

# The Communicative Theory of Punishment and Repentance

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## Abstract

The paper argues that the repentance of an offender can make his punishment inappropriate and that courts must consider repentance as a sufficient reason not to inflict punishment at all or to reduce it. The discussion begins with an examination of the communicative theory of punishment which acknowledges that punishment must aim at the repentance of offenders. However, this theory, as brilliantly presented in the works of Antony Duff, does not admit generally that repentance is a sufficient reason to remit punishment. Another representative of the communicative theory, John Tasioulas, argues that repentance must be considered as a ground for mercy. Both writers, however, perceive repentance outside the normative framework of criminal justice process. The author argues that repentance can and must be an essential element in inflicting or remitting punishment. The reasons to support such a conclusion are drawn from a variety of writings ranging from traditional criminology to the theological writings of Augustine, Aquinas, and Calvin.

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## Keywords

legal theory, concept, offender, quilt, clemency, correction

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## Introduction

The importance of connecting punishment with repentance has been long acknowledged by criminologists. There is a big difference between punishment which brings about change in the perpetrator's behaviour by helping him to realize the detrimental effect of his act on the one hand, and punishment on the other hand which contributes to the formation of a negative self-image of the offender and strengthens his criminal inclinations. Criminology is much driven by this

pragmatism. Repentance clarifies the moral nature of punishment as it has been developed within the theory of communicative justice. There is, however, a general perception that repentance is not a legal reason for remission or reduction of punishment, even though it may be a ground for mercy. It will be shown that the communicative theory of criminal justice, despite its merit, fails to acknowledge the due place that repentance must take within the criminal justice process.

This paper is not limited to a particular system of criminal law. Repentance as a ground for remission or reduction of punishment can be found in many jurisdictions. Law news from lower courts around the world give many examples when judges determine the measure of punishment according to their finding whether the accused has repented or not<sup>1</sup>. One common objection as for why repentance cannot be a ground for remission of punishment is that criminal law does not allow that. This work neither affirms nor confronts this objection. Instead, the viewpoint of a Legal Realist can be taken as a starting point.<sup>2</sup> Law is what judges actually do, and the fact is that there will always be some room to take repentance seriously by completely remitting punishment, granting probation, or reducing the term of imprisonment for a repentant offender. When giving their judgements, the courts may refer to repentance as the reason for a particular measure of punishment,<sup>3</sup> but more likely, there will be no written trace of that.

This work does not present an empirical study how courts treat repentance of offenders. Rather it attempts to defend the thesis that repentance must be a ground for remission of punishment. In other words, courts must treat repentance as a sufficient reason not to inflict punishment at all or to reduce it. The discussion begins with an examination of the communicative theory of punishment acknowledging that punishment must aim at the repentance of offenders. However, this theory, as brilliantly presented in the works of Antony Duff<sup>4</sup>, does not admit generally that repentance is a sufficient reason to remit punishment. Another representative of the communicative theory of punishment, John Tasioulas<sup>5</sup>, argues that repentance must be considered as a ground for mercy. Both writers, however, perceive

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<sup>1</sup> Evesham gardener from Spring Valley jailed for burglary. 2017. Available at: <http://www.eveshamjournal.co.uk/news/1532956> (accessed: 01.11.2018). China jails former senior judge for life in graft case. 2017. Available at: <http://www.reuters.com/article/us-china-corruption-court-idUSKBN15V10W> (accessed: 10.11.2018)

<sup>2</sup> Holmes O. *The Common Law*. Boston: Little, 1881. P. 172–173.

<sup>3</sup> *United States v. Biscoe* (1975). *Scott v. U.S* (1969).

<sup>4</sup> See: Duff A. *Punishment, communication, and community*. Oxford, 2001; *idem*. *The Intrusion of Mercy* // *Ohio St. J. Crim. L.*, 2007, vol. 4, p. 361; Duff A. (ed.). *Philosophical foundations of criminal law*. Oxford, 2013; Duff A. *Towards a modest legal moralism* // *Criminal Law and Philosophy*, 2014. P. 1–19.

<sup>5</sup> Tasioulas J. *Punishment and Repentance*. *Philosophy*, 2006, vol. 81, p. 279; *idem*. *Repentance and the Liberal State* // *Ohio St. J. Crim. L.*, 2007, vol. 4. P. 487; *idem*. *Where is the Love. The Topography of Mercy* / R. Cruft (ed.) *Crime, punishment, and responsibility: The jurisprudence of Antony Duff*. Oxford, 2011. P. 37–53.

repentance as outside the framework of criminal justice process. The fact that positive law may ignore the experience of repentance does not mean that judges do and must ignore it as well.

The justification for bringing repentance into the ambit of the sentencing mechanism can proceed following several lines. It can be argued that there is a higher natural law judges must take into account when interpreting positive law provisions. Another justification can be based on the idea of human rights and a following requirement to respect the offender who repents. This paper chooses another line of argument that combines traditional criminology with the theological writings of Augustine, Aquinas, and Calvin.

## **Crime and the Criminal**

Repentance is a certain response by an individual (the criminal) to his crime. Therefore, it is important to outline briefly the concepts of crime and the criminal before repentance itself is properly considered. A criminal is a person who is guilty of committing a crime. All the terms used in this definition of a criminal: person, guilt and crime require further clarification, and indeed these are an object of an extensive literature. Even a brief consideration of this would go beyond the scope of this paper. Nevertheless, a brief definition is necessary to make the object of this enquiry more precise. Guilt is here understood not as a feeling of anxiety or unhappiness of a person who did something wrong, even though this meaning of guilt relates directly to the idea of repentance. Instead, guilt is understood here as an official finding of one's responsibility for a crime. Crime itself is more difficult to define even from a purely legal positivist approach since many offences can fall somewhere in between crime, tort and administrative delict. In order to make the argument of this paper more explicit, crime is defined by its formal characteristic — a decision of a court that the deed under consideration is a crime. In other words, crime is what courts think to be such. The same applies to the definition of a criminal. These definitions have been maintained in the tradition of Legal Realism<sup>6</sup>.

Within jurisprudence, Legal Realism advocated an empirical approach to studying law<sup>7</sup>. It is noteworthy that Legal Realism was particularly strong in the United States, also a pioneer in many fields of criminology<sup>8</sup>. However, Legal

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<sup>6</sup> Paul J. The Legal Realism of Jerome N. Frank: A Study of Fact-Skepticism and the Judicial Process. Brill, 2012. P. 141.

<sup>7</sup> See: Holmes O. The Path of the Law // *Harvard Law Review*, 1897, vol. 10, p. 457–478.

<sup>8</sup> See: Llewellyn K. The Brumble Bush. N.Y. 1969; idem. Recht, Rechtsleben, und Gesellschaft. Berlin, 1977.

Realism was not limited to Common Law countries<sup>9</sup>. The Realist understanding of crime makes the object of the present research more specific and subject to empirical study. Such a formal definition of crime and the criminal can close a gap between traditional jurisprudence and criminology which is perceived by many academics<sup>10</sup>. The Realist definition of crime and the criminal is accepted openly by some criminologists<sup>11</sup> and is implicitly present in most criminological works which do not make an effort to provide clear definitions. Despite its merit, the empirical approach to punishment has not produced so far a comprehensive criminological study of repentance within the tradition of Legal Realism.

Contemporary criminology considers legal penalties as the means of preventing crime<sup>12</sup>. Two types of prevention are generally singled out. The first is general prevention. The mere existence of a mechanism of discovering, prosecuting, condemning and punishing offenders serves as a deterring factor from committing crimes for any member of society. Special prevention (sometimes called individual or particular prevention) has the goal to force a particular offender to abstain from crime in the future. Punishment in his case can be seen as a kind of lesson not to repeat a previous mistake again. It would be natural to conclude that general prevention as well as special prevention pursues certain educational goals. One can also assume that such education aims at forming a good conscience in former offenders by means of repentance. Paradoxically, the moral side of general, and, particularly, special prevention is denied by some leading criminologists. For example, German criminologist, Karl-Ludwig Kunz<sup>13</sup> openly said that special prevention aims at enforcing compliance with the expectations concerning law-abiding behaviour, and not with “re-education towards a better human being.” The attention to repentance has been largely developed outside predominant schools of criminology and within the communicative theory of criminal justice, particularly by Antony Duff and John Tasioulas.

## **The Concept of Repentance**

John Tasioulas defined repentance as the intrinsically appropriate response to one’s moral wrongdoing. This response consists in realization of one’s own moral responsibility and the acceptance of blame<sup>14</sup>. He singled out several elements of such a response. It involves: first, feelings of guilt; second, blaming oneself; third,

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<sup>9</sup> See: *Olivecrona K. Law as Fact*. London, 1971; *Ross A. On Law and Justice*. London, 1958.

<sup>10</sup> See: *Farmer L. Criminal Law, Tradition and Legal Order*. Cambridge, 1997.

<sup>11</sup> Hentig H. *Das Verbrechen*. Berlin, 1961. P.4.

<sup>12</sup> See: *Triplett R. Handbook of the History and Philosophy of Criminology*. Chicago, 2017.

<sup>13</sup> *Kunz K. Kriminologie: eine Grundlegung*. Bern, 2004. P. 325.

<sup>14</sup> *Tasioulas J. Repentance and the Liberal State*. P. 488.

confession and apology; fourth, moral reparation for the wrong such as willingly undergoing as a penance any inflicted punishment; and fifth, a resolution not to commit such a wrong again. All these elements are of great importance for criminological research. Each of them requires particular methods of study. This analytical exposition of the meaning of repentance helps us to understand the relationship between repentance and remorse. Remorse is an important element of repentance, yet repentance is more than a feeling of remorse.

This definition of repentance, however, lacks precision. It would be much better if Tasioulas expressed repentance primarily as an adjustment or amendment in the meaning of the Christian ethical tradition (briefly considered below) which presents repentance as an actual turning away from sin towards rightful living. For him, repentance is a process in which an actual adjustment is only an ideal state. The degree to which the elements described above are present, may vary from case to case, depending on the nature of the wrong, the identity of the victim, and the character and the personality of the offender<sup>15</sup>. He also admits to degrees of repentance.

Repentance is largely defined by Tasioulas as different from regret or disappointment. The wrong-doing is the internal object of repentance, while regret can involve all sorts of things that are not wrong, including things that are positively right (e.g. 'I regret I have to punish you'). Thus, Tasioulas distinguishes between the objects of repentance and the objects of regret or disappointment. Repentance has the wrongfulness itself of an act as its object, not the consequences of the act "beyond those that constitute its wrongfulness." The link between repentance and the wrongfulness of an act is well established by Tasioulas, but his abstract concept of wrongfulness can easily miss a specific and contextualized individual, as well as the social, experience of what is wrong and what is right.

The definition of repentance by means of the idea of wrongfulness must be accompanied by identifying the seat or the source of repentance as the conscience. The reference to conscience is important to enable us to see that repentance can take a whole variety of forms, all of which must be dealt with by a criminologist. Conscience itself can differ from person to person, from culture to culture, and from one historical period to another. The experience of repentance which Tasioulas described so well, is only one type of conscience which leads to one particular type of repentance. This type of conscience, we can call deontological. There can be also consequentialist conscience which ascribes wrongfulness to the action depending on its consequences. The difference from regret or disappointment may not be so clearly expressed in "consequentialist" repentance, even though one must agree with Tasioulas' argument that it is the wrongfulness of the act which repentance is about.

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<sup>15</sup> Ibid. P. 489.

Drawing on the concept of conscience would help to see more clearly the difference between feelings of guilt and feelings of shame. Tasioulas himself follows a rather common view that they differ in the characteristic objects: for guilt, it is one's wrongful conduct, for shame, it is one's character or the kind of person one is<sup>16</sup>. It seems, however, that the difference between guilt and shame is not so much in object, because one can be ashamed of wrongful conduct, as in the nature of the feeling. Shame is a more relational feeling. I can feel shame because my friends, parents, or other people disapprove of my conduct, not my character. Guilt, however is more personal, and may not involve necessarily the view of others. What is important for criminologists is the realization that individual conscience can be variously smitten by feelings of shame and guilt, and that the intensity of those feelings can be culturally, socially, or religiously explained. In order to analyze the feelings of guilt and shame, one has to examine the state of conscience of the offender.

## **Punishment and Repentance**

The concept of repentance developed by Tasioulas is based on the realization of one's own responsibility. There is an argument in criminal law literature that the issue of responsibility can no longer be understood simply as a moral philosophical question of specifying the conditions under which an autonomous individual may be held culpable for certain acts, and subject to state punishment<sup>17</sup>. The issue of responsibility must be considered within the constraints of an institutional framework, power and culture. If this is true of responsibility, it is also true of repentance. In other words, one must be aware that the relationship between punishment and repentance can significantly vary according to the nature of the institutions of criminal law, power and culture.

The role of repentance itself within the general theory of punishment is controversial. The most interesting issue in Western academic literature is not so much whether punishment can induce repentance<sup>18</sup> but whether the fact of repentance can affect the degree of punishment<sup>19</sup>. More specifically, the discussion focuses on whether a repentant offender deserves mercy. In other words, the scope of debate is limited and reflects certain cultural, intellectual and ideological constraints.

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<sup>16</sup> Ibid.

<sup>17</sup> *Farmer L.* Op. cit. P. 12.

<sup>18</sup> This issue has been discussed in a number of writings. See, e.g. Duff A. Punishment, communication, and community...P. 12; Maslen H. Remorse, penal theory and sentencing. L., 2015. P. 79.

<sup>19</sup> *Tasouilas J.* Punishment and Repentance. P. 279.

Some academics perceive punishment and mercy in an antagonistic conflict while others deny this antagonism<sup>20</sup>. Those who deny the antagonism between punishment and mercy tend to perceive justice as capable of accommodating mercy within itself. It can be an act of justice to show mercy to a repentant offender. Those who affirm the antagonism disagree very widely on the way a repentant offender must be treated. John Tasioulas<sup>21</sup> argues that punishment must take both justice and mercy into consideration, and that repentance may be a legitimate ground for showing mercy to a repentant offender. Anthony Duff objects because a truly repentant offender will reject any sentence less than that which he deserves in order to expiate fully the guilt of his wrongdoing<sup>22</sup>. However, Duff does not deny that repentance might serve as a basis for reducing an offender's sentence if justice requires so, not because of mercy.

The divergence between Tasioulas' and Duff's positions on the relationship between repentance and punishment reflects different visions of punishment. Tasioulas distinguishes between justified punishment and deserved punishment<sup>23</sup>. Even though an offender deserves harsh treatment, repentance is one of the reasons justifies a more lenient punishment. Thus, Duff represents a deontological theory of punishment which does not perceive a difference between what is justified and what is deserved, while Tasioulas leaves much room for consequentialist moral reasoning.

Despite their differences, both Duff and Tasioulas defend the communicative theory of punishment: by means of criminal law, society communicates to the wrongdoer public censure for his wrongdoing<sup>24</sup>. They affirm that "punishment has a constitutive link with repentance: the offender is given the opportunity to communicate his repentance in a forceful and public manner precisely by undergoing the deserved punishment"<sup>25</sup>. Punishment, as deserved hard treatment of offenders, acts as a penance through which the offender makes apology. This view, however, misses a great difference between legal punishment and penance. The latter is a self-inflicted punishment and can be a manifestation of repentance if it is accepted as sincere. The former is different. It is inflicted by society, not by the wrongdoer himself. Therefore, legal punishment itself can hardly be perceived as a forceful and public expression of repentance, unless there is an additional opportunity for the offender to express this.

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<sup>20</sup> Garvey S. Questions of Mercy // Ohio St. J. of Crimin. L. 1997, vol. 4. P. 321.

<sup>21</sup> Tasioulas J. Punishment and Repentance. P. 279.

<sup>22</sup> Duff R. The Intrusion of Mercy. P. 386.

<sup>23</sup> Tasioulas J. Punishment and Repentance. P. 311.

<sup>24</sup> Ibid. P. 310.

<sup>25</sup> Ibid. P. 283.

Despite all the philosophical differences in understanding the way repentance should relate to punishment, most researchers in criminal procedure maintain that punishment does not depend only on the wrongfulness of the act, but on the assessment of the actor's character and on the exact damage to particular persons also. If the offender has admitted guilt, expressed remorse, and apologized, he is perceived as a better character and deserves a more lenient punishment: "Prosecutors, sentencing judges, and parole boards are naturally disposed to go easier on remorseful, apologetic defendants. Capital jurors care greatly about remorse and are much less likely to sentence a remorseful defendant to death"<sup>26</sup>.

The way how a display of repentance affects punishment of itself deserves careful consideration by criminologists<sup>27</sup>. However, there is something more for a criminologist to do than simply to describe the *actual* impact of repentance on sentencing. Criminologists who believe that their task is not simply to explain crime and punishment, but also to indicate the most efficient ways to deal with crime, must certainly pay more attention to the relationship between repentance and punishment as it has been reflected in the communicative theory of Duff and Tasioulas which claims: "legal punishment may seek to facilitate repentance, and, when repentance is in evidence prior to the completion of a justified punishment, that can be a legitimate ground for the merciful reduction of the offender's sentence"<sup>28</sup>.

It has been argued that issues of repentance, forgiveness and mercy play fairly small roles in the criminal justice process which is dominated by deterring, incapacitating, and inflicting retribution<sup>29</sup>. Despite this neglect of repentance, mercy and forgiveness, authors, like Stephanos Bibas and Richard A. Bierschbach<sup>30</sup> maintain that contemporary modern criminal law can be adjusted to integrate those values into the criminal justice process. They suggest that victim-offender mediation and sentencing discounts could encourage offenders to express remorse, victims to forgive, and the community to reintegrate offenders. The authors have also identified the dangers of fakery and arbitrariness if courts' sentences have to take remorse into account. These dangers present a strong objection to active integration of the concept of repentance in the norms and practices of criminal law. Jeffrie Murphy argues that repentance can be readily faked<sup>31</sup>. Murphy does not

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<sup>26</sup> Bibas S. Forgiveness in Criminal Procedure // *Ohio St. J. of Crimin. L.* 2007, vol. 4, p. 340.

<sup>27</sup> Smith N. Justice Through Apologies: Remorse, Reform, and Punishment // *Queen's Law Journal*. 2016, vol. 41. P. 527.

<sup>28</sup> Tasioulas J. Repentance and the Liberal State. P. 487.

<sup>29</sup> Bibas S. Forgiveness in Criminal Procedure. P. 329.

<sup>30</sup> Bibas S., Bierschbach A. Integrating Remorse and Apology into Criminal Procedure. *Yale L.J.*, 2004, vol. 114. P. 85.

<sup>31</sup> Murphy J. Remorse, Apology, and Mercy. *Ohio St. J. Crim. L.*, 2007, vol. 4, p. 440.

deny that repentance can play an important role in clemency proceedings, yet it is not a reliable concept in sentencing practices.

If we have to integrate remorse, repentance, and forgiveness into the criminal justice process, we must address the issue of adequate evaluation as to whether repentance of an offender is genuine. There is a big problem with using the standard of sincerity of repentance as a basis for forgiveness. Bibas stated that “forgiveness cannot be forced or routinized, and that introduces dangers of inequality and discrimination”<sup>32</sup>. The same can be said about repentance. Any attempt to fit repentance into a straitjacket of legal standards carries a danger of creating a fake of it, or of failing to identify all the variety of forms which repentance can take. These issues can lead to inequality and discrimination when applying criminal sanctions. The fundamental question here, however, is not whether repentance can be adequately observed and evaluated in general. The question is whether a judge or juror can draw on any specific standard of repentance in our world of cultural and moral diversity. If such a specific standard is impossible to define and recognize, then it leads to ambiguity in law application.

When we judge whether a person repents or not, we often rely on moral intuitions and cultural prejudices which can barely be expressed in any logical form. The major concern is whether those intuitions and prejudices can be rationalized and verified. Our intuitions and prejudices can be challenged by our individual experience and knowledge. The more I know the person and the ways he expresses his feelings or suppresses them, the more reliable my judgement on the sincerity of his repentance would be. The contemporary criminal process functions more like a machine where intimate knowledge of a person’s feelings is hardly possible. In this context, allowing a greater role for intuitions and prejudices can break the whole fabric of punishment and sentencing.

Bibas’ suggestion to solve this problem is not to pull down the whole fabric. Rather, his suggestion is to introduce forgiveness by the victim or the community as a procedural prerequisite for reducing or doing away with punishment. It will bring more stability into the criminal justice process and protect the rights of the victim. Even though Bibas avoids saying that remorse must precede forgiveness, the thrust of his argument is that the repentance of the offender should lead to reduction or non-imposition of punishment but this is conditional on forgiveness by the victim. Repentance of the offender should play a key role in the decision of the victim to forgive. On the contrary, “forgiving a remorseless offender could undercut the violated moral norm and the victim’s self-respect”<sup>33</sup>. Bibas suggests procedural mechanisms to bring the offender and his victim together. If, as the result, the victim forgives, mercy and clemency can be granted to the offender.

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<sup>32</sup> *Bibas S. Forgiveness in Criminal Procedure. P. 331.*

<sup>33</sup> *Ibid. P. 332.*

Under these conditions, the victim will be the best judge of the sincerity of repentance. In this respect, the task of criminology is not so much to elaborate the objective standards of genuine repentance as such; rather its task is examining the perceptions of the victims to see what makes them confident in the genuineness of the offender's repentance.

Giving victims the powers to forgive is a very controversial subject<sup>34</sup> whose consideration would lead beyond the scope of this paper. This, however, underlines the significance of repentance in choosing a measure of punishment. Judges and juries are likely to impose lower sentences if the victim expresses his or her willingness to forgive<sup>35</sup>. Acknowledging the role of the victim is one way to establish the connection between repentance and punishment. By considering historical and cultural changes in the criminal justice process, Bibas provides many other connection points. The attractiveness of Bibas' work is that he combines an empirical approach to courts' practices, on the one hand, with a clear emphasis on the normative importance of repentance in sentencing practices on the other.

## Repentance and Forgiveness

There are already some criminological studies, particularly in the area of restorative justice, which maintain that repentance must be a ground for forgiveness<sup>36</sup>. An unrepentant offender must face punishment. However, the relationship between repentance and forgiveness is more complex than seeing repentance as a prerequisite for forgiveness in the criminal justice process. Forgiveness itself can have a profound psychic effect on the offender and induce his repentance, or it can reinforce the experience of repentance. There is empirical evidence that kind treatment of former offenders can induce a higher rate of compliance with the law in the future.

In criminal law, it is not only the victim but also society as a whole, personalized in the judge and jury, who can communicate forgiveness to the offender. In some jurisdictions, under certain conditions, the court can exercise the power of forgiveness. Juvenile offences are a good example. According to the Thai Penal Code, for example, criminal liability begins at the age of seven<sup>37</sup>. Punishment can be inflicted from the age of fourteen<sup>38</sup>. According to the written provisions, Thai courts also have discretionary powers to reduce the scale of punishment

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<sup>34</sup> London R. *Crime, Punishment, and Restorative Justice: A Framework for Restoring Trust* Eugene (Or.), 2014. P. 42.

<sup>35</sup> Bibas S. *Forgiveness in Criminal Procedure*. P. 334.

<sup>36</sup> Johnston G. *Restorative Justice*. Cullompton, 2002.

<sup>37</sup> Thai Penal Code. 2558. Section 72.

<sup>38</sup> Ibid. Section 75.

by one third or one half in juvenile cases if it seems appropriate to the judges, or not to impose punishment at all<sup>39</sup>. In practice, Thai judges hardly punish any offender below the age of eighteen. They openly exercise their power to forgive communicated to the offenders<sup>40</sup>. Interviews with Thai juvenile offenders in such cases indicated that they understood the fact of being forgiven. A further research step would be to study whether such forgiveness can induce repentance understood as an amendment or adjustment.

Further, forgiveness can help the offender to move from a simple sense of guilt to the overall change of attitudes and life-style. Bibas maintained that forgiveness may lighten the burden of guilt from the shoulders of offenders, making it easier for them to reintegrate into society<sup>41</sup>. If one accepts that forgiveness as well as repentance of offenders carries a strong rehabilitative force, then it would be logical to examine critically the whole process of criminal justice to see what elements of it facilitate or impede the occurrence of forgiveness and repentance. Perhaps, the greatest impediment lies not so much in the procedures and institutions as in the perceptions of those who move the process of criminal justice. For many of them, repentance and forgiveness are outside the scope of criminal law. There are several arguments which can challenge those perceptions, as well as the reasons which support them.

## **Criminal Law as the Means for Repentance**

One of the strong arguments, which supports the importance of repentance in the criminal justice system, comes from a teleological interpretation of punishment. According to this interpretation, punishment is a means to elicit an appropriate response on the part of the offender to make him feel regret for the crime he committed. The appropriate response consists in repentance and turning away from crime to rightful living. Nozick<sup>42</sup> is considered to be the leading advocate of this approach. There are some arguments against a teleological view of punishment which have direct relevance to a criminological study of repentance.

Opponents affirm the criminal justice system is based on what an offender deserves rather than on any psychological processes such as repentance<sup>43</sup>. The emphasis on deserts rather than on any psychological or moral experiences makes a criminological study of the criminal justice process easier and more comfortable.

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<sup>39</sup> Ibid. Section 76.

<sup>40</sup> See: *Shytov A. Bunchu Na Pompechara. Thai Juvenile Delinquency Justice and its Perception by Juvenile Offenders.* Bangkok: Chiang Mai University, 2007.

<sup>41</sup> *Bibas S. Forgiveness in Criminal Procedure.* P. 334.

<sup>42</sup> See: *Nozick R. Philosophical Explanations.* Oxford, 1981.

<sup>43</sup> *Tasouilas J. Punishment and Repentance.* P. 279.

Punishment in such a study can now be safely reduced to the performance of certain actions which can be more or less reliably observed. For example, a criminologist can look at the wrongdoing as an action, the involvement of the offender as an action, harms and risks expressible in a form of an action, and finally punishment as an action. Repentance is different. There may be no action flowing from the experience of repentance, and there is a constant danger of losing the objectivity to which so many criminologists aspire. A criminologist may admit that repentance can accompany punishment. However, since the essence of punishment is reduced to what the offender deserves from the past, and not dependant on his subsequent moral experiences, repentance can be safely discarded.

This is exactly where the Legal Realist's approach challenges the image of criminal justice as exclusively based on deserts. Judges in the Western courts do take into account repentance of criminal offenders when choosing a sentence. In some cases, the value of repentance has been discussed (e.g. *United States v. Biscoe* (1975). *Scott v. U.S* (1969)). It is likely, however, that its influence on the decision of a judge is more latent since his judgement must comply with the requirements of legality. Legal Realism calls for the examination of actual cases. If judges do pay attention to the phenomena of repentance, then it is a legitimate subject for a criminological study. It is true that judges do not always follow the teleological concept of punishment, but that does not matter if there is evidence that they sometimes do. The advantage of Legal Realism is that it offers a more comprehensive way to look at the whole variety of conflicting judicial policies. The weakness of Legal Realism is that unlike the theory of communicative justice, it does not offer a comprehensive ideal or normative standard against which conflicting judicial practices can be examined.

We encounter this situation when Legal Realism methodology offers an approach which is able to take into account various judicial policies of punishment but lacks a particular moral standard for evaluating those policies. At the same time, we have the communicative theory of punishment which offers such a standard but which contains an inadequate image of repentance, and denies its real role in judicial decision-making. This inadequacy can be seen in the idea that a repentant offender would be willing to undergo the full measure of punishment in order to expiate the guilt of his wrongdoing<sup>44</sup>. This seems unlikely! The teleological approach maintains that repentance can be the goal of the criminal justice process, affecting if not replacing punishment altogether. As soon as the offender shows remorse and turns away from crime, there is insufficient reason to continue inflicting punishment on him. However, critics may argue that since a repentant offender himself needs punishment to expiate the guilt, the goal of punishment is not exhausted by the fact of eliciting repentance.

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<sup>44</sup> Duff A. *The Intrusion of Mercy*. P. 386.

The argument for expiating guilt is of more than academic interest. It has important practical implications from a criminological point of view. If we agree with the teleological thesis that the goal of criminal law is to elicit repentance, then repentance must bring about the end of punishment. Repentance itself would become the key-concept of the whole science of criminology. On the contrary, if one accepts the critic's view on punishment as the necessary means of expiating guilt, then the evidence of repentance taking place before the infliction of punishment should not matter. However, this view can mislead a researcher. Its flaw is not so much in the denial of idea there is no need for punishment if repentance is evident, as in adopting a distorted concept of repentance itself. It is a mistake to present all truly repentant offenders as willing to undergo punishment in order to expiate guilt. It is possible that a repentant offender will be willing to undergo the punishment, but it is not at all impossible that he would not be willing.

The Bible, truly a handbook for studying repentance, provides many examples of repentant offenders who were not willing to undergo punishment imposed by God for their sins. For example, King David committed adultery and intentionally caused the death of the woman's husband<sup>45</sup>. After that, he married the woman expecting a child from the adulterous relationship. Being confronted by a prophet, David repented. Being reassured after that that he himself would not die but only the child, David fasted and prayed trying to plead with God to preserve the child's life. The example of King Manasseh is even a better example of an offender whose repentance involved a powerful plea for canceling the punishment he was to suffer<sup>46</sup>. The Bible is full of examples when the fear of punishment resulted in repentance. The books of the prophets present the awesome pictures of future doom for those who will not repent. The words of Jesus: "Unless you repent you will all perish"<sup>47</sup> can be seen as the summary of the whole Bible which communicates the image of repentance as moved by the fear of punishment.

The idea, that the fear of punishment can induce repentance, reconciles the contradictory images of criminal law as a deterrent and as a means of rehabilitation. Thus, a criminologist, who accepts an adequate concept of repentance, will obtain a rich ground for complex research integrating many sides and dimensions of the criminal justice system. Criminal law in general and punishment in particular can be studied as the means of repentance. This teleological approach to criminal law does not mean that repentance of the offenders is its sole goal. There are other goals of punishment such as satisfying victims' demands for justice. Nevertheless, repentance, when conceived in its full form as the wholehearted change in the

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<sup>45</sup> *Second Book of Samuel*. Chapter 12.

<sup>46</sup> *Second Book of Chronicles*. Chapter 33. The prayer of Manasseh does not appear any more in a Hebrew Bible. It is preserved in the Septuagint, Ancient Greek translation of the Bible.

<sup>47</sup> New Testament. *Gospel according to Luke*. Chapter 13.

attitudes and behaviour of the ex-offenders, takes a special position because, first of all, it can in some cases satisfy the demands of the victims of crime; and more importantly, it fits better into a more humane picture of criminal law in respect to the dignity of human beings.

## Repentance and Love

To summarise briefly the discussion above, the communicative theory of punishment allows repentance to play a limited role in imposition of punishment. Its thesis that punishment must be based on desert may not necessarily reflect the practice of the courts. The communicative theory does not deny the importance of repentance as a goal of communicating public censure to offenders through punishment. However, it lacks clear affirmation that despite their crimes, the offenders still possess human dignity because of their good nature. This is an attitude of love. If we accept this attitude, then the concept of punishment will be perceived differently from being an impersonal mechanism of imposing a “penitential burden that is placed upon offenders to censure them for their crimes, with the aims that they will then come to repent, reform themselves enforcing compliance with the expectations concerning law-abiding behaviour”<sup>48</sup>. Punishment loses its purpose if repentance has already occurred. The problem with the communicative theory of punishment as developed by Duff is that it cannot contain the demands of love and forgiveness. Tasioulas’ discourse of mercy seems to be more flexible, but his idea of love and forgiveness is still placed outside the scope of justice<sup>49</sup>. It has been shown above that there are strong reasons for considering repentance as the essential element of criminal justice, and not as an extra-legal ground for forgiveness or, at least, for mitigation of punishment.

This is exactly the point at which drawing on the theological concept of love can correct this shortcoming of the communicative theory of punishment. Aquinas maintained that to correct the wrongdoer is a spiritual almsdeed, which is further defined as works of charity<sup>50</sup>. The Latin word *caritas* is translated as charity in English. It is noteworthy that *caritas* was used by Jerome to translate the Greek word *agape* — Christian love, and *caritas* has the same linguistic root as *garuna* — a key concept of Buddhist ethics. Love is a great universal moral force to change lives (not limited to a particular religion), and this force must be used in the system of criminal justice.

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<sup>48</sup> See: Lee A. Defending a communicative theory of punishment: the relationship between hard treatment and amends // *Oxford Journal of Legal Studies*, 2017. Issue 1.

<sup>49</sup> Tasioulas J. Where is the Love. *The Topography of Mercy*. P. 40.

<sup>50</sup> Aquinas T. II/II 33. 1.

The old theological concepts continue to shape many criminal justice institutions in our secularized world<sup>51</sup>. The framework of Duff's and Tasioulas' ideas move much within the *Summa Theologiae* of Aquinas who distinguished between measures of correction on the one hand and measures of justice on the other. Any fraternal correction is directed to a brother's amendment. Justice has a different purpose. It is not about taking into account the brother's amendment. Rather, it serves the purpose of deterring the offender and the others from committing a further offence<sup>52</sup>. Aquinas stated that a person guilty in offending against another person deserves punishment even though there is a reason to believe that punishment will make him even worse: "The order of justice must be observed"<sup>53</sup>. Justice is conceived in terms of coercion while brotherly correction is seen as admonishing.

It would be a mistake, however, to blame Aquinas for excluding love and forgiveness from the scope of criminal justice. Aquinas was writing at a time when there was a powerful institution of a church which could undertake the task of correcting and admonishing. The state had a choice of only very primitive measures to deal with offenders. The state at the time of Aquinas did not undertake the task of correction and leading an offender to repentance. His emphasis on the importance of correction and its understanding as a manifestation of *caritas*-love must be accepted as a valuable contribution to develop a theory of repentance as the goal of punishment. There are two elements of Aquinas' concept of correction which are particularly valuable. The first is that correction must lead to a change of the offender (amendment). The second is that correction must be done in a way to serve this end<sup>54</sup>. Thus, repentance for Aquinas would mean something more than a mere realization of one's own moral responsibility and the acceptance of blame<sup>55</sup>. It actually requires adjustment by the offender. At the same time, a criminal law sanction would not be seen as a correction if it does not serve the end, i.e. repentance.

Calvin more clearly, than Aquinas, articulated the idea of criminal law as a means to bring about repentance. Referring to the ancient law of the Jews, Calvin stated that the law brought the realization of sin on the part of the person to whom the commandments of the law were addressed. This function of law to communicate a standard of right and wrong behaviour<sup>56</sup> deserves our closest attention. According to Calvin, the primary function of the law was to lead people to repentance. The law is a kind of mirror in which the humans can see their own fall from the original

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<sup>51</sup> Johnston G. Op. cit. P. 172-174.

<sup>52</sup> Aquinas T. II/II 33. 3.

<sup>53</sup> Aquinas T. II/II 33. 6.

<sup>54</sup> Aquinas T. II/II 33. 2.

<sup>55</sup> Tasioulas J. Repentance and the Liberal State. P. 488.

<sup>56</sup> Calvin J. II. VII. 12.

state of their moral nature<sup>57</sup>. At the same time, Calvin stated that the law serves another function: that of a bridle for those who are unable to restrain their offensive behaviour<sup>58</sup>. In other words, only a person who does not repent deserves punishment.

The best expression of the idea that repentance means the return to the goodness of human nature is expressed by Apostle Paul: “he who loves his fellow-man has fulfilled the law. The commandments, ‘Do not commit adultery,’ ‘Do not murder,’ ‘Do not steal,’ ‘Do not covet,’ and whatever other commandments there may be, are summed up in this one rule: ‘Love your neighbour as yourself’”<sup>59</sup>.

Generally, criminologists shun speaking about love. There are, however, rare exceptions. Hirschi, for example, admitted that love for one’s neighbour is vital for crime prevention<sup>60</sup>. Hirschi’s admission of love as the means to prevent crime was rather accidental. There are, however, more serious attempts to bring ethical love into criminological discourse. When affirming the importance of repentance and restorative shaming in the criminal justice process, Braithwaite maintained that justice must go along with love<sup>61</sup>. However, he could not perceive it within the formal court’ criminal procedures. It is true that the contemporary court process reminds us more of a machine than a human interaction where love can take place. However, if we understand love as our will to do to others what we would have them do to ourselves<sup>62</sup>, then court justice still leaves some room to act upon such love. Moreover, Braithwaite conceived of love in terms of respect. It is indisputable that respect is required and can be shown to offenders in the courts of justice.

There is empirical evidence that many offenders, particularly at the time of their arrest and sentencing, want to change their lives and stop offending. There is also evidence that they usually do not change after they come back from prison. “Usually this is due to officials’ failure to understand the felon’s viewpoint, their misinterpretation of felon’s acts and responses, and the continuation of their own

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<sup>57</sup> Ibid. II. VII. 7.

<sup>58</sup> Ibid. II. VII. 10.

<sup>59</sup> *St. Paul*. Letter to Romans. Chapter 13.

<sup>60</sup> *Hirschi T. The Craft of Criminology*. J. Laub (ed.). New Brunswick, 2002. P. 104. Hirschi came to this conclusion after finding out that religion (understood as church attendance) does not help to reduce delinquency: “The church is irrelevant to delinquency because it fails to instil in its members love for their neighbours and because belief in possibility of pleasure in another world cannot now, and perhaps never could, compete with the pleasures and pains of everyday life” (ibid., p. 104). This conclusion apparently conflicts with his view that involvement in conventional activities (going to the church) and holding certain law-abiding beliefs (obeying the authorities is required by God) are two of the four vital elements of social bonds which make an individual integrated in a law-abiding society (Ibid. P. XXIII).

<sup>61</sup> See: Braithwaite J. (2002) *Restorative justice & responsive regulation*. Oxford, 2002; Braithwaite, J. (2004) *Restorative justice: Theories and worries*. UN AFEI. *Resource Material Series*, no 63, pp. 47-56, 123rd International Senior Seminar. Available at: [http://www.unafei.or.jp/english/pdf/PDF\\_rms/no63/ch05.pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no63/ch05.pdf) (accessed: 01.11.2018)

<sup>62</sup> Gospel according to Mathew. Chapter 7.

misguided policies”<sup>63</sup>. Another study suggests that loving and caring relationship can overcome the negative influences of delinquent peer groups<sup>64</sup>. In other words, there is much in criminology which warrants drawing on the concept of love as described above. Remission of punishment for a repentant offender will reinforce his pro-social responses.

Affirming that repentance is the goal of punishment makes more sense of applying the fundamental categories of criminal law such as guilt, intention, and negligence<sup>65</sup>. The intentional crimes deserve heavier punishments exactly because of the presence of evil will. Augustine affirmed that punishment follows only the person whose will is directed towards evil<sup>66</sup>. The presence of an evil will does not mean, according to Augustine, that the nature of the person is evil. The person retains the power to choose what is good and avoid what is evil. His nature remains good. Augustine drew this conclusion from the theological idea that all creation is good: “Things solely good, therefore can in some circumstances exist, things solely evil, never.” This idea contains a very important implication for the whole policy of the criminal justice. It follows that the good nature of the offenders remains despite the evil acts they commit. Accepting or rejecting this belief has important criminological implications since it shapes the whole system of the criminal justice. A policy maker who does not believe that anything good remains in a particular offender will choose a certain type of criminal sanction which will tend to exclude the offender from society for the longest period of time possible without any serious attempt to reform him. Another policy maker, who perceives the obliterated goodness in the character of the offender, will try to apply certain measures to reinforce that goodness and to turn the offender back from the way of crime to the way of rightful living.

Contemporary theorists of criminal law and criminology are characterised by a trend to abandon the moral language of describing crime and the criminal. Instead of morally laden terms like malice, wickedness, gross culpability, the modern science of crime attempts to use descriptive, psychological concepts<sup>67</sup>.

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<sup>63</sup> Ibid.

<sup>64</sup> Hazani M. Prevention of Delinquency Through Repentance: An Ethnographic Study in a Jerusalem Slum // Small Group Research, 1987, vol. 18, no. 1. P. 82–98.

<sup>65</sup> For example: Para 15 of German Criminal Code speaks of *vorsätzliches* and *fahrlässiges Handeln*. Article 121-3 of French Penal Code also distinguishes between intent on the one hand and recklessness (imprudence), negligence, or failure to observe an obligation of due care or precaution on the other. This distinction is important to classify different types of criminal offences such as felony (*le crime*), misdemeanour (*le délit*) and petty offences (*la contravention*), and different jurisdictions of the courts based on these types: *cour d'assises*, *le tribunal correctionnel*, and *le tribunal de police*.

<sup>66</sup> Augustine. XII. 3

<sup>67</sup> Farmer L. Criminal Responsibility and the Proof of Guilt / M. Dubber M. (ed.) Modern Histories of Crime and Punishment. Stanford: Stanford University Press, 2007. P. 43.

This abandonment of ethical views makes criminological research intellectually weaker, void of inspiration and extremely dull, unable to mobilize moral force to combat the wickedness of crime.

## Conclusion

Despite its merits, the communicative theory of criminal justice lacks an adequate concept of repentance would facilitate its adoption within the normative framework of criminal justice. Repentance must be understood first of all as a positive change or amendment, not simply as a sense of remorse, or realization of one's responsibility. It is true that repentance is a complex process involving feelings of guilt, as well as the expressions of apology and penance, culminating in a moral resolution to live a virtuous life. However, the subjective feelings of the offender will hardly provide a sufficient ground for remission or reduction of punishment. Repentance is an act of conscience, and it can take many forms and contents of self-change conditioned by history, culture, institutions, and power relations. As a positive change, it is more difficult to fake than the expression of remorse, for example. It can be motivated by the fear of punishment, and as such there is nothing wrong in not inflicting punishment on the offender who finds a way to express a positive change of his life to conform to social morality in order to escape the punishment.

Taking the repentance of offenders seriously will save those having little moral strength from the impersonal machine of suppression, marginalization and rejection, as well as from prison where bad company spoils even what little is left of good morals. A criminology of repentance challenges the practices of the criminal justice system by putting an individual offender, his thoughts, perceptions, and his future as a member of the society, at the centre of the discourse on crime and punishment. It aims not only at explaining how the criminal justice system works, but also how it must become more humane and benevolent.



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