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TOWARD NEW FOCUS ON RETRIBUTIVE JUSTICE. REFLECTIONS ON BACKGROUND OF PASSIVE SUBJECT OF CRIME

The criminal law is a discipline of law that may raise doubts to the extent of what fair punishment is when in criminal sanctions are stipulated forms of reaction for committed offences. In its retributive trend, the criminal law takes its meaning from infringement of a legal norm of the criminal law. If an offender commits an offence, an appropriate procedure aiming at punishment should be initiated. An offender must bear the consequences of specific conduct. Nevertheless, questions about reason for punishment may emerge in this context and hence questions about premises being a lawful excuse for criminal sanctions may also be asked.

Retributive rationalisation may follow the words of Seneca who stated that: “Punishment is to be inflicted because a crime has been committed” (“*Punitur quia peccatum est*”). Hence, if punishment is an immediate response to a crime, then retribution is in place. The essence of retributive punishment is a just reciprocation for an actually committed criminal offence which is judged by means of a specific criminal trial during which appropriate findings regarding the relevant criminal offence are compiled in conformity with the principle of material truth; a criminal offence determining the response to an offender’s lawless conduct.

Nowadays, however, the retributive vision of punishment is often undermined, being particularly reproached for the failure to answer questions about reasonable justification for punishment¹. Therefore, the conceptual frameworks representing

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¹ See widely R. SHAFER-LANDAU, *The Failure of Retributivism*, “Philosophical Studies” 1996, vol. 82, iss. 3, p. 289-316.

the intention to eliminate or limit institutionalised punishment are reflected in the awareness of the criminal law theorists. The tendency to curb the philosophy of inevitable punishment or deservable punishment in the case of a committed offence may entail a variety of consequences. It may be manifested by means of reasonable measures aimed at limiting criminal liability due to purposefulness, for example, in consideration of the wish for a consensual ending of criminal proceedings declared by an offender, reconciliation with a victim, making up for damages inflicted upon an injured person, upon an offender's initiative. On the other hand, over-privatization of the criminal procedure as well as transferring the so-called dispute back into the hands of the parties directly concerned i.e., an offender and a victim, often become outstanding issues. It is a crucial assumption of the restorative justice, where a victim is the major point of reference. However, it is meaningful that the retribution, with the emphasis on its proportionality, is still socially commonly acceptable².

1. IN SEARCH FOR NEW GROUNDS FOR RETRIBUTIVISM

It bears noting that the contemporary criminal law systems still primarily rely on the retributive punishment but leave a considerable room for a rational way to mete out punishment. Purposefulness entails not only the fact that reducing an offence to its essence may lead to the conclusion that a relationship of an offender and a victim constitutes an interdependence that may be referred to as an object of the substantive criminal law³; every prohibited act being a carrier of a typically abstractly assumed degree of social disturbance that is crucial from the point of view of the criminal law. Hence, the justification for punishment is searched for in various sources, which leads to creating theories concerning the determination of the essence of the criminal justice. Nevertheless, the classic approach focuses on an offender and criminal liability for a committed offence, on the assumption that the criminal law is public law. Therefore, the mainstream reaction to an offender's criminal conduct is punishment imposed on the basis of the principle of just deserts. As it was rightly pointed out by Moore, the criminal law is enforced to punish people because they deserve it in proportion to their merits⁴.

² J.M. SCHEB, J.M. SCHEB II, *Criminal law and procedure*, Belmont 2013, p. 652.

³ G. MARINUCCI, *Il diritto penale messo in discussione*, "Rivista italiana di diritto e procedura penale" 45 (2002), p. 1040.

⁴ M. MOORE, *Victims and Retribution: A Reply to Professor Fletcher*, "Buffalo Criminal Law Review" 1999, vol. 3, no. 1, p. 66.

Similarly, following the version of retributivism created by Angelo Corlett, punishment is reasoned to the extent of its deservability stemming from liability in proportion to the wrong done in effect of criminal conduct⁵.

Punishment may be deemed both appropriate and fair due to the fact that an offender committing an offence has violated the binding legal norms of law, therefore, has disturbed a certain social order. Moreover, the response of relevant authorities in an institutionalised form is reasoned by the fact that an offender has infringed or directly imperilled legal goods that may be assigned to a specific holder who becomes a victim of an offence that causes a breach on such legal goods. Such rationalisation is symptomatic as it is indicative of the close relationship between a possible detriment of legal goods enjoyed by a victim in result of a committed criminal offence and the reasons for criminalising a conduct, and consequential excuse for punishment itself. An offence, that to some extent constitutes a starting point, contains both public and private features. Therefore, it seems that in relation to an offender one should take into account the issue of deservability in the public and private *spectrum* i.e., in relation to the wrong done to a victim⁶.

In view of the above, recognition of the need to adopt such a retributive punishment scheme, that essentially addresses the importance of a victim of a criminal offence, seems to be legitimate. Nevertheless, the essence of the retributivism is giving an offender what he or she deserves, and almost all the cases of criminal offences include victims. Thus, they are constitutive elements of wrongfulness in result of a criminal offence⁷. There is a kind of reciprocity between the sense of injustice felt by a victim and certain compensation a victim derives from suffering of an offender⁸. It seems to me that this assumption is valid, if subjectivity of a victim of an offence is assumed as well as its significance on the grounds of the substantive criminal law. Generally, such a thesis constitutes a starting point for further debate on the significance of a person whose legal goods are protected by the norms of the criminal law, also in the perspective of the significance of such a person in the context of the theory of retributive punishment.

Therefore, a victim occupies an important position within the framework of a prohibited act. I do not fully share the conviction represented by Professor Flet-

⁵ J. ANGELO CORLETT, *Making More Sense of Retributivism: Desert as Responsibility and Proportionality*, "Philosophy" 2003, vol. 78, no. 304, p. 285.

⁶ Cf. A. ASHWORTH, *Punishment and Compensation: Victims, Offenders and the State*, "Oxford Journal of Legal Studies" 1986, vol. 6, no. 1, p. 111-112.

⁷ L. ZAIBERT, *The Ideal Victim*, "Pace Law Review" 2008, vol. 28, iss. 4, p. 891-892.

⁸ J. COTTINGHAM, *Varieties of Retribution*, "The Philosophical Quarterly" 1979, vol. 29, no. 116, p. 241-242.

cher saying that a victim incorporates itself into the definition of legal good protected by the norms of the criminal law⁹. I believe that it is a victim who, as a subject, is acting in its capacity as a carrier of legal goods – objects. I will present this view in a greater detail in the latter part of this paper. However, my approach being supported by the conceptual framework of a passive subject of an offence, in my deliberations I will make the attempt, as Fletcher did, to find the relationship between punishment and interests of those who have become victims of an offence. The theory of retributive punishment will serve as the point of reference.

As Fletcher states, punishment may be both deservable, on the basis of retributive approach, and useful as an instrument of social defence. At the same time, retributivism is, however, an extremely conservative theory, according to which any attempt to modify it, in particular showing the beneficial side effects of punishment, is automatically subject to criticism¹⁰. A similar risk appears in the case of attempts to present a victim as a significant factor from the point of view of retributivism. The theories of retributive justice basically leave no place for victims of an offence, which results in disregard of their importance. It is even more curious as it is a victim who, with all the suffering and harm recognised to be relevant from the point of view of the criminal law, primarily defines or determines an offence itself altogether with an offender. It does not seem legitimate to totally objectify the source of retributivism by equalling it to the relationship between a criminal conduct and a norm prohibiting such a conduct or abandonment under penalty. This results in detachment of an offence within the meaning of criminal law from its actual image. In fact, an offence is reduced to an abstract entity devoid of references to the factual offence that is often the result of a direct or indirect interaction taking place between two elements that constitute its framework – an offender and a victim¹¹.

An offence leaves certain effects in the outside world, thus, it is not an entity detached from reality. A certain kind of output of an offence is in particular the harm done to a victim that expects judgement of an offence. Therefore, if we recognise the significance of the harm on specific grounds, we can logically assume that doing justice to victims not only could but also should constitute a part of the theory of retributive punishment. Punishment in accordance with the principle of

⁹ Cf. G.P. FLETCHER, *The Place of Victims in the Theory of Retribution*, “Buffalo Criminal Law Review” 1999, vol. 3, no. 1, p. 54-55.

¹⁰ *Ibidem*, p. 52.

¹¹ B. HOLYST, *The Scope, Tasks, and Aim of Penal Victimology*, [in:] H.J. SCHNEIDER (ed.), *The Victim in International Perspective*, Berlin–New York 1982, p. 80.

just deserts would be enhanced if it takes into consideration suffering of a victim as a co-decisive constituent in the process of reasoning why the punishment is deservable and therefore fair¹². At the same time, punishment should not be brought to the instrument subordinate to a victim's revenge. The assumption that the state's right to punish an offender within the principle of just deserts is reasoned in so far as a victim feels the need to avenge the wrong done, does not seem to be legitimate¹³. In this context, it is appropriate to look for a suitable place for an injured person. On the one hand, there is a victim and individually recognised wrong or harm and therefore, that is often the will or lack thereof in terms of the punishment of an offender. On the other hand, there is a state with an institutionalised system of punishment carried out by relevant and competent authorities. In the latter case, however, suffering of a victim resulting from the wrong done is disregarded and the retributive theory of punishment is assumed. Thus, despite the assumption that an offender will bear criminal liability within the principle of just deserts, both the role of a victim and a due respect for a victim's rights is marginalised. Due to the suffering caused by an offence which often constitutes a personal tragedy, it is a victim who deserves particular empathy in the above-mentioned context as well as attention to a victim's well-being, property and interests when applying the state's mechanism of punishment. Therefore, the legalistic reasons cannot obscure the frequently human dimension of an offence, given the fact that a victim of an offence is usually a human being.

Considering the above, it seems plausible to ask about the point of retributivism¹⁴. The doubts arise from the fact that retributivism being rooted in morality and deriving its sense from morality ignores a victim of an offence as an important factor in the process of rationalisation of punishment. *De facto*, the theory of retributivism involves separation of punishment from what it has been meted out for. It is rather regarded as an outcome – an offence aside from its substrates – subjects. Of course, an offence is a product of an offender's conduct in contravention of the norms of the substantive criminal law. However, it can be noticed that the attention is generally drawn to the very offence in certain detachment from the causative factors. In my opinion, in the theory of retributive justice

¹² See G.P. FLETCHER, *The Place of Victims in the Theory of Retribution*, p. 58.

¹³ See J.G. MURPHY, *Getting Even: The Role of the Victim*, "Social Philosophy & Policy" 1990, vol. 7, iss. 2, p. 209-225.

¹⁴ See B. SLATTERY, *The Myth of Retributive Justice*, [in:] W. CRAGG (ed.), *Retributivism and its critics: Papers of the special Nordic conference held at the University of Toronto 25-27 June 1990*, Stuttgart 1992, p. 32-33.

a victim of an offence and its importance is generally unjustly depreciated. As it was rightly pointed out by Goldman, it is necessary to find a certain point of balance between the rights of an offender and of a potential victim¹⁵. A well-deserved punishment is based not only on moral considerations but also on rational considerations referring to what an offender deserves and providing it with proper dimension¹⁶.

In relation to the preliminary analyses, an outline of certain ideas presented by Jean Hampton is worth mentioning. Firstly, it should be pointed out that the argument that lawlessness of an offence consists in denying a victim's value in an externalised manner. Such an act is therefore regarded as an offence, *inter alia*, due to the fact that it sends a false message about the importance of a victim relating to an offender. In this case it is not essential how a victim of an offence regards the issue of a direct infringement of a victim's legal interests i.e., how a victim understands the wrong done to a victim by an offence. In fact, the key issue is the very fact of infringement of a norm of the criminal law, hence the infringement of legal goods, a holder of which is a subject, so that there is justification for a response to an offence in relation to an offender, the response being punishment¹⁷.

A particular advantage of the above conceptual framework seems to be the emphasis put on the importance of a victim in terms of a factual offence, and consequently, in the context of punishment that would constitute a way to restore the value of the wronged person that has been negated by an offence. This theory, however, seems to refer only to actual victims of offences, rather than to a specific type of a victim. With this approach, once again it may bring about the allegation of building an idea assuming consideration of punishment through the prism of each individual case of a direct legal good risk or infringement of legal good. Then, retributivism loses its essential characteristics because it is overly directed towards victims' legal interests protected by the norms of the criminal law and does not cover in its *spectrum* the entire class of victims i.e., not only those persons whose legal goods have been infringed but also the future or potential victims. In order to maintain a consistent vision of retributivism providing a place for a victim, as it was rightly observed by Fletcher, one should define a victim as a representative

¹⁵ A.H. GOLDMAN, *Toward a New Theory of Punishment*, "Law and Philosophy" 1982, vol. 1, iss. 1, p. 74.

¹⁶ Cf. H.A. BEDAU, *Retribution and the Theory of Punishment*, "The Journal of Philosophy" 1978, vol. 75, no. 11, p. 610-611.

¹⁷ J. HAMPTON, *An Expressive Theory of Retribution*, [in:] W. CRAGG (ed.), *Retributivism and its critics*, p. 12-13.

of the entire class of victims from the point of view of a particular generic type of a prohibited act¹⁸. Nevertheless, it seems that the reflections of the above-mentioned author lack a strong substantive foundation for basically pertinent statements. In this context, the concept of a passive subject of a crime seems to be particularly valuable and worthy of reference in relation to the retributive theory of punishment; this concept intends to be considered in comparison with the doctrine of the Italian criminal law.

Punishing offenders indicates that a victim and an offender are equal, of course, assuming that a subject who committed an offence will bear the deserved punishment. To some extent it reverses the *status quo* caused by a prohibited act. Taking into consideration the Hegelian point of view, punishment constitutes a certain factor annulling the wrong done to a victim¹⁹. A victim and an offender are equal insofar their subjectivity is acknowledged on the basis of the very composition of a type of a prohibited act. The balance disturbed by an offence does not allow to disregard not only the importance of a victim in the penal procedure but also the fact that legal good of a victim has been directly infringed or imperilled by an offence. In such context, the statement that the social utility of the institutions conducting penal procedure should constitute the reasons in a further perspective, gains even more significance²⁰. Thus, it seems even more justified to perceive a victim in terms of the model of retributive justice. I acknowledge that the interests of a victim must be subordinate to the theoretical foundations of punishment, including retribution²¹. Nevertheless, they should be taken into account, in the context of justifying these theories, as essential constituents of an offence – its subjects. At the same time I am far from accepting the assumption that confines punishment to a certain declaration about the value of a victim of an offence²².

¹⁸ See G.P. FLETCHER, *The Place of Victims in the Theory of Retribution*, p. 55.

¹⁹ N. HANNA, *Say What? A Critique of Expressive Retributivism*, "Law and Philosophy" 2008, vol. 27, iss. 2, p. 140.

²⁰ Cf. J. ANGELO CORLETT, *Making Sense of Retributivism*, "Philosophy" 2001, vol. 76, no. 295, p. 78.

²¹ Cf. M.M. O'HEAR, *Victims and Criminal Justice: What's Next?*, "Federal Sentencing Reporter" 2006, vol. 19, no. 2, p. 84.

²² Cf. J. HAMPTON, *The retributive idea*, [in:] J.G. MURPHY, J. HAMPTON (eds.), *Forgiveness and Mercy*, Cambridge 1988, p. 111-161. Cf. also D. GOLASH, *Punishment: An Institution in Search of a Moral Grounding*, [in:] C.T. SISTARE (ed.), *Punishment: Social Control and Coercion*, New York–Washington–D.C./Baltimore–Bern–Frankfurt am Main–Berlin–Vienna–Paris 1996, p. 11-28.

2. CONCEPT OF PASSIVE SUBJECT OF CRIME

As it has been already pointed out, a victim plays an important role in substantive terms. This issue should be deemed unquestionable as well as the importance of a victim in the context of an institutionalised punishment and the degree of penalty. Therefore, it is reasonable to consider the theory of a passive subject of a crime that will be juxtaposed with the idea of retribution further on in this paper.

As an introduction to this stage of consideration, it should be particularly noted that the concept of a passive subject of a crime has long been widely accepted and well-known in the West-European legal doctrine, e.g. in the French legal doctrine, the Spanish doctrine, the Italian doctrine as well as in the Latin-American literature, e.g. in the Argentinian literature, the Colombian literature, the Mexican literature or the Venezuelan literature. However, these considerations shall be carried out in comparison of the teachings of the Italian criminal law²³.

A passive subject of a crime (*soggetto passivo del reato*) is a holder of legal goods protected by the norms of the criminal law²⁴. In other words, the subject of a crime is a victim²⁵. It is characteristic that the concept of a passive subject is found in the doctrine of the criminal law and in the judicial decisions, while in the Italian Criminal Code of 19 October 1930²⁶, in book I title IV, as indicated by its title: "*Della persona offesa dal reato*", the legislature adopts the term of a person injured by an offence (Article 120-131 of the Italian Criminal Code). Therefore, the doctrine sometimes uses interchangeably the terms *la persona offesa* and *l'offeso* for a passive subject; it can be understood as "a person offended by a crime". However, the indicated term should not be identified with the procedural recognition of *persona offesa dal reato* that means a victim, and therefore, a passive subject playing a particular role in the criminal procedure stipulated by the provisions of the law. The explanation of the concept of an injured person (*persona offesa dal reato*)

²³ See M. SMARZEWSKI, *Podmiot bierny przestępstwa na tle włoskiego prawa karnego*, Lublin 2013, p. 19-21 and literature there cited.

²⁴ See: M.G. AIMONETTO, *Persona offesa dal reato*, [in:] *Enciclopedia del diritto*, vol. XXXIII, 1983 Milano, p. 319; F. ANTOLISEI, *L'offesa e il danno nel reato*, Bergamo 1930, p. 108-110; R.A. FROSALI, *Soggetto passivo del reato*, [in:] *Novissimo Digesto Italiano*, vol. XVII, Torino 1970, p. 817; R. GAROFOLI, *Manuale di Diritto Penale. Parte generale*, Milano 2003, p. 259; A. GIARDA, *La persona offesa dal reato nel processo penale*, Milano 1971, p. 13; F. MANTOVANI, *Diritto penale. Parte generale*, Padova 2009, p. 225; P. NUVOLONE, *La vittima nella genesi del delitto*, "Indice penale" 7 (1973), p. 640; A. PAGLIARO, S. ARDIZZONE, *Sommario del diritto penale italiano. Parte generale*, Milano 2006, p. 153.

²⁵ F. ANTOLISEI, L. CONTI, *Istituzioni di diritto penale*, Milano 2000, p. 99.

²⁶ D.P.R. 22 settembre 1988, n. 447, "Gazzetta Ufficiale" n. 250 del 24 ottobre 1988.

as well as the concept of a passive subject should be searched for in the doctrine²⁷ because it is not defined in the provisions of the Italian Code of Criminal Procedure of 22 September 1988²⁸. What is important, in the outline of the debate on the position of a victim understood as a passive subject of a crime in the perspective of the retributive theory of punishment, a passive subject of a crime constitutes a substantive category, i.e. refers to the class of victims but does not constitute a concept of the law on criminal procedure. It is an important view that allows to propose a thesis that every injured person is also a passive subject. On the other hand, not every passive subject is an injured person, thus, not every passive subject constitutes a party to the criminal proceedings.

In the context of the concept of a passive subject of an offence, it is crucial to determine it, which is not always easy, on the basis of the definition formulated in the introduction to this stage of consideration. In fact, each offence may infringe or imperil legal goods of several persons, not every of which can be considered as a passive subject. For example, in the case of theft, a prohibited act may infringe both legal good of an owner of assets as well as indirectly legal interests of its creditor. Homicide often causes harm to persons closest to a slain person, in particular, when he or she was a sole breadwinner in family²⁹. Therefore, a person who suffers harm indirectly in result of an offence is not a passive subject; a passive subject is only a holder of legal goods (that is a legal subject of a type of an offence), who suffers a constitutive damage due to the occurrence of a crime³⁰. The indicated constituent of the immediacy of legal good risk or infringement of legal good allows to distinguish a passive subject from an aggrieved person. According to the provision of Article 185 of the Italian Penal Code, an aggrieved person is a subject who has suffered harm or wrong of financial or non-financial nature, and therefore is entitled to submit a request for repairing it. Wrong or harm constitutes the criterion for determining both an aggrieved person and a passive subject. Thus, in order to distinct between the indicated categories one should apply the criterion of the immediacy of legal good risk or infringement of legal good. Of course, one should bear in mind the frequent convergence of the characteristics of a passive subject and of an aggrieved person in individual cases, in relation to a specific individual. Such a convergence, however, is not necessary.

²⁷ P. GUALTIERI, *Soggetto passivo, persona offesa e danneggiato dal reato: profili differenziali*, "Rivista italiana di diritto e procedura penale" 38(1995), p. 1071.

²⁸ R.D. 19 ottobre 1930, n. 1398. *Approvazione del testo definitivo del Codice penale*, "Gazzetta Ufficiale" n. 251 del 26 ottobre 1930.

²⁹ F. ANTOLISEI, L. CONTI, *Istituzioni di diritto penale*, p. 99-100.

³⁰ F. MANTOVANI, *Diritto penale. Parte generale*, p. 225.

The concept of a passive subject of a crime should be also distinguished from a subject matter of an executory act. The subject matter of an executory act is a person or an object that is affected by the criminal offence of an offender³¹. The indicated differentiation is important to the extent that the characteristics of a passive subject of a crime and a subject matter of an executory act often coincide in one person which in turn can lead to the identification of these two elements of the composition of the type of an offence. This type of situation occurs especially in cases where a person who is a holder of legal goods protected by the norms of the substantive criminal law, that have been directly infringed or imperilled by an offence, is also a subject matter of an executory act. Such a convergence can be observed, *inter alia*, in respect of homicide, battery, bodily harm, insult, punishable threat or deceitful abuse of a person unable to undertake legal actions.

General acceptance of the convergence of the category of a passive subject and a subject matter of an executory act understood as a person who is affected by an offence should be considered inappropriate. A situation may occur when a subject matter of an executory act will correspond to an aggrieved person in result of an offence but not to a passive subject. As an example, one may use corruption, in the case of which a passive subject is the State, whereas an aggrieved person is a person forced to provide benefits by a person holding public office. A passive subject of a crime should not be identified with a subject matter of an executory act, despite the frequently occurring coincidence between the indicated figures.

The necessity for such a distinction is important in terms of both subjective and objective aspect. A subject matter of an executory act may be a human being or an object, whereas a passive subject may be, apart from a natural person, a legal person or a legally undefined grouping of individuals, such as society, family, institutions but never an object³². Nevertheless, the fact that a subject matter of an executory act is a human being will not always result in its sameness with a passive subject of a crime. One should keep in mind that a passive subject often constitutes a certain carrier of a subject of an offence, a holder of legal good protected by the norms of the criminal law. Determining a holder of legal good allows to determine a passive subject. A bright example stems from abduction of a minor with the related consent. In this case a subject matter of an executory act is a minor, while a passive subject is parent or legal guardian who holds protected legal goods that are exercised by means of parental authority over the minor³³.

³¹ F. GIANNITI, *L'oggetto materiale del reato*, Milano 1966, p. 23-24.

³² *Ibidem*, p. 183-205.

³³ G. MUSOTTO, *Diritto penale. Parte generale*, vol. I, Milano, p. 125; A. SANTORO, *Manuale di diritto penale*, vol. I, Torino 1958, p. 298.

Then, it is important to determine a passive subject of a crime. As it has already been mentioned, it can be either natural persons (in relation to their subjectivity, possession of legal capacity or capacity to undertake legal actions is irrelevant) or legal persons or other communities, institutions (e.g., in the case of offences against public security)³⁴. Interestingly, the state is indicated as a passive subject generalised in the doctrine of the Italian criminal law³⁵.

Of course, the state is also a passive subject of all the crimes that particularly infringe its legal interests, for instance, crimes against state security, crimes against public administration, crimes against the judicial system³⁶. The arguments in favour of considering the state as a passive subject of certain crimes can be derived also from the legal definition of a political crime stipulated in Article 8 of the Italian Penal Code. The indicated provision states that a political crime is any crime that infringes political interests of the state or the political rights of its citizens. In addition, it stipulates that a political crime is also commonly committed entirely or partly for political reasons.

In the Italian criminal law one may also distinguish a passive subject that is vague in respect of offences, in the case of which legal goods or interests, protecting good that is directly infringed or imperilled by an offence, are assigned to a vague domain of subjects³⁷. Recognition of such a group of passive subjects is reasoned in accordance with the taxonomy of the Code in which one can find groups of criminal offences classified according the following categories: offences against public trust; offences against public security; offences against religious feelings and respect for the deceased; offences against public order; offences against family.

Such an abstractly recognised group of offences is defined as offences with an unspecified passive subject³⁸. Those offences are interchangeably referred to as unclear or vague offences as the nomenclature is derived from the term *vage Ver-*

³⁴ G. FLORA, F. AZZAROLI, *L'elemento oggettivo del reato*, [in:] G. FLORA, P. TONINI (eds.), *Nozioni di diritto penale*, Milano 1997, p. 41-42.

³⁵ G. BETTIOL, L.P. MANTOVANI, *Diritto penale. Parte Generale*, Padova 1986, p. 761-762; G. FIANDACA, E. MUSCO, *Diritto penale. Parte generale*, Bologna 2007, p. 169-170; V. MANZINI, *Istituzioni di diritto penale italiano. Parte generale*, vol. I, Padova 1949, p. 585; A. SANTORO, *Manuale di diritto penale*, vol. I, p. 298.

³⁶ F. ANTOLISEI, L. CONTI, *Istituzioni di diritto penale*, p. 100.

³⁷ C. FIORE, S. FIORE, *Diritto penale. Parte generale*, Torino 2008, p. 158.

³⁸ A. DE VITA, *I reati a soggetto passivo indeterminato. Oggetto dell'offesa e tutela processuale*, Napoli 1999; F. MANTOVANI, *Diritto penale. Parte generale*, p. 225-226; A. PAGLIARO, *Principi di diritto penale. Parte generale*, Milano 1996, p. 239.

brechen formed in the German doctrine³⁹. The multiplicity of passive subjects is imminent in the case of offences, the essence of which is that they infringe or imperil an unspecified number of individuals. However, in order to be able to confer about offences of an unspecified passive subject, an additional precondition must be met, namely that the description of such offences governed in acts of law encompasses protected non-exclusive good since such good is not intended for exclusive use⁴⁰. It is plausible to state that with respect to such good there is the so-called dispersed interest⁴¹. This interest is a certain private subjective reflection on good and the inclination of a subject to protect such good⁴². Thus, if it is difficult to identify a typically specific subject or subjects, legal goods of whom have been infringed or imperilled by an offence, we deal with a predefined indeterminable group of subjects, and hence, a category of unspecified passive subjects⁴³.

3. IMPORTANCE OF PASSIVE SUBJECT OF CRIME

Having preliminarily deliberated upon the conceptual framework of a passive subject in comparison to the Italian criminal law, it seems necessary to pass general comments regarding the legal significance of a passive subject. In this context, the properties of a victim of an offence or a victim's conduct gain particular importance.

The properties of a passive subject occupy an important place in relation to the genesis and the very committing of a prohibited act. They may in fact constitute the features of a prohibited act as well as the circumstances that are taken into account by the court when meting out punishment. The properties of a victim of an offence gain importance to be features describing a victim's characteristics, status of a victim's affairs, situation, relationship with an offender or the circumstances determining an event that incorporates itself into the statutory features of a criminal offence indicated in acts of law, that govern the degree of punishment for a criminal offence. Hence, it can be concluded that in some cases, committing of a criminal offence may depend on certain attributes of a passive subject.

³⁹ See P.J.A. VON FEUERBACH, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts*, Giessen 1840, p. 535 n. See also M. BERTOLINO, *Il reo e la persona offesa. Il diritto penale minorile*, [in:] C.F. GROSSO, T. PADOVANI, A. PAGLIARO (eds.), *Trattato di diritto penale. Parte generale*, t. I, Milano 2009, s. 228.

⁴⁰ Cf. A. DE VITA, *I reati a soggetto passivo indeterminato*, s. 7.

⁴¹ M. CRESTI, *Contributo allo studio della tutela degli interessi diffusi*, Milano 1992, p. 3-7.

⁴² F. ANTOLISEI, L. CONTI, *Istituzioni di diritto penale*, p. 94-95.

⁴³ G.D. PISAPIA, *Istituzioni di diritto penale. Parte generale e parte speciale*, Padova 1975, p. 40.

Properties of a victim may also precondition specific legal qualification of criminal conduct of an offender, as a favoured or qualified one. In this context, the aforementioned characteristics, state of personal affairs, situation or mutual relationship with an offender will gain significance. Furthermore, in view of these deliberations, one should also refer to an erroneous passive subject, which is the case with an offender who intends to infringe or imperil legal goods of a person other than the actual victim.

Therefore, from the perspective of the substantive criminal law, properties of a passive subject of an offence constitute an extremely important element; they are also considered within the context of victimology. Certain attributes of a victim determine an offence and are incorporated into the process of committing an offence; they constitute the elements shaping the very prohibited act, i.e. the elements without which conduct cannot be implemented by a person. But they also allow to determine proper volume of legal liability for an offence, and have both mitigating and tightening aspect.

If we see an offence as a phenomenon on the basis of which one can frequently observe the interaction between a passive subject and an active subject, it is reasonable to assume that on specific grounds, not only (but particularly) mere criminal conduct of an offender is significant but also the issue of conduct of a victim of an offence that could be important when considering the causes of criminal offence⁴⁴. A passive subject's conduct may influence motivation of an offender and create incentives for offence or discontinuation or consent to committing an offence by an active subject or even induce another person to carry out the features of a prohibited act inflicting on a passive subject. Thus, a victim should be considered in terms of sometimes active influence on creation of an intention and further realization of features of a prohibited act.

Therefore, in a number of cases conduct of a passive subject is very important from the point of view of both substantive and procedural criminal law. Conduct of a victim may be important before committing a prohibited act, in the course of realizing features of a prohibited act or, finally, after having committed an offence.

A passive subject may cause retaliation on the part of an offender particularly by means of provocation or other kinds of conduct. Moreover, a prohibited act may be a consequence of consent expressed by a holder of legal good or of re-

⁴⁴ P. NUVOLONE, *La vittimologia: Aspetti giuridici*, [in:] F. FERRACUTI, F. BRUNO, M.C. GIANINI (eds.), *Trattato di criminologia, medicina criminologica e psichiatria forense*, vol. III: *La criminologia e il diritto penale*, Milano 1987, p. 91.

quest addressed by a passive subject to an active subject, the content of which is committing an offence having an impact on a victim by an active subject. Even before committing an offence, an active subject may also influence a victim by coaxing or helping, for example, a passive subject in attempting on a passive subject's life. Thus, conduct of a passive subject can constitute a feature that is the necessary precondition for a criminal offence to be committed. A passive subject's conduct is often important in terms of realizing features of a prohibited act in reference to the *modus operandi* of an offender. Therefore, it seems legitimate to conclude about frequently constitutive nature of a victim's conduct in relation to the circumstances specified in the act of law, that govern the occurrence of a prohibited act.

A passive subject's conduct may also be relevant in the context of the degree of penalty i.e., it may mitigate it or tighten it. Hence, one may draw a conclusion that there is a relationship between the final ruling on the criminal responsibility and the individual conduct of a victim that takes place before, during and after committing an offence.

Conduct of a subject of an offence may also be considered as a reason for exclusion of criminality of an act in terms of its illegality. This statement refers to the institution of consent of a holder of legal good and to the necessary defence. Conduct of a victim of an offence is also often a *conditio sine qua non* for institution and continuation of criminal proceedings. We deal with this type of situation when prosecution of an offence depends on the activity, primarily of a victim, in the form of submission of a required application form or petition.

Conduct of a passive subject who, within the framework of criminal procedure, frequently performs the roles assigned by the criminal procedural law, will also affect the course of criminal proceedings, both in the pre-trial stage as well as later in the court proceedings, during which a victim may act as in the capacity as a party or a victim's participation is relevant due to the nature of a procedural step.

4. RATIONALISATION OF RETRIBUTIVISM IN VIEW OF CONCEPT OF PASSIVE SUBJECT OF CRIME

Following the presentation of the concept of a passive subject of a crime and an abstract approach to the related significance for the criminal law, it seems reasonable to refer to the outlined theory of retributive punishment and to determine the new optics that I would like to suggest in this context. Therefore, I will at-

tempt to reason for the vision of retributivism that derives from taking consideration of the assumptions underlying the institution of a passive subject. I will also point out the relationships that can be identified between the issue of recognition of a victim as a subject of a crime and the problem of retributive punishment.

The significant relationships between the concept of a passive subject and the retributive theory of punishment can be traced even in the definition of a victim understood as a subject of an offence. A passive subject is a holder of good protected by the norms of the criminal law that has been infringed or imperilled by an offence. In this case, if we assume that legal goods, that are affected by offences, generally has holders, the social harmfulness caused by an offence, the reason for their criminalisation and penalisation results to some extent from the fact that not only the objectively understood social order (the guardian of which is the State) but also the welfare of individuals have been infringed or disturbed. However, if on the indicated grounds there is such an essential relation between the issue of the subjectivity of a victim and the wrong that is suffered by a victim in result of an offence and between the problems of criminalisation and penalisation, one can assume what an offender deserves is, or at least should be reflected in the punishment of an offender and in the degree of penalty. However, punishment is imposed when a crime has been committed; when adopting the concept of a passive subject, it is considered that a victim is a constituent of a prohibited act, and therefore becomes the second (side by side with an offender) important factor existing theoretically but also practically in the reality of an offence. Thus, if one assumes such a place of a victim in the composition of a type of a prohibited act, the basis for the adoption of the quoted statement is well grounded. I must, however, emphasise that I do not intend to opt for making the punishment dependant on a victim of an offence or for a stronger dependence of this issue on a victim's intentions and position in a criminal procedure. One thing is, however, a material concept excusing an institutionalised mechanism of punishment, which, as it seems, to a large extent is related to the theory of retributive punishment. And another one is understanding of a passive subject as a key factor in the criminal offence which allows also to seek further rationalisation for retributivism. If the context of punishment one takes into account good of a victim, the punishment regarded as a balance for the infringement of the good of a passive subject becomes more fair, thus, is fully justified.

Further explanation of the proposed approach may be found in the issues relating to the definition of a passive subject. This subject is, as it has already been emphasised, a natural person, a legal person or an institution, but also the state. In

the study of the Italian criminal law the state is quite often regarded as a constant and generalised passive subject of a crime. With such an approach to the issue of the passive subjectivity, it seems reasonable to recognise that the concept of a passive subject fits into the paradigm of retribution, in the sense that it is indicated that the main subject of a crime is a state with the right to punish and which, as Petrocelli said, is a victim for itself⁴⁵. With regard to passive subjects of crimes, in the case of a direct infringement or imperilment of the norms of the criminal law, one assumes general subjectivity (of the state) and a particular subjectivity referring to further identifiable subject. The concept of a passive subject is therefore consistent with the retributive model and highlights the fact that each offence to a greater or lesser extent remains within the field of interest of the state. The state, as the guardian of the established legal order is authorised and at the same time obliged to impose a fair retribution for the wrong done to an individual and, above all, due to the act of infringement. The state may be then regarded as a kind of a surrogate victim of an offence but to some extent it takes over the role of an essential factor from a victim in the judicial system. If it is not capable of fulfilling its essential role that is to prevent and reduce crime, then this is probably due to the fact that when shaping the judicial system does not pay due attention to those subjects that suffer in result of a criminal offence i.e., victims. However, it seems that it should exercise restraints in view of the adoption of the assumption that the state constitutes a generalised passive subject of a crime. This idea is essentially limited to the theoretical determination which has no practical application of the norms of the criminal law⁴⁶. On the other hand, the recognition that the state has an interest in the criminal-law protection of the legal good protected by the norms of the criminal law can help to explain the public nature of the criminal law and to explain why the punishment is not a private revenge and for what reasons it must not be brought to the issue of compensating a victim for the wrong done.

Finally, it is necessary to draw attention to the importance of a victim of an offence in the context of property owned and conduct. A victim should not be regarded through the prism of a subject matter of an executory act. A passive subject is the recipient of an offence and usually its constituent; its role is significant in relation to the genesis and dynamics of a criminal act. The aspects under analysis, in which the importance of a passive subject is expressed, allow to agree with the thesis according to which it is not possible to understand the beginning,

⁴⁵ B. PETROCELLI, *Principi di diritto penale*, vol. I, Napoli 1955, s. 222-223.

⁴⁶ G. FIANDACA, E. MUSCO, *Diritto penale. Parte generale*, p. 169-170.

growth and development of an offence if the mutual relations and relationships between an offender and a victim are not judged⁴⁷. Taking into consideration the criminological aspect of the concept, it can be concluded that a passive subject is an important factor in the context of punishment, since a victim's significance determines whether a victim is to be taken into account when determining what an offender deserves in view of the criminal liability and within the limits of the fault and resulting lawlessness.

In conclusion, it seems that it is plausible to state that a victim of a criminal offence, understood as a passive subject of a type of an act prohibited under penalty, in its substantive aspect fits in the retributive vision of punishment. In particular, it is an expression of justification for punishment. Apart from the fact that punishment is a state, institutionalised form of response to the lawless act committed, it is additionally, but very importantly, justified in the fact of a direct legal good risk or infringement of legal good attributable to a particular subject or to a circle of subjects that cannot be determined, and therefore limited. Thus, punishment is not only a form of response to an act recognised as socially harmful or an offence governed by the criminal law but also an important response to wrong, from the point of view of the criminal law, that is inflicted on the legal goods of an individual who is normally a human being. Thus, both the fact of wrong as well as the suffering caused by an offender can be regarded as the factors that additionally rationalise the necessity to punish an offender. Nevertheless, it should not be forgotten that punishment is an instrument of a public nature and in the mainstream it is an expression of a state's counteraction measured in relation to the principle of just deserts, particularly with regard to the principle of proportionality. In such a case, when meting out punishment, one takes into consideration all circumstances of an offence, therefore, primarily those relating to an offender but also those concerning a victim. In particular, understanding a victim as a subject of the composition of a type of a prohibited act, one can search for its importance as a factor which is often a constituent of an offence and, therefore, as a factor which should necessarily be considered in the context of punishment.

In this case, the concept of a passive subject indicates importance of a victim in view of an offence regarded both from a legal and social point of view. Not

⁴⁷ M.M. CORRERA, D. RIPONTI, *La vittima nel sistema italiano della giustizia penale. Un approccio criminologico*, Padova 1990, p. 6.

only an offender, as the recipient of punishment, plays an important role in an offence but also a victim who constitutes a factor that often has a crucial importance within a generic type; that is why a victim is also a significant constituent of the actual conduct detrimental to a victim and realizes the features stipulated in acts of law. Thus, in many cases, a victim will be a subject interested in punishing a wrongdoer. The statement of Mantovani is particularly relevant in this context, as he argued that a coherent penal policy must strive for a sustainable synthesis of the position of a victim and an offender. The penal policy should be an expression of the continual search for balance between personal freedom and social protection⁴⁸. A victim of an offence should be understood as a subject within the composition of an offence, at the same time stressing its actual influence on the criminal situation – its occurrence of and shaping of its image. A victim should also have a sense of protection of legal goods by the state. The state is to uphold the protected values. An offence having been committed, a passive subject has an interest in punishing an offender⁴⁹. If punishment is not grounded in parallel by infringement of legal goods of a victim or legal interests risk faced by a victim, it must be considered that the earlier assumption that legal goods are protected as the specific attributes of an individual would no longer be valid. Such goods could be divided into completely separate entities, protection of which would lie solely in the interests of the state. Such an approach raises objections, because punishment should essentially be a reciprocation for the wrong caused by an act detrimental to the legally protected interests, a holder of which is a victim.

Therefore, if the criminal law governs people's conduct, an active and possible subject of which become an offender and a victim, providing a relevant sanction, punishment being the result of criminal conduct must essentially involve an offender and take into account the circumstances relating to an offender but constitute an expression of lawlessness occurring both in the social and individual aspect, therefore, must be related to a victim. In the criminal law that is based on the principle of justice, one should also emphasise the importance of a victim of an offence, especially in the aspect of its subjectivity, in the context of the rationalisation of punishment in general, but also at a later stage as an important factor in relation to a specific punishment and its severity.

⁴⁸ F. MANTOVANI, *Diritto penale. Parte generale*, s. 226.

⁴⁹ PAGLIARO A., *La rilevanza della vittima nel diritto penale sostanziale*, [in:] *La vittima del reato. Questa dimenticata. Tavola rotonda nell'ambito della conferenza annuale della ricerca (Roma, 5 dicembre 2000)*, Roma 2001, p. 39-41.

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NOWE SPOJRZENIE NA SPRAWIEDLIWOŚĆ RETRYBUTYWNA.
ROZWAŻANIA NA TLE KONCEPCJI
BIERNEGO PODMIOTU PRZESTĘPSTWA

STRESZCZENIE

W artykule podjęto próbę nowego spojrzenia na retributywizm. Punkt wyjścia dla prezentowanej idei stanowi koncepcja biernego podmiotu przestępstwa. Wydaje się bowiem, że retributywizm wobec wyczerpania środków do jego argumentacji wymaga nowej podbudowy. Stąd postuluje się zestawienie teorii retributywnego karania z koncepcją podkreślającą znaczenie ofiary przestępstwa w jej materialnoprawnym ujęciu. Prawo karne potrzebuje uzasadnienia dla publicznej reakcji, którą stanowi kara z uwzględnieniem pomiotu biernego, tj. tego, czyje dobra prawne, będące przedmiotem ochrony norm prawa karnego materialnego, zostały bezpośrednio naruszone lub zagrożone przez przestępstwo. To ofiara cierpi wskutek przestępstwa i dlatego też wymaga szczególnego podejścia, zwłaszcza ze strony odpowiednich organów państwowych. Jednocześnie jest ona podmiotem, który może posiadać istotne znaczenie w kontekście ustalenia tego, na co sprawca zasługuje, także w perspektywie sądowego wymiaru kary. Ofiara przestępstwa jest więc istotnym czynnikiem, abstrahując nawet od kompensacyjnej funkcji prawa karnego. Kluczowe miejsce w tym kontekście zajmuje koncepcja biernego podmiotu przestępstwa, która może zostać zestawiona spójnie z retributywizmem. Nie jest ona bowiem względem niego teorią sprzeczną, a wręcz przeciwnie, w wielu aspektach pozostaje z nią zbieżna i stanowi istotne dopełnienie, niejednokrotnie kluczowe dla uzasadnienia sensu retributywnego karania.

Słowa kluczowe: retributywizm, sprawiedliwość retributywna, przestępstwo, ofiara, sprawca, bierny podmiot przestępstwa, kara, karanie

TOWARD NEW FOCUS ON RETRIBUTIVE JUSTICE.
REFLECTIONS ON BACKGROUND
OF PASSIVE SUBJECT OF CRIME

SUMMARY

This paper supports the attempt undertaken by its author to take a fresh look at criminal justice in relation to retributivism and conceptual framework of a passive subject of a crime is the starting point for any related consideration, for it seems that retributivism needs new grounds when measures of argument strength are no longer feasible. Therefore, it is postulated to juxtapose the theory of retributive punishment with a victim of a crime in its substantive perspective. However, the criminal law requires reasonable grounds for public response being punishment, not losing sight of a subject whose legal goods are protected by norms of the criminal law but have been directly infringed or imperilled by an offence. After all, it is a victim who suffers in effect of an offence, thus requiring a special approach, especially on the part of relevant public authorities. At the same time, a victim is a subject who may be significant in the context of determination of what an offender deserves, and therefore in the perspective of judicial punishment, too. So, a victim is an important factor, even if we disregard the compensation function of the criminal law. The conceptual framework of a passive subject of a crime, that may be consistently juxtaposed with retributivism, has been specifically highlighted in this paper. This conceptual framework is not contradictory to retributivism, on the contrary, in many respects it is consistent with retributivism and serves the grounds for retributive punishment.

Key words: retributivism, retributive justice, crime, victim, offender, a passive subject of a crime, penalty, punishment