Chapter 5

Restorative Justice and Technology

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ABSTRACT

In civil law countries, criminal justice is beginning to experience a shift from retributive justice towards restorative justice. Amongst other goals, restorative justice aims to give the victim a pivotal role in the administration of justice, which until now, with the traditional criminal justice, has not happened at a desirable level. It covers very different processes, but victim-offender mediation is certainly the most established one. Although an online version of the victim-offender mediation model is yet to be implemented, we believe that it could be a relevant alternative to an offline setting. It is nevertheless clear that further studies are necessary to fully comprehend the extent of the structure and implications of an ODR system for criminal conflicts.

INTRODUCTION

Conflict resolution is a multidisciplinary and an interactive field of knowledge, where the theory of justice and even criminal law has an important role to play. The conflict between a citizen and law should not be considered solely as a problem between a person and the State. The progress and changes caused by technological advances need to foster a return or approximation to the interpersonality nature of conflicts’ resolution. After the unthinkable crimes against humanity that have been committed since the second war world, Hegel’s thought of human progress based on the necessary sacrifice of some victims is neither valid nor satisfactory (Reyes Mate, 2011; Galain Palermo/Garreaud, 2012). Victims became visible and, according to Walter Benjamin, justice must be done through the compensation of injustice and the reparation of damages committed against them. Habermas advocates for the necessity of “communicative actions” and for the resolution of social conflicts based on dialogue, encounters, and communication. This new philosophical consideration of justice demands new theories of justice.

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Criminal justice is historically assumed as a State’s monopoly. It is a social control method that relies on the imposition of punishments (retribution) with a preventive purpose. Thus, the main purpose of a criminal system is not to punish someone who committed a crime simply because he committed such a crime, but to prevent it from happening again. This is the idea behind current criminal justice systems in most civil law countries, such as Germany, Spain or Portugal.

Even though criminal prevention can be described as promotion of avoidance, by means of punishment, of the (re)occurrence of crimes and of the endangerment or injury to legal goods or values (Rechtsguts), its description would be incomplete without mentioning that it encompasses four distinct and intersecting dimensions – general prevention, special prevention, positive prevention and negative prevention. Positive general prevention focuses on the reaffirmation of the value of the legal norm against the unlawfulness of a crime (Hassemer, 1998, 2002; Streng, 1991), while negative general prevention (deterrence) happens when the State acts on the population through intimidation, deterring them from committing crimes, being the punishment of the offender a deterrent example to others. Special prevention can operate in a positive or in a negative fashion. There is a positive special prevention (rehabilitation) when the State aims at the (re)socialization of the offender and negative special prevention (incapacitation) when it regards the offender as a source of danger which needs to be segregated and separated from the community.

This is the abstract and retributive logic that legitimizes the power of the State against citizens who disregard legal criminal norms. This public power to resolve criminal conflicts so far denies any communicative rationality that could support agreements as an alternative path to end any emerging conflicts (Luhmann, 2005). From this punitive logic, that ignores the will and needs of the citizens involved in a crime (either as an offender or as a victim), derives a punishment that puts an end to the legal dispute, but is incapable of fulfilling the underlying goal of law: social pacification. Despite the strong criticism made by scholars, that highlights the serious crisis and failure of the criminal justice system in achieving the purposes stated above, traditional criminal justice systems continue to ignore other methods of resolving serious conflicts (Galain Palermo, 2009). However, a new vision of justice rooted in the will and needs of the people involved, whose place has been expropriated by government officials and lawyers (Christie, 1977; Wright, 1991), promises to bring significant changes to a normative, retributive and traditional legal landscape (Kerner, 1983). Scholars call for a new vision of justice and new questions. Rather than asking “Who has done such act?”, one must ask “Who has been harmed?” and then learn what is necessary to do and how can offender, victim and other stakeholders resolve the conflict (Zehr, 2004). The question is whether these new “lenses” with which one should assess the legal conflicts and make the right questions determine a simple correction to the traditional way of seeing justice, in other words, whether they would work as a complement to existing legal techniques, or they imply a major overhaul and reform of the responses to crime.

Now, if restorative justice intends to replace traditional or retributive criminal justice, what would be the paradigm shift? As for the answer, not even the various theories within restorative justice have reached an agreement (Johnstone & Ness, 2007; Luna, 2003, Braithwaite, 2003; Zernova & Wright, 2007). Everything indicates that, more than a paradigm shift, it is a question of determining where and when traditional criminal justice should step in and where and when there should be spaces or realms of interaction between the stakeholders (Galain Palermo, 2009). An additional question should be placed: technology could be a useful instrument for restorative justice?