

FORMALITY OF INFORMALITY

THE ROLE OF LEGISLATION CONCERNING RESTORATIVE JUSTICE PRACTICES

ESSAY

FOR THE SEMINAR

ON MEDIATION AND RESTORATIVE JUSTICE

LECTURERS: PROF. TONY PETERS & PROF. FRANK HUTSEBAUT

WRITTEN BY: BORBALA FELLEGI

MASTER IN CRIMINOLOGY

CATHOLIC UNIVERSITY OF LEUVEN

JUNE 2005

INTRODUCTION

The initial question that is evolving from the title is whether we *need* legislation concerning restorative justice, and if so, why. If we are successful in answering this question and systemising the reasons behind our answer, the following issue that is coming up is whether our argument is valid in any context or not. If not, it would serve as a sign that there are more underlying aspects behind our argument concerning the legislation of restorative justice.

Translating this abstract introduction into more concrete terms, the following essay will firstly discuss the reasons behind my argument pointing out that *legislation is necessary* in any justice system applying restorative practices. Following discussing the ‘pro-legislation’ aspects, I intend to sketch some of the *possible dangers* that have to be taken into consideration while designing any legislative framework. As a consequence, the final part of the essay will highlight those issues that, in my opinion, have even more underlying roles concerning the effective application of restorative justice than merely the emphasis on legal framework. Namely, in the final section the necessity of a broader approach in implementation issues will be discussed. Accordingly, I intend to argue that besides legislation we also need to focus on realising a suitable *institutional* as well as *cultural framework* in a society in order to find the place for restorative interventions in any justice system. If we forget this broader context and only consider the necessary legislative aspects, we can easily ‘loose the wood for the trees’.

Conversely, the main focus should be on identifying the *underlying principles* that we want to reflect on through the implementation process as a whole. Consequently, this exercise can highlight my presumption that legislation is only *one* of the aspects of implementation. Hence, solely regulations cannot guarantee the principled application of restorative justice. However, a broader vision about the position of restorative justice can help us in identifying the necessary steps that have to be taken not only in legal, but also in institutional and cultural terms.

As a final remark of the introduction, I would like to mention that a more thorough legal analysis would unquestionably require a consistent distinguishing between continental and common-law systems. Needless to say, the differences between these approaches have a significant role concerning the legislation issues of restorative justice. However, because of the limitations of this essay, the current discussion rather intends to touch upon more general legal-philosophical aspects, than provide a complex overview and comparison between the roles of legislation in these two major legal concepts.

THE POTENTIAL OF LAW

Defining the legislative background of restorative justice seems a quite paradox ambition to me. The main question is how to formalise an institution and philosophy that is, by definition, based on informality. Moreover, how to raise the level of an originally community-based approach - in which the main emphasis is on the dialogues and the active as well as personal participation of citizens - to the macro level that might result in a formal, impersonalised system? One of the ways in which this controversy can be solved is to continuously keep in mind that these are not the specific institutions but rather some underlying principles that we have to stick to while designing formal frameworks. By such consistency I think that it might be possible to regulate micro activities on a macro level

without losing the fundamental concepts. However, my suggestions in this regard will be concluded in the last part of the essay.

At this point, I would prefer to reflect on the aspects of the initial statement behind the title, i.e. first of all the role of legal certainty, predictability and equality. I do agree that these needs of justice systems are essential to be represented. Therefore, every measure and intervention in a system should guarantee the fulfilment of these requirements as much as possible. I share the opinion that restorative practices – due to their personalised approach and case-specific focus – might endanger the accomplishment of these fundamental demands. As a consequence, legal frames might have the potential to compensate citizens for this possible dysfunctional aspect of restorative justice. This purpose can be served by integrating legal safeguards in the system in which restorative interventions take place. Hence, I do believe that clarifying firstly the meaning of the above-mentioned legal principles, secondly defining methodological and ethical standards in restorative practices and finally ensuring the voluntariness in any model can be largely beneficial in guaranteeing these essential needs.

It can be considered as a *common view*, that restorative justice might have the danger in realising ‘unjust’ consequences of criminal cases due to its reduced capacity in ensuring the principles of certainty, equality and predictability. On the contrary, legal codes have the potential to guarantee meeting these requirements. However, instead of getting into more detail of this approach, in the following I would like to point out that this is not as black and white as it seems to be.

Firstly, concerning *predictability*, before accepting such a dual standpoint, we have to keep in mind the *discretionary power of judges* as well and the unpredictability that might be caused because of the different interpretations and subjectivity of judges concerning the referred paragraphs in the legislation. Therefore, in other words, we cannot assume that criminal justice systems basing their interventions on the principle of legality are completely predictable.

On the other hand, I am confirmed that we cannot conclude either that restorative justice is necessarily an unpredictable measure in reacting to crime. As a consequence, firstly predictability can be significantly increased by assuring the necessary *methodological standards* in providing mediation services (e.g. the mediator always have to keep in mind the ways in which the balance can be maintained between victims and offenders during a mediation session), secondly, by building *legal safeguards* into restorative justice schemes and thirdly, by providing restorative measures always only as an *alternative* to the traditional criminal justice system keeping the traditional system available and applicable anytime during the procedure.

Regarding the assurance of *legal certainty and equality* in conventional justice systems, it is also less obvious as it seems for the first instant. The institution of legal defence in criminal justice systems has an unquestionably essential role in the intention of providing ‘justice’. However, by now in the judicial world the consideration of any rule-breaking as well as the legal consequences of offences largely – if not exclusively – have become depended on the skills of defence lawyers in finding legal justifications, mitigating factors etc. for the act and in trying to minimise the toughness of punishment for their clients. As a consequence, highly skilled lawyers’ clients – who can afford paying their experienced advocates - might have much higher chances to receive more lenient reactions for the same act as those ones who cannot afford the same quality of legal defence. Moreover, the basis of

the judicial decisions concerning criminal acts is dominantly consisted of legal arguments, justifications (presented by lawyers), than the actual story of the suspect. In short, in the current system paying good advocates and searching for legal excuses for rule-breaking by lawyers can be much more 'beneficial' from the offenders' point of view, than admitting personal responsibility and honestly detailing the background factors behind an offence. Hence, in my opinion, current justice systems do not have the intention to encourage offenders to face the real consequences of their offence at all. According to this, I argue that not only the principle of equality and certainty can be questioned but also serious ethical and moral issues can be raised concerning the conventional justice systems' functioning.

The next issue is whether legislation can have an *external controlling function* as well. Defining minimum standards that have to be represented by restorative practices (e.g. not accepting highly disproportionate or imbalanced agreements between the parties) can unquestionably have a controlling effect. If these standards are defined beforehand, it can be beneficial in directing the mediation process towards realistic paths without endangering the autonomy of the parties involved. However, once the minimum requirements of restorative practices are laid down, agreements and decisions of the directly involved parties should be maximally taken into respect by the judicial system. Since the philosophical approach of restorative justice (in which the main focus is on repairing the harm) is completely different from the retributive ideology (in which the primary consequence of any crime has to be the punishment of the offender), I do not believe that an agreement that was made in a restorative atmosphere could or should be revised by any agent of the criminal justice system thorough a retributive lance (under the title of 'external control'). In my opinion, it can result in even more harm for the parties than the consistent use of a pure restorative or retributive system.

Following a similar logic, I am also dubious concerning the argument that legislation of restorative justice is needed because of the need for *correcting judicial procedures* with respect to the rights of victims and offenders. The significant difference between the underlying philosophies of the conventional and restorative justice systems raises the question whether any of each could serve as merely a correctional measure, compensating for the disadvantageous characteristics of the other system. Legal and institutional systems have to be *consistent* in representing the underlying ideologies by their measures and regulations. Therefore, anytime a new measure is built in the system that has to be an integral part of the broader concept of the given judicial model (at least theoretically). In this regard, if we link correctional functions to restorative justice, it would make it a measure that would only have a partial role and potential to represent the principles of the restorative philosophy. In other words, how could we expect from any restorative intervention to be effective if it is embedded in a basically retributive context and the only expectation linked to restorative intervention is to *correct* the dysfunctional system of the judicial model regarding the respect of the rights of victims and offenders? Nevertheless, I would like to stress that this critical question does not mean that I do not believe in the *complementary* roles of each system. According to this, for the sake of the optimal harmonisation of both systems' advantages I do believe that the effective integration of the two approaches can be realised if it is assured that each of their measures consistently reflect on the undermining ideology behind them.

While several actors of continental legal systems argue that the *principle of legality* has rather a 'contra' than a 'pro' role in reasoning for the complex implementation of restorative justice, some thinkers consider the principle of legality as primarily a *contributing* factor

towards the recognition of the need for implementing restorative justice¹. They highlight the crucial role of justice systems in not only *reacting* to wrongdoings but also in being more *proactive*, and providing the possibilities for a more interdisciplinary, inter-sectoral approach in dealing with crime by cooperating with agencies of e.g. the welfare and educational systems. They also emphasise that while the criminal justice system can only act under very specified conditions to a very limited extent (according to the principle of legality), restorative justice could play a role in referring the case into those sectors, in which the more complex background behind each crime can be considered and ideally more effective services can be used in order to restore the damaged emotions and social bonds of individuals and communities. However, these interventions can hardly become integral parts of criminal justice systems without having specific legal frameworks regulating their operations.

Moreover, concerning legal principles that can be reflected on by restorative practices, I would like to mention the *subsidiary* and the *participatory principles*. Although they might not have the same priorities as the principle of legality – I suppose that the latter one is a more underlying concept, particularly in continental legal systems – but they do definitely have a gradually increasing role in justice systems. Therefore, they also should be taken into account while thinking about the possibilities of restorative justice that unquestionably represents these two principles (by definition) and also might serve as a complimentary instrument, which have the potentiality to ‘compensate’ citizens for the dysfunctionalities of the criminal justice systems regarding their decreased subsidiary and participatory characteristics. In other words, if the state monopolises the criminal justice system, the chances for subsidiary are very low, and if we cannot offer alternatives for victims and offenders to actively participate in their case as well as to *voluntarily* offer personal commitments in order to deal with their conflict, the realisation of the participatory principle is highly questionable in traditional justice systems.

Additionally, I would like to mention one more reason that highlights the necessity of legislation. Several countries, especially those that have only recently started to implement restorative justice, often suffer from the *general lack of legitimacy of informal, community-based responses to criminal offences*. As a consequence, the *legitimising and credibility-increasing roles* of formal frameworks, especially of legislation in the judicial profession as well as in the general public, cannot be underestimated while discussing the effective ways of implementation. In other words, laws are one of the most significant instruments of the effective implementation, since they are crucial in providing reasons, justifications, clear positions, protocols, institutions, and credibility in the society from a top-down direction (balancing the original ‘grass-root’ characteristics of restorative initiatives). Therefore, it can be concluded that promoters of restorative justice *need* legislation in the field of restorative justice, particularly in those countries that are in the initial stage of implementing this concept into their justice systems.

Concerning the contributing role of legal frameworks in the effective implementation procedure, additionally I would highlight the significant roles of *procedural regulations*, bylaws and protocols as well. Several research findings show that even in countries where there has been a long tradition of restorative justice, there could be much more

¹ according to a recent personal conversation with Leo van Garssen

referrals to, for example victim – offender mediation, than there are currently.² According to discussions to several experts working on the implementation of restorative justice in European countries³, one of the reasons behind this gap is the lack of clear protocols in the referral procedure. Hence, in order to avoid the future under-use of restorative justice, experts often mention that it is not enough merely to codify laws allowing mediation in criminal matters. From the very beginning institutions and formal agreements should also advise the actors of the criminal justice system in which ways referrals should be done and what type of cases are suitable ones for referrals.

THE LIMITS OF LAW

In the previous paragraphs I tried to shed a light on some of the possible reasons behind promoting the legislation of restorative justice. However, besides thinking all the ‘pro’ arguments over, meanwhile it is worthwhile to consider the possible *dangers* of legislating processes. As mentioned before, one of the main issues is how to realise the *formalisation* of an initially informal institution *without losing* its underlying *principles*. How to *avoid* that restorative justice be *co-opted by the traditional criminal justice system* and become simply another measure within a basically retributive framework?

Moreover, the process of formalisation necessarily raises the question of how to *prevent* that restorative interventions lose their personalised and case-specific characteristics and become measures working on a daily *routine*. And last but not least, we need to take into account that creating formal frameworks increase the role of professionals in the relevant field. And once the issue of *professionalisation* is becoming more and more significant, there is a danger that the original idea of ‘giving the conflicts back to their owners’, i.e. to the citizens, is less and less represented. Accordingly, people might have the tendency to give their responsibility out again to the professionals. This process could have a quite damaging effect, even if from now the new profession would be called ‘mediators’ and not ‘lawyers’.

THE FINAL GOAL: LEGISLATION VS IMPLEMENTATION

To conclude, legislation has a crucial role both in implementing restorative justice as well as in continuously representing those fundamental principles without which justice could hardly be imagined. However, I would propose that instead of purely discussing the legislative aspects of restorative justice, we should look at this issue on a broader level. Therefore, I would like to emphasise the necessity of raising the question of integration on a complex level, in which legislation obviously consists one of the major, if not the most important theme. But it is not the only important aspect that has to be considered.

Hence, I would stress that besides the legal concepts the issues of institutional and cultural aspects cannot be ignored either. If the effective implementation is our ‘wood’ that we want to see, we have to firstly identify all those principles that should be represented in it and should not allow that the different legal intentions as trees cover the wood. Once these

² In a country as Germany for example, with 400 local mediation programmes, it has been calculated that the number of judicial files on assault that could be taken into consideration for mediation is about 100.000 a year, compared to the 15.000 cases of all crimes effectively selected for mediation at present. (E. Weitekamp, ‘The Paradigm of Restorative Justice: Potentials, Possibilities and Pitfalls’ in J.J.M. VAN DIJK, R.G.H. VAN KAAAN and J. WEMMERS, *Caring for Victims. Selected Proceedings of the 9th International Symposium on Victimology*, Monsey, Criminal Justice Press, 1999, 123.)

³ Within the framework of an AGIS project focusing on implementing restorative justice in Central and Eastern European countries.

are clarified, we can, of course, have debates on what kind of institutional frameworks will realise these principles and how they can be combined in order to design a consistent system.

In short, I would like to emphasise that these are not particular legal institutions, but rather the more underlying principles that we should stick to in the process of institutionalising restorative justice. In other words, instead of limiting the use of restorative justice within the criminal justice system and only focusing on the necessary legal frames, we should also look at how, for example, the education system might be able to represent similar restorative values. Otherwise, we might get closer to create an almost perfect criminal justice system that has integrated restorative principles, but if other institutions', such as schools' functioning is still based on punishment and on the retributive approach, the efficiency and consistency of restorative interventions can be highly questioned.

Therefore, the main challenges are firstly to agree on the underlying principles we want to be consistent to, secondly to keep them continuously in mind, and finally to revise our actions, regulations, institutions and practices from time to time to check whether the reality still reflects on the originally identified purposes. I do believe that with such a process the formalisation of an originally informal institution can result in an optimal combination of the advantages of both systems.