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Restorative Justice between Aspiration and Reality

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Abstract: Emerging during the second half of the twentieth century, the concept of restorative justice is insufficiently studied and practiced in the Romanian social and judicial area. The legislation and logistics required to conduct programs of restorative justice are scarce and weak. Despite some projects initiated by the Ministry of Justice in 2003 and 2004, with some encouraging results, the studies did not carry on and experience was not brought any further. This study aims to present some essential features of restorative justice in the current status of the concept, as well as some proposals competent institutions have made. Also, we aim to state some views, mentalities and visions which the concept of restorative justice must face in Romania. Finally, a synthesis of the international forums which Romania is part of (the E.U. and U.N) will be presented, together with the actions taken in that respect.

Keywords: restorative justice in the contemporary world and in Romania

1. Introduction

Sometime during the 1980's, specialists in prevention and fight against crime noticed that, for some crimes of certain categories of offenders, the classical criminal system – so-called *retributive* – became insufficient and, at times, harmful. Included here are low-risk offences, minor offenders, young people or first time offenders.

It was noticed that crimes to which the pursuit is subject to prior complaint by the injured party, or to which the penal action ceases by agreement of parties or to which there are no serious consequences, take a long time to handle by the judicial police, the prosecutor's office and courts of law, and the judgment issued is not always the most adequate. On the other hand, the penal sentences issued by the courts do not have the desired consequences on the aforementioned offenders.

Overcrowded prisons cannot lead to more responsible convicted felons, as most of the times they leave the establishments gaining more experience in committing crime. It was also thought that the victims had a marginal role in the actual trial of the offenders and their interests were treated as marginal, while the state had a prime role as the performer of the public action. It was concluded that the main objective should be to make the guilty responsible for their crimes by meeting the requests of the victims who have endured physical, psychological or material damage.

Under these circumstances, alternative solutions were sought to provide real efficiency to the solutions which give accountability to offenders, making them face the consequences of their actions, their victims and the community in which they live and commit the criminal acts.

2. General Principles on Restorative Justice

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In 1977, Albert Eglash, an American psychologist, considered that criminal justice can be provided in three forms: *retributive, distributive* and *restorative justice*. The *retributive* justice has as main objective punishing the offender in relation to real and personal circumstances. The distributive justice aims at the rehabilitation of the offender, while restorative justice handles essentially the repairing of the prejudice brought on the victim.

Subsequently, the concept of restorative justice was redefined to comprise some new elements. This is shown to be the effect of various situations emerging.

Thus, most authors emphasized the following causes for the emergence and imposition of the concept:

The decline of the classic, traditional criminal system which became clumsy and inefficient in certain circumstances;

Failure of imprisonment sentences and, generally, of the criminal punitive sentencing;

High costs of managing crime;

Crowding courts of law with criminal files, some regarding minor offences;

Emerging and development of the crime victim support movement (Cușmir & Balica, 2005, p. 6).

At the same time, two different tendencies were identified in judicial practice of most countries. On one side, increasing stringency regarding criminal punitive sentences, which led to an increased number of trials, and an increased number of sanctioned offenders, and on the other hand the use of alternative procedures having as scope involving the victim and culprit for the solution of the case, named restorative practices.

Close analysis of these practices reveal that their inspiration sources can be identified in traditional practices for solving conflicts specific to certain ancient cultures or in religious precepts, such as forgiveness and redemption, accepted and practiced within particular confessional communities.

From this perspective, some authors stated that in the respective ancient cultures and religious communities emerged and were developed the first restorative justice programs (Latimer & Kleinknecht – apud Cușmir & Balica, 2005, p. 7).

In attempting to differentiate as precisely as possible between the restorative and the classic justice system, these authors started by explaining how the two systems regard the notion of offence. The classic penal justice system considers crime is an action or lack thereof affecting the state and system of laws. Restorative justice considers that offence is a conflict between persons which brings prejudice to the victim, to the community and even to the offender.

This results in a repositioning of parties in the penal proceedings. The victim is placed on an active status with regard to conflict settlement and obtaining material and moral compensation. The new model of justice proposes that the offender undertakes responsibility for this action, in order to repair damage and prevent repeating offences. At the same time, restorative justice gives the community a chance to state their opinion regarding a social phenomenon such as criminality.

As such, it was thought that restorative justice starts from a simple idea, that a conflict of criminal law can be resolved by repairing the material and moral damage caused. By “damage repair” it is evidently meant both material and moral damage. This kind of settlement leads to rebalancing the relationship between the victim and the community, restoring and strengthening peaceful coexistence.

The great advantage of restorative justice compared to the traditional or, more precisely, to the retributive system, is that the parties involved in a legal relationship agree together on the solution and

on any future implications. In other words, restorative justice attempts "to cure and make right the harm inflicted, by cooperation of the parties", as alternative to state intervention (Howard & Mika, apud Cuşmir & Balica, 2005, p. 9).

The damage caused to the victim must be repaired without overlooking the offender, who will be supported and encouraged by the community to undertake responsibility for his crime and make every effort to reintegrate into society. These aspects are barely taken into account in the traditional trial, in which the main objective is determining and applying punishment. This is the main distinction between restorative and retributive justice.

3. International Documents on Restorative Justice

The interest international organizations have shown for restorative justice is expressed in a series of documents belonging to the U.N. and E.U., stating some principles of the new dispute resolutions in the criminal justice system.

Some examples in this respect: *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly resolution 1985*; *Council of Europe Recommendation 18/1987 concerning the simplification of criminal justice; Council of Europe Recommendation 16/1992 on Community sanctions and measures; U.N. Economic and Social Council Resolution 33/1997 regarding "Elements of responsible crime prevention: standards and norms"; U.N. Economic and Social Council Resolution 23/1998 regarding "International cooperation aimed at the* reduction *of prison overcrowding and the promotion of alternative sentencing"; Council of Europe Recommendation 19/1999 concerning mediation in penal matters; U.N. Economic and Social Council Resolution 26/1999 on the Development and implementation of mediation and restorative justice measures in criminal justice; U.N. Economic and Social Council Resolution 14/2000 regarding Basic principles on the use of restorative justice programmes in criminal matters; E.U. Council Framework Decision 220/2001 on the standing of victims in criminal proceedings; U.N. Resolution 12/2002 regarding Basic principles on the use of restorative justice programmes in criminal matters; U.N. Economic and Social Council Resolution 15/2002 regarding Basic principles on the use of restorative justice programmes in criminal matters; U.N. General Assembly Resolution 56/261/2002 entitled "Revised draft plans of action for the implementation of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century"; E.U. Ministry of Justice Resolution 2/2005 on the social mission of the criminal justice system; Council of Europe Recommendation 8/2006 on the assistance of victims.*

Out of all the above, we emphasize U.N. Resolution 12/2002 on the *Basic principles on the use of restorative justice programmes in criminal matters*. This document is important because it recommends member states of the international community to initiate and develop strategies to implement restorative justice programmes and to bring these programmes into practice. It also recommends, as means to evaluate and expand these programmes, periodical meetings of magistrates with the representatives of organizations and institutions conducting restorative justice programmes, in order to identify best practice solutions with regard to the criminal justice system.

Restorative justice was one of the main subjects of the eleventh and twelfth U.N. Congresses in 2005 and 2010. The eleventh U.N. Congress was held on April 18-22 2005 in Bangkok, on the subject of *Preventing Crime and Criminal Law*. It emphasized the importance of reforming the criminal system by promoting restorative justice, whilst respecting local practices

(http://www.un.org/french/events/11thcongress/). The final statement of the participants includes the acknowledgement of restorative justice for promoting the interests of victims and social reintegration of offenders. It also asserted the importance of restorative justice programmes and procedures, as alternative to negative effects of imprisonment and as an opportunity to reduce the volume of work in courts of law.

The twelfth U.N. Congress in 2010 (Salvador – Brazil) continued the debate on implementing the restorative justice system, underlining crime prevention and protection of the victim, particularly with regards to minor offences.

4. Restorative Justice in Europe and around the World

Although deriving from *common law* systems, restorative justice extended to European states, as proven by E.U. recommendations and resolutions and the legislation of member states and those outside the Union. Cultural diversity was not an obstacle in the development of the new justice system, therefore most member states prefer mediation in criminal law as a means of restorative justice. Council of Europe Recommendation 19/1999 decided that mediation is synonym to restorative justice.

Analysis on the implementation and results of the new model in some European states has revealed that these are far from meeting expectations. The reasons are diverse and complex, mainly of a social and economic nature, routed on a certain spiritual attitude, tradition and mentalities.

E.U. institutions' recommendations and resolutions led to adopting internal norms in agreement with their principles, with the main purpose to optimize procedures for minor offenders, relieve courts of low risk cases and reduce prison overcrowding. According to most norms and in compliance to European regulations, specific restorative justice procedures may intervene during any stage of the proceedings, but are mostly used in the initial stages of the criminal trial.

European and national norms were extensively criticized and some issues have not yet been cleared. As such, it is evident that the premise for any mediation is the acknowledgement of the crime by the offender, a requirement included in most European state legislations. Critics to this rule consider that it brings great harm to the principle of the presumption of innocence, present in all constitutional and procedural legislations. The restorative justice supporters claim that without acknowledgement of the deed, true mediation cannot occur, anything contrary is fictitious. This last expression (fiction) determined contesters to view the procedure as indeed fictive, when the offender's interest dictates acknowledgement of the offense, even if they did not commit it.

As mediation regards to minor offenders, it is thought that bringing the minor offender to-face the overage victim creates inequality of opportunity, even if the underage person would be assisted by the lawful persons.

Finally, as the European Community recommendations and resolutions provide the possibility to make use of restorative justice means at any stage of the proceedings, even prior to criminal pursuit, and many states have taken over this provision, a debate rises on the legal basis to initiate such proceedings before opening a criminal case.

Worldwide, restorative justice gained ground in the U.S.A., Canada, New Zealand and Australia. Here, this system takes up the main role in the justice system. Procedures such as *family conferences* have acquired a primordial role in solving underage crimes. These conferences are gaining ground also in causes with overage offenders. They offer both victim and offender a chance to answer questions

such as why the deed was committed, why on that particular victim etc., and also what was the motivation of the offender and what punishment they will receive.

Studies have revealed a high level of satisfaction of the attendants – offenders, victims, their families, and also a low level of recidivism, compared to persons punished within the traditional criminal justice system.

5. Experimenting Restorative justice in Romania

Restorative justice is thought to have emerged in Romania in the year 2002, by means of the Minister of Justice Order 1075/C/10.05.2002 setting up two experimental Centers for restorative justice in Bucharest and Craiova.

It is only fair to remind of two norms issued prior to 1990, promoting elements of restorative justice in the current sense of the notion: Law 69/1968 on trial committees[1] and Decree 2018/1977 on the transition measures for sanctioning and labor reeducation of some offenders, as provisioned by criminal law.[2] By means of Law 59/1968 were created the trial committees as sub-common bodies having the scope of increasing the importance of public opinion and that of the community in ensuring law is respected and in fighting against antisocial activities. Basically, these committees solved, among other issues, criminal causes regarding low risk crimes by determining offenders' responsibility and compensating the victims' prejudice. They did not apply penal punishment.

Decree 218/1977 aimed to increase the role of socialist units and public organizations in law enforcement, punishment and reeducating by labor the persons committing violations of the social coexistence norms and country legislation. It mainly stipulated that underage people, aged between 14 and 18, committing criminal offences, shall not be sentences to prison and shall be trialed and punished by the communities in which they live or study.

Both norms were repealed by Law 104/1992 for changing and amending the Criminal code, Criminal proceedings code and other laws, as well as to repeal Law 59/1968 and Decree 218/1977.[3] Thus, all practices accumulated for this model of alternative justice were abandoned, for purely political reasons that had nothing to do with knowledge in fighting crime.

Creating the two experimental restorative justice centers and expanding their activity in 2003 led to the management of various projects, such as *Restorative Justice – Possible Solution to Juvenile Crime* and *Improving the Juvenile Crime and Crime Victims Protection System*.

These projects also used elements of restorative justice (mainly mediation) having as "target group" underage and young people aged 14 to 21, who committed crimes which require a formal complaint from the victim in order to start the criminal action, and for which the agreement between parties exempts from criminal liability. Several services were initiated and activated to support victims and offenders, such as: informing, assistance, guidance. Local Coordination Committees were set up, constituted of court, prosecutors, police and social integration services representatives.

At the end, a study was performed, which mainly underlined the following:

- Weak and insufficient legislation (since then, Law 192/2006 was adopted, on mediation and organizing the profession of mediator, which ignored the results of the experiments conducted);

[1] Republished in the Official Gazette no. 27/09.03.1973.
[2] Published in the Official Gazette no. 71/17.07.1977.
[3] Published in the Official Gazette no. 244/01.10.1992.

- Weak level of cooperation between institutions involved in the projects;

- No coordination of the activities, as each involved party acted upon their own concept which most of the times was different than that of the others;

- Local Coordination Committees only met sporadically and did not take decisions to eliminate issues and to impose clear directions;

- The bureaucracy and didacticism component of all activities;

- Team work was strictly formal, which determined restraint from the people likely to become subjects to the restorative justice activities;

- Lack of involvement from communities in the projects.

These and other factors make restorative justice in Romania an aspiration far from becoming reality.

6. Conclusions

The model of restorative justice should be a goal for Romanian society to reach. This is not difficult to accomplish, but requires a solid and rigorous legislation. Current Law 192/2006 on mediation and management of the mediator profession, sought as "a real progress and judicial innovation useful for the Romanian justice system, opening a series of opportunities on the introduction and ruling of restorative principles and practices…" (Rădulescu, Banciu & Dâmboianu, 2006) cannot fulfill this role (at least not on its own), especially after Constitutional Court decisions regarding the constitutionality of certain texts within its contents.

On the other hand, legal norms on restorative justice must be elaborated taking into account the experience gained so far and using people who have activated in such projects. Even though criminal law politics reflects the views of the governing parties, it should have nothing in common with *politician's* politics (Cioclei, 1994, p. 2). In other words, in this matter, specialists must have priority; otherwise, the objective of Romanian society will be hard to reach.

7. Bibliography

Cușmir, Anca & Balica, Ecaterina, *Programe de justiție restaurativă în lumea contemporană (Analiză documentară)/ Programs of Restorative Justice in the Contemporary World (Documentary Analysis),* criminologie.org.ro./wp-content/umploades/2015programe-de-justitie-restaurativa-in-lumea contemporana.

Rădulescu, Sorin M. & Dâmboianu, Cristian (2007). *Criminalitate, comunitate și justiție restaurativă (Raport științific final)*/ Crime, Community and Restorative Justice (Final Scientific Report). insoc.ro/devianta/pdf/2007-criminalitate.pdf.

Rădulescu, S.M.; Banciu, D. & Dâmboianu, C. (2006). *Justiția restaurativă. Tendințe și perspective în lumea contemporană/ Restorative Justice. Trends and perspectives in the contemporary world.* Bucharest: Lumina Lex Editions.

Cioclei, V. (1994). *Viața sexuală și politica penală/ Sexual life and criminal policy*. f.l., Holding Reporter Editions.