allows, sometimes needs the criminal to be punished. Punishment can afford satisfaction. So the law of punishment follows the human need to satisfy fundamental human feelings.

But this look at punishment as a satisfying process only focus on the harm afflicted, the crime committed, the wound inflicted. Yet this way of looking at the moral fact which is injustice, is unilateral. Because the offender also suffers feelings: either shame or triumph.

(3) Ethics focusing on future

Starting at the other's side the offender will feel guilty looking at the harm he caused, the victim will feel angry towards the offender. Both sentiments reflect a status quo: guilty in accepting the fact of harm which has been caused, angry in having the offender felt the harm. But in both cases victim and offender take each other serious as human persons with their human dignity. That is the ethical base of justice: things should be done in a way that respects the dignity of the human person, of victims as well as offenders. It is the victim who has the key to break open a new future, but the very condition is the readiness of the offender to seek forgiveness. So awareness of guilt at the side of the offender is such a condition, not the key itself, which only can be the mercy of the victim.

(4) Mercy main ethical principle of a human penal law

Penal law should be based on the ethical principle of mercy, not as a privilege but as a matter of justice. At the same time mercy cannot be a juridical principle, since nobody can be forced by law to show mercy to his offender, even if he shows himself guilty and ask for forgiveness. Nevertheless, juridical justice cannot limit itself to revenge and satisfaction by punishment. Justice aims at new relationships between human persons.

This is why Catholic canon penal law, while it is a most elaborated proceeding law, at the same time seems to avoid as much as possible to declare offenders guilty and punish them. Punishments in the eyes of canon law are *per definitionem* medicinal instruments, to have the offenders to become better persons.

(5) Mercy: exigence of humanitarian ethics or fruit of a religious view?

Finally: If penal law should be based on mercy as ethical principle, is this founded in sound humanitarian reasoning or does this view presume religion? This I think depends on the underlying

anthropology. Since repentance and mercy cannot be forced or sanctioned the humanitarian base of this approach can only be an optimistic view upon the capacity of self-consciousness of human persons. Perhaps we need religion not to understand and agree with this necessary optimistic view on humanity but to be able to put it into reality.

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