The Restorative Paradigm: Just middle-range Justice

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If the idea of justice has any function whatsoever, it is a model for making good Law and a measure for telling good from bad Law. HANS KELSEN

ABSTRACT: Restorative justice is a middle-range paradigm, a promise of future systemic change, implemented on a lower level of abstraction with operational notions defined for restricted orders of conflict, in specific, localized conditions. To systematically connect personal relationships in their multiple aspects, engender change and help justice systems to enforce law more adequately and effectively, reduce crime, fear of crime and their economic and social costs, restorative initiatives must be carried out as a stabilizing influence, fostering confidence in mainstream legal and political institutions.

KEY PHRASES: Justice paradigm shift - The "effective justice" syndrome - Justice procedure - Comparative justice systems - Middle-range justice - Restorative projects

A CONVICT ON DEATH ROW IN THE CALIFORNIA STATE PRISON at San Quentin gave my very first critical impression of the Anglo-American system of justice. Sentenced for kidnapping and subsequently rapping two young women, Caryl Chessman was the acclaimed author of three books that brought his case to widespread public attention all over the world and made him a symbol of the endless controversy over capital punishment. For more than a decade the Chessman debate versed on the circumstances of crime, mostly on the circumstances of proof needed to condemn someone like him to death - death being the penalty for kidnapping in California at the time if the victim was physically harmed. Crime is a very serious thing that must be proven beyond reasonable doubt. However, since there are crimes that are wrongs of a moral nature (e.g., murder and rape) and others which depend exclusively on people's perception of social order, proof in the legal (persuasive) sense is different from proof in the context of science. A great deal of the facts that concern the courts of justice cannot be tested empirically. Chessman was found guilty to a large extent because of uncorroborated evidence: the court was led to presume that the incapacity of one of the victims to provide a clear account to support a charge of "sexual perversion", was caused by the violence inflicted by the defendant himself.

Dyson (1908) is a classical example of how, to the layman at least, legal technicalities seem to have so little to do with justice. Dyson was charged with the manslaughter of his baby daughter who had died in March 1908 following brutal assaults by Dyson in November 1906 and December 1907. The judge had directed the jury that Dyson might be convicted of manslaughter if satisfied that death was caused by the assault in 1906 or acceler-

> ated by the assault in 1907. The jury found the accused guilty. However, according to a rule introduced in British law many centuries ago, before anyone can be convicted of homicide it must be proved that death occurred within a year and a day of the injury causing death. The validity of such rule may be arguable in the light of modern medicine, but it is a rule of law, not an endless regress of causes. The judge misdirected the jury and Dyson's conviction was accordingly quashed.

Secondly, Chessman's lawyer later complained that judges were predisposed against her client because he conducted most of his own defense, a picturesque feature of legal contexts where rules may be designed mostly to provide solutions for a trial rather than uphold codes of conduct and to enact peace more properly than articulate a background for social order. As such, law recognizes no distinction between public or private investigation and prosecution; citizens are told that they have the chance to initiate criminal proceedings. In practice, however, crime investigation and prosecution for the most part are left to those with expertise and resources necessary to do so - namely, police and other public agencies - even though more than once many a cause célèbre has resulted from private initiative and embarrassed officials, as in Chessman's case. In 1985 the *British Prosecution of Offences Act* left unaffected prosecutions by private individuals, but went a step forward by abolishing the power which the police had to conduct criminal proceedings. Consequently, a principle according to which those concerned with the investigation of crime should not be involved in prosecution, long established in countries where legal science has developed on the basis of Roman *ius civile* was finally accepted in British courts.

Finally, as his time was coming to end Chessman concluded that the real problem with Anglo-American criminal justice was that it had been built mainly on *retribution* - "correction" or "rectification", according to Aristotle (1975), , i.e., equalization of things by means of a penalty. Had he not been executed in the gas chamber in 1960 he would have certainly agreed with the following statement:

> Few sets of institutional arrangements created in the West since the industrial revolution have been as large a failure as the criminal justice system. In theory it administers just, proportionate corrections that deter. In practice, it fails to correct or deter, just as often making things worse as better. It is a criminal *injustice* system that systematically turns a blind eye to crimes of the powerful, while imprisonment remains the best-funded labor market program for the unemployed and indigenous peoples. It pretends to be equitable, yet one offender may be sentenced to a year in a prison where he will be beaten on reception and the systematically bashed thereafter, raped, even inflected with AIDS, while others serve twelve months in comparatively decent premises, especially if they are white-collar criminals. (Braithwaite, 1998)

To be sure not just in Britain or the United States, but everywhere in the West criminal justice systems are "brutal, institutionally vengeful and dishonest to their stated intentions". Why they fail is the interesting question that remains unresolved largely because the debate has collapsed to a see-sawing context be-

tween retribution and rehabilitation, opposing those who want the system to work and those who believe that it makes sense to stigmatize people first and then subject them to rehabilitation. To hop off the dilemma the simplest solution seems to be a victim-centered system capable to restore not only the victims, but also offenders and community. This unique arrangement is restorative criminal justice, which in spite of being not "a grand system imposed by experts", stands as a "paradigm shift" deeply rooted "in ordinary people's needs and experiences" (Zehr, 1997).

I

CONSIDERED AT PRESENT A DARING PIECE OF SOCIAL ENGINEERING restorative justice had humble beginnings back in the 70's, as religious and scholarly circles became progressively involved in programs of reconciliation and conflict mediation. At the time intellectual imagination was swayed by a vertigo of criticism, which strengthened the impression that some traditional academic disciplines and powerful institutions were both undergoing a deep "crisis of identity". That feeling had a lot to do with a tardy realization that conventional regulative design ended up distorting everything which only spontaneous mechanisms - "neutral" technology, market forces or moral apperception - could have given a real sense of purpose (Scuro, 1992). To overcome the "crisis" a new measure for understanding reality, identifying sources, forms and methods of cognition, and defining truth and the ways of attaining it was in need.

The answer was found in a principle laying stress upon simplicity or "economy of thought", to wit, achieving maximum understanding with minimum cognitive means. The term was coined a hundred years before by Richard Avenarius and Ernst Mach, founders of a doctrine shaped into a theory of knowledge based on "pure experience" freed from interpretation and error. Minimum cognitive effort suspended correspondence of concepts with objective reality. The basic procedure was simple, just as economical as the principle itself: knowledge was "purified", rid of notional encumbrances such as matter, necessity, causality etc., usually translated with difficulty, wrongly introduced into the realm of concrete experience. Knowledge became grounded on reality as the total sum of "neutral elements" or sensations given through observation (more precisely, empirical verification) of phenomena.

Minimum cognitive effort made a profound, lasting impact and paved the way for important discoveries, particularly in natural science. The idea was that concepts unconnected with the results of experimentally reproduced operations accessible to direct empirical observation or measurement were meaningless. The use of operational definitions and rigorous criteria of verifiability led, for instance, to the rejection of absolute time and space and paved the way for Einstein's relativity theory. But it also prompted some to presume that recognition of reality independent of measurement procedures was equally devoid of meaning [1]. Nonetheless, as scientific ontological debate also has evolved it is now conceded that at every level understanding of ra-

[1] "Things are a construction of ours". Percy W. Bridgman, a Harvard experimentalist and follower of Mach awarded with the Nobel Prize in 1946. In *The Logic of Modern Physics* (1927) he wrote: "In general, we mean by any concept nothing more than a set of operations ... If a specific question has meaning, it must be possible to find operations by which answers may be given to it."

tional concepts proceeds by interacting with the development of operations, so that we no longer speak of one-way action except on special and momentary occasions and in alternating successions. Between operations and causality there must be an intimate relationship, lest “logico-mathematical constructions of the subject would never meet with reality, while reality would modify the subject’s operation without his knowing it” (Piaget, 1997).

Law is accordingly portrayed in structural analysis as a dynamic system of norms that exhibits strikingly operational character and is held together by a relation that, in spite of being analogous to causality, does not describe legal phenomena causally. Such a relation, *Zurechnung* (imputation), implies that an offence and a sanction are linked by a prescription or permission, so that sanction *implies* is not *caused* by offence, depending on the offender being legally responsible (*zurechnungsfähig*). The nexus between sanction and offence is established by an act, or acts, of human volition, "an act that create Law, that is, an act whose meaning is a norm” (Kelsen, 1997:324). The system is therefore intrinsically and irreducibly normative and can easily be given the form of an algebraic network. Norms are not facts (the *ought* is not reducible to the *is*) and the fact that conduct may eventually not comply with a particular norm - which is therefore “violated” - it doesn’t mean it is not valid or that there are exceptions to its validity.

Viewed from the perspective of norm derivation such a structure seems to hold quite well. But if the legitimacy of the system does not consist in its being commonly accepted by those subject to the law, on what, then, must the system depend? Natural law theorists respond that justice must be acknowledged as the fundamental value and not reduced to mere system of norms and of social control (State coercion, more precisely). Hence Antigone’s sacrifice invoking divine ruling versus human decrees. Or Locke’s *appeal to Heaven* in the struggle against unfair positive laws. Or the more recent emphasis on “ordinary people’s needs and experiences” whenever the system turns a blind eye to crimes of the powerful. These answers appear satisfactory if one believes in the permanence of human nature, but manifestly circular, unsuitable to understand the same human nature in terms of its formation (Piaget, 1973:106).

The role of Law - more specifically the part played by the flow of administrative decisions known as system of justice - is never beyond controversy. The dynamics of the system is paradoxical, particularly when judged from a perspective that apprehends only the plausible appearance of phenomena, peering occasionally at the intricate patterns of legal language and activity. One is thus led to believe, for instance, that the contradictory goals and policies of criminal justice systems - and the regrettable state of affairs in which decisions made at one stage conflict and are not sustained at other levels - can be straightforwardly resolved via models based on more rationality and with better use of adequate information and statistical prediction tables to anticipate the outcome of various decisions (Gottfredson and Gottfredson, 1987).

As surveys frequently indicate the art of doing justice can be evaluated and guided by enough scientific evidence to draw provisional conclusions about cause and effect. It is the assumption of what is known today a the most ambitious and influential endeavor to elaborate an overarching concept of justice to explain legal decision making from the point of view of the cross-disciplinary of "law and economics" (Posner, 1993:353). At the grassroots this academic venture is stimulated by a movement for the progress of crime

prevention, often endorsed by "get tough" approaches to law and order and initiated at the fringes of the criminal justice system (police and corrections). Its instrument in the United States has been the *Omnibus Crime Control and Safe Streets Act* (1968), implemented to help State and local governments "in reducing the incidence of crime, to increase the effectiveness, fairness and co-ordination of law enforcement and criminal justice systems at all levels". To support programs of research, evaluation and demonstration, technology development and data dissemination, the act has also created a National Institute of Justice[2]. As a result criminal justice programs to prepare for careers in law enforcement, grew dramatically in colleges, from 40-50 in 1968 to over 1300 by 1978, even tough the increase in vocational and technical training was not matched by better performance of courts, police and prisons (Sherman, 1978).

Frequently, the intention to give more spiritual or intellectual light to crime prevention and law enforcement is endorsed by decision theory, economic behavior and a functional approach to system performance, focused on reducing criminal activity thorough incapacitation, deterrence, rehabilitation. A favorite target here is plea bargaining, procedure used in common-law courts to sort innocent from guilty, but which in reality is said to do little or nearly nothing to prevent or deter crime, and rehabilitate offenders (Parker, 1968). The root of criticism is that an overwhelming majority of people charged with criminal offences plead guilty in magistrates' courts. But results would be worse for the administration of criminal justice if every defendant pleaded not guilty and put the prosecution to the trouble of proving its case. Considering that delay defeats justice plea bargaining prevents the defeat of justice by avoiding delay: the defendant is rewarded for saving State's time and money, victims and families are spared from the possible embarrassment and even humiliation of a trial.

Thus, seen from the perspective of decision theory or the economic approach to law, plea bargaining is an effective practice, an optimal act that maximizes utilities. It fosters the view that in the legal process there is something for all parties: the prosecution gets a conviction without delay, the police can close their files on the case and the defendant gets off more lightly than he might otherwise have done. It presents an optimal solution for the problems of the system. Nevertheless, still and all the real danger is not measured in terms of economic behavior, but in the fact that plea bargaining compromises the rule of law: on the one hand, it gives prosecutors discretion to charge a lesser offence or call for a lighter sentence; on the other, it subjects defendants to a drastic choice; last but not least, it frustrates legislative intent and fails to meet the legitimate expectations of victims.

In that respect criminal proceedings in the civil law world, despite being not more "economical", seem more likely to distinguish accurately between guilty and innocent. Here, hierarchical procedures of revision sharply restrict prosecutorial discretion and a trial cannot be averted by a guilty plea, the determination of guilt belonging always to the courts. In some civil law countries examining judges and the judicialised function of the prosecuting attorney also help to prevent the trial of persons who are probably not guilty.

[2] In 1997 the NIJ received 100,6 million dollars (23,5 m. in 1994) from government and Congress.

> In the end, a statement made by an eminent comparative scholar after long and careful study is instructive: he said that if he were innocent, he would prefer to be tried by a civil law court, but that if he were guilty, he would prefer to be tried by a common law court. (Merryman, 1996: 132)

II

AS A RULE, COMPARISON INVOLVING THE CHARACTER AND LOGIC of criminal proceedings in different legal systems is clouded by ignorance of Law and judicial practice. The meaning and specificity of legal problems, together with proper understanding of their role in social reality, are also discarded when, under the pretext of meeting "ordinary people's needs and experiences", one favors spontaneity and informality of conduct as means of circumventing a system that is *everywhere* "brutal, institutionally vengeful and dishonest to [its] stated intentions". Maybe a broad historical and comparative perspective associated with the testing of judgements in terms of available empirical facts and logically precise, a coherent theoretical analysis (Parsons, 1964:181) could help. Regrettably, such a procedure is deemed abstract, too complex and inappropriate to study justice in concrete settings and in relation to specific social processes. Thus, much too often analysts have preferred to approach the structure of justice systems in terms of a few observable traits and interactions, as a totality of "neutral elements".

Accordingly, systems of justice are very special social structures, stable dispositions of constant normative elements virtually impervious to externally imposed disturbances. Particularly in civil law countries, where with "three words" legislators modify rules and legal concepts and send to the pulp mill entire juridical libraries[3]. Legal science itself, like mathematics, consists of a number of systems of logic written in shorthand, which can be used to study relations by themselves without direct reference to things or events - unlike observational science Law does not need data but only postulates, which need have no relevance to the real world. Nevertheless, underlying those concepts and rules, legal elements and features intimately linked to civilizing processes, ways of thinking, conditioned attitudes about law, subsist. Adequate system comparison is therefore made by highlighting not contingent factors, but truly significant legal characteristics, "through which the rules to be applied are themselves discovered, interpreted and evaluated" (David and Brierly, 1978:19). An implicit promise is the ultimate justification of legal systems:

> Laws, regulations and customs that are valid in a country at any period, including the unwritten norms upon which the application of laws is based, rest in the last analysis upon the tacit assertion that, their fulfillment assumed, community and private life in the state will flourish, and certain aims, about which agreement is taken for granted, will be reached. (Mises, 1951:333)

This basic covenant is only made possible by means of social control, that is, through prescriptive or permissive norms of conduct, positive and negative sanctions that give a distinctive nature to social patterns

and models, frustrate contingency and provide the means for precise definitions of behavior. *Legal* sanctions in particular do not attach responsibility to every act, nor even to all deleterious acts, but to deeds that presume fault or blame in terms of some prevailing juridical framework of value. They are not caused by, they are imputed in offences. Nor are they enforced as the intent of a single, solitary will. Their function is to ensure conformity to norms of general validity, deal with relations among people in an orderly community life, vouch for cohesion, guarantee the functioning and permanence of the social whole. Otherwise they would not inhibit warfare, bring existence out of barbarism, make social and political conflicts yield to the authority of institutional rules.

The welfare of the commonwealth - a fundamental political pledge and prime requirement for the efficacy and validity of law - is thus at the heart of this process and dependent on the repudiation of violence through the legitimate monopoly of the use of force by an unprejudiced State. (Lehne, 1996) Modern law in its course however may have excluded weaker subjects, excused *les damnés de la terre* from abiding to the terms of the covenant. Therefore, as it intended to replace pre-modern reaction against crime and pre-modern cruelty, liberal penal law has restricted and regulated the application of punishment, changed the ways of suffering, but did not contain violence, just concealed the perverse structure of violence in society and made social inequality legally invisible. (Christie, 1981; Baratta, 1987)

> Ordinary people in many ways perceive that legal institutions do not meet their rational expectations and fail to secure minimum standards of freedom and protection. This awareness generates bitter resentment and easily results in violence, in concealment of violence or indifference in relation to violent means. After all, if the primary reason for the existence of legal institutions is to protect one's rights and property, to allow ordered access to production and facilitate harmonious interaction with other individuals, it is understandable why so many not able to attain such goals, rebel against the institutional context that seem to discriminate against them. (Soto, 1986)
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> The miserable are no longer an army of ragamuffins doing dirty jobs infrequently. They now carry weapons and are often involved in activities that pay much more than legitimate employment. The new miserable cram in illegal markets and coexist in legal markets. For them there are no rights to be conquered nor expectation of social welfare. The only thing that counts, they staunchly believe, is to consume and at any cost. Longing for the very opposite of what liberalism contemplates as material well-being and equal opportunity, they despise civil rights: easy access to sources of revenue and goods is the only thing that matters. The new miserable don't question nor challenge drug cartels; knowing the risks of fighting wars of survival, they enter the underworld to attain their fleeting expectations of individual prosperity. Justice is nothing but staying alive, escaping from extermination. To be in custody is not bad altogether, but another chance to carry on living and to remain in contact with the illegal market via the prison system. (Passetti, 1995:20-22)

[3] J. Kirchman. *Die Wertlosigkeit der Jurisprudenz als Wissenschaft.* 1875.

This gradual transition between two coexisting contradictory systems of order - each is “valid” precisely to the extent that there is probability that action will in fact be oriented to it (Weber, 1964:126) - in conjunction with a hybrid combination of legal and illegal markets, market anarchy and State interventionism, is seemingly eroding the foundations of modern law without replacing it with any substructure of comparable strength. The probable solution is to revise the modern covenant thoroughly to incorporate the excluded subjects and proceed towards superior forms of “human development”, new thresholds for civil rights and social necessities and capacities (Denninger, 1990:221; UNDP, 1990). The chances of such a process to succeed however are fairly meager: our society is based on private commodity ownership and exchange, legal systems rest on formal equality that pervades every domain but is increasingly hollow in view of uneven economic development, productivity and exchange. This favors advantaged people, nations and societies and goes back to the problems of different social structures to which social causes of injustice must be ascribed.

The radical perspective conventionally "resolves" such difficulties arguing that the origins of Law and State coincide somehow with the genesis of private property, so that both are secondary elements of economic interests, power positions or combinations of the two, no more than mystified forms of conflicts involving the ownership of commodities (Pashukanis, 1970). Such argument is obviously an exaggeration: Law and State are “older than capital” and their functions “cannot be immediately derived from those of commodity production and circulation” (Mandel, 1975:477). To be more precise, basic Western legal institutions - monogamy, family, inheritance, contract and private property - have beyond memory passed on fundamental premises about reality, truth, good and evil, and human existence, with similar logical implications and symbolic expression in every sphere of social intercourse. Thanks to these five "pillars of wisdom” Western Law enjoys a solemn image of a pre-established totality, hierarchically integrated, external to men and women, that advances social configurations and inter-individual relations whilst assimilating innovation, within limits and depending on prevailing social values.

Legal norms are thus forms of social consciousness, elements of an immense *superstructure* of interconnected and interacting views, concepts and ideas of political, juridical, aesthetic, ethical, philosophical, moral and religious nature. Far from being passive entities or mere reflections of economic conflicts, legal norms are fairly autonomous and play a determining role in the life of Western societies: on the one hand, they implement and sanction structural differences (between individuals and groups), and, on the other, sustain the legal system as a framework of formal cohesion and social control (Poulantzas, 1980:75-76). Strictly regulated, abstract and generalized legal norms are *produced*: men and women never miss an opportunity to "truck, barter and exchange", to work together and trade the outcome of their multiple, countless material and spiritual activities, and build, independently of their will, substantive, indispensable connections. Human beings however are seldom capable of getting the most from autonomy, so highly developed forms of legal and political organization may coexist alongside relatively backward conditions or relations of material reproduction (Scuro, 2000:72). As in Latin America, where a remarkably sophisticated legal tradition and an extremely well-developed system of juridical institutions, rules and procedures coexist in situations that have

little or nothing to do with equality, freedom or human dignity, and pretend that legal rules are effective, valid for each and every citizen.

> It is not easy to give credence to law in Latin America. ... To argue in its favor is even more difficult. Law doesn't stir up the masses of people, young generations in particular see it as a catchword, an empty formula with meaning only for lawyers to justify their own dealings, but worthless for the majority ... Law has lost normative power, most of its political strength. The cause is *structural impunity*, one of greatest calamities of our time, which exonerates from blame on the basis of power concentration and unequal distribution of privilege. Structural impunity is the very opposite of democratic rule, invalidates political pacts and parliamentary activity, dodges the rule of law and dissimulates abuses of power. (Binder, 2000)

In such a context the predicaments of modern law are frequently attributed to the cultural backwardness and authoritarian tendencies of the masses of ordinary citizens, as the result of ages of submission to demagogues and imperialists, but also to their extreme individualism, social disintegration, illiteracy and many other evils which prevent them knowing the law and discerning right from wrong correctly. The opposite, however, seems to be true. Not the rabble but the cultivated few, political leaders, *engagé* intellectuals, businessmen, government officials and other politically conscious groups, more than often proclaim the hollowness of law. The choice part has the greatest restrictions to the rule of law, in particular to the institutional context in which justice is realized, that context of equality under the law, in which State power and authority derived exclusively from law discourage action beyond what is legally established, even if it is motivated by wholesome intentions and performed in the name of public interest.

The plight of modern law in Latin America is better explained arguably through the incapacity of complex, precise and formalized legal systems to meet the demand for justice in its entirety, which is particularly magnified under conditions of deep and swift social change. Further, by the fact that societies everywhere live under a firmament of valid rules infinitely larger and more intricate than any positive system of law. When norms of conduct are challenged, showing the possible course of further social transformation, subsisting interstices or "pockets" of tradition and expectations flow more freely, unleashing antinomian feelings towards Law and the system of justice. It is precisely under such circumstances that, moved by candid sentiments on moral standards and values, ordinary people may feel entitled to take justice in their hands and pay offenders in their own coin. As in lynching, a kind of mob violence in which, under the pretence of administering justice, presumed offenders are tortured, mutilated and executed without trial. Responding to the needs and experiences of average people, lynching and other varieties of summary and irregular justice can be seen as methods of *making things right more inclusively and closely to emotions*, without the interference of powerful institutions or in opposition to them.

In the United States, between 1882 and 1951 almost five thousand persons, of whom 3, 437 were black, were lynched; the practice continued during the 1950s and '60s, associated with racial conflicts involv-

ing lower working classes (Beck and Tolnay, 1990). In recent years however lynching rose from merely a form of perverse collective behavior to the nobler status of "social movement" promoting makeshift justice: the populace shows disaccord with official alternatives of social change that violate traditional conceptions, values and norms, through incipient forms of "democratic cooperation in the construction (or reconstruction) of society, whereby ordinary people proclaim and confirm elementary and contradictory social values, denying the rationality of impersonal Justice and law" (Martins, 1995).

To be sure, if it is true that "justice *begins* as a principle of restraint" and is useful mainly for "curbing disorder and limiting the abuse of power (Selznick, 1994:429), then lynching - and vigilantism - is not exclusively a demonstration of social unrest. It is conceivably a form of justice whereby the masses of people not only retaliate upon individual offenders, but also question dissenting definitions of order and disbelieve the capacity of mainstream legal and political institutions to uphold norms and values. However, justice is at odds with arguments on conflicting ends or ideals. It is not about substance; it refers to "regular and reasonable procedure of weighing claims and counter-claims". Justice is about fair and rational procedure "designed to avoid conflict" and arbitrate "between competing interests and between competing moral claims" (Hampshire, 1989:68 - quoted in Selznick, 1994). Therefore, lynching is not justice, not even "community justice" (Sherman, draft, p. 28) and has little or virtually nothing in common with folkways and autonomous popular initiative:

> The idea that lynching is "people's justice" is easily disclaimed when in it the leading role of state officials is brought to light. In the township of Matupá (Central Brazil), for example, the police arrested, beaten severely and shot three petty thieves, who were then delivered, still alive, to a mob of commoners, civil servants, retailers and police officers. These, on their turn, spread gasoline over the victims and set their bodies on fire. Not long past, in metropolitan areas Brazilian law enforcement officials used to fasten presumed offenders with barbed wire and mutilate their bodies, so that police vigilantism would come into view as lynching, i. e., "justice made by the people". (Scuro, 2000:16)

Diverse forms of "community justice", old or new, suggest the malfunctioning of social systems; more specifically, that mainstream political and juridical institutions are no longer capable to preserve social order adequately, that is to say, to regain threshold levels of public order and safety whilst spending public funds most effectively and showing respect for citizens' integrity and the rule of law. As such those forms may be counted as elements of an increasingly powerful trend towards authority devolution to small cliques, assemblies, unobtrusive government, minimal legal institutions, the vigilante media etc., all *stressing problem-solving on face-to-face bases*, rejecting authoritarian intervention, very much in the top-down, postmodern spirit of accountability. Judged in motivational terms and individual points of view this postbureaucratic trend is not restricted to definite cultures or parts of the planet. Public opinion polls show, for example, that mostly white Americans trust less the government today than thirty years ago, because when in government people "are crooked", "serve a few big business" and "don't care what people like me think". In countries as

diverse as the United States, Finland, Mexico and Great Britain, between 1981 and 1990 respect for the police and armed forces declined markedly, as did pride of most people in their nation. In all but three of 21 countries surveyed "declining respect for authority was reported, whilst in 14 of the sample the respondents said the had increasing trust in other people" (LaFree and Drass, 1990; Nye, Jr., Zelikov and King, 1997[4]).

It is not new that people are inclined to represent complex power and authority relations in palpable terms focused towards particular objectives, from a [Balzac's] Crainquebillean way of looking, for example, Law and State as grouchy old men behind a counter, a desk or a judge's bench. Commonsense decodes and dynamically weighs - in a necessarily incomplete and most likely simplified manner - prevailing legal and political institutions by singling out agencies or individuals such as congressman, judges, tax collectors, soldiers, policemen, officials, the President, the Queen or *der Führer* (Schutz, 1955:199; MacIver, 1964:292). This crude symbolism reflects, on the one hand, the plight of human existence in the shadow of Law and State, and, on the other, the trouble people have to understand and use those institutions whilst trying to manage their own ever-changing views, feelings and expectations (Scuro, 1989:64). Nevertheless, forasmuch as the promise of justice in not circumscribed by urgent needs and motivations, and even though it is hardly an exaggeration to claim that the larger framework of society, its institutional complex, results from purposive actions, justice systems are not satisfactorily explained nor compared on utilitarian grounds alone; they are part of a totality, an undivided ideology built not exclusively on sensible, retributive features.

> [J]ustice does more than enforce minimal requirements of order and co-operation. *The process of doing justice stimulates moral and legal development.* To do justice, we must draw insight and justification from a larger context of moral experience and reflection. When we say that justice is part of morality, we do not mean it is only a loosely coupled part. It is nourished by and supportive of the more general values that inform all moral experience. Justice cannot be even moderately realized if there is no appreciation of personal dignity, trust, fidelity, caring, and rationality. ... Although justice *emerges* as a response to practical urgencies, it *eventuates*, under appropriate conditions, in ideas and practices that are subtler and more value-laden. ... If we reduce justice to a negative virtue or to a way of achieving minimal co-operation ... we miss the full contribution justice can make to the enrichment and enlargement of community. (Selznick, 1994:430-431)

III

JUSTICE PRINCIPLES ARE TIMELESS, REFLECT NEEDS AND ASPIRATIONS of all human societies and are governed by a grandiose common concern: correct ordering of power and interest in the community. Notwithstanding theoretical discussion on the positive attributes of justice, the power of Law depends largely on the efficiency of the system of justice, the criminal justice system in particular, considered by many as most ineffective in identifying, prosecuting, punishing, deterring or reforming criminals.

[4] Inglehart (1997) and Orren (1997).

> If we had a radar defense system or an emergency medical system that operated at the level found in the criminal justice system, we would not be alive for very long. Yet we continue to support the criminal justice system in its present form. One should conclude from this that we do not really want to do away with or control crime. The criminal justice system is reactive and not proactive; that is, it waits for the crime to occur before reacting, and it does not try to prevent crimes before they occur. (Jeffery, 1990:125)

If one is convinced that potential for serious offending is reduced through incapacitation and deterrence - detention or punishment so repugnant that offenders desist to commit crime - or rehabilitation - treatment to avoid negative behavior aftertime - criminal justice systems are unquestionably innefective. Among other things because (1) less than 40 percent of all cases of victimization (U.S. National Crime Victimization Survey) are reported to the police; (2) rates of imprisonment are extremely low (3 per thousand criminals); (3) increased incarceration cannot reduce crime any way (Reiss, Jr. and Roth, 1993) - incarceration rates in the United States have grown enormously since 1974 (from an average of 106 per every 100,000 individuals in the population to 313 in 1984 and 600 by 1995), state governments invested heavily in the improvement of their systems of justice, and crime rates fallen considerably, but the chances of serious offenders of being arrested and staying in prison remain as low as ever.

United States' criminologists approach the criminal justice system after a suggestive allegory, equivalent of the "structural impunity" prevailing in Latin America as the pre-eminent reason for the increase of criminality: the “funnel effect”, a sharp drop in numbers at every stage of the criminal justice process is verified as one moves from the number of serious crimes committed (top of the funnel) to the number of perpetrators in jail (bottom of the funnel). Cross-national comparison of serious crime rates confirm that the funnel effect is not characteristically American and suggest that the United States may closely resemble some of the most violent countries in the world today (Hagan, 1994). For example, in a sample of murder cases of youth and children in São Paulo (1996) police made no arrest in 48% of the cases; 63% of the remaining were discontinued for lack of evidence; only 28% of the people arrested were charged, of which 9% were prosecuted and just 1.7% found guilty as charged. In 1998 an attorney with an amazing record of success defending murder suspects in one of the most violent areas of São Paulo claimed that only ten out of 130 of his clients were tried by jury. Of those just three ended up doing time in jail. The reason, according to him, was “the inefficiency of the Brazilian system of criminal justice”, weak policing in particular: in eighty percent of the cases police was not able to gather enough evidence to charge his clients.

THE ETHOS OF VIOLENT SOCIETIES

Cross-national comparison of societies and peoples is not properly attained through artificial constructs, such as scales of social mobility, industrialization and urbanization, ecological and demographic patterns. Differ-

> ences and similarities do not result from ideal types - which have as much explanatory power as the arithmetic mean, i.e., useful in the main for showing year-to-year trends - but out of *real* affinities of character and processes embedded in political origins, moral traditions and styles of conquest (territory occupation and frontier settlement). Thus, if the United States more closely resembles Brazil and other violent nations of the world than it does Canada, for example, the reason is congruence of national experiences conditioned by (1) an egalitarian, populist ethos fostering impatience towards superior institutions and disrespect to the rule of law, and (2) orientation to ends rather than to means, the "achievement complex" that emphasizes "open society", "winning the shore", confrontation as a method of conflict resolution, "utopian moralism" against the perverse practices and evil dispositions of opponents or outsiders. (cf. Lipset, 1992:435-439)

In 1999 São Paulo violent crime rates began to come down (2.89% drop in 12 months), but success could not be imputed to the increase of incarceration in the same period (+1.57%) nor to more effective policing (Kahn, 2000). São Paulo police force did embark in a process of management and operational change, although in a much lesser degree than in the United States, particularly New York (McDonald, Greenberg and McEwen,1998). At any rate, in Brazil as in the U. S., the strength of police and criminal justice effects on crime is difficult to establish, generally moderate rather than substantial, and comparable to the effectiveness of institutional contexts such as family, community, schools and labor in preventing crime, disorder and violence (Sherman, 1997). Seen from a larger perspective therefore the “most serious problem” is resilient *fear of crime*, the feeling that feeds the uneasy anticipation of the public, as the result of regular bombardment of citizens with accounts of assaults, sex crimes, robberies, murders, vandalism and public response to such offences, by television news programs, daily newspapers, official reports and opinion polls.

> ... in 1996, the juvenile arrest rate for murder was at its lowest level since the beginning of the decade. A 1996 analysis of juvenile homicides examined where such crimes occurred and found that 56 percent of the country's juvenile homicide arrests were made in six States and that four large metropolitan centers (containing only 5.3 percent of the Nation's juvenile population) accounted for 30 percent of such arrests. Nonetheless, the media have helped engender widespread fear that violent acts are taking an unacceptable toll on the lives, education, and opportunities of many young people in this country. A 1993 national school-based survey that polled a representative sample of high school students showed that students' fear for their personal safety at school or travelling to or from school compelled as many as 4.4 percent of responding students to miss a day of school each month. Of the respondents to a 1996 national random telephone survey of more than 1,300 high school students, nearly half of those in public high schools reported drugs and violence as serious problems in their schools.[5]

[5] Combating Fear and Restoring Safety in Schools. *Juvenile Justice Bulletin*. Apr. 1998.

RELATIVE DEPRIVATION THEORY

> "... families suffering serious losses will feel *less* deprived than those suffering smaller losses if they are in situations leading them to compare themselves to people suffering even more severe losses. ... This pattern is reinforced by the tendency of public communications to focus on the most extreme sufferers which tends to fix them as a reference group against which even other sufferers can compare themselves favorably". (Merton, 1967:40)

In as much as fear of crime is not culture-specific nor simply a ripple effect of American culture in global entertainment media, a more compelling explanation for common-sense labeling criminal justice as an *inefficient* system is surely wanting. To be sure, more than laying open the futility of using such a system to reduce crime, emphasis on efficiency denotes need for an alternative approach to criminal law, befitting situations of social emergency and the postmodern emphasis on openness, problem-solving and group experience. *Efficient* criminal justice systems must then yield prompt and definite responses to offenders, progressively turning procedure against suspects and suppressing a number of their civil rights. The basic concept of justice is altered and liberal views on criminal law reversed, procedures of weighing claims and counter-claims are unsettled and rewritten to conform pre-modern penal principles and practices. Viewed in its essential qualities efficient criminal procedures beget proof, create criminals and become punishment. No longer a last resort penal law evolves to become a *prima ratio* for the resolution of unbridled social problems.

However, to be fully aware of the limitations of the criminal justice system is not exactly a virtue, as emphasis on effectiveness might be simply a mode of looking at conflicts from the perspective of binary crime/punishment oppositions (Baratta, 2000). To be sure, crime-centered, effectiveness-prone justice systems expand moral dimensions of conflict, stimulate psychosocial mechanisms of projection, practices of labeling and stigmatization, and formation of silent majorities. Important forms of conflict (organized crime, terrorism, extortion and corruption, crimes against the environment etc.) are thus confined to narrow contexts of meaning and devoid of political significance. Around them is attached a *cordon sanitaire* made of technical expertise, professional competence and technological answers to deflect public debate. Seemingly absurd, emphasis in the criminal contours of conflict ends by reproducing impunity, magnifying and propagating funnel effects.

The efficiency syndrome - the “what works” discourse - is deeply rooted in current proposals for legal reform and intended strategies to improve the performance of criminal justice systems. Restorative parlance and schemes are no exceptions, arguably because “there are good preliminary theoretical and empirical grounds for anticipating that well designed restorative justice processes will restore victims, offenders and communities better than existing criminal justice practices” (Braithwaite, draft, p. 112). Nevertheless,

> ... for all of this hope about the advantages of restorative justice over the models with which it must compete, restorative justice offers limited prospects of a revolutionary improvement in the circumstances of victims or the control crime. The primary reason for this is that the most fundamental things we must do to control crime and thereby improve the lot of victims are not reforms to the justice system. They are reforms about liberty, equality and community in more deeply structural and developmental senses. (Braithwaite, op. cit., p. 113).

Both restorative justice and the models with which it "must compete" today advocate essential legislation and minimal crime control institutions. Both consistently argue in favor of crime prevention, citizens' welfare and security grounded on effective protection of essential rights to life, freedom, identity, communication, decent living etc.(Denninger, 1990; Friedmann, 1992). Punitive intervention, if any, must be applied only when those rights are violated or in case of "indisputable social demand". Both consider that the real challenge comes from tasks such as controlling risk factors or permanently improving legislation and the performance of courts, police and corrections, which is nothing but a *petitio principii* that begs the whole question.

In truth, in comparison to courts "third models" or "new lenses" in so far displayed as alternatives to punitive justice, offer little and poorly systematized procedural safeguards - whose function is not precisely to produce consensus but neutralize disappointment and prevent conflict generalization (Luhmann, 1969). It is the case of programs such as the Australian *Wagga* - commercially marketed in North America under the label of *real justice* - focused to change investigative routines, but in which police malpractice, unlawful or unfair, become virtually invisible: "allegations of failure to require parental attendance during questioning, of refusal to grant access to a lawyer, of unauthorized searches and excessive force could become hidden in cases dealt with by family group conferences" (Warner, 1994:42; McElrea, 1998). At adjudication and sentencing stages similar problems with procedure also come into view, and it is not likely that these would be properly dealt with simply by designing and implementing "better" restorative justice processes.

IV

REAL DANGERS LIE AHEAD IF RESTORATIVE JUSTICE IS ACCEPTED before sufficient ground work is done, so as to meet high expectations across different frontiers, whilst remaining true to its values. In that respect, some of its proponents are deeply mistaken when they insist in blaming established "systems dominate by professionals", criminal justice systems in particular, for the deficiencies that befall the paradigm.

> Innovations in entrenched systems such as criminal justice are often co-opted and diverted from their original visions. Terms are watered down; old approaches are justified with new concepts; programs are instituted without the necessary value base, with the result that they do not work or have unintended, negative consequences. These processes have plagued most criminal justice reform efforts

> and are will likely occur again, given the immense self-interest in maintaining the status quo inherent in what researchers have called the "corrections-industrial complex." Alterations are already visible within "restorative justice": the term is being used for some approaches that seem diametrically opposed to restorative values, for example, and victim/offender mediation has on occasion been used to punish offenders rather than provide opportunities for healing and resolution to both victims and offenders. (Zehr, 2000)

Conversely, the conviction that during most of the prehistory of justice restorative values and norms could have prevailed - up to the moment when criminal acts were transformed into a matter of disaffection or felony against king and country - allied to postmodern aversion to the obligatoriness of Law, surely play a decisive role in holding back qualitative developments. Thus is not wise and fair to say, for example, that criminal justice systems are culturally inappropriate for the introduction of gradual changes, and that restorative justice should not be linked to or supervised by courts and centralized legal institutions. This is particularly true in view of the procedural difficulties presented by ongoing restorative initiatives, which on more than one occasion have placed extremely serious threats to the rule of law.

> The best protection for the rule of law may result from a rich diversity of national and international associations, comprised of both interested advocates and professionals (or lay people employed) in the field. There is probably even virtue in competition and conflict among such groups, just as we find in the conflict among the several organizations advocating gun control in the United States. ... [T]he existence of any such civil institutions would be a radical departure from the current state, in which a handful of consulting and training organizations constitute the entire institutional fabric of restorative justice. Without a strong set of civil institutions to raise money, create publicity and lobby relevant legislatures and police, restorative justice may go either nowhere or too far. (Sherman, draft, p. 30)

But equally unproductive is to posit restorative justice as an *ideal type* subjacent to liberal democracies, comparatively more successful in material and educational terms, where the “need for governance” descends and “public dissatisfaction with institutions in general” comes to a peak, and breed “disrespect for all institutions, including law itself.” So, at the “end of history” - that is, when the supremacy of liberal democracy, “the final form of ideological evolution”, is beyond dispute - the “declining threat to material well-being” (struggle for “food, water, shelter and peace”) prompts citizens to demand more respect from the State, and quest for recognition, arguably the “central engine of history” and “source of powerful emotions of anger, pride and shame” (Sherman, draft, passim). This line of reasoning is fruitless because (1) is based on unwarranted use of poorly analyzed notions (Gosling, 1973:Chapter III; Hegel, 1976:355; Collingwood, 1973:113-122); (2) neglects comparative appraisal of legal traditions and contemporary legal systems; (3) modern civilization is about legality and control, not legitimacy, genuine emotions or enlightened rationality.

> The "new canon law" (*jus novum*) of the Roman Catholic Church, the first modern Western legal system, was formed following the 1075-1122 movement to make the Bishop of Rome the sole head of the church, emancipate the clergy from the control of emperors, kinds and feudal lords, and sharply differentiate the church as a political and legal entity from secular polities. Henceforth, a number of features have remained characteristic of Western Law:
>
> 1. Relative autonomy in relation to politics, religion, and to other social institutions and scholarly disciplines;
> 2. Entrusted to legal specialists, legislators, judges, lawyers and legal scholars;
> 3. Legal institutions conceptualized and to a certain extent systematized, and legal learning posited as meta-law to evaluate and explain juridical rules and organization. (Berman, 1983:2,37)

Comparison based on *ideal types* yields constructs that are merely perceived, even when focused on real social structures. They eventually allow introversion upon the character and processes of society, but the findings produced scarcely can be generalized to similar settings in other places and times. To be sure, differences between peoples and societies are not exclusively synthetic, artificial products of intellect. They result from concrete, *real* affinities between social structures, thanks to the fact that in different environments and occasions similar forms of social agglutination tend to reproduce correlative institutions and patterns of interaction. Reproduction is factual and bears little resemblance to the initial motives or beliefs of actors concerned with immediate ends and short-term objectives. As the reproductive movement follows on, changing patterns grow larger, and the nexus of interdependency spreads far beyond the reach of sight, codified “civilized behavior” is consolidated through a specific combination of state-societal and self-control (Elias, 1993).

Law is a quintessential changing pattern, a *totality* or ensemble of “co-ordinations of distinctive character” (Geiger, 1983), typical of social configurations of equally distinctive structure, such as in our modern society, in which legal systems - institutions, procedures and rules - have become a solid autonomous machinery, relatively impervious to movement and change, run by a body of experts with interests in the preservation of *status quo*. The fact that Law resists or is unaffected by change is not considered as entirely bad or undesirable by sizeable portions of society. Legal safeguards actually repose on such power or capacity of resistance.

> Law reinforces immobility. The larger the field and greater the number of people integrated and made interdependent, the more necessary is a uniform law covering all fields - just as necessary, for example, as stable and uniform currency. Thus, the more Law and the judiciary become, as it happens with currency, elements of integration and begetters of interdependency, the more they oppose any sort of change, and increasingly serious tend to be the upheavals and interest displacements which change brings into play. ... Only when social turbulence and tensions become unusually vast, and interest of large social sectors in the preservation of prevailing law becomes uncertain, only then, fre-

> quently after periods of time that last several centuries, do social groups begin to submit conventional law to the test, in order to verify, in battle, whether it still corresponds to actual relations of power. (Elias, 1993:282)

Law may be seen as a standard form for problem-solving or conflict resolution. But more than just a disciplinary matrix or way of looking at things, Law is a paradigm, equations or formulae for answering further problems, to settle disputes between opposing interests by mutual concession, and to minimize conflict and ensure that social peace will be maintained on a relatively safe and permanent bases. Seen from this point of view restorative justice are *middle-range paradigms*, promises of future systemic change, implemented on a lower level of abstraction with operational notions defined for restricted orders of conflict, in specific, localized conditions (Merton, 1967; Scuro, 1999; Thorsborne, 1998). To connect systematically personal relationships in their multiple aspects, engender change and help justice systems to enforce law more adequately and effectively, reduce crime, fear of crime and their economic and social costs, restorative initiatives must be carried out as a stabilising influence, fostering confidence in mainstream legal and political institutions.

Accordingly, an active experiment have been devised to bring conferencing (*câmaras restaurativas*) into use in the youth justice system of Porto Alegre (Southern Brazil). Unlike New Zealand integrated model of family group conference, which has succeeded over the years since its inception in 1989 "in keeping large numbers of young people out of the formal justice system and out of state institutions" (McElrea, 1998), the present design is not applicable to all young offenders. In New Zealand, with only a few exceptions, no summons is issued and no charge can be laid in court for matters not denied without a FGC being convened. Conference members decide whether a matter should go to court and how it should be dealt with. FGCs also puts forward plans of action - apology, reparation, community service, curfew, undertaking to attend school, no association with co-offenders etc. Courts do not usually supervise plans; they are asked to adjourn proceedings, so as to allow for the plan to be implemented.

In New Zealand emphasis on diversion is reinforced in the *Children and Young Persons and Their Families Act of 1989*, by principles requiring that criminal proceedings should not be instituted against a child or youth "if there is an alternative means of dealing with the matter". Criminal proceedings are considered a last resort and community-based solutions are encouraged, which is not the case in Brazilian legislation (*Children and Adolescents Statute of 1990*). Here, depending on the circumstances and consequences of the incident, social context, personality of the offender and degree of her/his involvement in the offending act, a public prosecutor may concede *remission*[6] and exclude an offender from legal proceedings. If granted during criminal proceedings remission implies suspension or extinction of the process. It also up to the prosecutor to recommend measures - reparation, community work, compulsory school attendance - applied exclusively to first offenders guilty of less serious offences (theft, possession of drugs, ordinary (or common) assault, damage), that is, 60 to 70% of the summons issued by courts against young persons in São Paulo and Porto Alegre

[6] The *British Criminal Justice Act 1991* defines remission differently: cancellation of part of a prison sentence.

(some magistrates taking part in the experiments believe that certain crimes - e.g., possession of weapon, shoplifting - sometimes may be considered less serious offences).

In Brazil Youth Court magistrates and public prosecutors handle exclusively matters concerning offences committed by juveniles and other affairs relating to children under 18. In New Zealand, though specialists in these areas, they are also District Court judges and prosecutors, and deal with general civil and criminal cases. On the other hand, a great deal of São Paulo Youth Court judges and prosecutors have background in criminal cases in adult courts, which explains, according to some of their colleagues, why so often they get tough beyond measure with juvenile offenders. An additional factor is unusual public pressure resulting from very high levels of fear of crime. All this is detrimental to young offenders, causes serious distortions and threats to the rule of law, particularly in view of the fact that Youth Court proceedings are not public and are generally conducted in a more informal way than in ordinary courts.

The Brazilian experiments shall succeed on three accounts. Firstly, if they are able to prove that (1) restorative justice principles can be implemented in a statutory framework supervised by youth courts, (2) juvenile offending does not increase, or at least remains stable as a proportion of total crime, even though the use of courts and state institutions is reduced - excessive demand (judicial cases, young people under supervision, treatment and in custody) and fragmented services being at present the main sources of conflict involving young offenders. Secondly, if they show that justice is not a contest between court procedures and quantitative outcomes (lower criminality rates), but the real capacity of ordinary law - rather than manifestos on fundamental rights or insights into ordinary needs and experiences - to protect personal liberties. Finally, if their restorative instruments are implemented effectively, so as to "produce better results for the end-values or substantive outcomes for all stakeholders" (Sherman, draft, p. 22), and engage victims, offenders, families and communities in a movement of critical affirmation and reconstruction of positive law, through confidence in the ideals of justice the system conceals, together with disposition to change it from within and to open and enlarge the frontiers of legal tradition and scholarship.

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