

## THE VICTIMS AND THE SUFFICIENCY OF THEIR RIGHTS IN THE CRIMINAL JUSTICE SYSTEM\*

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**Summary.** The question of victims' rights in the criminal proceedings is one of the most discussed question in the sphere of criminal law in the recent years. According to Howard Zehr the restorative justice system is a system that look in a special way on crime, offender and victim. In this connection it should be also said that also Catholic church encourages models of restorative justice that seek to address crime in terms of the harm done to victims and community, not simply as a violation of law. Based on the key idea of restorative justice formulated by Howard Zehr, according to whom restorative justice is primarily a means of addressing the needs of victims of crime, it is undoubtedly possible to assume the central role of the victim within the restorative concept of criminal justice.

**Key words:** victim, criminal proceedings, restorative justice, rights, Catholic Church

### 1. VICTIM IN RETRIBUTIVE JUSTICE

Support and compensation for crime victims generally appear to be the primary objective pursued under the standard criminal justice system, but this is not the case in the absolute sense of the word. Most formal criminal systems focus on the person of the offender rather than the person injured by the crime. The main focus is therefore on identifying, detaining, imprisoning, accusing, bringing to justice, convicting and punishing persons who breach the criminal law. Likewise, the activity of the relevant state authorities, such as members of the police, prosecutors, judges, prison staff or probation officers, is aimed primarily at the perpetrator and the proceedings against him. It follows that, although the needs of victims are clearly known to the state, there is a clear imbalance within traditional criminal justice systems regarding the distribution of activities of the competent authorities or the redistribution of resources to support and compensate victims [Liebman 2012, 26].

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In the formal criminal process, victims thus become a secondary, least important “player.” The state views the victim only as a party to the proceedings injured by the crime, to which it does not provide any wider space than the one in which he plays the role of a witness in criminal proceedings. This apparent lack of a legitimate role is perceived by a significant number of victims as a very shocking, unexpected fact when they enter criminal proceedings [Strang 2004, 96]. The possibilities to participate are not sufficiently defined in legal systems and the possibilities of their real use are also considerably limited [Herman 2004, 75]. Victims thus receive only a minimal opportunity to retell their story as well as to have a real, meaningful participation in resolving their criminal case. The real victims of crime are thus largely overlooked – they are perceived more as a means of obtaining evidence (testimony of witnesses), which is then used by the relevant state authorities in order to obtain the conviction of the perpetrator [Cardenas 1986, 371].

Regarding this insufficient role, which is entrusted to victims in traditional criminal proceedings, very little attention is also paid to the question of their awareness of the progress made in the ongoing process. Although most European legislation regulates the obligation to provide information to victims of crime, at the same time, legislators are using clauses which considerably weaken the obligation – such as “if it is possible” or “when it is feasible,” which often results in very low awareness of the facts that are particularly important for victims [Strang 2004, 96]. In this context, reference may be made to the legislation of the Slovak Republic, specifically to the provisions of para. 46, sect. 8–9 of Criminal Procedural Code, which enshrine the information obligation of the competent state authorities in relation to the injured person in the situation that the accused person has escaped or has been released from custody or from serving a custodial sentence. In more detail existence of this obligation is conditioned either by the existence of a threat to the life and health of the injured party, the assessment of which is in the competence of the relevant state authorities, or by the submission of a request for the information in question by the injured party.

Based on the above, victims of crime feel ignored, excluded and largely overlooked by the traditional criminal system. Their emotional, psychological and financial needs are only very rarely, if ever, addressed to a sufficient extent, and the traditional criminal justice system does not even provide sufficient space for the victim to interact with the offender [Herman 2004, 75]. As a result of the facts described, victims do not feel satisfied with their experience with the criminal system and very often they feel that their position in criminal proceedings is not perceived as seriously by the state as it should be because of the consequences of crime, which they must necessarily bear [Strang 2004, 97].

## 2. VICTIM IN RESTORATIVE JUSTICE

On the contrary, as indicated above, in the system of restorative justice, the primary emphasis is on the victim of crime. Proponents of restorative justice point out that this alternative response to crime has enormous potential to address the needs of victims. Restorative justice emphasizes the recovery and strengthening of social ties – the cornerstones of the restorative justice system are mutual understanding, responsibility and, above all, empathy, which is a kind of engine driving regret on the part of the perpetrator and the elimination of retributive feelings on the part of the victim [ibid., 99]. In this context, Daly attaches particular importance to the empathy that exists on the part of the perpetrator, emphasizing that this is a precondition for a truly successful restorative justice process – as long as it is absent from the perpetrator (often in the case of juvenile offenders), it is not realistically possible to achieve a sincere justification and thus the very success of the restorative process [Daly 2007, 139–40].

In this connection it should be shown at the statement of the bishop of USA in which he said that both justice and mercy are very important and they should work together. Also St. Paul calls us to affirm the demands of both justice and mercy, the place of punishment and forgiveness, and the reality of free will and poor choices.<sup>1</sup>

Within the restorative concept of criminal justice, there is also a diversion from the standard concept of crime – this illegal act loses its sign in the form of depersonalization, which is typical of the traditional criminal system, and acquires the character of some “experience” happened between individuals within the community, society. All three criminal parties – the victim, the perpetrator and society – have the opportunity to understand how the committing of this illegal act has affected each and every one. All parties are seeking to re-establish social ties and build healthy interpersonal relationships [Herman 2004, 75].

The restorative justice system offers particularly significant improvements over the traditional criminal system. Victims are given the opportunity to retell their story and, above all, the opportunity to be truly heard. Restorative justice perceives victims as real participants in the process, not just as a means of providing evidence to the relevant state authorities. It creates a concrete space for discussion aimed at solving the most important, key problems and issues that led to the commission of a crime and that arose from its commission [ibid., 76]. At the same time, these discussions represent an important step towards the full recovery of victims trauma caused by crime. Their aim is to obtain answers to questions concerning the circumstances and motive of the crime committed, which can only be adequately answered by the perpetrators themselves, as well as to express the victims’ feelings about the crime that had been committed against them, their pro-

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<sup>1</sup> Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice. A Statement of the Catholic Bishops of the United States issued by United States Conference of Catholic Bishops (15.11.2000).

perty or their relatives [Johnstone and van Ness 2013, 17]. The dialogue between the victim and the offender maximizes the possibilities for the exchange of information and the mutual agreement between the victim and the offender. At the same time, this element can be considered as another fact, which fundamentally distinguishes the process of restorative justice from the formal court process, where the dialogue between the victim and the perpetrator absents in most cases [Liebman 2012, 26]. In this context, it can be added that a significant number of studies indicate the obvious success of victims' meetings with perpetrators – the success of realized dialogues. According to surveys, up to 80% of victims were satisfied with the process [Daly 2007, 138].

In addition, the restorative justice system also provides a “helping hand” to victims who feel isolated after committing a crime by seeking to re-engage the victim with the community [Herman 2004, 76].

### 3. NEGATIVE ASPECTS OF RESTORATIVE JUSTICE WITH REGARD TO THE STATUS OF VICTIMS OF CRIME

#### **3.1. Restorative justice serves only a limited number of victims**

It is a typical feature of restorative justice programs that a significant number of victims of crime will not be “entitled” to participate in restorative proceedings in order to address issues related to their victimization. There are several reasons for this “phenomenon.” One of them lies in the inaction of the victims themselves – we often encounter cases where the victim does not make a report about the commission of a crime. However, the remaining of the reasons in question are rather linked to a certain failure on the part of the relevant state authorities – law enforcement authorities are not always able to successfully identify the perpetrator of a reported crime. However, it should also be added that even if they succeed in identifying the offender and his subsequent accusation, he may not automatically be taken into custody and subsequently prosecuted in court proceedings on the basis of the indictment [ibid.].

The models of restorative justice are based on the need to identify and apprehend the perpetrator of the crime [Walker 2013, 35], as a result of which only a small percentage of victims of crime are actually able to take advantage of the defined and described benefits that the concept of restorative justice presupposes for victims [Herman 2004, 76]. This fact thus appears to be a significant negative of the restorative system. The shortcoming in question appears even in restorative justice programs, which do not require the perpetrator to participate in restorative proceedings in the absolute sense of the word. Even in these cases, we encounter the need to accept a certain degree of responsibility on his part, which is nevertheless a prerequisite for a certain degree of participation of the offender.

Due to the need for active participation of the offender in the restorative resolution of criminal cases, there is a significant reduction of cases that are eligible for restorative proceedings [ibid., 77].

If we want to think about an appropriate way to solve this problem, which would ensure the opening of the concept of restorative justice for a wider range of victims, the simplest and relatively logical solution in principle seems to be to carry out a restorative process without the involvement of the perpetrator. In this context, however, the question automatically arises as to the extent to which such a solution is applicable in practice.

### **3.2. Orientation of restorative justice to perpetrators of a crime rather than to the injured party**

Another significant negative of the concept of restorative justice, which is directly linked to the negative described in the first place, is the fact that the process of restorative justice is often perceived as a process directed at perpetrators rather than victims of crime. The restoration process, as stated above, is largely limited to cases in which the offender is willing to accept responsibility for his crime and at the same time participate in resolving the case in this alternative way. In addition, the remedies themselves provided under the restorative system are severely limited by the perpetrator [ibid.].

The statement in question can be underlined by the fact that it is the offender's consent to the restorative justice process that needs to be reached first in accordance with the "manuals" of restorative programs,<sup>2</sup> thus emphasizing the superiority of the offender's consent over the victim's consent. In other words, unless the competent authorities obtain the perpetrator's consent, the victim's potential consent has no real significance for the restoration process. This fact can again be very conveniently demonstrated on the example of Slovak diversions from typical criminal proceedings. The legal tools in question include, in particular: a) conditional cessation of criminal prosecution; b) reconciliation; c) conditional cessation of criminal prosecution of the cooperating accused; d) plea bargain and; e) a criminal order.

Regarding the institutes of conditional cessation of criminal prosecution and reconciliation, the Slovak law explicitly formulates as a *sine qua non* condition of their application the granting of consent by the accused person (para. 216 CPC and para. 220 CPC).

With regard to the institutes of conditional cessation of criminal prosecution of a cooperating accused and the plea bargain in these cases the legislator does not explicitly formulates the condition in the form of consent of the accused person, but the need to give consent of perpetrator follows from the nature of these tools. With regard to the defined institutes, it should be added that, although all these tools are considered as tools for an alternative solution to criminal cases [Klátik 2008, 81], we believe that only regarding the first two we can talk about the legislator's interest in the injured party. Only in the case of conditional cessation of criminal prosecution of a cooperating accused and conciliation, the law

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<sup>2</sup> Ministry of Justice of New Zealand: Restorative Justice. Best Practice in New Zealand, 2004, p. 12.

regulates as one of the conditions for their application the duty of the accused to compensate for the damage caused by his illegal activity (para. 216, sect. 1, letter b and para. 220, sect. 1 letter b CPC).

### **3.3. The restoration process does not address all the needs existing on the part of the victim**

Another negative of the concept of restorative justice, which can be identified in connection with the position of victims within it, is the fact that the restorative process does not address absolutely all the real needs that exist on the part of persons injured by the offender's crime. Remedying the damage resulting from the offender's unlawful conduct is very often a much more complicated process than just obtaining justification, compensating for the damage or restoring interpersonal relationships. This finding is based on the fact that for many victims, the trauma resulting from the commission of the crime, persists even after the restorative process, and in connection with its solution, the restorative system no longer comes with an "offer" of any help or support.

In fact, even after completing the restorative process, victims are diagnosed with the reduced work performance, loss of self-confidence, various mental disorders, drug and alcohol addictions, or even the occurrence of suicides, which is not an isolated phenomenon. Solving problems of this nature requires the development of specific "restorative services" aimed at restoring (rebuilding) the victim's life. As an example it can be presented the model of long-term sophisticated counselling, victim relocation services, emergency day care for victims who need to get a job to cover new crime-related expenses, drug abuse treatment for those who have started to take a drug because of the trauma from the committing a crime, an accompanying service for victims who feel too scared to leave their homes, job counselling or training for those who are unable to continue doing their original job or even something as trivial as the usual replacement of door locks or replacement windows of the affected house. However, most of the listed needs cannot be met by perpetrators of crimes or other participants participating in the process of restorative justice. Based on the above mentioned facts, it is necessary to state that restorative justice should not be limited to the means that the perpetrator or community "puts on the table" within the restorative process [Herman 2004, 78].

In this context, however, it should be emphasized that the different situation arises in connection with the needs that exist on the part of the victims immediately after the commission of the crime. The victims are in favour of addressing these needs by means coming directly from the offender rather than from any state-created compensation scheme, and in these circumstances they are even willing to accept much less than in a situation where compensation is provided by the state [Strang 2004, 98].

### 3.4. Insufficient role of the state in the process of restorative justice

The concept of restorative justice is very often based on the idea of the background position of the state and public authorities. The professionals in the restorative process acquire tasks completely different from those entrusted to them by the formal criminal process. They have the opportunity, not the obligation, to participate in the meetings and dialogue that takes place between the victim and the offender. In the case of their actual participation, they are entitled to provide advice, support or assistance to the parties involved, but do not become party to any agreement and their dominance in the discussion is also excluded.<sup>3</sup>

In this respect, however, some doubts can again be expressed about the correctness of this idea of restorative justice. The state alone is able to provide all the means necessary to address the above-mentioned long-term and relatively complicated needs of victims [Herman 2004, 78].

### 3.5. Restorative justice and material compensation

Material redress is very often part of the agreements concluded between the victim and the offender in the context of the restorative process. At the same time, perpetrators tend to accede to the agreement much more frequently under restorative programs than in cases where it is proposed in the courtroom, within court proceedings [Strang 2004, 98]. This fact should be illustrated by statistical data concerning the application of procedural tools, which in the conditions of the Slovak Republic can be described as institutes that are closest to the principles of restorative justice relating to the material and emotional compensation of the victim – these are specifically legal tools in the form of conditional suspension of criminal prosecution and conciliation, in which the legislator explicitly formulates as a condition for their application compensation for damage caused to the injured person by a crime. The number of decisions on conditional cessation of criminal prosecution and approval of conciliation reached in court proceedings is incomparably lower than in the stage of pre-trial proceedings. While in the court proceedings the number of suspended suspensions in 2018 was 177 and the number of approved settlements was 76, in the preparatory proceedings it was 2242 and 634.<sup>4</sup> On the basis of the above, it can therefore be stated that despite the fact that the Slovak legislation provides opportunities to resolve a criminal case by other than retributive manner, the environment of the courtroom no longer provides such space for their real application as in the seemingly less formalized stage, in pre-trial stage.

Despite the possibility of concluding an agreement on material, financial compensation in the restorative process, victims tend to show compassion rather than obtain a specific amount of money from the perpetrator. It is this expression of remorse that very often represents an act that provides the victims with a spiritual

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<sup>3</sup> Ibid., p. 14.

<sup>4</sup> *Štatistická ročenka o činnosti prokuratúry Slovenskej republiky za rok 2014*, p. 61.

correction, a correction that is often the most critical for the victims. In addition, studies over the last ten years have shown that what victims primarily desire is not material reparation but instead symbolic reparation, in particular justification and sincere regret, which is almost unlikely to be achieved within the courtroom, regardless of how sorry the perpetrator feels inside [ibid., 98].

## CONCLUSION

On the basis of all the above facts, it can be concluded that restorative justice is a much more attractive option for victims than traditional criminal systems, but this can be applied only if the specific conditions are met – the conditions fulfilment of which victim cannot affect. This is primarily a prerequisite for the successful identification of the perpetrator and the acceptance of his responsibility for the illegal conduct and for the damage caused by his own illegal conduct. The question posed at the beginning of this article, namely the question whether restorative justice can be described as a concept that is primarily focused on the victim of a crime, cannot therefore be answered in the totally positive way. Indeed, we believe that a program aimed primarily at victims of crime should ask what victims need to repair the damage caused by the crime, what steps need to be taken to remedy it as far as possible, and its response to the offense should be an immediate response in the form of necessary assistance and support without the need to meet any conditions that are outside the sphere of influence of the victim himself. In other words, it should cover the needs of all victims who would agree to such a solution.

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## OFIARY I WYSTARCZALNOŚĆ ICH PRAW W SYSTEMIE SPRAWIEDLIWOŚCI KARNEJ

**Streszczenie.** Zagadnienie praw ofiar w postępowaniu karnym jest jedną z najczęściej dyskutowanych kwestii w sferze prawa karnego ostatnich lat. Według Howarda Zehra system sprawiedliwości naprawczej to system, który w szczególnie sposób ukierunkowany jest na przestępstwo, sprawcę i ofiarę. Należy również podkreślić, że także Kościół katolicki zachęca do modeli sprawiedliwości naprawczej, które starają się postrzegać przestępstwa w kategoriach krzywd wyrządzonych ofiarom i społeczności, a nie tylko w kategorii naruszenia prawa. Biorąc za podstawę kluczową ideę sprawiedliwości naprawczej sformułowaną przez Howarda Zehra, według którego sprawiedliwość naprawcza jest przede wszystkim środkiem zaspokajania potrzeb ofiar przestępstwa, bez wątpienia możliwe jest wskazanie centralnego znaczenia ofiary w koncepcji systemu sprawiedliwości naprawczej.

**Słowa kluczowe:** ofiara, postępowanie karne, sprawiedliwość naprawcza, prawa, Kościół katolicki

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