

## PUNISHMENT, REVENGE AND SACRIFICE IN THE ANCIENT WESTERN WORLD\*

Francesco Lucrezi\*\*

1-In a famous passage of *De Ira*, Seneca writes how vain it is to impose any sanction of restoration justice, for damage that has been done, since what happened in the past cannot be revoked in any way, while one can only intervene in the future. (*revocari ... praeterita non possunt, futura prohibentur*). There would be no sense to impose any punishment for something that was committed in the past.

Seneca says that no wise man, would inflict a punishment for past acts, but only so that the wrong act will not be repeated in the future: *ut Plato ait, nemo prudens punit, quia peccatum est, sed ne peccetur* .

This reasoning comes from Plato, who wrote that punishment must not be served because of the wrong act but in order to make the wrong act evident. As a result, the guilty and those who witness the punishment, will not have the tendency to commit crimes in the future.

Plato-Seneca's opinion, became an example over the centuries, of logical division between the different, contrasting functions of punishment, which filled the legal and philosophical speculation of the West.

The afflicting opinions, considering punishment a necessary evil - "*quia peccatum est*" - as opposed to damage that was committed in the past (from Thomas Aquinas, according to whom a *lex naturae* orders that "*ille qui peccat, puniatur*" from Grotius - *malum passionis ob malum actionis* - to Kant's 'categorical imperative' and Hegel).

The 'pedagogical' and 'preventive' opinions assume that punishment must prevent, that evil is repeated ("*ne peccetur*": from Plato to Seneca to Beccaria, Marcian, Paul, Ulpian and many others). Other authors like Cicero, Sextus Caecilius, Emperor Justinian and Feuerbach, consider sanction as a necessary threat that uses the fear of punishment).

The modern idea of the 're-education' of the offender is considered, at least in theory, primary by many modern legal systems, but it was practically unknown in the ancient world. And the same can be said for the recent syncretistic and multifunctional theories of punishment as *mixtum compositum*, imposed '*quia peccatum est et ne peccetur*' .

2- Trying to get rid of modern categories is very difficult. These categories concern, for instance, the idea of the 'necessity' of punishment, of the necessary existence of a 'public' punitive system, of a certain number of 'prohibitions' linked to the same number of violations and 'sanctions'. It is also complicated not to take into account a major basic distinction between two general categories of unlawful acts: those of a 'private' nature (for which there is no sanction without the active involvement of the injured party [*civiliter agere*]), and those of a 'public' nature (which involve a response by the legal system regardless of any victim's involvement [*criminaliter agere*]).

It is also necessary to abandon the idea of an 'objective' subjugation of the offender to the punitive system, or of a 'natural' maturation of this system from a more ancient revengeful approach to more modern, humanitarian and re-educative views.

Even the idea of a necessary link between individual responsibility and punishment must be left aside, since punishment has its own 'ought to be' that is often independent of the offender's personal guilt: the concept of 'defense of civil rights' does not exist in the ancient world, and also the idea of 'innocence' is essentially modern.

Concerning the function of punishment in antiquity, it would be necessary, first of all, to ask ourselves whether we could identify in the civilizations of the past a general concept that could assimilate within itself the meaning of what is understood today by 'punishment'.

The answer to this question has to be doubtful and controversial, because of the many faces of today's function of punishment. But the main difference, between the ancient and modern worlds, probably consists in the fact that, today the idea of 'punishment' is apparently emptied of a function that, in many historical contexts of the past, has instead appeared essential and prevalent. This function is the sacrifice, the ritual purification of the community through the elimination of a person that is considered disruptive. Today, in no country in the world, not even in the most underdeveloped, could be said publicly that a subject is 'sacrificed' for the good of the community, since the idea of sacrifice would seem definitely opposed to the idea of 'punishment': but the two concepts have been combined for centuries, and it is certainly not easy to say when and where they came to separate: But did they really separate, everywhere and completely?

3- The idea of punishment is naturally linked to the idea of guilt. Against whom is given the guilt? Who could have committed it? Who can claim reparation? Modern systems attribute, as we know, at least in theory, legal subjectivity to all living human beings, and therefore consider it possible that anyone can be a victim of an offence and deserve reparation. The situation, however, was profoundly different in ancient systems that generally recognized the entitlement of rights only to precise, limited categories of persons (e.g. citizens, free men, *patres familias*, etc.). While, today we generally have an idea of 'crime' in the abstract sense, i.e. as a behavior prohibited against anyone, the concept in the ancient world was quite different. The same act could represent a crime if performed against a certain subject, a private offence if performed against a different subject, or a completely licit act if performed against a third individual (e.g. the killing of a free man, of someone's slave, of one's subordinate).

4.- A public punishment interprets a primordial human instinct, on a psychological and anthropological level rather than on a rational level, which is the revenge', the restitution of the evil, through the production of a new evil. The logic of 'evil for evil' seems to bring humans closer to animals, as it is linked to a reactive instinct that is the subject of studies on an ethological as well as anthropological level. And if, in anthropology, there is no scientific agreement on the origin of human aggression ('natural' or 'social?'), it is actually the comparison between the behavior of animals and the behavior of humans that has provided so much material for study and observation in the last century. It is evident that the individual reaction of self-protection, or private revenge, seems genetically close to the 'natural' reaction of a stricken animal.

It moves away from the natural reaction, because of human memory, which conceives of revenge even distant in time. The distance is even bigger, when self-defense is replaced by a 'public' response, according to which, revenge must be applied by subjects other than the victims of the offence

The link between reaction and memory emerges clearly from Jewish law, where remembering the evil received is a duty (Deut. 25.17: "do not forget what Amalek did"), not for the victim of a specific injustice, but for the entire people. The offence must be remembered, and in certain cases, a reaction must necessarily correspond to it: in the case of murder or deliberate mutilation, for instance, monetary compensation is explicitly forbidden, preventing the victim, or his relatives, to avoid the perpetrator's death.

Even in case of a manslaughter, whose perpetrator can escape in (so called) sanctuary cities, the victim retains the power of revenge outside the city limits, and the criminal cannot escape confinement through monetary compensation.

In addition to the laws concerning the compulsory nature of reaction, however, there also appear, in the Torah, orders to go beyond revenge, which would later be largely collected and developed in the Mishnah and the Talmud.

It is necessary to remember what Amalek did, but the memory of Amalek must be erased.

5.- But, as we know, the primordial states of all ancient societies saw in the punitive function, mostly a means of sacral expiation, useful in appeasing the anger of God that was triggered by a behavior contrary to the will of the divinity. And it is characteristic that civilizations very different and distant from each other (among which is impossible to find certain relationships of derivation or influence) are associated with similar forms of catharsis and composition, for example in the purifying rituals generally related to the Latin expression "*homo sacer*".

This term is ambiguous and controversial and indicates the condition of a subject who is deprived of the protection of a God or Gods or on the contrary of someone who is 'consecrated' to them, in the negative sense of "abandoned to their anger."

The most famous case of *sacertus* can be found, in the Genesis account, of the killing of Abel by his brother, where Cain, realizes the evil he has done, and its irreparability ("My iniquity is greater than that I may deserve pardon"). He admits that he deserves the loss of divine protection, and also of every right and possession ("Today you are driving me from the land, and I will be hidden from your presence; I will be a restless wanderer on the earth"), including his own life, which now anyone can eliminate ("whoever finds me will kill me").

The same account gives evidence not only of the idea of *sacertus*, but also of its overcoming in the ancient Jewish tradition. The Lord clearly forbids *sacertus* (with the words: "Whoever kills Cain will be punished seven times more"), punishing it in a worsened way ("seven times more") than the 'primary' crime (which, in Genesis, is not even punished, with the apparent inconsistency of a "seven times zero").

God's rejection of *sacertus* is materialized in the famous 'mark of Cain,' which the Lord would place on the murderer so that no one could kill him.

In the Roman experience, *sacertus* expressed a 'negative sacredness,' in which a '*quivis de populo*' (or, perhaps, any *pater familias*) could purify the community of the contaminating' presence of the offender , and restoring *pax deorum*, which is, the divine benevolence toward the community of men.

The murder of the *homo sacer* is not compulsory but beneficial and not punishable: *neque fas est eum immolari, sed, qui occidit, parricidi non damnatur* ("It is not permitted to sacrifice this man, yet he who kills him will not be condemned for homicide")

The similarity between the Hebrew and Roman conceptions is evident. However in the biblical account, sacredness appears as a rejection, an elimination of a primitive practice, forbidden by God.

6.- The history of criminal repression is mostly the overcoming of private revenge and its gradual replacement by 'state' punishment which is imposed in the name of God and then in the name of the community, by public institutions.

Public criminal repression gradually took the place of private revenge, formalizing the patterns and inheriting the primordial violent and cathartic instincts.

We can find a suggestive literary evidence of such a passage - from 'vengeance' to 'justice' - in the exterminating and purifying fury of Odysseus, who after having returned to Ithaca, and eliminating the suitors, decides the death or salvation to his former courtiers, after judging the responsibilities of each of them.

The transition from vengeance to justice represents a hard process that was never definitely completed, not even in the present day.

7.- As we mentioned, the elimination of the guilty, often takes different forms, than revenge, and becomes a cathartic tool. This way, the sacrifice restores the people's and land's lost purity.

What we don't know, is for how long, such logic prevailed in the earliest antiquity. Probably for a very long time.

There are many traces of such logic in the biblical *mitzvòt*: for example, the condemnation to death by fire of those responsible for idolatry and witchcraft, or even the destruction of the cities and forests where they were hosted. Also, the obligation to eliminate the witch, the triple burning for those who unite with the mother of their wives (for the man as well as for the two women); or, the reaction to incest, homosexuality, bestiality, and intercourse during menstruation.

In all these acts, the whole population appears as a victim, affected in its sanctity. As a result, the sanction has a purifying function. The particular 'ordeal' procedure of 'bitter waters' (that the suspected women of adultery had to ingest) is linked to ancient sacrificial approaches. The ritual seems to have the dual function of being a means of proof and - in case of guilt - a way of purifying the community through the elimination of the adulteress. Even subhuman animals that have performed or have been involved in certain actions must also be eliminated for cathartic reasons: the Torah, for example, establishes the stoning of the bull that has caused the death of a man (forbidding the eating of its flesh), or the stoning of the animal with which a human has been physically related; a law of Numa Pompilius predicted, in the case of the removal of boundary stones between land, the possible elimination of both the violator and his oxen.

All ancient populations have known and widely practiced the sacrifice of animals to Gods (alongside plant offerings and often, even the sacrifice of humans).

Is there an inherent difference between the animal sacrificed to the gods as an offering (regardless of the negative actions attributed to it) and the animal sacrificed because of its alleged 'nefarious' act? Can we assume, in the second case, that the animal is sacrificed on account of its 'guilt'?

If this last question seems impossible according to modern logic, it assumes another meaning in the ancient rationality of sacrifice. There are also more questions that emerge from it, and even if they seem difficult to answer, they have to be asked anyway:

To what extent, for ancient people, is the position of man, the "king of creation," different from that of other living creatures?

If 'guilt' exists, does it affect only humans? Or can there be 'punishment' for other living creatures as well? Even, for inanimate things?

When, for example, a sinful city is declared to be destroyed, is it meant to affect only the men who inhabit it, or also the walls and houses that have witnessed the shame?

The universal flood submerged everything, in the same way that the cities of Europe and Japan were entirely destroyed in the last world war, with all their inhabitants, human and subhuman, and their buildings and temples.

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\*\* Professore ordinario di Diritto romano e diritti dell'antichità presso l'Università di Salerno