

REFLEXIONS UPON THE RESTAURATIVE JUSTICE

Senior Lecturer Anamaria Cercel PhD
University of Craiova
Faculty of Law and Administrative Sciences

The penal system which relies only upon repression could not provide solutions to all the problems created by the phenomenon of criminality. So, during the recent decades, alternative procedures have been developed, namely conciliation procedures of the society type, in which the sides are placed on equal positions. The procedures, named restaurative, aim to restore the social relationships that have been deteriorated through the anti-social deed, to cover the material and moral prejudices suffered by the victims, aim to make the delinquent side aware of the consequences of its doings and to increase its responsibility towards them. Last but not the least, these procedures aim to help the community to involve itself actively, so establishing a kind of justice that is vowed to be as well official and public.

The increase of criminality is evident and seems to escape the traditional means of prevention and fight. Thus, the penal system based on repression can no longer provide solutions for all the problems which can appear and it has been attempted, especially over the past 20 years, to set the basis for restorative systems, which offer solutions where traditional systems have failed.

Quite often, the resolutions pronounced by the courts in the repressive system cannot be considered flexible enough to be real solutions for certain conflicts. Also, the time awarded to classical procedures is pretty long¹, and the decision pronounced in the end only gives the impression that one of the parties won, and the other lost².

This is the traditional image of the penal trial, a duel-trial between society and the criminal, described poetically as a symbolic sword keeping the balance, which makes us think of straight-forward solutions, of justice and injustice, of truth and lie, of the innocent and the guilty. "How can we reconcile the irreconcilable, mix water and fire, when there is the question of separating the good from the evil: punishment does not mean searching for conciliation, but showing the disapproval, marking the social opprobrium"³.

In the last decades, the practices of horizontal, dynamic consensus between citizens, procedures of conciliation, practices called restorative⁴, as well as mediation, conciliation (especially penal one), community service, and so on, have gained ground. They became

¹ Dorel Julean, Flaviu Ciopec, *Dreptul la judecarea cauzei intr-un termen rezonabil. Despre necesitatea unei reglementari – The right to be tried within a reasonable time. On the necessity of regulations*, in "Noutati legislative in spatial juridic penal European", Universitaria Publishing House, Craiova, 2008, p. 130-143.

² Eileen Servidio – Delabre, *La médiation aux Etats-Unis*, in *Archives de Politique criminelles*, Editions A. Pedone, 1985, p. 200.

³ Reynald Ottenhof, *Les techniques de conciliation en matière pénale*, in *Archives de Politique criminelles*, Editions A. Pedone, 1984, p. 124.

⁴ Lode Walgrave in R. Cario (dir.), *Victimes: du traumatisme a la restauration*, Paris, L'Harmattan, 2002, p. 275.

more and more frequently used in the European countries, especially in the case of justice for the minors.

For the first time the term of restorative justice was used by Albert Eglash, in 1977, in the work "Beyond Restitution: Creative Restitution"¹. The institution is not new, it is not a discovery of this era, and its origins are lost in the beginning of civilization, as we can encounter it in the communities of the American Indians or Aborigines, who understood to mediate, to negotiate the closure of a conflict arisen in their community.

In the Romanian Countries it is known as the Gathering of the Elders, which had the role of regulating and mediating conflicts, based on the traditions and customs of the area, on the moral rules which had deep roots in the community, assumed by generations, and which were implicitly easier, more natural to accept and recognize. Also, the ethnical minorities in Romania had a form of judgment by mediation and negotiation, as is the case of the leader in the rrom nation, practices which are still used nowadays, to avoid bringing the conflicts before the institutions of the state.

This form of justice appeared officially in the countries of the Anglo-Saxon system of law, initially in New Zealand, and then expanding to Australia, Canada, United States and later on in the European countries of the Latin system of law. Considering the fact that some of the principles of the restorative justice, such as forgiveness and reparation, and at the same time, fundamental concepts of Judaism and Christianity, the communities with these religions manifested more cooperation in adopting and applying this new system of justice.²

The countries in the common-law system set the basis and developed this new system because the principles of their system of law are more flexible in the sense of social pacification, and the judges have more discretionary power, which allows them to judge in equity and according to the spirit of the laws.

On the contrary, the European countries which have systems of law based on the Latin model, were more reticent in adopting certain alternative forms, accepting mediation and community service only when they encountered the inefficiency of the traditional repressive system, for certain penal cases and in this situation, as new variants or in addition to the traditional and re-educational practices³.

The restorative practices are different from the traditional, repressive system because the first ones have as objective the restoration of social links, the reparation of the damages sustained by the victim, so they focus on the victim, while the classical systems focus on the punishment, on the sanctions as means of restoring public order which the criminal has broken.

By the restorative justice, the criminal assumes direct responsibility for the deed he has committed, repairing the material damages, but also the emotional ones of the victim, increases the direct involvement of the community, because it leads to the awareness of the state of security within the society and the necessity of solving the conflict. The action against the delinquent is more personalized and adapted to his affectivity, which usually, in the traditional system is not a frequent concern of those involved.

¹ Sorin M. Radulescu, Dan Banciu, Cristina Damboeanu, *Justitia restaurativa. Tendinte si perspective in lumea contemporana*, Lumina Lex, Bucuresti, 2006, p. 14.

² Jeff Latimer, Steven Kleinknecht, *Les effets des programmes de justice réparatrice: Analyse documentaire sur la recherche empirique*, Division de la recherche et de la statistique, Ministère de la Justice, Canada, 2000, p. 6.

³ L. Walgrave, *op.cit.*, p. 275.

Thus, from the mechanisms of functioning of this type of justice we can deduce the fundamental principles it is based on: reparation, responsibility, voluntary work, sincerity, democratic and community spirit, avoiding discriminations, early remedy and prevention¹.

Also, are brought together: delinquents and persons important to them, victims and their supporters, including the associations for protecting the victims, other interested parties, such as: the probation personnel, the social services, personnel from the field of education, volunteers as well as other persons which have an interest from the perspective of the society or the community².

We can define the restorative justice as a new approach in the way of making justice, oriented mainly on the repair and elimination of grief and damages caused by a penal deed³.

From these restorative practices we will deal with the *penal mediation*, to underline in which way it is a guarantee to the victim.

Mediation can appear to be an attempt at a dialogue between law and tradition. Different social actors understand by it to maintain a certain social solidarity⁴. Thus, mediation can also be considered a process of regulation of the conflicts in traditional societies, which means, at the base, more involvement from society and less from the state⁵. In this line of action, in some E.U. countries, mediation was used to solve conflicts between neighbors, especially in multi-ethnic communities⁶.

The penal mediation was used initially in New Zealand, in 1989, under the form of "family group conference" and it was adopted gradually by other countries⁷. It implies a meeting between a criminal and the persons close to him, the victim and the persons close to her and a police representative, animated by a professional mediator.

This reunion intends to identify the damages and the suffering of the victim, and the means of repairing them. The advantages of this informal procedure are the involvement of the persons who have a direct interest and who can assess with certainty which are the material and moral damages suffered by the victim, as well as their personal participation in deciding the means of reparation.

Moreover it favors the personal involvement of the criminal, his awareness of the gravity of his deed. The advantages are on the victims' side also, who, participating in a "restorative conference", have considerably higher degree of satisfaction regarding the feeling of equity, of respect as a human being and moral support⁸.

Studies have shown that the victims appreciate especially the opportunity of communicating the feelings and situations they have lived through, more than the material compensations. As for the criminals, they feel that they are receiving a fairer treatment and

¹ Sorin M. Radulescu, Dan Banciu, Cristina Damboeanu, *op.cit.*, p. 16.

² K. S. Williams, *Criminology*, Oxford University Press, 2004, p. 111.

³ G. Bazemore, L. Walgrave (eds.), *Exploring restorative justice juveniles*, Monsey (New York) Criminal justice Press, 1999, p. 48.

⁴ Philippe Coppens, *Mediation et philosophie du droit. Archives de Politique criminelles no. 13/1991, p. 16. John Braithwaite, Commentary: Law, morality and restorative justice. European Journal on Criminal Policy and Research, no. 1/1997, Springer Netherlands, p. 93-98.*

⁵ D. Salas, *Le proces penal. Elements pour une theorie interdisciplinaire du proces. P.U.F. 1992, p. 109-122.*

⁶ Bram Pepper, Frans Spierings, *Settling Disputes between Neighbours in the Lifeworld: An Evaluation of Experiments with Community Mediation in the Netherlands, European Journal on Criminal Policy and Research, no. 4/1999, Springer Netherlands, p. 483-504.*

⁷ Anna Mestiz, Simona Ghetti, *A Comparative Perspective on Victim-Offender Mediation with Youth Offenders Throughout Europe, Victim-Offender Mediation with Youth Offenders in Europe, Springer Netherlands, 2005, part I, p. 3-20.*

⁸ L. Walgrave, *op.cit.*, 2002, p. 278.

better understand the meaning of the sanction and the obligation of repairing the damages suffered by the victim¹.

There are cases when the victims do not wish to be confronted with the criminal, especially in the case of violent crimes. For this reason, the participation at the mediation cannot be an obligation, all the participants must consent freely to it, because only in this way is the deal a result of free will, and what is assumed freely was also be executed willingly.

It is important to underline what we understand by victim participating in the mediation. We will consider the direct victim of the crime, but also the indirect victims. In the extremely wide sense, we can say that society can also be considered a victim. This is the reason why the penal justice, by holding accountable the criminal, is done, in the traditional system, by the state as a representative of society. But we are not in a traditional repressive system, where the state becomes the main victim and the direct victim becomes subordinate, thus depriving the persons involved of the actual conflict².

For these reasons, in the restorative justice procedures, the victim can no longer be considered, only in subsidiary, to be the state, as representative of society.

Because these restorative procedures concentrate on the victim, the eternally forgotten party in a penal trial, it is obvious that a main objective is to identify and quantify the material damages, but also the moral ones suffered by the victims. Thus the material damages will be more easily evaluated, as they are objective.

Research of the victims have shown that we mustn't overlook the victim's sufferance cause d by the interaction. It is difficult to quantify these sufferings, as moral damages, in money and for these reasons, the restorative procedures propose non-patrimonial ways of covering the moral damages.

Examples of suffering caused to the victims are the psychological suffering, the need to get specialized psychological or psychiatric help³, troubles in socializing, isolation with respect to the community, but also with the close entourage, the lack of self confidence and the lack of confidence in the authorities, the feeling of uncertainty.

The material and moral damages must be covered, even if the criminal is not apprehended by the authorities or is not solvable, because, in principle, society, by means of the state's authorities, is the one who could not ensure the protection of the person who could not benefit from the guarantees of safety that he/she is entitled to. On these grounds, the state must assume the responsibility of covering the material and moral damages of the victim, especially if they cannot be blamed.

Thus, it is essential to the penal restorative justice that the reparation of the damages be a collective task, of the communities, of the state. By this we maintain the social reaction to crime in the public eye and avoid the reduction of the restorative justice to a variant of civil law⁴.

The means of reparation of the prejudice vary, as they can be patrimonial, the classical damages paid in money, but mostly non-patrimonial, such as offering public apologies. The damages can be concrete or symbolic. The victims need psychological aid right after the offense; they need to be listened to.

¹ Ibidem

² R. Cario, *Introduction...*, *op.cit.*, p. 209

³ Idem, p. 207

⁴ L. Walgrave, *op.cit.*, p. 277.

The recovery of the material prejudice can also be done by reparation service to the victim, with their consent, because reconciliation does not necessarily imply paying a sum of money.

Among the non-patrimonial means of reparation of the prejudice we can mention the words of apology, or mailing a letter to the victim, in which the offender apologizes, shows the reasons for the offense and expresses honest regrets¹.

With all the advantages of these restorative practices, there is an impediment as to where they apply, because for them to be effective, they must reach final performances, as well as restoring the social links and the final reparation to the victim.

This impediment is as to the nature of the penal deeds (crimes) which can be subject of reconciliation, based on a series of subjective factors: the dangerous character of the offender and the vulnerability of the victim.

Restorative practices can be used in the case of crimes with a low degree of social anger. Although they aim at fundamental social values, the offense is relatively small from the point of view of the penal importance. These deeds need not be the object of a penal trial. For these deeds we recommend restorative practices².

The procedure in restorative causes must take into account a series of particularities compared to the repressive justice form:

- 1) the judicial investigation must be oriented not only on determining the offence and the guilty, but especially on identifying and quantifying the material, moral, personal and social prejudices of the victim, in order to determine the possibilities of reparation;
- 2) the offenders are actively involved in understanding the damages and suffering of the victim, in order to identify their expectations in the case of damage reparation;
- 3) the restorative sanctions will not be based solely on determining the facts, responsibility and guilt, but most of all, on determining the reparation benefits of the offense they represent.

The agreement reached by the offenders and the victim, freely consented, has the juridical force of a transaction. It is preferable that this agreement be executed willingly, if not, the victims, in their request, should have strong guarantees from the state, which is involved by the presence at the mediation of the police representative.

Indeed, this agreement is not a mere transaction between private persons, it is not a private way of solving a fight. Thus, as we have shown so far, restorative justice, including mediation, is public justice, not a private one.

If we were to consider it a form of the private justice, it would be rather dangerous, because it would be a step back, it would open the possibility for any victim or for their close ones to take justice into their own hands, so it would be a blow to democracy and the rightful state.

There are situations when the mediation can not take place, wither because the offence is too serious, of the victim refuses or after the reunion no agreement has been reached.

The followers of the traditional system believe that in these cases the solution is to go back to the traditional justice. The followers of the restorative justice claim that we must explore the restorative potential of compulsory interventions.

¹ Jacqueline Fanchere, *Regard sur le droit penal de la reparation*, Archives de Politique criminelles no. 13/1991, p. 11

² Idem, p. 30.

In order to overcome these situations, the cause must be presented to the court, who can apply alternative measures or, based on the complexity of the situation and the serious risk of victimizing, can apply a punishment of imprisonment¹.

If the offender is convicted to a penal fine, his state of solvability must be taken into account. In this way, there will be a competition between the pecuniary obligations assumed with the mediation agreement and the penal sanction. In our system of law, the civil obligations are executed independently from the penal punishment of the fine, which has priority.

In the system of the restorative justice, specialists have shown that it is very important, in the situation when the pecuniary resources of the offender are insufficient, the priority is that of paying for the damages to the victim, and a punishment involving a fine or the confiscation of goods will not be pronounced.

The practices of restorative justice could be thought to favor second offences, because there are no repercussions, obligations and intimidation such as they are illustrated in traditional systems.

However, no study has yet shown a high risk of second offences. It seems like there are other factors for this, such as the methodological quality of the mediation, the restorative conference of the surveillance of the execution of the alternative punishment, such as community service².

In the specialty literature³ it has been shown, without a doubt, that restorative justice has numerous advantages, being a type of penal policy which is very attractive from the contemporary political climate.

It gives the due priority to the victims, in a time when this seems important, it is cheaper than the system which already became classical, it seems to be more effective when it comes to second offences and has fewer inconvenients.

Restorative justice also has faults, including the determination of the juridical nature, which is different in every country and depending on the system of law, on the procedure which must be followed in the case of mediation and also, it does not provide solutions for any type of offense.

However we must observe that this restorative approach is an alternative to the traditional systems, but it is perfectible, and not one of a kind.

We can state that, if it is true that the restorative justice is the best instrument for other social interventions, than it can be applied to the interventions which have the purpose of repairing the damages produced by the restorative justice itself⁴, as there have been cases when certain mediations have failed.

It is important that it favors the re-establishment of social interpersonal connections between those involved, and by this, it reinstates social order in its entirety. In this way, it allows the penal system to fulfill its mission of guaranteeing public safety, becoming, from being a simple reparation, a restoration of social peace.

¹ L. Walgrave, *op.cit.*, p. 299.

² *Idem*, p. 298.

³ K. S. Williams, *op.cit.*, p. 112

⁴ John Braithwaite, *Encourage restorative justice, Criminology and Public Policy*, Columbus, no. 6/2007,