

MORALITY AND PENAL LAW

I. PRINCIPLES

1.1. Principles of evaluation of moral and legal deeds

This present study does not wish to get involved too deeply in the various theories of ethics or its connections with laws. Only those concepts which are strongly related to our topic will be specified. It should be noted, however, that these philosophies overlap with each other.

First of all those most significant moral philosophies which include the evaluation of deeds as well will be taken into consideration. The two prevailing philosophies nowadays will be outlined at the outset.

Egalitarian moral philosophy focuses on the individual with respect to the moral values on the basis of a just distribution of goods amongst all the members of society. It concentrates on how the consequences effect society as a whole.¹

The opposite theory is *utilitarianism*. This concept prefers the biggest welfare to the broadest range of people, that is it wishes to maximize the total amount of the measurable benefit for all people in society. Therefore this notion applies a cost-benefit analysis.²

From our point of view it seems to be quite a significant fact that this theory allows some deviations from the law, provided that they are more likely to increase welfare.³

Utilitarianism regards punishment as useful only if it generates more benefit than other possible decisions. Thus, the legality of punishment depends on its reasonably predictable deterrent effect and also upon any other reasonably expectable cost and benefit.⁴

Fortunately these various theories, often concealing different political views, have never existed in an absolute form. They cause enough tragedies on those occasions when they enjoy, temporarily, exclusive power. We are already fairly familiar with the consequences of egalitarianism (Witness the theory and practice of the thriving vulgar-Marxism). The theory of utilitarianism is at present holdingsway (witness the lack of compensation for the appalling conditions of certain social groups). If it becomes the sole wielder of power the advantages might well be overshadowed by the disadvantages.

The question is how these two concepts most significantly affecting our topic might be balanced; and how could the advantages be adopted while the disadvantages are discarded. Any adequate solution requires both the recognition of the strong link between ethics and laws, as well as the impossibility of any interchange or replacing one with another, but on the other hand it must allow for their necessary complementarity. A legal system willing to support only one of these concepts is deemed to failure.

This point of view was advocated by a banned but recently rehabilitated thinker – István Bibó – in his book, published a half a century ago. Analyzing the relation between ethics and penal law he emphasizes that ethics opposes moral illness in a not clear evaluational form, which itself was conceived on the basis of a belief in the possible abolition of illness. Criminal law also faces moral illness – and not a unique illness

restricted to criminal – but it considers this moral illness as an actual fact which will not and cannot be eliminated by the law itself. It rather focuses on the lost balance of society which was generated by moral illness and the attempts to rationalize it, keep it within narrow bounds. The actual accomplishment of this aim is carried out by the sentence.

When a sentence of guilt is passed it means that moral indignation is justified. Its punitive consequence stems not from any moral condemnation but from human emotions compensated by indignation.⁵

The priority of ethics is manifested as soon as ethics and criminal law collide, that is when the moral justification of public indignation conflicts with a penal law approach, in such a way that criminal law averts those activities which comply with moral evaluations; or when it remains indifferent even though public indignation is justified; or, also, when indignation is not compensated, but increased by it; and finally, when it raises such public emotions that cannot be satisfied within its capacity.⁶

Public feedback on the evaluation of a deed is either tacit or loud. The legal and moral evaluations do not necessarily coincide. The orientating role of law (the penal law) is indispensable. However, if its decisions are alienated from the public, its orientating, value-preserving and -creating features cannot be accomplished. Nevertheless, this situation might occur not only when the laws does sanction a deed which is not, at least totally condemned by the public, but also when it does not sanction a deed, or just mildly does so, although public indignation was quite severe.

These above mentioned facts mean that the law needs to be permanent renewed simultaneously in two ways. In our rapidly changing society the expectations towards the legal system are mounting, especially so as to regulate the prevailing relations, and on the other hand to achieve an orientating role.

Nowadays it should be reflected in three areas at least: in legal theories, in legislation and in the everyday application of law which is closely linked to public opinion. This latter area is, however, determined by the two previous ones. Nevertheless, the basis of the implementation of everyday application of the law is not completely indifferent. These achievements – such as the navigation between the mitigating and the aggravating circumstances – might influence the prevailing idea about the general evaluation of the deed and also it might affect, through the general features of each decision, the approach of the representatives of legal theories and legislation.

It is uncertain though, what sort of factual knowledge about public opinion the actors are aware of in all these three fields; what we know about the way the public classifies the importance of protecting the values; whether there are deeds which are not or just mildly punished although the public considers them to be more punishable or vice versa. If there are; lawyers ought to take it seriously whether or not their concepts demand a revision.

1.2. Connection between ethics and (penal) law

In these past few years a stronger need has developed for a more efficient legal influence on social relations. Meanwhile a debate continues over how the law might be capable of accomplishing this. Most people doubt whether the law itself – especially penal law – could be a proper means to achieve the required task.

To what extent the law would be obeyed if it complied with the norms of the involved parties has virtually never been discussed. Therefore, since the system of the

norms is basically regulated by the evaluating order, and since this latter one is governed by the system of ethics, an analysis of their relations would seem logical.

In primitive societies the legal norms and crimes prescribed by law were unknown. The law had not been separated from other social norms — religious, moral, technical, etc. —, likewise the ruling power from the human groups.⁷

Agnes Heller points out that, despite the lack of moral freedom, punishment existed in primitive societies even without any relative autonomy of activity. People were called to account and punished according to the needs, benefits and interests of the society. Later on, when relative autonomy had already developed, the way and the procedure of punishment and responsibility were still governed by such dominating elements as the benefits and needs of the community. When someone was expelled from the community no one cared about them any more. The destiny of the morally punished individual only became important long after this period.

Beyond this I believe the liability for the violation of prevailing norms was punished regardless of the fact of whether or not it was beneficial to society. The system was accepted absolutely, the norms were considered to be perfect a priori. It was a mere consequence of the presumption that if someone had offended the norms or queried its rightness by a deviant attitude, their act was considered an irremissible crime. This led to an unavoidable and crude revenge for the violation of norms. This point of view is easily recognizable today as well.⁸

Revolutionaries of any time — so Heller carries on with her train of thoughts — have every right to claim that it is not first of all, the individual who is responsible for his/her crime but society is to be blamed. The glory and welfare belong to the offenders. Therefore, if we want to change the people, society ought first to be altered so that the possibility for the achievement of new values might exist. Nevertheless, it should be taken into consideration that bad and restrictive objective economic laws might cause a general increase of crime but cannot be "responsible" for the increase. Responsibility is attributed to those who maintain, sustain and enforce the laws.⁹

The theories of legal consciousness, public morale and jurisprudence are not uniform, however, it is worthwhile quoting one of them, namely the concept of András Sajó. Analyzing the Hungarian situation he draws the attention to the phenomenon that before World War II — referring to the studies of Ferenc Erdei¹⁰ — because of the traditional way of Hungarian life people had not been accommodated to special legal situations, since such specializations — as in a traditional society — had not existed whatsoever.¹¹

Nevertheless, György Lukács believes that the standardization achieved by moral ethics bears all the classifying features of a specialization. This relation might be more obvious concerning the generality of the legal sphere. Certainly, it is too difficult to prove historically that the increasing numbers of diversities in the legal systems are rooted in the social pressure of public opinion, legislation and its application. To illustrate this point it is enough to refer to a long debate on this subject. Whilst pure "intention ethics" (morality) excludes the consequences of the deeds from moral evaluation, the legal evaluation focuses precisely on the pure deeds and their results. (The fact that legislation and cases are increasingly based on the idea of intention is due at least partly to the influence of legal ethics.¹²

This summary makes clear that the relationship between morality and law, and hence the operation of the regulating system is in doubt. One thing is certain though, the connection between the two spheres. The legal system itself, including its actual rules — with some distortions — is an accurate reflection of morality and the concealed or revealed values of leaders and led in the relevant era.

In the accelerated socio-economic changes of our present circumstances it should be even more urgent to reconsider the relation of morality and law. The past shows that similar historical periods have also increased the interest in such issues. The social sensibility of both the socio-economic and the legal, moral changes could hardly be a coincidence. For me it is obvious that different socio-economic relationships will generate different ethics. This alteration, however, will not necessarily mean an amelioration since the socio-economic changes are not necessarily displaying a tendency towards development. The new construction of both the socio-economic and moral changes will include a vast number of significant components from the past – both good or bad. Yet the changes are inevitably attributed to present day law, partly following, partly creating it.

These problems require deep scrutiny; on one hand in order to avoid the reinvention of the past statements and to learn the lessons of past failures, while on the other hand in order to allow the efficient intervention of law into the future reforms of society. The relation of morality and law ought to be reconsidered here and now. Those principles should attempt to define what should be applied to develop a social orientation of the law in both the short and long terms. The often quoted present-day confusion of values stems – though not exclusively – from the obscurity of the connection between morality and law.

However possible any moral support for the prevailing law might be, nevertheless this support is not found in the broad scope of life. Yet, even more difficult is the fact that the mere existence of a presumed moral justification for legal prescription does not yet exist – if it ever will – in many fields of life.

The experiences of the past warn that the law alienated from the morality of the majority in society works at a considerably low level of efficiency. Therefore those attempts which are committed to the mere alteration of the legal prescriptions in order to reform the basic social relations seem perilous. However strictly enforced the law or its control might be, without any moral force success – especially in the short term – cannot be expected especially if new ambitions which sometimes contravene the previously proclaimed principles exist. After these sorts of changes the new regulations which often contradict the previous demands, may generate a long term total chaos in values.

Summarizing my study, relation of morality and law should be analyzed especially in three fields:

1. Whether or not there are important moral norms which are not supported by law, although they should be? If so what kind are they?
2. Whether or not there are important legal norms which are not supported by morality, although they should be? If so what kind are they?
3. Whether or not there are contradictory legal and moral norms, and if yes what sort?

The aim in the first two instances ought to be the establishment of a support system while in the third the destruction of contradiction. In the case of the elaboration of a new project the emphasis should be on the narrowest possible scope from where such problems might emerge. The more successful the result, the more balanced social development will be obtained.

2. RESEARCH PROJECT

The project included a population survey covering two aspects:

– the first one, as the questionnaire shows, extended to the various groups of offenders of the law in the following way:

1. individuals
bureau officers:
2. leaders
3. employees
authorized persons:
4. officers in local government
5. companies, co-operatives
6. producing co-operatives
7. others

– the second – not shown in the questionnaire – included the violated values as follows:

- biological: A. environmental
B. others
- economic: C.
- intellectual: D. (the violation of human rights and others are included)
- cultural: E.
- moral: F. sexual
G. others

The mailing process (which was the same carried out by experiences of László Korinek) consisted of a communication card which included an anonymous questionnaire carried out by OKBT. This well-known organization would have seemed more neutral for those who were supposed to fill the questionnaires than the name of the National Institute of Criminology and Criminalistics, the basic institute of the research.

After selecting the list of addresses – obtained from the Ministry of Interior – 1967 letter were sent out on 25 August 1988, out of which 87 were sent back for several reasons (rejected: 2, moved: 29, unknown address: 43, wrong address: 7, died: 6); and 24 persons noted that – in spite of having the anonymous and voluntarily nature of the project – they did not wish to participate. These letters were taken away from the project.

The number of questionnaires posted on September 1988 was 1922.

The fact that the *rate of filled questionnaires* which were returned by 25 October 1988 was 61.2% – out of which 1089 proved to be valid (i.e. 56.7% of the total amount of posted letters) shows the considerably high interest of the population in this issue.

This amount of evidence provided sufficient material for data processing.

3. SPECIFICATION OF THE ACHIEVEMENT OF THE RESEARCH

3.1 General evaluation

The following were to be evaluated by the respondents, by choosing their order of preference from the following options:

1. The parties should carry out their pledges.
2. The (higher) authority should arrange the case but no one should be punished.

3. I would impose a fine.
4. I would impose imprisonment.
5. I would have the damages compensated by the offender.
6. I would dismiss, prohibit him/her of his/her profession.
7. I would reward him/her.
8. There is no need for any measures to be taken.

These options enumerated above also provided an opportunity – within the already mentioned limits – to compare some questions of the TÁRKI II¹³ research project, although there were open questions – closed down afterwards – and questioners working on it there.

It is obvious that the order of the options means a line from the most aggravating to the mildest or from the worst to the best decision. Certainly the positions might be doubted (which is the most severe punishment: the *remedies* compensation or the fine), although, basically, the possible answers could be divided into two groups: the non-punishing and the punishing ones.

Before going into details I should make a *general statement*, that is: the questioned individuals reacted sensibly to the economic cases. (Relatively speaking this field challenged their strictest condemnations in autumn of 1988), especially mostly in the cases of either political or economic leaders.

Also it proved to be a general experience that younger people – under 24 – seem to be more tolerant to the violation of law or to the infringement of moral but not legal norms, than older people. This is also the case with women and the lower educated persons – 5 years of school or less. Among those who are rather unsatisfied with their life or those who live in an unsettled family the majority was in favour of punishment, including its more severe forms.

These facts are considered to be interesting because the studied population could be regarded as being representative of the country regarding sex, age, education, etc.

3.2. The connection between punishment and non-punishment

During the processing of the data *two dimensions* were taken into consideration: the area of values and deeds.

The data show that the people strongly condemned the violation of environmental and economic norms, especially by leaders. The most severe offences of the values are considered to be those carried out by managers (50% of the managers' deeds belong to the category of punitive deeds which 90% consider punishable). It is followed by the contravention of economic values committed by individuals (31.2% of them belong to this category); and by employees (16.7%); then by the mostly corporate deeds of companies and co-operatives (11.1%); then, finally, by local government (9.1%).

The same sort of study concerning the values allows us to draw the conclusion that the most frequent values are economic (5%), then come environmental values (42.9%), biological (25%), other moral ones (20%) and intellectual (7.1%). None of the sexual or cultural values could be found there.

It should also be noted that the estimation related to the behaviour of managers was remarkably more rigorous – according to a two-year research carried out by *Sajó* under the courtesy of TÁRKI II. In those questionnaires 29.5% of people saw no reason at all for condemning a manager who made his/her employee commit suicide. In our studies this proportion has decreased to 3.2%.

The *most emphasized crime* is theft, regardless of values. This explains the fact that one-third of the deeds of individuals are in this category. The severity of the judgement has also increased. According to the research of TARKI II the rate of those who would not punish is 39.1%, while ours is 5.5% (when a radio has been stolen from a wealthy man) and 8.1% (in case of a poor victim).

Special stress was put on the abuse of power – especially in the field of the economy, and mainly in the form of theft. One-third of the leaders are in this category for this reason.

Another question arises from the analysis of the above mentioned TARKI II, since a tendency of a more rigorous judgement was also illustrated: that is, the manager of a company which has a sewage pipe going into the lake should not be punished by 32.6% at that time and by 2.6% by now.

Deserves special emphasis is the question of what sort of *values* could be infringed *without* deserving punishment according to *more than half of the adult population* (i.e. those cases which belong to the categories of 50.1 – 100%). These instances are 50% for the violation of biological values, 38.3% for intellectual, 20% for other moral values and 9.1% for economic values. This list confirms the observation of several sociologists – especially by Ágnes Losonczy – that the *economic values occupy first* position in the evaluation of people while *the last* positions are related to the protection of *life and health*. Also, such high a proportion for the Intellectual values in this category demonstrates a general disdain for intellectual work.

The significant *hostility towards managers* as well as a basically different attitude towards private and the public sphere were testified by comparing two questions. In both cases someone commits suicide because of someone else and, although the end is similar – that is, the victim stays alive – in the case of the manager and employee 96.8%, while in the case of a woman driven to suicide by an ever drunken husband only 47.8% of the questioned individuals believed no form of punishment to be necessary.

To demonstrate the opinion related to privacy a good example occurs by comparing the cases of a spouse who committed murder and suicide. Practically the same proportion considered the murderer wife to be punishable as the drunken husband in the case of the wife committing suicide. This is the most spectacular case of witness *how remote the approach* of penal law is from that of the public judgement.

The rate of the punishable and non-punishable answers draws attention to several other features of social judgement. Some of them obviously reveal that the individual or/and group interests are in favour the most. The indifference in the violation of intellectual values is most evident.

Also there have been several criticisms, even straight-forward condemnations of the prevailing values in the answers. It is a clear manifestation that in plenty of cases the majority of people – and not only the people involved – do not protest against or even agree with the results emerged from the offending of values. Most of them do not even bother with possible outcomes like jeopardizing the rule and stability of law, or with the fact that what can be an advantage under certain conditions, might be a disadvantage under others.

To summarize the problem we present an overview of which instances the public conforms with official view points.

There are three possible classes according to the official judgements:

1. The behaviour should be punished because a crime has been committed,
2. the behaviour should be punished because a minor offence has been committed,

3. the behavior is not to be punished neither by penal law nor by minor administrative regulations.

On the basis of the answers the question of whether or not the majority (more than 50%) of the public agrees or disagrees with official judgements can be demonstrated. It is demonstrated by the following table:

	According to the law	According to the public
Punitive	34	51
Non-punitive	30	13
Total	64	64

The following table shows those acts which the majority of the public wishes to be punished although the law remains silent:

The spheres:

- private 1 case out of 16
- manager 3 cases out of 20
- employee 3 cases out of 6
- companies 4 cases out of 9
- local governments 8 cases out of 11
- producing co-operatives 1 case out of 2

The values:

- biological 2 cases out of 4
- environmental 2 cases out of 7
- economic 6 cases out of 22
- intellectual 5 cases out of 14
- sexual 1 case out of 4
- cultural 1 case out of 3
- other moral ones 3 cases out of 10

In these cases the public estimation diverts from the official one.

In these cases, in every instance, the public deems the deeds more severely than officialdom does.

It should be noted, however, that these contradictions cannot be traced back to the lack of legal consciousness. It would be rather useful to consider whether or not the legal regulation fits the certain circumstances, if such a significant divergence can occur in the views of the public and officialdom.

4. CONCLUSION

Supervising the documents of the research it can be confirmed that this is an accurate reflection of society – or at least a part of it. Nevertheless the character of society is another issue. The researcher is not unambiguously captivated; so let us look at the details and draw some conclusions.

The *general features* are the following:

1. The level of toleration differs in each groups. (It can be measured by the proportion and the severity of the punishments.) So, by and large – with some exceptions – young people, especially between 19–24; women, perhaps a bit striking; people with lower levels of education, household workers and those who are more content with their life, or live in a settled family, are more tolerant than other groups.

It should be noted though that this question requires more detailed knowledge, so that research is still going on in order to reveal the most significant connections between social origin and such judgements.

2. During our studies the already well-known deep inclination for punishing was brought to light, that is the population is fairly punitive minded and prefers – compared to western countries – to punish with penalties (eg. the deprivation of rights), than through negotiation.

It should also be acknowledged that this tendency has become more intensified. Especially rigorous are the condemnations in the cases of managers' and former cadres' offences of norms, which are regarded as a legally punishable deed even if the prevailing laws do not sanction them.

It should be taken into consideration, however, – as a possible instruction to the future – that the opposition was no stronger against the communist party than against the administrative functionaries; that is the objection was not specifically to the Party, but rather to the representatives of power.

3. This resistance to power adds to an extremely confused order of values. Moreover, what is most striking is that this chaos exists even in areas where it seemed to be clear. Our evidence is the following:

- Priority of materialistic values over others – such as life, health, environmental, intellectual etc.
- The attitude towards the values implied in the penal code is fairly heterogeneous. Although in most cases the public and official aspects were quite similar concerning the legally punishable and non-punishable deeds, there are plenty of divergent views. It is also extremely interesting that out of 30 legally non-punishable deeds 20 were considered to be punishable by the majority while out of 35 legally punishable cases there were only 3 regarded not to be punishable.

I would like to underline that the above mentioned 20 cases refer not to the confusion of legal consciousness whatsoever – since we had not asked that at all –, but to such a rigorous judgement of the behaviour which might be repaired solely by punishable sanctions. (These instances are included in the attached table, these attitudes might be seen more clearly with reference to it.) It nevertheless demonstrates quite adequately – unfortunately – both the deficiency of the means for solving the problems and the sheer lack of tolerance. Furthermore it reflects a remarkably rigid view, incapable of compromises which rejects all possible negotiations in solving a problem generated by infringements. The rates of imprisonments are basically much higher in Hungary than in western countries, as it is more severely demanded in our country than in western democracies.

The already mentioned muddled order of values are quite alarming, however, in certain instances.

It is fairly characteristic though, that nevertheless the compensation of the victims ought to be the most important issue: however, the punishment of the offender still proves to be more significant. Certainly it clearly demonstrates the stubborn belief that this is the only way to prevent future damages.

The lethargy and resignation to the conditions – experienced fairly broadly – are quite remarkable and also disadvantageous. Hopefully in this area at least prospects will change.

Nevertheless the numerous *consequences* ought to be met, so that the remaining inefficiencies of jurisdiction should be acknowledged.

However painful it might be, decriminalization – in spite of its urgent need – is obviously going to be extremely slow, although the law will undoubtedly follow public judgements; at least partly. On the other hand the public attitude also warns us that there are cases where the law might and should divert from the public view point, since it has been demonstrated that even legal deeds were to be punished by them. However, one significant element should be emphasized, that is the public demands for punishment ought not to be allowed. Instead, every possible step should be undertaken to broaden the means of handling the problems.

The *solution* will be found at the end of a long process almost completely outside the criminal sphere and also the scope of legal policy. The initial gesture should be carried out by the government, which has radically altered. Its basis should be the establishment of a fair public policy, fairness both in private and business life. Individuals should be reached by improvements in communal life which require the revitalization of communities which were dispersed according to communist ideology. Only this way will we avoid the present mass of alienated, isolated, frustrated individuals and create an interest conscious community. It might provide less expectations towards the legal system and would reduce the punitive and justice distributing role of law, or possibly even make these roles exceptions only.

Nevertheless a quite *alarming threat* ought to be mentioned at this point, i.e. the group of those most rigorously penal minded individuals who might cause the largest hindrance on the way towards European civilization. As has already been pointed out they are mostly middle-aged, higher educated men, employed mostly at different levels of the administration. They threaten the liberalization and hence the establishment of a system based on developed concepts of social justice.

NOTES

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TÁRKI = The Social Research Informatics Society

OKBT = National Committee of Traffic Safety