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More conciliation and less punishment: Demanding a public choice

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The author argues that if societies wish to promote reconciliation and restoration in criminal matters, for which there are excellent reasons, the criminal codes need to be changed so as to allow for the procedures aimed at such reconciliation and restoration. Restorative justice and punitive justice fundamentally exclude each other both in the theoretical and political conception of aims and in procedural terms. The predominant aim of punishment in traditional criminal justice is discussed and demonstrated to be an impediment to reaching trustworthy results in terms of restorative justice. Therefore the substantive criminal code will have to identify the types of offences for which restorative procedures and aims are prioritized and also such types of offences for which the traditional response of punishment remains priority or even the exclusive response.

Key words: Restorative justice, reconciliation, punishment, restorable offences, criminal codes.

INTRODUCTION

In the spring of 2009 there was an expert seminar in Oñati (Spain) about a theme that is very appealing to the author and indicates precisely what he feels our (western) societies need: more reconciliation and less punishment. There is a challenge implied because many of our contemporaries daily express desires for more and more severe punishment, apparently expecting a more safe and secure society as a result. With this article the author wants to take up that challenge and open up what he feels is an important debate, against the background of ever-increasing punitiveness of our criminal justice systems and the rise of restorative justice as an institutional alternative. It will take a lot of effort to convince our fellow citizens who express these punitive desires that they are wrong in viewing punishment as fundamentally the most suitable response to illegitimately damaging conduct and that there are many reasons to use punishment only relatively scarcely. And we would have to convince them that the protagonists of restorative justice are right in stressing the merits of (re-)conciliation and in interpreting the dominant praxis of punishment as an impediment for such (re-)conciliations. This seems to me to be the most important issue to address first in this contribution, which is written against the background of Dutch legal thinking and developments in the Dutch criminal justice system.

After having shown that restorative justice opens up opportunities for reconciliation this contribution will demonstrate the theoretical necessity to depenalize – to a large degree - the criminal justice system and develop preliminary ideas about reorganizing the substantive and the procedural criminal codes in such a way that these closely connected codes prioritize the procedures of restorative justice and its sanctions. This contribution should be read as a sequel to the author's earlier contribution on the theme of institutionalizing restorative justice (Blad, 2006).

CRIMINAL JUSTICE, RESTORATIVE JUSTICE AND RECONCILIATION

Restorative Justice is clearly a form of criminal justice in the sense that it fundamentally accepts the legal descriptions of certain forms of conduct as criminal offences: it does not prominently advocate decriminalization¹ of any or most of these types of conduct and, like

¹ Decriminalization can be done 'de jure', by changing the law expressing a different moral appreciation of the conduct in question, or 'de facto', for instance by dealing with the conduct in another way than by criminal procedure and punishment. In the second sense restorative justice can

the criminal justice system, is clearly reactively responding to the occurrence of such conduct in order to restore the social and normative order or balance. Precisely because restorative justice wants to deal with criminal offences it is crucial to identify the most important differences between criminal justice and restorative justice and, in the context of this contribution, how they relate to (the concept of) reconciliation.

Traditional criminal justice and reconciliation

The most important trait of our (continental, civil) criminal justice system is that its structural and cultural organization derives from the fundamental concept of punishment, which is defined as the intentional imposition of pain, threatened beforehand by law for a well-defined breach of the law and imposed by a judicial authority legitimated by and in conformity with that law (Walker, 1991:1). The substantive criminal law defines the criminal offences and the law on criminal procedure facilitates and regulates the implementation of the right to punish these offences. Crime and punishment are predominantly seen as legal constructs and due process of law is considered necessary to establish whether or not a certain criminal charge is legal and legitimate. And when there is a legal right to punish in a certain case the independent courts – after a complete audit of the charge as well as the procedure - may impose a legally permitted punishment. From the moment of suspicion of a certain criminal offence written records about the event and legal language begin to inform and dominate the procedure, which is an affair of legal specialists, making both the suspect and the victim ‘clients’ of the system who have to wait and see what will result from the legal battle in the courtroom.

Of course, at least in a democratic state with rule of law, the criminal code is considered to serve the common interest of the citizens and this also goes for decisions to prosecute and to impose punishments. The criminal offences defined and their penalization are meant to serve the protection of citizens against any kind of victimization and in this sense we could say that one of the main foci of the criminal justice system is the actual and potential victim of crime. But there is also another and perhaps even more important aspect of the legal constructions of the criminal justice system, which is the necessary protection against the powers of the state, ruling out abuse of power and arbitrariness and promoting equality in terms of the law. The state, of course, is nothing more or less than the organizational instrument of the human collectivity which is able and sometimes inclined to destroy individuals. This is the most fundamental reason why it can be said that the level of civilization of a nation can be read in the legal

status - the rights - of the suspect in the criminal procedure (Peters, 1975). Most certainly, the traditional criminal justice system with its legality-principle, and all the other principles connected to that cornerstone of justice, has great merits and we should not want to do away with it. In fact, a well established and well functioning criminal justice system provides - by its legal definitions and its normative checks and balances - the institutional environment in which restorative justice can develop and flourish and we should be worried about introducing mediation in criminal matters where such a system does not exist or is blatantly failing to produce fair and equal justice. The arbitrary and unequal distribution of types of interventions – f.i. mediation for the mighty suspects, punishments for the poor and powerless – is a risk we should not want to take. But nevertheless, the disadvantages of the traditional criminal justice system are also widely acknowledged and they are the reasons why restorative justice has begun to develop and grow. Particularly, it disempowers the citizens involved in a very important type of conflict in their lives, both offender and victim have nothing much to say in the criminal procedure and their everyday language and their emotionality about the conflict is basically considered irrelevant (unless legal doctrine states otherwise). As already mentioned above, they are the clients of the system and the original Latin meaning of that word is ‘*slave*’: they are forced into passivity and subdued to the decisions of their legal masters. Victim and (presumed) offender are separated and/or kept apart and portrayed as fundamental adversaries who can only ‘symbolically’ be reconciled by the verdict of the court, the public pronouncement of guilt and punishment (Cleiren, 2000). But the legal meaning of the damaging and hurting conduct of the offender – as an offence – is more often than not unrelated to the biographical experiences and meanings of those who were directly involved, and their understanding of what happened and why is often not enhanced by procedure nor by conviction, however fair in legal terms they might have been.

In sum, it is indeed a fact that the conflict is stolen from them by legal professionals, and by this theft they are bereft of possibilities to make personal and social sense of this important event in their life, and of examining the ethical and normative implications of the conflict and clarifying legitimate social expectations (Christie, 1977). And they ‘learn’ the very unfortunate lesson that after such a conflict there is nothing they can do and that they themselves are somehow not responsible.....It is all up to the authorities.

These are all well-known disadvantages of the criminal justice system, but to this it should be added that despite the ‘historical’ theoretical expectations of founding fathers such as Bentham and Beccaria punishment does not achieve much in preventing crime, both in terms of general prevention and special prevention and in this sense it does not perform well in terms of protecting actual and potential victims. Also, despite the normative

contribute to decriminalization. See the Report on Decriminalisation by the Council of Europe, 1980, 14-15.

ideal of protecting the suspect and the convicted offender against illegitimate, arbitrary and unlimited use of (collective) power, the criminal justice systems of our times have been shown not to be immune to political pressures which have induced an ever expanding criminalization of types of conduct and increasing levels of penalization, even in the face of apparent failure to produce convincing results in increasing safety and security. While in history the criminal justice system has been defended as the system to put an end to the never ending *'status belli'* or even permanent war of each against all in the natural state, nowadays the criminal justice system has - at least in the popular and political culture - become a way of warfare, seeking to destroy the fundamental enemy called criminal. It may turn out as nothing else but a self-destruction.

Reconciliation

It may be needless to say that these dynamics of criminal justice do not facilitate reconciliation, to the contrary. For reconciliation to occur both victim and offender have to come to terms with the event in which the latter victimized the first. Both have to understand, normatively, the high-handedness of the offence and they have to know for sure from each other that they both now reject the injustice done. On a symbolical level all involved have to reconcile the contradictions inherent in social interactions, that in spite of a fundamental respect for the other as equal in general, harm has been done and an equal human being has been wronged. The victim as the aggrieved party has to be offered some genuine satisfaction for the harm done and this requires a voluntary reparative gesture from the offender, expressing at least recognition of the injustice done and if present, remorse (Duff, 2001: 109 et passim). Reconciliation not only has the inter-personal dimensions of recognizing each other as fundamentally equal and of establishing a new peace or friendship after a hostility, it also has to occur on an intra-personal level: coming to terms with having been victimized and learning that this does not have to define the person and his or her future, and for the offender likewise to acknowledge guilt and to dissociate himself from the offence by taking responsibility for its consequences. Equality and reciprocity have to be re-established between the two and mediating and observing others must see and recognize that this has been done (Pessers, 1999:62).

As the legal scholar Cleiren (2003) has convincingly shown, the traditional criminal procedure offers no room for the horizontal moral communications between the victim and offender that are necessary for reconciliation to occur. Voluntary acts of recognition of responsibility and repair are in fact made impossible by the context and aims of the criminal procedure, that concern only the relation between the suspect and the authorities that

exercise the power to punish. In this context of threats and force all and even the most honest subjective expressions of remorse cannot be otherwise than suspicious. The criminal procedure and its aims actually invite the offender to find ways to minimize his responsibility and this is even considered justified in view of the inequality of the offender in his conflict, which is with the superior state and not directly with his victim (McElrea, 2006: 125-126). For the victim this often means adding insult to injury. And so, even when the offender is punished, there is no true reconciliation, because what has happened is only that the high-handedness of the offender has been overtrumped - and only legally 'annulled' - by the punishment. And even if this punishment has perhaps belittled the offender and was meant to put him on an equal footing with regard to the law as anyone else, the context itself and the lack of moral communication make it impossible for the victim and others to judge what this means for the attitude of the offender towards his own conduct and its consequences for his fellows. And we all fear things to get worse, although 'justice has been done'.

Restorative justice and reconciliation

Restorative justice developed in response to the drawbacks and flaws of the traditional criminal justice system and puts the victim and the harm, moral and emotional communication and redress in the centre of the procedural reaction to criminal offending. The experiences of the victim, his or her needs expressed in everyday language and the damage done, require the primary attention of the responding legal agencies and the offender is made responsible for restoring the harm done in an intersubjectively suitable, feasible and acceptable way. Acceptable for both victim and society, represented by legal officials, suitable in the sense that it adequately reflects the offenders responsibility and finally the offender should also realistically be able to comply with the restorative obligations he took upon him, if necessary with the support of others.

In prioritizing the restorative responsibility of the offender, who is willing to admit to the basic facts of the offence, and promoting victim-offender-mediation or conferencing, facilitated and supervised by public officials, restorative justice optimizes the chance that the conflicting parties find reasons for reconciliation, or at least an acceptable redress of the harmful consequences of the offence. Sometimes you read in restorative justice literature phrases such as 'the conflict is given back to the parties' and 'not legal definitions but harm to people is the focus' but I feel that these cause misunderstandings. Of course these expressions are reactions to the flaws of the traditional criminal justice system, especially to the alienation experienced by the directly involved citizens, but we do not really want to privatise the reaction to crime

and make it only the responsibility of the victim to seek ways of finding the offender – in case he is unknown - and seeking redress inside or outside courts. If restorative justice would want that, it should propose a radical decriminalization of all or most criminal offences and make them a conflict in private law. The author think it is generally recognized by protagonists of restorative justice that criminal offences are a matter of common interest and that there is an important role to play for the public legal system and its officials. We should agree with Braithwaite/Pettit (1990) and Walgrave (2008) that it is crucial to guard and protect each other's dominion, which is the enjoyment of equal rights and liberty. And also with Judge McElrea, that restorative justice implies a procedural revolution by being so fundamentally victim-oriented. We could add: by making the civil parties – victim and offender and their significant others - so important in the public reaction to crime. In this way it offers the legal officials the systemic possibility to be really responsive to the needs and interests expressed and to contribute to tailored problem solving. This means that it is in general important to become conscious of the types of changes that we need in the criminal procedural law in order to facilitate restorative justice. But in the substantive criminal law there is also a very important implication and that is, that punishment will no longer be regarded as the primary and necessary reaction to each offense and offender. Also this is no less than a revolution, although McElrea (2006:128). has phrased it more euphemistically:

'My preference is to say that punishment should not be the overriding objective in dealing with crime, because that is to put the focus on the perpetrator to the exclusion of the victim'

McElrea also believes that punishment can be part of a restorative justice solution and that restorative justice is not an alternative to punishment: but it is evident that the preference the author, quoted directly leads us back to the flaws of the traditional criminal justice system - shortly characterized above - which imply the exclusion of the victim and of reconciliation. Judge McElrea is also aware of this, complaining about the criminal procedure as the root cause of offenders denying or trying to reduce their responsibility. This implies that the restorative criminal procedure should be liberated from the orientation on finally imposing a criminal punishment, in all cases in which we feel we should facilitate and allow restorative agreements and sanctions.

So, if punishment has a role to play, this could from a restorative justice angle be acceptable in only two ways: either by interpreting and defining punishment as something else than the deliberate imposition of pain and suffering, or by radically reducing the application of punishment in the daily praxis of doing criminal justice, making punishment available in a radically reduced number of types of offences. The first option is perhaps

not feasible, because language and interpretation are impossible to uniform and control and the attempt to do that might be unethical and undemocratic. The second and more realistic option is to stress and structurally implement the classical principle of punishment as last resort, the '*ultima ratio*' principle. In the remainder of this contribution the author will focus on this option and propose some new ideas about how this could be done by legislative changes in the substantive and procedural criminal codes. But first some further analysis of concepts is needed.

PUNISHMENT, SANCTIONS AND THE NORMATIVE ORDER

In this paragraph the author, want to make some preliminary remarks as the background to the things he want to suggest later with regard to the possible reorganization of the substantive and procedural criminal code, in order to facilitate the maximum use of restorative procedures and sanctions in doing criminal justice.

The public interest in responding to criminal offences by legal means has a normative, an instrumental and an organizational aspect. The most 'simple' of these is the last. The law should and can constitute the powers of the criminal justice agencies and orient their activities: the agencies are informed what phenomena they are expected to deal with and how to deal with them. The law at the same time limits these powers –which are a normative function of the legality principle - offering the citizen protection against abuse or excessive use of power. But also, the citizen's rights and freedoms are normatively re-established by the denouncement of an offence and the conviction of the offender. This normative function is expressed by Braithwaite and Pettit as the protection and promotion of dominion, understood as a set of assured rights and freedoms, which can and should be served by restorative justice.

Restoring the normative order

Now what is very important to realize is that this normative function - classically and popularly circumscribed as restoring the legal or the normative order - *cannot* logically be performed by any physical act or any change in the real world (the phenomenal world). The restoration of a normative order is a normative matter, performed only by a normative gesture, such as the verbal rejection of a normative breach (Glastra van Loon, 1957: 232 a.f.). But this, only when this verbal rejection can be trusted in its integrity. And here is where an important complication appears in the field of criminal justice: when the prospect of a punishment of some sort has been held out, the actual imposition of that punishment becomes an essential element of the experience that justice is done. It is simply a matter of the criminal

justice authorities keeping their word. This observation stresses the urgency of making legislative changes in the substantive criminal code: it implies that for restorative justice (and the chances for reconciliation) to grow the law has to announce that restorative sanctions can and will be sought for instead of punishments. An unconditional or conditional depenalisation² of criminal offences seems necessary.

This may frighten or worry our fellow-legislators so it is important to be aware that punishment is not the only and not even a necessary way to express this normative rejection of unacceptable social conduct. The only important thing is to communicate effectively the normative meaning of the conduct, which is that the conduct is un-acceptable since it implies a deviant norm that contradicts the legal order: a deviant norm, since the behavior itself suggests that it may be permissible to behave like that and might be performed by others. (Glastra van Loon, 1957) The deviant has set an example however, that cannot be followed by others without undermining this legal order³, which would have very detrimental social consequences: at least when the legal norm concerned reflects social normativity and functions to secure and stabilize a socially supported and functional type of interaction. The deviant and the public have to come to this realization by clarifying and explaining the normative and performative implications of the deviant conduct (Christie, 1977). In other words, the author is looking at the communication of normative expectancies with regard to social interaction (and sometimes also personal conduct).

The deviant behavioral example has to be annulled so as not to be repeated or followed by others. Negative sanction, *censure*, is what is important here. This type of normative communication is not limited to the legal system at all and is in fact part-and-parcel of every day social interaction.⁴ The threat of punishment can be an impediment to this normative communication, especially when punishment is not intrinsically considered as an instrument to convey normative expectations but as a technique, a technical instrument to enforce norm-compliant conduct, as a replacement for normative communication. And this seems to be exactly what has happened in the current criminal justice system that

performs its functions as if censure can only and should always be expressed by the imposition of punishments. It is this priori of punishment - and its legal-technical conception - that is fundamentally and correctly criticized in the restorative literature, most recently f.i. by Walgrave (2008).

With regard to the normative function to be performed by the law, in short, the conclusion is that this implies the use of censure, which can be expressed by a wide variety of sanctions, not necessarily of a punitive kind.

Means and ends: The instrumental dimension

The third aspect of the legal response to criminal offences mentioned above is the instrumental aspect of legal sanctions as means to serve a well-defined end. In the Classical School that 'founded' our current criminal justice system, Beccaria (1764) suggested that the legal and anterior threat of punishment would have a warranted general preventative effect, since all citizens were then able to calculate before the offence that the estimated 'gains' would be outweighed by the certain and fixed amount of pain the justice system would impose. To make the threat true and credible punishments would not only have to be fixed, but also always imposed on perpetrators of a proven criminal offence: only then the threat of punishment would be able to exert a decisive psychological force on the behavioral choices of the legal subject (Feuerbach as cited by Vervaele, 1990:100).

Most of our current criminal justice systems have moved far away from fixed punishments and no existing system has proven to be able to provide for the swift and certain apprehension, prosecution and punishment of each and every crime that seems so crucial to achieve this end. That is probably why all the research into this general preventative function of criminal punishment could still be summarized in the conclusion, that the general awareness that there is a criminal justice system that might react and impose some sort of sanction seems to have some behavioral influence on some people under certain circumstances (Andenaes, 1974; Denkers, 1975b; Van Ruller, 2001). And perhaps mostly with those citizens who are so well socialized that, under normal circumstances, they are the least inclined to perpetrate any severe kind of crime. What we need to serve this function is thus basically, the legal power to bring about some kind of negative sanction, not necessarily always being a punishment. A second 'classical' aim is special prevention, which in the Beccarian view was implied in the general preventative effect of threatening with pain. If all legal subjects learn to calculate with the right amount of pain they all would be prevented from doing legal wrongs. In the retributive lines of reasoning in the Classical school there was a prominent idea that the execution of the custodial sanction would provide the convict with the occasion and environment to reconsider his own moral and social development and, with the help

² The Report on Decriminalization of the Council of Europe (1980) defines depenalisation as 'all forms of de-escalation within the penal system. In this sense the transfer of an offence from the status of a "crime" or "felony" to that of a misdemeanour can be considered a depenalisation. The same is true in so far as custodial penalties are replaced by sanctions with less negative implications or side-effects, such as fines, probation, specific court orders etc.' (Report on Decriminalisation, p. 17).

³ In the Kantian rational-ethical view of the criminal law the essential norms – understood here as legitimate social expectations – are discovered by using the ethical golden rule (the maxim), that you should only allow yourself to do what you can allow all others to do. Or, negatively phrased: don't do to others what you do not want them to do to you. These are recipes for a maximized and equal freedom for all.

⁴ In as far as this is not the case, this might explain why and how criminal conduct develops.

of the bible read in solitary confinement, redeem himself. This slowly developed into the notion and praxis of rehabilitation.

From the times of the Modern School special prevention with the use of especially short-term custodial punishments was demonstrated to be an illusion, at least when the preventative effect had to come from a process of rehabilitation. Incapacitation, however, became an accepted method of special prevention, as it is today for many politicians and policy-makers. But we all know that this incapacitation offers only temporary and even fragmentary protection, until the convict leaves the prison. Recidivism-rates after imprisonment are notoriously high, and the less attention we pay to the - criminogenic or other - needs of the detainee and his or her legitimate interests, such as effective rehabilitation, the more dysfunctional imprisonment may prove to be. Furthermore, rehabilitation seems to be more feasible and more effective outside than inside the prison-walls. General and special prevention are aims that can and should be considered when contemplating the design of an optimally restorative justice system and this also goes – evidently - for the aim of ‘conflict-resolution’ proposed in more recent decades by Hulsman (1968) and Christie (1977). Hulsman also saw ‘the channeling of retributive feelings in the populace’ as an aim for the criminal justice system, primarily as a function of the criminal procedure as such, but if necessary and inevitable also as a function of the sanction to be imposed. This leads us to considerations about retributive aspects of criminal justice.

Retribution, by punishment or otherwise

One of the theoretical attractions of the retributive paradigm is that retribution seems to imply inherent limits on the measure of pain to be imposed on the culprit: the principle of proportionality. But meting out punishment in accordance with the degree of ‘guilt’ is quite a metaphorical operation since both phenomena - punishment and guilt – have many qualitative dimensions and cannot easily be uniformly quantified and measured in a reliable and objective way. Moreover, the general level of punishment that is viewed as proportionate to a certain kind of offence is highly vulnerable to political and legislative manipulation and the retributive praxis does not seem to exist anywhere in a pure form. The retributive imposition of punishment always seems to be accompanied with instrumental expectations, and especially when the dominant political culture stresses incapacitation and deterrence you see sternly rising levels of punishment. The limits the retributive paradigm suggests do in reality not exist.

Although Hulsman accepted the function of channeling retributive feelings by the criminal procedure and the sanction, he rejected retribution as such fundamentally. Hulsman plainly stated that we lack reliable scales to ascertain proportionality and that we should demand that

the interventions of the criminal justice system are demonstrably in the common interest. Retribution and proportionality are metaphysical and therefore ‘unaccountable for’ and what should count is what can be and is achieved by criminal justice interventions in the real social world, by demonstrable mechanisms in terms of influencing human conduct. The author agrees with all that and still he feels that retribution as a moral sentiment and emotional need are a central element of the public reaction to certain criminal phenomena: not all. Accepting that we may sometimes need to ‘channel’ retributive feelings implies accepting these feelings as such. Anyone with some capacity to empathy understands these feelings in many cases as legitimate. But what do they mean and how should they be dealt with? Can they be made productive and constructive? The author believes that on a micro-level the inclination to retaliate is a healthy assertion and vindication of interpersonal equality: we cannot and should not accept the high-handedness of someone doing us wrong and so we demand some sort of satisfaction, unless we feel that indeed we are less than the offender. In every day social interactions ‘tit-for-tat’ – whether generous or not - is a basic regulatory dynamic, both in a positive and a negative sense.⁵ Rewards of any kind for ‘good’ deeds and penalties of any kind for wrong (Polak, 1947:317; Duff, 2001). In this way it seems to be deeply linked to the notion of (reciprocal assurance of) dominion, in the sense that each wronged fellow-citizen can legitimately insist on restoring it after a breach. In the traditional criminal justice system it is the court that retaliates by imposing a punishment, but the alienation caused by non-participation implies that the victim may often feel that the wrong punishment has been imposed or a punishment for something which does not relate to the actual grief and harm caused. Retribution in the context of the current criminal justice system may be considered as relatively ‘unresponsive’ to the real and experienced dimensions of the offence for both victim and offender in case, but at the same time ‘over responsive’ to public pressures transmitted and amplified by mass-media and political debate, moral panics about what happened before in the sphere of crime and social conflict etcetera. It might even be considered as an abuse of the retributive feeling as such; highly unreliable in terms of seeking to limit itself to what is strictly necessary as a proportionate response to the damage and harm done. For these reasons the author agrees with Walgrave that restorative justice should be considered as a form of reversed retribution, in the sense that it is not the court who ‘pays back’ to the offender what his offence was ‘worth’, but the offender who pays his dues to the victim:

‘Retribution in its genuine meaning is achieved in a constructive way. *Retribuere* in Latin is a contraction of *re-attribuere*, to give back, and that is what restorative justice seeks to do. One could see in this reversed

⁵ Matt Ridley, in *The origins of virtue* (1996), p. 60-75.

restorative retributivism also a kind of proportionality. It is based, however, not on 'just deserts' but on 'just dues'. Restorative justice asks the question which 'debt' the offender has and what he owes to pay back reasonably for the losses he has caused (Walgrave, 2008:62). Hulsman and others coined this kind of retribution as 'empirical retribution' (Denkers, 1975a: 91) as opposed to the metaphysical and uncontrollable retribution he rejected: this empirical retribution can be much better controlled and limited, provided we have a monitoring procedure installed to guard aspects of proportionality.

Rearranging the laws

What the author have intended to show so far, is that restorative justice can and should be considered as a criminal justice system, but one of a fundamentally different kind, because of its other finality (redress and reconciliation), the different choice of key-players and the different procedures. As a justice system may serve the functions of traditional justice system, and perhaps even better, because it recognizes much better the disfunctionalities of the primacy of threatening with punishments and imposing them in terms of satisfying the interests of all involved. In terms of criminal policy the promotion of reconciliation and the reduction of punishment would mean a re-introduction of the 'ultima ratio principle', to which in recent decades only lip-service has been paid. In principle, there are two strategies to re-introduce and implement the ultima ratio principle: the first and the most commonly used – at least in the Netherlands – is the use of discretionary powers by the public prosecution service, implying non-prosecution in many cases. The second is to change both the criminal code and the criminal procedural code to enhance the use of restorative practices and sanctions. Let us focus first on the first mentioned strategy.

It is important to note that non-prosecution does often not mean that no response at all is given to the reported misconduct. According to Dutch procedural criminal law the prosecutor may offer a 'transaction' implying certain conditions under which the prosecutor is willing to abstain from prosecution. Often the condition is the payment of a certain amount of money – not being a fine but not exceeding the maximum fine that is possible for the offense involved – but the conditions may also imply f.i. giving up claims with regard to certain confiscated objects or goods and compensating for the damages of the victim. This prosecutorial arrangement has many merits: the case is diverted from a full criminal procedure and the suspect in case is not publicly punished but nevertheless negatively sanctioned for his misconduct. In the Dutch legal literature the 'transaction' has been called a 'functional sanction', meaning that although it is formally a procedural arrangement and not a punishment, the perpetrator experiences the consequences as a sanction:

the conditional non-prosecution is used and experienced as a sanction (André de la Porte, 1984). It is not punishment, but it is giving a serious response to the misconduct. The disadvantage of this arrangement in our traditional criminal justice however is that decisions are left to the discretion of the executive agencies, without any clear priorities indicated by the legislator. In the history of the Dutch procedural law doctrine, the principle of expediency or 'opportunity-principle' was first interpreted as an exception to the duty to prosecute in all presumably provable criminal cases. In 1970 an interpretative shift occurred, demanding that non-prosecution should be the rule, on which exceptions should only be made when common interests can demonstrably only be served by prosecuting for punishment. Now, in 2009, however we can note a return to the old doctrine of obligation to prosecute in all cases, under the influence of penal populism and instrumentalist political thinking. So this strategy seems quite vulnerable and does not create a structural basis for restorative practices in criminal justice, but only an instable ground, dependent on an uncertain cultural adherence of criminal justice officials to the culture of restorative justice. Moreover, these officials remain in a sphere of law dominated by punitive legal thinking, implying and expressing the priority of punishment, so they are not legitimated by law to prioritize restoration. In this context, making use of restorative procedures and sanctions risks to be understood as an imperfect and even inferior style of punitive justice (Blad, 2004:384). Although certainly very valuable, the attempts so far at theoretically constructing a fully restorative justice system seem to rely heavily on this and other types of discretionary procedural arrangement, without apparently addressing the nature and design of the criminal codes themselves. The most recent of these attempts, by Walgrave (2008:144-155), pictures a pyramid of restorative law enforcement in which a case can be moved up or down a level in a pyramid of increasing use of coercion, obligation and imposition. Walgrave chooses against Braithwaite's implicit 'either restorative justice or punishment' scheme and only wants to accept restorative sanctions, but his model also seems to suggest that it is all a matter of case-driven policy choices.

The discretionary decisions of the prosecution agency can of course be structured and limited by (procedural) law and by guidelines or directives, such as is the case in New-Zealand and Belgium – perhaps in more countries – where prosecution can only be initiated after a previous attempt at or at least consideration of a restorative process (Walgrave, 2008:149). We make progress when this happens, because it implies that the policy-maker or preferably the legislative body itself has expressed priorities, different from punishment. But different only in the procedural sphere and, as discussed above, it is with the primary legislative choice to threaten with the imposition of punishment that the announced model of

doing justice, and therefore also the justice-expectations of the citizens begin to become punitively oriented. It is better not to threaten with punishment, when this is not necessary. How could we restructure the substantive criminal codes in such ways that we make punishment least available and restorative procedures most?

Reorganizing the criminal codes

Let us reiterate first, that although restorative justice does not seek to punish, it does seek to sanction negatively criminal offences and offenders. Let us define the sanction concept of restorative justice as the expression of disapproval of the conduct: as reminding someone sensibly and sensitively of legitimate reciprocal expectations. Sensibly meaning that the censure is expressed in a sensible way, under circumstances that promote that the normative message is received and accepted. Sensitively, meaning that the tragic quality of the criminal conflict for both victim and offender is examined and communicated in a context that allows for emotions to be expressed and developed. Once the normative censure has been expressed and made common, means are sought to redress as adequately as possible the types of harm done and to express apology to the victim. Whereas the traditional criminal justice system with its orientation on punishment only has negative sanctions of the punitive kind available, the restorative system promotes the combination of both negative and positive sanctions, in so far as agreements are established and complied with, and support is organized to facilitate compliance and for addressing criminogenic needs by the offender and his or her social network. Making the right choices and making amends are recognized as pro-social conduct leading to positive reinforcement of the offender's self-image, avoiding stigmatization and social disintegration.

Against this background, the optimization of restorative justice and the prioritized values of redress and possibly reconciliation would require a substantial depenalization of the substantive criminal code. This could be done by re-categorizing all criminal offences in another way, announcing that sanctions may follow upon criminal conduct: in most cases sanctions of a restorative kind. The attempt that follows is just by way of example and thought experiment and even when it would be unsuccessful it may serve as a basis for rethinking prosecutorial guidelines and directives. When reorganizing the criminal code in order to make it more restorative, the threat of punishment has to be used sparingly and if necessary only subsidiary, but nevertheless I feel there that it is realistic to assume that in some cases punishment will be considered an inevitable answer to an identified type of criminal conduct. And not so much as a back-up for restorative processes in case they fail, but as a priori choice to retain and prioritize the imposition of

punishment.

The author noticed that in the end, although he fundamentally rejects punishment, also Walgrave sees a functional place for punishment in his restorative law enforcement pyramid. When restorative sanctions are imposed by the court, 'additional pressures' may be exerted on the convicted offender 'by (threatening or carrying out) explicitly unpleasant deprivations of liberty, such as a curfew or forced stay in a closed facility' (Walgrave, 2008: 153). The wording is euphemistic, but it seems to imply nothing else than criminal detention as a subsidiary sanction. Rephrased it might also be a civil law type of detention (for non-compliance), but Walgrave speaks of threatening with an unpleasant consequence, coming very close to the definition and practice of punishment. What we are looking at, moreover, is the possibility of imprisonment not for the initial offence, but as a sanction for non-compliance with a court ordered restorative sanction. Perhaps it is better, when the criminal code allows for restorative agreements in certain cases, that the victim or any other interested party initiates a civil procedure in such cases, when the offender does not comply with the agreement that he has reached with the victim. Of course it may be so that the public prosecutor will be instructed to assist the victim in such a civil procedure, but the advantage would be that the case remains outside the domain of punishment.

So, the legislators should chose and indicate the types of offences, for which restorative practices and sanctions shall be the prioritized or even the sole legal reaction to the offence. And on the other hand, which types of offences are considered of such a severe nature, that only public and demonstrative punishing would seem to be able to contribute to restoring justice and social peace, shifting restorative practices to the sphere of the execution of the prison-sentence, which will then also inherently be considered essential. Considering specific circumstances in concrete cases, there may also be two intermediate types of criminal offences. Cases in which voluntary restoration is the prioritized offer and in which prosecution may follow when the restorative procedure fails to achieve its aims. And, vice versa, cases in which prosecution is the legally prioritized option, but where a restorative procedure may and should be offered whenever the victim and the offender ask for it and the wider circumstances of the case allow for a restorative resolution. In sum, an optimal restorative criminal code could contain four sections of criminal offences:

- a) Offences, restorable only.
- b) Offences, in principle restorable.
- c) Offences, in principle punishable.
- d) Offences, punishable only.

Let us examine these four categories to see what types of criminal conduct they might consist of and what the implications might be.

OFFENCES, RESTORABLE ONLY

In this category we could consider to place all single crimes against property and offences causing damage, not of a personal kind, such as vandalism. A monetary compensation or restitution should seem to be feasible. In all those cases where the offender is unknown, police will have to clear up the case as in the traditional system and put the results of the investigation in the hands of the victim in case. An indicator for allocating crimes to this category is the kind of sanctions that are usually imposed by traditional criminal justice, either by police (if competent), public prosecutors or courts. If these sanctions are usually of a monetary, or in any case of a non-custodial nature, depenalisation should be reached by making these offences restorable only. The big advantage would be that the victim gets more opportunities to have more satisfaction than the monetary compensation alone, if he or she so wishes. If there is a need to meet the offender and confront him or her with his choice, a restorative meeting of any kind will be facilitated if possible. Of course, a simple financial transaction without any meeting should be possible as an option for the victim. And if restorative procedures are mostly led by non-judicial agencies, the justice system is relieved of a certain case-load.

Procedurally, it should be so arranged, that if the victim so wishes or if it seems necessary because of the attitude of the offender in case, the public prosecutor assists and supports the victim in a civil law suit, either to have a civil compensation imposed or to secure compliance by additional court-imposed conditional sanctions for non-compliance. In connection with this it should be mentioned that when a victim in The Netherlands claims a civil compensation in the context of the traditional criminal procedure, the damages are calculated and the compensation is awarded on the basis of civil law standards, which are often too complex for the judges populating the criminal courts. The author has begun with mentioning 'single offences', meaning that an identified offender has committed one offence against one victim. he has doubts about how situations should be dealt with in which we (first) find offenders with multiple offences against many victims over a certain period of time (as often happens). In these cases we may often not know who the victims are. Maybe when some of the victims are also identified and wishing to confront the offenders with their responsibility in a restorative procedure, and as long as the offences do not imply personal injury, restorative sanctions would still deserve priority. Perhaps most of the misdemeanors that criminal codes now contain could be transferred to administrative laws working with purely monetary sanctions (fines), which have no deep impact upon the sanctioned citizens. Often in these kinds of cases there is not much that needs to be restored since they are mainly without victims.

OFFENCES, IN PRINCIPLE RESTORABLE

Whereas in the first category, prosecution in order to have a court of law impose a criminal sanction is excluded, this procedural option should be allowable in this second category of offences. But priority is still given to a restorative meeting and restorative sanctions agreed upon by the citizen-participants in the restorative procedure, whether this be mediation or conferencing.

The kind of offences we should think of are the intentional crimes against the rights and freedoms of others, with the exclusion of the right to life. Crimes against life should remain in the most severe category of offences. But intrusion upon privacy (burglary etc.), and upon personal and physical integrity could be in this category, the latter as long as the injuries are light and curable in a short period of time and without lasting consequences.

Here we should also consider the so-called 'complaint crimes' since they are performed in the context of intimate and family-relations and usually express complex sets of relational problems and needs, that had better be examined by all involved before deciding what should be done to reorganize the social setting in such ways that the problematic conduct is stopped, if possible without breaking up the social network.

Furthermore, what should be allocated herein are also the so-called crimes of negligence, resulting in damage or personal injury. These are especially tragic events because nobody really intended or even expected the results to come about and both victim and offender will often have an urgent need to understand the mistakes that were made. Society in general has a great need to investigate and understand the genesis of the harmful event, in as far as it is connected to work-routines or institutional or company arrangements that promote being negligent or not attentive to certain possible harmful results. The threat of punishment often induces types of defense that obscure the real circumstances and blocks any opportunity to collectively learn from the unfortunate event.

The public importance of this category of offences is such that a prosecution should be initiated whenever a restorative procedure fails or compliance with the agreement is insufficient. This means that it should be possible for any citizen involved in the case to ask for a prosecution after such failures. Also, it should be allowed that the public prosecutor prosecutes when he believes that the agreement does not amount to a just and fair sanction for the offender in case and wants to have a public sanction added to the sanction-elements agreed upon between the citizens.

The sanctions to be imposed should be non-custodial and restorative in kind, obliging the offender to redress or compensate for harm done. This implies a structural de-escalation of the penalties available, compared to the current criminal codes.

OFFENCES, IN PRINCIPLE PUNISHABLE

Here we have a mirror-category of the former. Priority should be given to prosecution for punishment to be imposed, but the civil parties involved in the case should have the right to request for a restorative procedure and sanction-arrangement instead of punishment. This request should be considered and decisions upon the request should be motivated sufficiently in view of all the interests involved. Particularly, the prosecutor should indicate why and in how far prosecution for punishment seems necessary to promote restoration of order and peace. There is speech of punishment, because in this category also the most characteristic sanction of traditional criminal justice, imprisonment, should be available to the courts, be it conditionally or unconditionally.

Substantively, the kind of cases in this category could be intentional crimes against the rights and freedoms of others, with the exclusion of the right to life, now with serious bodily harm and long lasting consequences for the quality of life and the life-perspectives of the victim in case. Perhaps here one could also allocate the crimes that victimize no concrete individuals directly, but whole communities indirectly and by their long or short term consequences. And also, negligent crimes causing multiple deaths.

Drug-crimes should be considered here, but they need a separate discussion to decide whether a radical decriminalization would not have better preventative effects and sooner. If and when custodial sanctions are imposed in these kind of cases, attention should be given to the ways in which the regime of the custody could contribute to restorative processes and keeping the convict in for a minimal period of time.

OFFENCES, PUNISHABLE ONLY

Intentional crimes against life, resulting in death, should remain offences that are suitable only for the classical sanction of imprisonment. The author feels that when a life has been taken - without any justification or legal excuse - and the primary victim is no longer amongst us a threshold has been crossed and public trial and punishment should demonstrate the unconditional and absolute right to life by punishing the offender. Intentionally caused death is in my view beyond reparation⁶. A fortiori such crimes resulting in multiple deaths. Also here the ways in which imprisonment is executed should offer opportunities for victims and offenders to go through a process of - mainly emotional and psychological, but if needed also material - restoration.

⁶ This also implies that restorative justice should never accept death penalties, since they fundamentally give a wrong moral example.

Conclusion

In trying to reorganize the substantive code and re-categorize criminal offences the author strongly experienced the need to discuss this issue with others, his contemporaries, both lays and experts in the field. What kind of new laws do we want? We need to research that question more extensively. I think that what I have been addressing are fundamental issues of the design, the scope and the dynamics of the public justice system that is so crucial for the quality of societal and individual life.

A public debate about these issues and a clear public choice seems to be one of the most crucial conditions to be able to arrive at a more or even fully restorative criminal justice system that facilitates reconciliation and sub-ordinates punishment in a realistic way to the preference of such reconciliation for the quality of social life.

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