# Punishment, Restorative Justice and the Morality of Law

Edited by Erik Claes, René Foqué, Tony Peters

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Erik Claes, René Foqué, Tony Peters (eds.)



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# PREFACE

In 1984, the Aquinas Foundation of New York donated funds to the International Society of Criminology, allowing it to establish its administrative offices at the University of Montreal.

Since then, a first series of conferences have been held at prestigious universities around the world on the global theme of responsibility and citizenship in the domain of mental health and criminal justice. In a stimulating interdisciplinary climate, distinguished philosophers such as Christian Atias (Aix-en-Provence), Bernard Williams (Oxford), Ottfried Höffe (Tübingen), as well as eminent jurists like Lombardi-Vallauri (Rome), Ignacio Berdugo Gomez de la Torre (Salamanca), and Andras Szabo (Budapest) have been invited to give their views on the subject. One of the main challenges for this cluster of activities was to rethink the concepts of citizenship and civic responsibility, in order to address the challenges, difficulties and complexities of post-modern societies which are characterised both by strong individualism and privatisation by the state. Considered as a counter-weight against these disquieting developments, a richer and fuller notion of the "responsible citizen" bearing the relevant rights and obligations could play an important role here in the restoration of the public sphere. Introduced into the context of criminal justice such notions, which would be connected with security, well-being and human dignity, could also provide for better legal protection of both victims and offenders.

With its 10th Conference, entitled "Punishment, Restorative Justice and the Morality of Law" held at the Catholic University of Leuven on 2-3 May 2003, the Aquinas Foundation started a second series of activities focussing on the topic of "Ethical Limits on Social Practices and Political Actions". This broad subject covers an almost unlimited range of issues spanning the topics of paternalism, the moral status of children, distributive justice, the limits of tolerance, sex, and pornography, international law, criminal justice, and so on. The variety of such issues notwithstanding, the Aquinas Foundation invites young and senior researchers to engage in common reflection on the moral values and normative standards against which social and political practices could be assessed and by means of which these same practices ought to be guided.

The 10th Aquinas Conference on "Punishment, Restorative Justice and the Morality of Law", the proceedings of which are presented in this volume, has taken this common reflection as its basic reference point by focussing on the ethical fundamentals and limits of criminal punishment and restorative justice practices within the framework of a democratic constitutional state. Through the contributions it has produced, the

proceedings of the 10th Aquinas Conference are faithful to the intellectual spirit of the Aquinas Foundation, a spirit of resisting any subtle invitation to cynicism and cultural pessimism, combined with a deep and genuine attachment to the moral sources of our Judaeo-Christian civilisation.

On behalf of the Aquinas Foundation I would like to thank the Law Faculty of the Catholic University of Leuven, and more in particular Professor Erik Claes, Professor René Foqué and Professor Tony Peters, for succesfully having organised the Conference and edited its Proceedings.

Denis Szabo
Professor emeritus of Criminology
University of Montreal

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# INTRODUCTION

ERIK CLAES and TONY PETERS

## 1. CENTRAL ISSUES

The last decade has seen an upsurge of academic interest among lawyers, criminologists and philosophers in restorative justice programmes and practices. What these programmes are precisely aiming at is far from clear, and depends largely on the shape they take and on the role they actually play within, or in the margin of, the criminal justice system. What these programmes should aim at is even more unclear. The recent literature issuing from advocates of restorative justice evidences a multiplicity of goals which restorative justice should simultaneously achieve, moving from the repairing of the harm done to the victim, to the restoring of the dignity of both victim and offender and of their relationship. The problem here is that these goals are vaguely formulated without specifying how they can consistently be related to each other and whether some need to be prioritised above others.[1]

Critics take the unclear status of restorative justice practices, along with their vagueness in meaning and purpose, as a clear invitation to a fundamental questioning of the legitimacy of these practices. Their supporters consider the experiment of restorative justice as a platform for reforming penal institutions and for rethinking the legitimacy of orthodox legal reasoning. Within the framework of a "*rechtsstaat*", a democratic state governed by fundamental rights and by the rule of law, both issues of legitimacy lead not only to reflection on concepts such as restoration, punishment, or on such notions as harm and wrong. Questioning the legitimacy both of restorative justice practices and of the prevailing penal system also inevitably involves some reflection on, and articulation of, the underlying values and normative aspirations of such a democratic constitutional state. What are these values and how can they be given appropriate expression in the leading concepts and principles of criminal law? To what extent are fundamental rights and principles of the rule of law sufficiently reflected in the practices of restorative justice? How are these practices to be related to the criminal justice system according to the normative aspirations of a democratic constitutional state? To what degree can current penal practices be made continuous with these aspirations?

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[1] For this objection, see recently A. VON HIRSCH, A.J. ASHWORTH and C. SHEARING, "Specifying Aims and Limits for Restorative Justice: A 'Making Amends' Model?" in A. VAN HIRSCH, J. ROBERTS, A. BOTTOMS (eds), *Restorative Justice and Criminal Justice. Competing or Reconcilable Paradigms?*, Oxford, Hart Publishing, 2003, 21-41.

These fundamental questions formed the intellectual framework for the 10th Aquinas Conference on "Punishment, Restorative Justice and the Morality of Law", at which conference the larger part of the papers published in this volume were presented. Consistent with the structure of the conference, this collection of essays is organised into three parts, each focussing on one central topic and containing a lead essay and corresponding replies. The first part offers critical scrutiny of one of the cornerstones of a criminal justice system governed by the rule of law, namely the principle of legality. Efforts are made to empower this principle through reflection on its underlying values and aspirations, and this in order to meet some of the legitimate ideals and concerns of restorative justice. These efforts are subsequently assessed from both sociological and philosophical perspectives. In the second part, attention is drawn to the legitimacy of restorative justice practices. Here, the normative intuitions of a democratic constitutional state serve either as a critical framework to assess these practices, or, more optimistically, as ideals to whose realisation restorative justice is supposed to make a valuable contribution. And, finally, in the third part, reflection on the value of restorative justice brings us to a fundamental questioning of the legitimacy of punishment and penal practices. Central to the discussion is whether it is possible to interpret and normatively reconstruct the idea and practice of punishment so as to make them compatible with, and even continuous with, the underlying values of a democratic constitutional state.

In what follows, the contents of each of these three parts are briefly introduced and outlined. The contributions have a dual objective: first, they reflect a common effort to define the role of restorative justice in relation to the penal system, and second, they seek to uncover the fundamentals of a democratic state governed by fundamental rights, democratic principles, and the rule of law, as an appropriate means to estimate the legitimate prospects of restorative justice. This last goal will be referred to using Lon Fuller's well-known expression "the morality of law".

## 2. CRIMINAL JUSTICE, LEGALITY AND HUMAN DIGNITY

What are the basic values that underpin a *rechtsstaat*, or a democratic constitutional state, and to what extent are those values properly reflected in the familiar principles and concepts of the criminal law? The practice of restorative justice easily triggers this kind of reflection, for it is deeply rooted in a scepticism of these principles. According to the proponents of restorative justice, contemporary criminal justice systems are blind to the specific context of the crimes they deal with, thereby reducing the complexity of the conflict, and making an abstraction of the concrete lifeworlds of both victim and offender. These shortcomings are not only due to deficiencies related to the specific organisation of penal institutions.

They also derive more dramatically from the underlying concepts and principles around which the entire system is built, and from which that system draws its rationale and reasonableness. One such precept is the principle of legality. This principle holds, at least according to its classical continental conception, that only the legislator may define which actions constitute a criminal wrong. This very principle, considered to be one of the core elements of the rule, prevents the criminal judge from being context-sensitive in his dealing with crime. It prevents him from being attentive to the concrete lifeworlds of victim and offender, since it prevents him from creatively filling out the scope of the criminal offence in light of the particular circumstances of the case.

In his "Criminal Justice, Legality and Human Dignity" Erik Claes takes up this topic in earnest by examining to what extent the principle of legality can be restyled so as to give appropriate expression to the underlying intuitions and aspirations of the rule of law, while at the same time giving sufficient weight to the concrete circumstances of the criminal offence and to the personal perceptions of both victim and offender. An inquiry into the structure of legal reasoning, as well as into the intrinsic relationship between legality and human rights standards, brings Claes to a rights-conception of legality that, at least in an important respect, claims to be context-sensitive and to articulate adequately its deeper normative point. To retrieve legality's normative potential is, according to Claes, to conceive it in terms of the capacity of each legal subject to trust in the rule- and rights-governed behaviour of his fellow-citizens. Public officials who fail to accord this capacity to their citizens fail to respect their individual human dignity.

Claes' attempts to revitalise legality in a way that gives appropriate expression to the aspirations of a democratic constitutional state and simultaneously satisfy the worries of criminologists and proponents of restorative justice, brings him simultaneously to the very limits of a legality-based criminal justice system. For Claes, one should not prevent a criminal judge from being sensitive to the particulars of the case if he proves faithful to a more refined principle of legality, and, accordingly, if he makes efforts to interpret the scope of a criminal offence in light of one or more fundamental rights that are at stake in the circumstances of the case. But according to the principle of legality, only these circumstances are to be taken as relevant insofar as they help to determine the general scope of the criminal offence. Other circumstances, such as those revealing or expressing the personal perspective of the particular victim or offender with regard to the criminal offence, are cut off from the process of legal interpretation. Or to use Claes' terminology, the context-sensitivity of the criminal judge confines itself to being norm-relative and thereby fails to be person-relative.

In order to obtain a more substantial account of why legality resists being continuous with the kind of context-sensitivity which is at stake in restorative justice practices, Claes distinguishes two types of respect for human dignity, each of which tends to suppress the other. According to Claes, concern with the personal perspective of victim and offender, with their respective desires to express and communicate to each other their stance in the conflict can be traced back to what he calls a "particularistic conception" of respect for human dignity, entailing full recognition of each other's radical uniqueness. Restorative justice programmes, and more in particular, victim-offender mediation schemes, aim at an instauration of a context in which victim and offender can rediscover each other's dignity by growing sensitive to the concrete details, facts, stories, and so on, through which the other appears as radically unique and tries to assume his uniqueness.

According to Claes, this particularistic conception of human dignity underlying restorative justice worries can hardly be integrated with a rights-conception of legality, since the latter conception is ultimately grounded in a different, generalist type of respect for human dignity. Attention is drawn not to the details revealing the unique perspectives of victim and offender, but to their equal capacity to trust in the rule- and rights-guided behaviour of the government and of each other.

The project of revitalising the principle of legality, however promising it might seem, appears to encounter many obstacles on its route. These obstacles need to be cleared away if the project is to have any hope of success. In the replies of Tom Daems and Sandra Marshall at least two hurdles were pointed out.

The first challenge to be addressed relates to the viability of such a project in light of current socio-political circumstances and developments. In his "Punishment, Human Dignity and the Sociological Imagination" Daems argues that Claes' attempt to articulate the normative point of the principle of legality, by linking it to such notions as trust, human dignity, and fundamental rights, is utterly fragile because it lacks in its actual form sociological imagination. As it stands, Claes' project falls short in paying sufficient attention to the specific socio-political context of a late modern society in which penal institutions and modern law are embedded. Without this kind of sociological context-sensitivity, any ambition of reconstructing the principle legality will end up a highly theoretical and normative enterprise. It will fail to serve as a viable instrument capable of critically guiding and governing actual criminal justice practice under present societal conditions. According to Daems, a blindness to the background of penal institutions is also not without risk in the present societal context marked by a culture of control and in which penal institutions cannot be seen in isolation from mechanisms of recycling and disposal of "wasted

humans". Normative rethinking of the principle of legality could then easily serve as a mere legitimation of the status quo.

The second challenge relates to Claes' ambition to reconnect the principle of legality with some of the concerns of restorative justice, more particularly the full recognition of the private worries and concerns of victims and offenders. Claes sees this reconnection as an answer to what he takes to be one of the core aspects of the present penal crisis: the abstracting and alienating aspect of the legal framework of criminal law. For Daems, Claes overrates the legitimacy of these private worries, thereby obscuring some pressing public aspects of the penal crisis, such as the rise of punishment which is bound up with a broader context of power strategies of social exclusion and human engineering in the service of a particular social order. Daems here suggests refining the idea of legality based on human dignity in close connection with the principle of subsidiarity. Central to this refinement would be the answering of the following question: if one takes into consideration the potentially oppressive and interest-based character of legal norms, to what extent can the concept of human dignity inform decisions as to what type of behaviour deserves to fall within the scope of criminal law and criminal punishment?

In "Back to Basics", Sandra Marshall shares Daems' doubts in taking particularistic restorative justice worries as a legitimate standard for refining the principle of legality. Marshall engages in a constructive reading of Claes' objective to adjust the principle of legality to the complex process of legal reasoning and to ground it in the idea of human dignity. But this brings her to discover that the refinement of legality, however legitimate it may be, appears to broaden the gap with restorative justice instead of narrowing it. For Marshall, the grounding of legality in human dignity makes it all the more difficult to establish a legitimate place for private feelings and worries of both victims and offenders.

According to Marshall, to affirm the person-relativity of, for instance, the desire of the victim to enter into a dialogue with the offender, inevitably means recognising that this desire is not necessarily reasonable and that one cannot require the victim to have these communicative wants. But essential for a criminal justice system governed by legality, human dignity, privacy, and equality, is that such a system requires those communicative desires to be reasonable, and to be desired if reasonable. Marshall here draws special attention to what seems to be an incompatibility between the valorising of the person-relativity of the victim perspective on the one hand, and a commitment to the principle of equality and equal treatment, on the other.

## 3. RESTORATIVE JUSTICE AND THE MORALITY OF LAW

Daems' and Marshall's scepticism about the importance and legitimacy of the personal perspectives of victims and offenders with regard to restoring principles in the criminal law, can also be taken as a broader invitation to reflect critically on the underlying values of restorative justice. To what extent do restorative justice practices and their normative ideas contribute to the realisation of the ideals of a democratic constitutional state? On what normative grounds do we have to grant restorative justice ideas and practices a central role in the reform of our penal institutions and principles of the criminal law? These broader reflections are the subject of the second part of this volume.

In his "Restorative Justice and the Morality of Law", Serge Brochu parts from the idea that restorative justice and the traditional punitive system each provide different answers to the underlying fundamentals of a democratic constitutional state. Brochu summarises the morality of law in three basic principles: first, the principle of care for the well-being and the dignity of the victim; second, the principle of care for the well-being and the dignity of the offender; third, the principle of care for the safety and well-being of society. For Brochu, at least two arguments can be given why restorative justice, compared to the traditional punitive system, reflects these three principles in a more satisfying way. In the first, restorative justice, understood primarily as involved with the reparation of harm to the victim, gives full weight to the well-being and the dignity of the victim; whereas traditional criminal procedure is primarily characterised by the absence of the victim (first principle). In the second, when compared with the punitive system, restorative justice also acts more in accordance with the second principle (care for the dignity of the offender) for it seeks to empower the offender in his "responsibility-ability", in his capacity to assume his obligations toward the victim and toward society.

While reaffirming that restorative justice constitutes from the perspective of the morality of law an interesting alternative and better approach to the traditional system, Brochu ends his essay, with some critical points relating to the importance of restorative justice in present-day penal culture. In a contemporary society marked by the increase in punishment and by an obsession for security, safety, and control, restorative justice can only gain significance if it pays sufficient attention to the reality of recidivism. In addition, Brochu points out the undeniable, and perhaps unfortunate, reality of punitive desires on the victims' side, and the need to reconcile these desires with the values of restorative justice.

Mireille Hildebrandt is less confident about the potentials of restorative justice practice to meet the underlying aspirations of a democratic constitutional state and to offer a better view of criminal justice than that

of the traditional penal system. Like Claes, Hildebrandt undertakes a considerable effort to retrieve the morality of a rule-of law-based criminal justice system by articulating the importance of state intervention in criminal affairs and by articulating the morality of a fair trial.

For Hildebrandt, an interesting entry point for understanding the deeper meaning of criminal justice governed by the rule of law is to understand the meaning of mediation in non-state societies. In these societies the success of these mediation practices is crucial to the further existence of the entire social fabric. The alternative is war, revenge, or feud, endangering thereby the coherence of the society. What constitutes the inner morality of a modern criminal justice system is that its rules and principles presuppose delegation of violence into the hands of the state. This mechanism of delegation makes the social fabric less vulnerable to war and revenge. In light of these insights, Hildebrandt remarks that there is no reason to be romantic with regard to mediation in a non-state society, and that in our contemporary society, there is no reason to overstate the role and importance of informal, consensual dealings with crime.

As a next step, Hildebrandt assesses the prospects of restorative justice by drawing attention to the values of a fair trial, recognised as one of the essentials of a "*rechtsstaat*", or a democratic constitutional state. Hildebrandt starts her analysis by reflecting on the concept of a legal norm.[2] According to her, legal norms cannot be reduced to their imperative status or to regular behaviour patterns; they are the expression of normative and mutual expectations holding together the ever-changing fabric of society. The meaning of legal norms therefore depends on the way citizens interpret these mutual expectations in their concrete actions; i.e. legal rules and actions are mutually constitutive. Each citizen has the power in undertaking an action to relate himself to the prevailing normative expectations of his society, and this by interpreting, affirming, or denying the legitimate status of these expectations and the legal norms in which they are embodied. One of the essentials of a democratic constitutional state is that it aspires to organising institutions, especially its penal apparatus, so as to confer on each legal subject charged with committing a legal wrong the capacity to reconstitute his actions as reasonable, and thus likewise his stance regarding the status of the legal norm. Such an aspiration calls for the implementation of a fair trial: a public, accusatorial procedure where the suspect is called to answer for his actions and is judged by an independent judicial body. The inner morality Hildebrandt has so far uncovered in the idea of a fair trial is that it obliges the state to recognise the norm-creating and norm-defying power of the citizen and,

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[2] For a profound analysis, see M. HILDEBRANDT, *Straf(begrip) en procesbeginsel*, Deventer, Kluwer, 2002.