



WORKSHOP

# **STRUCTURING THE LANDSCAPE OF RESTORATIVE JUSTICE THEORY**

MAASTRICHT, 26 OCTOBER 2005

VENUE: FACULTY OF LAW,  
UNIVERSITY OF MAASTRICHT, BOUILLONSTRAAT 1-3, MAASTRICHT, NETHERLANDS

SCIENTIFIC REPORT

CHRISTA PELIKAN  
SÓNIA SOUSA PEREIRA

WITH THE FINANCIAL SUPPORT OF COST – EUROPEAN COOPERATION IN THE FIELD OF SCIENTIFIC AND  
TECHNICAL RESEARCH AND THE UNIVERSITY OF MAASTRICHT, FACULTY OF LAW

<http://www.cost.esf.org>

<http://www.unimaas.nl>

## **1. Introduction**

### **1.1. Concept and objectives**

A one-day workshop was organised in the framework of COST Action A21 in cooperation with the Faculty of Law of the University of Maastricht that was intended to expand on the compilation and mapping of theoretical research on Restorative Justice in Europe. The contributions of foreign experts were to add more aspects to European vistas gained so far and enrich further debate in the COST A21 Working Group Theoretical Research. By organising this workshop, the initiators hoped to meet the often formulated criticism that Restorative Justice is still missing a sound theoretical basis. This way, this workshop must be seen as a logic continuation and expansion of the COST workshop on 'The institutionalisation of Restorative Justice', organised in November 2004 at the Catholic University of Leuven.

The workshop aimed to provide an opportunity for further theoretical analysis of the themes identified and elaborated during the last year and a half within the three sub-working groups of the Theoretical Research domain of the Action. These sub-working groups are dealing with the following broad topics: 'Society and Restorative Justice', 'Restorative Justice and the Law' and 'The inner dynamics (micro-theories) of Restorative Justice'. The work of the Theoretical Research domain had started with defining and elaborating theoretical controversies relevant to the field of Restorative Justice. In the course of the meetings in Budapest and in Ljubljana these controversies were bundled to become focused around the three topics named. Templates that attempt to bring the host of theories and 'pieces of theory' into perspective have been developed. They are to become complemented and modified by the comments and the critical appraisal of eminent experts and scholars from outside the working group. In addition, we expected to be confronted with new theoretical aspects that will become integrated into the theoretical landscape.

The proposed workshop fits into the framework of COST Action A21. The main objective of this Action is to enhance and to deepen knowledge on theoretical and practical aspects of Restorative Justice in Europe, with a view to supporting implementation strategies in a scientifically sound way. In order to meet this objective, COST Action A21 has identified three domains: evaluative research on Restorative Justice practices; policy oriented research on Restorative Justice developments; and theoretical research. Even though the workshop is primarily concerned with theoretical research it will also inform the work done so far and the work scheduled for the future in the fields of evaluative and policy oriented research.

The preparations for and discussions at the workshop provided a sound basis for placing Restorative Justice in the wider framework of societal institutions and arrangements that deal with conflict resolution and tried to define more clearly its place vis-à-vis the criminal justice system.

## 1.2. Organisation

The workshop was held in the Faculty of Law of the University of Maastricht, The Netherlands; it lasted one whole day (Wednesday October 26, 2005).

The local organiser was: Katrien Lauwaert - Faculty of Law, University of Maastricht and member of the Management Committee (MC) of COST Action A21.

The organising committee consisted of:

- Ivo Aertsen – Chair of Management Committee (MC) COST Action A21, and professor at the Catholic University of Leuven;
- Marko Bosnjak - Researcher, University of Ljubljana, Faculty of Law, Institute of Criminology;
- Christa Pelikan - Researcher, Institute for the Sociology of Law and Criminology, Vienna;
- Sonia Sousa Pereira – Lawyer, City Council Lisbon;
- Bas van Stokkom – Researcher, Centre of Ethics, Radboud University, Nijmegen.

Apart from the COST grant and the participants' personal financial contributions, the workshop was supported by the University of Maastricht in terms of provision of facilities (statenzaal of the university) and through administrative and practical support received from administrative staff of the Faculty of Law.

Participants received a workshop folder containing the following materials: the workshop concept presentation; practical information on the location, on reimbursement matters, on lunch and dinner; a participants' list with full contact details; a presentation document on the COST mission; a presentation document on COST Action A21, and flyers on the 'Magister Iuris Communis' Programme of the Faculty of Law of the University of Maastricht.

## 1.3. Participation

As with the workshop on 'The institutionalisation of Restorative Justice in a Changing Society' the workshop was only open to invited participants. Due to the great interest the programme was met with the original number of 40 participants has been raised to 48 persons who finally participated in the workshop – including keynote speakers, organisers and session chairs (see list in annex).

Distribution by nationality was as follows:

Austria	1
Belgium	10
Bulgaria	2
Canada	1
Columbia	1

Germany	3
France	1
Hungary	1
Israel	2
Italy	1
Netherlands	8
Netherlands Antilles	1
Norway	3
Portugal	6
Romania	1
Slovenia	1
Spain	1
United Kingdom	4

## **2. The scientific programme**

### **2.1. The design**

The plan for this workshop was based on the three sub-working groups: 'Restorative Justice and Society', 'Restorative Justice and the Law', and 'The inner dynamics of Restorative Justice'. A member of each of the working groups was to present an extract of the work done so far, starting from a template that tried to depict the main lines of the theoretical arguments (in the case of the 'Law-group') or the place of Restorative Justice as a mode of conflict regulation in historical time and in socio-political space. These presentations were then to be commented by external experts, eminent scholars from outside the COST-group to gain fresh insights and to stimulate further theoretical debate.

Sufficient time for plenary discussions was provided.

### **2.2. First Session: Restorative Justice and Society**

#### ***Christa Pelikan's presentation***

In its first part Christa Pelikan's presentation attempted to locate the place of Restorative Justice in time and space. Restorative Justice is identified as a specific mode of conflict regulation. In the course of history and in geographical space different social formations ('Formen der Vergesellschaftung' (Georg Simmel) have been marked by different modes of conflict regulation. The functions of any type of conflict regulation are integration/cohesion, 'justice' in a very broad sense and safety. The core elements of the mode we have come to call Restorative Justice are the active participation of the parties involved in and affected by the conflict, as well as an orientation toward consensus, reparation and peace-making. We find this type of conflict regulation with village assemblies or moots and councils of elders in

egalitarian hunter/gatherer societies. Hierarchical societies, or societies marked by domination (of which the patriarchal family is the smallest, larger social formation being the 'oikos', chieftainships, principalities, kingdoms) resort to modes of conflict regulation where the pater familias, the lord of the household, the chief, the prince, or the king decide authoritatively those conflicts that are their prerogative. The power of jurisdiction is an integral part of what can be called patrimonial domination compound, i.e. a mode of domination (more commonly referred to as feudal rule) comprising both economic and political domination.

The rise of the modern state brings about a transformation of the patrimonial mode of domination; and - as one of its constituents - the emergence of modern positive law. The modern state is doing away with the feudal cascade of domination of lords and sub-lords and their respective authoritative jurisdiction. The last bulwark of this type of conflict regulation - the right of parents to submit their children to corporal punishment - is only reluctantly and until today only in a few European countries explicitly abolished, abrogated by the state in its capacity as 'parens patriae'. The modern state is also - at least partially - doing away with the special rights of groups of equals, the estates or the guilds and all those privileged corporations, albeit bodies and - predominantly - arbitration procedures for conflict regulation of old and new professional corporations are continuing to be active or become newly established.

This state law emerges in itself as a specific 'autonomous' (self-referential) sub-system of society, separate from the system of politics, the system of economy and the moral system; it is guided by the ideas of the enlightenment, individual freedom and equality of the individuals enjoying the status of a citizen. This abstract equality implies that the law and more specifically jurisdiction has to abstain from any differentiation according to rank and status, and it implies also non-consideration of specific circumstances of the 'act' at stake. A jurisdiction refraining from arguments 'ad hoc et ad hominem' has its drawbacks though and they are 'felt' and experienced especially in the field of criminal law. A pure 'Tatstrafrecht' (criminal law focussing exclusively on the criminal act) that sets aside the context of the act, the relation of the persons involved, that is not interested in the victim except as a provider of evidence, runs the risk of leaving the persons involved highly dissatisfied.

Proceeding to more recent developments we see the eclipse or abdication of the (nation) state. It remains a contested question though whether this is only an adaptation and a new configuration of state power that remains essentially unabated or whether we witness a fundamental transformation of modes of governance that affect the lives of those that are 'ruled and governed'. We are referring to changes that come under different concepts: effects of globalisation and glocalisation, new governance and/or governance at a distance. The change is conceptualised as movement from politics to markets (Christensen and Lagreid 2002) or as a new 'mentality of rule' whereby direct state command and control are being substituted by indirect rule and forms of 'regulated self-regulation' (Rose 1996, 1999; Crawford 2002). In any case, the mode of conflict regulation is a prime indicator of the changes that stand to be analysed. The difference we have identified with regard to conflict regulation in different social formations is participatory versus authoritative

modes of dealing with conflicts that affect the way people live together (conceived very broadly).

While resorting to the law – modern positive law – represents an apex of authoritative conflict regulation contained and restrained by procedural safeguards that function to prevent undue restrictions of the freedom rights espoused by the enlightenment, new modes of conflict regulation are spreading: arbitration and mediation, the latter most explicitly characterised by the active participation of the 'parties' involved. (This happens apart from the vast array of informal conflict regulation that has always and is still at work in all social formation (not least 'modern Western societies'))

This movement therefore appears in line with or rather as a main constituent of the 'dispersal' of central state governance and the rise of 'nodal governance' - a term invented and used by Clifford Shearing. Compensating for the deficits, we have described, inherent in state law, by re-introducing attention to the concrete circumstances of the conflict at stake, and the everyday or life-world-meaning of doing something harmful and on experiencing harm, by focussing on reparation as a result of active participation of the people involved, makes for the main elements of 'Restorative Justice'.

Within this theoretical perspective, the economic system and more specifically the forces of the market, first within nation states and now increasingly 'global markets', and the inescapable pressures they exert on people's lives have been left aside. To face the challenge to locate the influence of market forces in relation to the development of modes of conflict regulation we will make reference to a strand of theory that comes under the name of the dialectics of the enlightenment brought forward by the Frankfurt-school. Rendering its main contents in broad strokes it runs thus: the equality and the freedom of citizens propagated by the enlightenment is based on the rise of the market. The equality it brings forward is a fictitious equality though, based on the supposition that every citizen deals with goods according to his own free will and, more important, peddles his/her labour force in this market 'freely'. This brings about - hidden and disguised - new repression and new inequality. It is a more subtle form of repression and domination than the old modes of domination but is - exactly because of these qualities and this subtlety - overarching and inescapable. Modern law and centralised 'state' jurisdiction contribute substantially to this hidden repression and the inequality that are a consequence of the free play of market forces.

This reasoning might be applied to the more recent developments described by Jan Froestad and Clifford Shearing as the 'governance disparity'. Under the pressure of the market and following economic differences, differences between the haves and the have-nots, they observe differentiated access to and use of the participatory modes of conflict regulation. ("While nodal governance holds promise for greater democratic direction and control for all, poor people's self-direction, rights and services have not been enhanced.")

In this perspective the movement that carries forward Restorative Justice as a mode of conflict regulation would remain another aspect of the improvement of living con-

ditions - in the widest possible sense – reserved for those who own the necessary resources to further enhance and transform these resources.

The same authors have pointed to ways to overcome this governance disparity: in South Africa and in Argentina we find various projects that follow the so-called Zwelethemba model. This model rests on the establishment of peace committees in poor and disadvantaged communities – peace communities that use 'local knowledge and local capacity' for peace-making in a great variety of conflicts as well as peace-building efforts.

We find a striking parallel in the world of economics; it is the rise of micro-credits – mainly in impoverished regions of the third world (the Grameen bank in Bangladesh being the most well known of these enterprises). The system of micro-credits, using the entrepreneurial capacities of women to make a living for their families and the work of the peace-committees in poor communities on Africa and South America set in motion countervailing forces – within the respective systems: the economic system in the case of the micro-credits, the political system in the case of the peace-committees of the Zwelethemba model. The peace committees mobilise countervailing forces for securing a tolerable way of living together, for providing safety and a sense of justice and for promoting social cohesion. The paths chosen appear both radical and pragmatic. They are radical in the face of the problems confronting these societies and the very poor communities where these projects have been established, and they are pragmatic because they act on the world and in the social circumstances as they find them.

The second part of the original paper had dealt with sociological theories that contribute to understanding and explaining the societal developments that firstly, mark the emergence of modern positive law and secondly, the more recent developments that accompany the rise of Restorative Justice as a social and 'political' movement.

Christa Pelikan has already made reference to a strand of theory contained in the dialectics of the enlightenment. It is directed at 'unveiling' the new qualities of inequality and repression that emerges at the backside of the market equality and market freedom. Substantial critique of modern positive law is also to be derived from this theoretical stance.

Jürgen Habermas' analyses deal more specifically with the repercussions of the rise of the modern state and of bureaucratized government, especially with a kind of estrangement that is the effect of institutionalisation and bureaucratisation – 'colonisation of the life-worlds' he has coined it. Habermas' discourse-ethics, the concept of a discourse, free of domination (*herrschaftsfreier Diskurs*), on the other hand, is to be understood as an attempt to redeem the project – and the promise - of the enlightenment. The values of freedom and equality ought to be saved and 'realised' in the course of an uninhibited dialogue grounded in mutual recognition. More recently Habermas has evoked a new 'dialectics' ('*Die Dialektik der Sakularisierung. Über Vernunft und Religion*', Freiburg/Breisgau, 2005) that points to a way of overcoming

the crisis brought about by uninhibited dominance of the market (Marktdominanz) through religion grounded in and guided by reason.

Interestingly, Foucault's critique of modernity focuses on the importance of knowledge, engendering new inequalities and on the role and influence of various professionals (most important that of the health professions). The processes he describes are processes whereby discipline is increasingly 'internalised' by the individual citizens and whereby normative regulation is replaced by normalised 'self-directed' behaviour. In the wake of this critique, more recently, 'government at a distance', and the governmentality that goes with this new mode of governance, has been perceived as the latest 'trick' of the state to tighten once more its grip, at least to make its rule more effective and efficient.

Finally there is the system's theory of Niklas Luhmann. Apart from the difficult and highly controversial notion of self-referential (autopoietic) closure of different societal subsystems, Christa Pelikan regards the attention he has drawn to the different inherent logics of different systems as a useful tool for understanding the working of these subsystems of society and of the relation between them (Jan Froestad in his contribution has admirably succeed in making Luhmann's highly abstract and hermetic reasoning accessible to the auditory).

In the context of the workshop Pelikan made special use of Luhmann's sociology of law, and his analysis of the function, the sole function of law as 'counterfactual stabilisation of normative expectations', 'normative expectations'<sup>1</sup> being those that have come to be codified as articles of the code of law, in the case we are concerned with, the criminal code. In 'Das Recht der Gesellschaft' he goes on to say that the norm enshrined in the code of law does not entail the promise of law-abiding behaviour, but it protects those expecting it ('Die Norm verspricht nicht ein normgemäßes Verhalten, sie schützt aber den, der dies erwartet' (Luhmann 1993: 135). Luhmann's' reductionist perception of the function of law that explicitly dismisses the whole arsenal of retributive as well as preventive (general and individual) functions, generally regarded as inevitable ingredients of a theory of criminal law, is at first sight surprising, even disturbing. Its potential becomes evident when measuring a Restorative Justice approach against this function. It becomes clear that punishment is not a necessary prerequisite of the criminal law response and that reparation can quite adequately serve the function of confirming 'upholding' the rightful claim of the victim.

Theories that inform about the changes in the mode of governance and the concomitant modes of conflict regulation have already been hinted at. They have been further expanded by Jan Froestad's comment.

---

<sup>1</sup> 'Expectations' are the core, the micro-dynamic element of Luhmann's sociological theory in general, and it would need a more lengthy introduction into its full meaning: suffice it here to say that they take the place of the more well-known concept of the social role.

## **Jan Froestad's comment**

Jan Froestad has concentrated on those theories outlined in Christa Pelikan's paper that promise to contribute to the understanding of Restorative Justice's place and importance in contemporary societies (or social formations) as well as to the understanding of those social changes that have led to its development.

He has first of all expanded on

### *1) Changes in state governance*

Turning to the question what this theory implies for Restorative Justice he explained that it seems to tell us that social projects that confirm with major state objectives and that can promise to conduct things in a responsible way might to-day be allowed large amounts of autonomy. RJ schemes, for instance, might prosper to the degree that they do not seriously challenge basic objectives of the state's Criminal Justice System. The theory indicates that there are currently new openings for 'taking conflicts back', engaging ordinary people and disputants in solving problems that concern them, without too much interference from the state or the professionals.

This theoretical approach is indeed connected to the concept of

### *2) Pluralisation or feudalization of governance*

This theory argues that the 'rule at a distance' interpretation is insufficient. Simultaneously to the changes at the top, regarding the ways that states now tend to prefer to govern, a more 'bottom up' process driven by the market and the big corporations has led to a real pluralisation of governance.

One possible implication is increased democracy. It seems to be a general conclusion that people included as governing nodes within these new policy networks seem to be more satisfied; they get more control over their lives, more influence and better services.

On the other hand, one aspect of the network society has been captured by the idea of a growing 'governance deficit'; we do not only have a world of increasing material inequality; on top of that, and strengthening it, we have a new inequality of governance. Scholars typically observe that networks are not very inclusive; to be included you need resources, and power. What we witness is more democracy and better services for some, less for others. The observation that Restorative Justice might lead to a new bifurcation of the Criminal Justice System, being offered as a service for some, while other 'customers' are lead into more punitive arrangement, potentially the poor, the weak or the indigenous, might be interpreted within such a framework.

Therefore, the picture seems to be one of possibilities and challenges: plural governance might deepen democracy, by so far mostly for the well-to-do. The future, however, does not seem to be determined, it is contingent, to some degree by our imaginative capacities.

### 3) *Luhmann's system theory*<sup>2</sup>

Luhmann's theory is about the development of self-referential social systems. Such systems, like the law, the economy, the political system, the technological system, etc., are assumed to be cognitively open, but normatively and operationally closed. A system like the economy, for instance, will acknowledge the criticism of the environmentalists as a 'disturbance' in its environment, but it will only be able to process such information by translating it into its own logic of cost and profit. Today the big corporations, for instance, acknowledge the need to include ethical issues as part of their overall economic budget-function. They try to estimate: what will it cost and what will the profit be if we operate in particular ways given the kind of social and environmental criticism that is likely to be mobilised. In a similar way the law transforms all impulses from the 'environment' (i.e. from outside its own system) into its own basic logic of legality and illegality, of distinguishing between acts that imply an infraction of the law or not.

And again Jan Froestad asked: What does this theory of Luhmann imply for Restorative Justice?

Scholars argue that there is a strong tendency of strong self-referential systems to close themselves off from the environment becoming insensitive to problems and needs that are not captured by their internal logic of operation. This creates tensions. The relation between the instrumental logic of the law and the emotional needs of human beings might be one such tension; explaining why experiments like RJ currently are getting more support. If so, maybe we are witnessing the beginning of a gradual reversion, a new move toward de-specialization and de-professionalisation; remove issues and tasks out of the sub-systems and back to society and laypeople. This might be seen as the optimistic interpretation of Luhmann.

On the other hand, the theory of Luhmann seems to tell us that if an alternative movement like RJ ties into a strong professional and self-referential system like the law, for instance by setting up RJ practices as diversion schemes, it will be very difficult not to be influenced by the fundamental way in which the law pre-constructs the issues to be dealt with. Thus some scholars argue that to work within the confines and the definitions of the law is not always in tune with social realities and sometimes seems to prevent participants from engaging in a more unconstrained form of deliberation.

So the picture Luhmann's theory seems to paint for Restorative Justice is again ambiguous: there are new openings and potentials, but there are also many challenges and problems ahead.

### 4) *Risk-focused management*

Jan Froestad has finally at some length referred to a theory, Christa Pelikan had not paid attention to, but regarded by him as an important approach contributing to the understanding of the position of Restorative Justice in recent society(s). It deals with the concept of risk and the 'risk society'. The tendency is that governance systems tend to govern things by anticipating problems and designing ways of avoiding risks, as a way of 'colonising the future': basing decisions in the present on conscious assessments of potential future consequences of such decisions. The focus is on utility

---

<sup>2</sup> We quote in extenso since we regard Jan Froestad's explanation as exceptionally clear and well suited to get 'the gist' of Luhmann's system theory.

and instrumentality and it is oriented toward managing risks as a way to reduce loss and increase profit. The surprising thing is that this corporate mentality leads to a practice that in many ways seem to be much closer to core Restorative Justice values and practices than the Criminal Justice System.

It is now argued that the logic of risk has also begun to penetrate the spaces and institutions of the state and that because of this, one might expect increased tensions to arise between the dictates of such a logic and the requirements of the Criminal Justice System, which is more back-ward looking and much more punishment-oriented.

The question is: what are the implications of this development for Restorative Justice?

Some scholars draw a very pessimistic picture. They emphasise how risk orientations are driving out concerns for other practices, like rehabilitation. Risk technologies, in their view, are increasingly being used to manipulate human beings into conformity by designing situations and environments so that it becomes too risky for rational actors to violate the law.

Some scholars, however, argue that Restorative Justice, unlike the retributive paradigm, might fit quite easily with that of risk. It is argued that Restorative Justice seems to provide a very promising starting point for how one might rethink justice in ways that permit an integration of past- and future-focused strategies of governance.

Within the Zwelethemba model this integration is consciously sought. Within such an approach justice will be served first and foremost by offering participants the likelihood of a more peaceful tomorrow; reducing the risk that their moral goods will again be violated. This is not seen as eliminating a concern for the past, but the past is addressed primarily to ensure that the future is different. Restoration, reintegration, remorse and such matters are not unimportant, but within a risk focus and more instrumental scheme they will be seen as things that are 'nice if they happen', but the primary focus will be on trying to find a solution that binds disputants to an agreement for future peace. What the Zwelethemba model seems to document is that participants do experience fairness and justice to be done within such a future-oriented approach. Maybe we are too caught up in our limited Western or European tradition, maybe we have something important to learn about doing justice as it has been and is practiced on other continents.

### **2.3. Second Session: Restorative Justice and the Law**

#### **Context**

In this session we have tried to narrow down the perspective from society and social change, locating Restorative Justice in time and space, and to focus on the relationship between Restorative Justice and the Law, especially criminal law. Marko Bosnjak is well acquainted with continental law systems, the German and the French as well as the common law system; in his contribution he aimed at defining Restorative Justice as an alternative response to conflicts, i.e. an alternative to the criminal law response. His effort started from a juxtaposition of the ways an event that can be labelled as criminal is dealt with within the Criminal Justice System on the one hand

and through restorative processes on the other hand. Thus he tried to bring into focus the conceptual specifics of the restorative approach, and to place these theoretical concepts in relation to the landscape of legal theories, i.e. those theories produced by theoreticians of the legal sciences (Rechtswissenschaften) themselves and of sociological theories of criminal law.

### **Marko Bosnjak's presentation**

The template that served as guidance and illustration to the presentation followed the way the analysis of an event took within the Criminal Justice System and within Restorative Justice processes. It differentiated substantive and procedural level of analysis and described the aspects to be considered in the (substantive) analysis and the phases to be followed in the procedure. It perceived these elements of the analysis as tools that served to fulfil different functions attributed to criminal law on the one hand and Restorative Justice on the other. There are two types of functions: explicit and implicit ones (or: manifest and latent functions). The explicit functions of criminal law are those put forward by different strands of legal theory: retribution, protection and prevention, safeguarding of Human Rights and the solution of conflicts; the implicit functions have been developed and discussed also by legal scholars but also by sociologists of law, by criminologists and political scientists. They are norm confirmation, 'the hydraulics' theorem and theories of social cohesion and the concept of legal peace.

Marko Bosnjak dealt with each of these functions, starting with the so-called absolute theories of punishment, the infliction of pain as a means to erase the wrong caused by the offence and to re-establish the order that existed before the act was committed. (the reason why these theories are called absolute is the fact that the punishment is not justified in relation to its efficiency in attaining some possible goal, but has the aim in itself.) And he related the parts of substantive and procedural legal analysis of a life event to the different functions, e.g. the analysis of Handlung and its Tatbestandsmaessigkeit serve the localisation of the wrongdoing in the form of one act by one author. The function of protection of the society against criminal behaviour is declared as one of the predominant criminal law theories; prevention theories, being the most relevant today, are included there, implying protection from future criminal acts. The history of individual and general prevention and of the instruments to achieve it, namely: deterrence, rehabilitation/re-socialisation and incapacitation as it was put forward by different schools of legal theorists and criminologists, English, French, Italian and German, was shortly delineated, and its importance in the present day-debate was assessed.

The prevention argument, Marko Bosnjak contended, persists as one of the strongest justifications of penal repression. It is somehow accepted without much debate that the use of penal sanctions is the most or even the sole effective way to eradicate any unwanted behaviour. He pointed also to the fact that the notion of protection of the society was very abstract or otherwise inadequate. This was one of the reasons the idea of protection of the particular victim was brought forward.

The function of safeguarding human rights is regarded of pivotal importance and as defining part of criminal law. The protection against arbitrary repression is offered by

the principle of legality of substantive criminal law as well as by fundamental rights of every person accused of a crime guaranteeing him/her a fair trial. Looking at the role of exactly this function in present day society, its erosion is diagnosed by some scholars. The need for an effective fight against crime, which is perceived as an ever growing danger supposedly requires limitations of the rights and freedoms previously enjoyed by the accused.

The safeguarding element of criminal law is supposed to serve another function as well, namely the equality of the persons accused. This was already mentioned in Christa Pelikan's presentation. The modern law with abstract and general rules is supposed to treat all persons equally regardless of their personal status, personal circumstances and other factors. This proves also a function and an achievement of modern law that calls for making accessible alternative or complementary arrangements that soften the adverse consequences of the highly abstract and formal legal procedure.

There is also the function of the legal solution of cases labelled as criminal ascribed to criminal law by some legal scholars. It is the very distance between the disputing parties put into effect by the abstract procedural rules and by the state stepping in and declaring that the criminal event is a breach of a social contract as enshrined in the penal code that facilitates a fair dispute to reach a 'just' outcome.

Proceeding to the implicit (or latent) function of criminal law, Marko Bosnjak listed 'norm confirmation' including Niklas Luhmann's theory of 'counterfactual stabilisation of normative expectations', the creation of social cohesion as put forward first by Emile Durkheim, and the 'hydraulics effect' as a function of criminal law. The idea there is that the criminal procedure and the criminal sanction are needed to vent public repressive feelings. The criminal law provides for a minimal and controlled expression of that 'repressive energy' whereby the public feeling will be satisfied, calm restored and legitimacy and authority returned to the public institutions. This 'beneficial effect' that penal oppression has for the legitimacy and authority of the public institutions has abundantly been used by the elite in power throughout history. In modern times the fear of crime is incited and criminals are found and punished in order to gain public support for the government.

Marko Bosnjak then went on to investigate the concepts used in the analysis of the event by the Restorative Justice approach. The functions to be served by the Restorative Justice process are listed as restitution and reparation, solution of the conflict and peacemaking "as a very ambitious function".

At this point Marko Bosnjak argued that on the basis of this investigation into the functions and the fulfilment of functions by criminal law on the one hand and by Restorative Justice on the other one can find arguments for promoting Restorative Justice as offering a more effective and efficient performance of functions which usually legitimate the existence of criminal law. Thus the criminal law is taken as a measure of the acceptability of Restorative Justice. But it begs the question whether Restorative Justice should not be accepted as a separate system with its own goals and its own function to be assessed independently. Even more so as the functions of criminal law referred to might prove to be ethically unacceptable or less acceptable and should be altogether abandoned. To do so would afford a meta-ethical position from which the acceptability of functions if criminal law is to be assessed.

Marko Bosnjak finally proposed the following course of further theoretical- empirical investigation:

- functions of criminal law and of Restorative Justice have been studied, but maybe in future they do need a detailed description;
- tools for achieving those functions have been studied as well;
- if interaction/relationship between RJ and criminal law is to be studied in order to establish whether RJ can replace criminal law (at least to a certain extent), criminal law functions and meeting of those functions must be taken as measure of acceptability of RJ;
- a common meta-ethical position has to be developed in order to assess acceptability/legitimization of functions of criminal law as goals of the State action/intervention interfering with individuals;
- empirical instruments have to be developed in order to study to what extent acceptable functions are met by RJ and criminal law; to put it another way, to study whether a legitimate goal can be achieved by means RJ and criminal law provides for;
- from this meta-ethical position, the acceptability of the tools developed to meet the functions has to be assessed in itself and in its proportionate relationship with the goal;
- within the same step, one has to determine which is the most moderate (least intrusive) tool to achieve the legitimate goal<sup>3</sup>;
- as a result of meta-ethical and empirical analysis, the need may be demonstrated for both RJ and criminal justice to change and adapt or to intertwine.

### **Arthur Hartmann's comment**

*Professor of Criminal Law at the Hochschule für öffentliche Verwaltung in Bremen, Arthur Hartmann (member of WG2 of COST Action A21) had taken the place of Horst Schueler-Springorum, professor emeritus of the University of Munich who was prevented to participate due to an accident, and has kindly, at very short notice prepared a comment on Marko Bosnjak's presentation.*

Arthur Hartmann concentrated on Marko Bosnjak's description and explanation of the (ideal-type) legal analysis that comes with German Strafrechtsdogmatik. By referring to the history of the famous 'Mignonette' case<sup>4</sup> he emphasised the pragmatic

---

<sup>3</sup> Usually it is considered that the RJ action is more moderate than the one provided for by the criminal law and therefore more acceptable. However, such a stand must not be taken for granted and must be assessed more carefully.

<sup>4</sup> The British Yacht "Mignonette" started on May 19<sup>th</sup> 1884 from Southampton heading for Sidney. At a distance of about 1600 sm before Capetown the yacht got wrecked in a very heavy storm and sunk within a few minutes. The crew could just save its lives in a small boat without water and provisions. From the wrecked yacht the captain could only save two pounds of turnip. Captain Dudley, first mate Stephens, sailor Brooks and cabin boy Parker drifted for 20 days anywhere on the Atlantic. The cabin boy drank sea water and got seriously ill and lay apathetic in the boat. In this almost hopeless situation the captain and the first mate decided after a discussion to kill the cabin boy, whereas Brooks voted against it. As Stephens felt not able to perform the deed, the captain himself killed Parker after a prayer for the mercy of God and shortly informing Parker of what he was facing to suffer. Parker was not willing to consent to his own sacrifice but was not able to resist. The rest of the crew in-

aspects of this highly and - at first sight - hermetic and 'ivory-towered' approach. He arrived at some observation concerning the exchange and the communication flowing between public opinion and the processes of legal decision making and of law-making. Arthur Hartmann contended that the 'orientation function' thus achieved by 'the law' seems to lack an equivalent with Restorative Justice.

Thus ran Arthur Hartmann's argument:

/ The primary function of "German Strafrechtsdogmatik" is to decide cases or more simply: guarantee a certain degree of consistency, i.e. make possible that similar cases are decided in the same way.

/ Complicated and problematic cases are driving the development of 'dogmatics'. This can result in an improvement of dogmatic structures and finally in new legislation (as it happened in Germany with the introduction of § 35 in the year 1962 after a long lasting and thorough legal debate had been taking place).

/ Legal theory in Germany has reacted to the Mignonette case and similar cases by differentiating justification and excuse. (By this means it is now technically possible to find a solution for the problem that it can on the one side not be justified that a person saves his/her life by sacrificing the life of another person and on the other side that the criminal law should respect that at the edge of life a human person is not prepared to sacrifice his/her own life.)

/ Thus a new solution found as a reaction to a legal problem can become to some extent a "blueprint" for the solution of similar cases; based on the new difference introduced they can now be decided fast and efficient (as is shown by the example of the "Mignonette Case").

/ Although public opinion has usually no direct impact on the judges' decision-making, further legal reasoning will be stimulated if a judgement is not approved by public opinion. But in this reasoning not only the "mind and mood" of contemporary journalists etc. is taken into account but also the whole amount of legal reasoning throughout legal history. Therefore it is well justified to say, that legal reasoning has deep roots in the culture of a people and in the ongoing process of civilization.

/ Judgements and legislation based on profound legal reasoning therefore provide not only the legal world with rules for further court decisions but are also used as a means of orientation in everyday life and therefore also in Restorative Justice and mediation procedures. Law, legal reasoning and judgements therefore serve in a

---

cluding sailor Brooks survived on Parker's blood and flesh for four more days. when eventually they met a ship and were saved on board.

The case came with a special verdict to the queen's bench of the High Court. After a thorough disputation among the defend attorneys and the members of the Court, taking into account the most authoritative writers in British and general legal history tracing back the legal reasoning of the case to Cicero and Carneades, the Court decided under the presidency of Lord Chief Justice Lord Coleridge, that captain Dudley and first mate Stephens are responsible for manslaughter and have therefore to suffer the death penalty.

Queen Victoria reprieved them to six months imprisonment without hard labour.

The case incited public opinion and induced an amount of legal reasoning. The court decision seemed not to be a satisfying solution for this problem at least to the Queen. So the final outcome was not a legal decision in its more narrow sense. This might have be one of the reasons why the case caused a vast amount of legal reasoning following the decision even in Germany. In those days the German Criminal Code was newly introduced (1871) and it was questionable whether then § 54 StGB (German Criminal Code) could provide the appropriate legal source for decision.

pluralistic world to some extent as a functional equivalent to the widely shared values in small scale societies.

/ Since the results and the reasoning and arguing taking place in Restorative Justice and mediation procedures are not published and not publicly discussed, these procedures can not in itself provide for the necessary orientation of a wider public.

## **2.4. Third Session: The internal dynamics of Restorative Justice**

### **Context**

Pompeu Casanovas, professor at the Autonomous University of Barcelona, who had been invited to comment on the internal dynamics of Restorative Justice has practically come to fulfil several functions in the course of his presentation: he commented on the contributions of Christa Pelikan and of Marko Bosnjak and he provided the audience with various pieces from his own research related to the internal dynamics of Restorative Justice. They offered insights from Cultural Sociology, from Socio-Linguistics, and from his work on the 'Semantic Web'.

We present below an extract from this rich and highly stimulating contribution.

### **Pompeu Casanovas: Ten comments on the internal dynamics of Restorative Justice**

1. RJ crosses dialectic and deductive models of reasoning (relating to the development of the Modern State).
2. RJ may have a different shape according to the different political contexts of the state. (collapsed or failed states vs. rule of law) Any nation-state has developed its own "institutional legal culture": (a) crisis of the nation-state (as a form) does not imply the crisis of the State (as a power); (b) RJ is a minor (and diminished) form of conflict management, the vision of a 'great reversal' is an optimistic view.
3. The conceptualization of RJ may require the distinction between inner-outer layers and levels of abstraction (inner/outer environment: logic of reciprocity vs. logic of market).
4. The conceptualisation of RJ requires, as a form of knowledge, the right representation of cultural and institutional contexts embedded into human behaviour (e.g. kinetics of Islamic justice, Barcelona 1993).
5. From a systemic point of view, differentiation into behavioural patterns requires the description of "structural coupling" mechanisms (e.g. *selekologie*, ethnography in Morocco, 2003).
6. The legal and social framework of discourse "constitutes" the implicit assumptions for rule-compliance, and therefore RJ procedures and attitudes cannot overlap or interfere *at the same time* with conventional judicial roles. There is a continuous institutionalization through discourse, and judicial discourse constitutes an "institutional genre": (i) e.g. disruptive behaviour of implicit assumptions, 1997, (ii) e.g. "counter-performative" effects, 1995).
7. RJ requires a reflected decision (consciousness) taken by the victim and the offender that overcomes the polarization between "legal expert knowledge"

and “pop-law” (“saturated culture” or “hyper-real culture” in R. Sherweins terms). This situates RJ in a non-conventional dimension.

8. The social and legal templates are figures, comprehensive or theoretical “images of law” (ideal types): they should be grounded on comparative reliable data as well. Implicit vs. explicit functions of the legal template can be translated into implicit and explicit representations of a theoretical model of law.
9. Data is required also on visual abduction (face to face interactions) and the different role of emotions in real restorative settings. The role in RJ of the so-called “moral emotions” – shame, guilt, remorse, or trust – requires further empirical research and a better definition in procedural and substantive terms (Braithwaite, Sherman, van Stokkom.....).
10. The new governance paradigm could take into account the structure of the INTERNET, the IT governance paradigm, the stake of languages of then so-called Semantic Web, and the possibilities of performing RJ activities through the Web. Virtual communication does not create, but amplifies emotions and enhances identities (A. Ze'ev, 2000).

## **2.5. Fourth Session: Summarising: The pluralist nature of Restorative Justice theories**

### **Context**

The last session was to provide an overview of the landscape of Restorative Justice theories as they stand today grouped alongside some of the main differences discernable.

### **Bas van Stokkom's presentation**

The presentation focussed on the main 'dissimilarities' within Restorative Justice theory. It aimed to cover different strands of thought and attend to different types of questions: should Restorative Justice be perceived as a movement that strengthens autonomous decision making power for direct stakeholders, or as an alternative sanction system as part of state (government) criminal policy?

A diversity of theorists is working within the Restorative Justice movement, from radicals – sometimes embracing the abolitionist project (Ezzat Fattah in Canada) – to pragmatics who favour peace-meal reforms (Jim Dignan in the UK). Internal criticizing is part of Restorative Justice's evolutionary process and must not be viewed as a lack of clarity or lack of maturity but of its 'being on the way to maturity'.

Many concepts that are central in Restorative Justice theories function as icons. These concepts, like 'community', 'reintegration' and 'healing' appear as container-words: anybody can use them with his/her own meaning attached. Once they are defined and the associated values expressed, they are essentially contested. An inventory of main controversies within Restorative Justice may bring to the fore the political and ethical connotations of these concepts and reveal what is considered relevant. Which aspects are morally or politically deemed urgent, and what themes

are actually at stake? Disputants are forced to explicate their norms and ideals so that theories get more profile.

Criminal justice and criminal policy is often considered as a patchwork that changes continuously, rejects practices e.g. corporal punishments as outdated and integrates new ones, e.g. community sanctions and pedagogical interventions. It combines perspectives, that might seem contradictory, as hard treatment on the one hand and rehabilitation on the other. The landscape of Restorative Justice theories can be viewed in the same way: an archipelago of theories that are guided by competing and sometimes contradictory values and aims (which refers to the 'multi-functionality' of criminal law in practice).

Purist and maximalist interpretations seem to dominate the debates within Restorative Justice. Purism limits Restorative Justice to restorative practices where parties with a direct stake in the offence try to come to a solution. Maximalism conceives a justice system in which Restorative Justice is not limited to these communication processes. It is admitted that not all crimes can be addressed by communication between victim and offender. Maximalism puts harm and restoration in the centre of the reaction towards a crime and it is thus not process- but rather outcome-oriented. By contrast, in the purist account the voluntary participation of all parties is preserved.

Related relevant questions are: Should crimes be conceptualised as conflicts which are the property of the parties involved? Are the victim's needs the proper starting point? Or must this 'privatising' of the crime give way for approaches wherein the public interest (renunciation of the crime, norm confirmation, reduction of fear and feelings of social unrest) plays a dominant role?

### **3. General observations and further perspectives**

#### **3.1. On the concept and contents of the workshop**

The theme of the workshop drew quite a lot of attention and the organisers had to struggle to accommodate all those who voiced an interest to participate. The overall concept of having a main contribution from the members of the COST Working Group and a comment from an eminent external scholar proved highly attractive and very fruitful. Thus the horizon of theoretical thinking covered in the course of the deliberations of the Working Group was substantially widened. Real stimulation could be derived from the comments provided. One can say that we had chosen our commentators very well.

It was, of course, unlucky that Professor Schueler-Springorum could not participate to give his comment on Marko Bosnjak's presentation, although we were extremely lucky to find Arthur Hartmann to step in (and therefore extremely grateful).

The workshop suffered from the fact that workshop convenors were hindered to contribute in the preparation and the remaining time for those who stepped in was very short. The papers of the presenters and the external commentators were therefore not distributed beforehand. The discussion was lively enough but could have profited

from people knowing in more detail what would be the line of the argument of the speakers.

**3.2. On the practical side** everything went very smoothly thanks to the excellent work of the local organisers. The COST-group benefited from the nice representative rooms of the University of Maastricht and in general from the great hospitality of Grat van den Heuvel.

### **3.3. Publication plans**

The workshop will provide the nucleus of a publication on Theoretical Research on Restorative Justice in Europe that will come as the final result of the activities of Working Group 3 of the COST Action A21.

Contributions of the other group members that have been written and discussed in the course of the last three years will be included. The group is in the process of developing a more detailed plan; first drafts will be ready in March 2006.

## 4. Annexes

### 4.1. Programme

- 9.00 Registration
- 9.20 Welcome by Rob Mackay (Chair of the theoretical working group of COST Action A21)
- 9.30 *Session One: Restorative Justice and Society*  
Chair: Ivo Aertsen (K.U.Leuven)  
Presentation from the sub-working group (Christa Pelikan)  
Comment by Jan Froestad (University Bergen)  
Plenary debate
- 11.00 Coffee break
- 11.30 *Session Two: Restorative Justice and the Law*  
Chair: Katrien Lauwaert (University of Maastricht)  
Presentation from the sub-working group (Marko Bošnjak)  
Comment by Arthur Hartmann (Academy of Public Administration, Bremen)  
Plenary debate
- 13.15 Lunch
- 14.15 *Session Three: The internal dynamics (micro-theories) of Restorative Justice*  
Chair: Beni Jakov (Bar-Ilan University, Israel)  
Comment on the presentation from the sub-working group by Pompeu Casanovas (Autonomous University of Barcelona)  
Plenary debate
- 15.45 Coffee break
- 16.15 *Session Four: Summarising - The pluralist nature of Restorative Justice theories*  
Chair: Martin Wright (UK)  
Presentation of the summary account (Bas van Stokkom)  
Comments of the external experts  
Plenary debate
- 18.00 End

## 4.2. Participants list

Ivo AERTSEN, Belgium  
Esther AVIHAR, Israel  
Doina BALAHUR, Romania  
Marko BOSNJAK, Slovenia  
Isabella BUENO, Columbia  
Pompeu CASANOVAS, Spain  
Dobrinka CHANKOVA, Bulgaria  
Johan DEKLERCK, Belgium  
Jacques FAGET, France  
Borbala FELLEGI, Hungary  
Jan FROESTAD, Norway  
Roel GERITS, Belgium  
David GRONBAEK, COST OFFICE  
Arthur HARTMANN, Germany  
Ida HYDLE, Norway  
Beni JAKOB, Israel  
Siri KEMÉNY, Norway  
Michael KILCHLING, Germany  
André KLIP, The Netherlands  
Diogo LACERDA MACHADO, Portugal  
Katrien LAUWAERT, The Netherlands  
João LÁZARO, Portugal  
Ashlee LONGMOORE, Canada  
Rose M. SLING, The Netherlands Antilles  
Robert MACKAY, United Kingdom  
David MIERS, United Kingdom  
Pedro MORAIS MARTINS, Portugal  
Frederico MOYANO MARQUES, Portugal  
Stephan PARMENTIER, Belgium  
Vania PATANĚ, Italy  
Christa PELIKAN, Austria  
Antony PEMBERTON, The Netherlands  
Tony PETERS, Belgium  
Alette SMEULERS, The Netherlands  
Sónia SOUSA PEREIRA, Portugal  
Emiliya STANINSKA, Bulgaria  
Marta VALIÑAS, Portugal  
Grat Van Den HEUVEL, The Netherlands  
Denis Van DOOSSELAERE, Belgium  
Remke Van SCHIJNDEL, The Netherlands  
Bas Van STOKKOM, The Netherlands  
Kris VANSPAUWEN, Belgium  
Lode WALGRAVE, Belgium  
Elmar WEITEKAMP, Germany  
Jolien WILLEMSSENS, Belgium  
Brian WILLIAMS, United Kingdom  
Annemieke WOLTHUIS, The Netherlands  
Martin WRIGHT, United Kingdom

### **4.3. Workshop Folder (hard copy)**