

POENA EXPIATORIA IN CIC

A terminological note

The *Codex Iuris Canonici* of 1983 replaced the term «*poena vindicativa*», which had been used in the previous code of 1917 (cann. 2286 sq), with the term «*poena expiatoria*» (can. 1336). It can be asked whether this was an improvement in terminology. A more radical question would be whether these terms are needed at all for legislation.

In this short study, I shall first report how the new term «*poena expiatoria*» was introduced in CIC83. Second, I shall discuss the traditional term «*poena vindicativa*», which was used in CIC1917 and which it replaced. Thirdly and finally, the question may be raised about the terminological option in a future revision.

1. A Novelty in Canonical Terminology

In the Study Group «De iure poenali», which prepared the draft of canons «De poenis expiatoriis», there was some discussion about this change of terms, but the reasons for the change have not yet been made known. Some preferred another term.

De locutione «poenae expiatoriae», quam schema pro «poenis vindicativis» adhibet, aliquae animadversiones factae sunt. Aliqui proposuerunt potius locutionem «poenae reparatoriae». Propositio Consultoribus non displicet, ideoque locutio «reparatoriae» in textu provisorie recipitur, ita ut postea seligi possit quatenus in textu definitivo retineri debeat (Communcationes 7 [1975] 169).

For whatever reasons, all were agreed on a change of terminology. A minority opted for the term «*poenae reparatoriae*», which was retained provisionally but in the end the term «*poenae expiatoriae*» was definitively adopted.

The term «*poena vindicativa*» has been much discussed in philosophy of law. It has been long denounced by positivists, but they have rather confused the issue than clarified the matter. In the minds of many «*poena vindicativa*» suggests revenge or vengeance, and therefore they rightly want a change of term. But this is owing to a misunderstanding. In Roman law and classical canon law «*vindicare*» means «to lay claim to as one's own, to make a claim upon, to demand»¹. The term «*poena vindicativa*» belongs to the traditional legal vocabulary of canon law² and so it was natural for CIC17 to use this term. No objections were raised against its use by standard commentators like Wernz/Vidal³, M. Conte a Coronata⁴, Vermeersch-Creusen⁵, etc. However, more recent writings have often confused between «*vindicativa*» and «*vindicta*» the latter being a synonym for «*ultio*», which means «revenge» or «vengeance». But the primary meaning of «*vindicta*» in legal language is «vindication», that is, «defence, protection, asserting one's right», as can be ascertained from any good Latin dictionary. This meaning is preserved in Italian in the verb «*rivendicare*» (e.g., «*si rivendicò la paternità del libro*» = he claimed he was the author of the book), which is different from the verb «*vendicarsi*», meaning «to avenge oneself, to take revenge»; and the noun «*vendetta*», which means «revenge».

¹ GAIUS, *Institutiones*, 2, 24; 4, 16; *Dig.* 44, 7, 24 etc.

² W.M. PLÖCHL, *Geschichte des Kirchenrechts*, V, Wien 1968, 91.

³ F.X. WERNZ – P. VIDAL, *Ius canonicum*, VII, Romae 1943, 343: «ad tuendum ordinem sociale Ecclesiae».

⁴ M. CONTE A CORONATA, *Institutiones Iuris Canonici*, IV, Taurini 1935, 260 sq.

⁵ A. VERMEERSCH – J. CREUSEN, *Epitome Iuris Canonici*, III, Mechliniae 1923, 291sq.

Surely no sensible person would want to legalise revenge or to go back to the ancient law of talion, «an eye for an eye, a tooth for a tooth».

Presumably it was to forestall all confusion that CIC83 adopted a radical measure, change of terminology, replacing the term «*poena vindicativa*» with «*poena expiatoria*». But this was a departure from the classical canonical tradition. The term «*poenae expiatoriae*» is in fact foreign to Roman law. The Romans had expiatory religious rites or sacrifices, for example, after temples or shrines were desecrated. Expiation was a religious duty to the gods who were offended, wrote Cicero: «*quibus dis violatis expiatio debeatur*»⁶ and he added «*in deos impietatum nulla expiatio est*»⁷. Seneca asked: «*expiationes [...] quo pertinent si immutabilia sunt fata?*»⁸. «*Expiare*» in Roman law is a liturgico-theological term, not a juridical term. It means «to atone for, to purify by sacrifice, to expiate». In this sense we find, in Christian writings, the Letter to the Hebrews saying that the sacrificial death of Christ expiates the sins of humankind (*Heb* 10,1-18), an idea which became a thesis in Christian soteriology. Hence Gratian spoke of «*peccata expianda*» (C. XV, q. 1) but he never used the term «*poena expiatoria*».

Trying to explain the term «*poena expiatoria*» used in CIC83, commentators have generally referred to the authority of St. Augustine, who in his *City of God* cited Vergil's *Aeneid* VI, 733 sqq, where the poet describes the punishment meted out to the wicked in the nether world. Augustine wrote:

*Qui hoc opinantur nullas poenas nisi purgatorias volunt esse post mortem, ut, quoniam terris superiora sunt elementa, aqua, aer, ignis, ex aliquot istorum mundetur per expiatorias poenas, quod terrena contagine contractum est*⁹.

⁶ CICERO, *De Haruspicum Responso*, 21.

⁷ CICERO, *De Legibus*, 1. 40.

⁸ SENECA, *Naturales quaestiones*, 2. 35. 1.

⁹ AUGUSTINE, *De Civitate Dei*, 21, 13; PL 41:727; CSEL 40², 542.

Augustine conceived of punishment *after death* as purifying the souls of the dead pagans. He was not discussing penal law using juridical language but dealing with eschatology using theological language. As Giuseppe Di Mattia has pointedly observed, Augustine «was not using the term in the same sense as attributed to it here in penal law»¹⁰.

In sum, the Romans of old spoke of sacrifices which expiate offences committed against the gods or the temple worship but they did not conceive of expiatory punishment. In the Christian vision it is the unique sacrifice of Christ that expiates the sins of humanity. Our penitential works can have expiatory value thanks to the expiatory sacrifice of Christ. Because of this essentially religious or theological dimension of «*expiatio*», the classical jurists did not speak of «*poenae expiatoriae*» but of «*poenae vindicativae*». And CIC17 followed in the classical tradition and did not use the term *poenae expiatoriae*, although it was said that «*delicti expiatio*» was the scope of *poenae vindicativae* (can. 2286). The standard commentators of CIC17 stood by this classical tradition and used the term *poenae vindicativae*.

2. The Traditional Term

But subsequently writers, especially of the positivist school, attacked «*poena vindicativa*» as sanctioning revenge contrary to the Gospel. This was really to confuse between «*vindicativa*» and *vindicta*, which means revenge (in Italian *vendetta*). Avoiding such confusion, CIC83 opted to speak of «*poenae expiatoriae*» in an attempt to forestall misunderstanding. But this was a departure from the classical tradition. In his commentary on can. 1336 of CIC83 Juan Arias writes: «*Il fine principale e diretto che si persegue è l'espiazione del delitto, ossia la riparazione*

¹⁰ *Comentario exegetico al código de derecho canónico*, IV/1, Pamplona 2002³, 373 (De poenis expiatoriis).

pubblica dell'ordine sociale leso dal delitto»¹¹. Here the expiation of the delict is identified with the public restoration of the damage done to the social order.

The terminological replacement of the classical and traditional «*poena vindicativa*» with «*poena expiatoria*» in CIC83 was not a change for the better, but the opposite. It confused between law and liturgical theology and broke with tradition. In philosophy of law generally, penalties are said to have a threefold end, which may be variously expressed: 1) to vindicate justice («restore the juridical order»¹², repair the violated social order, etc.); 2) to correct the culprit (educate the delinquent, emend the offender, etc.); 3) to deter others (repair the scandal, prevent spread of the evil). Writers usually give priority to one of these three ends, sometimes minimising one or both of the other two even to the point of exclusion, depending upon each one's perspective and preference, whether it is the society at large, the individual or the conceptual ideal. Whatever one's preferential option, the choice of the term *poena expiatoria* does not seem to have been a happy one.

3. The Future Option

Although a return to the terminology of CIC17, which was faithful to the canonical tradition, would be better from the point of view of doctrine, in practice such a return can be embarrassing or confusing. Although the term «*poena vindicativa*» can be defended as supported by the classical tradition, it can and probably will lead to worse confusion in the context of the general diminution of the knowledge of Latin, thus setting the process on an endless cycle.

¹¹ J.I. ARRIETA, ed., *Codice di diritto canonico e leggi complementari commentato*, Roma 2010³, 878.

¹² G. GRANERIS, *La filosofia del diritto*, Roma 1961, 230 («ordinis iuridici restauratio»).

In a future revision, the real solution may be found in adhering to the legislative method and abandoning the didactic method. Law must be ascetic in terminology and use only the minimum necessary terms. In the present case the solution is simply OMIT «*poenae expiatoriae/vindicativae*» as unnecessary terms! The proof that this can be done without any harm to codification is the *Codex Canonum Ecclesiarum Orientalium*, which has shown that the canons on penal law can be formulated without using the term «*poenae expiatoriae/vindicativae*». And this code is none the worse for avoiding both these terms. In other words, the fact that CCEO has formulated the canons in the Titulus XXV *De sanctionibus poenalibus in Ecclesia* without using either of these two terms is proof that they are not necessary in canonical legislation. Indeed, in spite of certain disorderliness, this Titulus has been the object of particular appreciation by several experts of Latin penal law. The term «*poenae vindicativae*» or «*expiatoriae*» may be useful for doctrine, in manuals and text books, but are not needed in a legislative text. They can be left to the cathedra. In the didactic style and literature, greater clarity may be achieved using explanatory terms that are not needed in the legal texts, whose majesty is served by sobriety. In short, *entia non sunt multiplicanda sine necessitate*, according to the ancient adage. Unfortunately, both CIC17 and CIC83 had suffered not a little from the «cathedra complex», both products of professors! But professors can also learn from legislators and vice versa.

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