Contents

1. Introduction: Restorative justice and the criminal justice system

LINDA GRÖNING, & JØRN JACOBSEN

1.1 The aim of the book

This book is concerned with restorative justice and criminal justice. More specifically, its focus is on exploring restorative justice with regard to ideas, rules and system structures connected to the traditional Western model of a criminal justice system, including the conventional criminal process. As a starting point, it seems clear that the perspectives of restorative justice challenge this model. As an alternative to traditional ideas, the current restorative justice movement raises questions about the potential for replacing traditional structure, and processes of criminal justice with programmes or processes of restorative justice. This book does not aspire to answer these wide-ranging questions directly. Instead it aims to explore the relationship between restorative justice and criminal justice from a variety of different perspectives. By doing so, the aim of the book is to articulate different ideas of what restorative justice is and its relationship to the traditional criminal justice system.

1.2 The reference point: The traditional understanding of a criminal justice system

In order to provide a better understanding of the departure point and context of this book, and more generally of the (still) dominant perspectives of criminal law, it seems necessary first to clarify what we refer to by the term traditional model of criminal justice, and

the system aimed at realising it. Despite some apparent differences, the Western criminal justice systems to a large extent have common traits. In this respect, the paradigm of the national criminal justice system corresponds to some basic ideas about what a criminal justice system is and how it should function as a system. These ideas are so firmly anchored in Western legal discourse that they – in spite of all controversial details – can be said to form a traditional model of a criminal justice system.[1]

In brief, the traditional model is centred on the idea that the criminal justice system is the state's legal apparatus for the use of public penal power. The purpose of the criminal justice system is to secure social order on the territory of the state, by means of crime control through the threat and use of punishment. From this starting point, the basic justification for the system's existence lies, paradigmatically, in the argument of general deterrence. At the same time the criminal justice system should secure criminal justice. In this respect, the criminal justice system is typically considered as rooted in the basic values of the democratic *Rechtsstaat*,[2] of individual autonomy, equality and in the desire to avoid the abuse of power (both from public institutions and from other individuals). In other words, the criminal justice system aims at both effective crime prevention and effective prevention of the abuse of public penal power.

As the overall legal system of the state, the criminal justice system is most often taken to include, as a minimum, both a certain system of norms and a certain organisation of institutions authorised with different kinds of competencies of public power. As basic elements of the criminal justice system, the system of norms contains both

1 See further Linda Gröning, 'A Criminal Justice System or a System Deficit: Notes on the System Structure of the EU Criminal Law', *European Journal of Crime, Criminal Law and Criminal Justice*, 18 (2010), pp. 115–137.

2 A *Rechtsstaat* is defined here as a state in which the authorities are allowed to intervene in the legal position of individual citizens only on the basis of law, not by armed force or at the authorities' own discretion. A *Rechtsstaat* is furthermore a State in which the authorities themselves are bound by the rules that they have created and from which they cannot deviate at their own discretion. Deviation and exception from the rules can be allowed only in a way that is prescribed by law. In a *Rechtsstaat* legal security is a fundamental principle. Many will also presume that a *Rechtsstaat* respects fundamental human rights. See further Jørn Jacobsen: *Fragment til forståing av den rettsstatlege strafferetten* (Bergen, 2009), ch. 3, Fagbokforlaget.

rules of substantive criminal law and rules of criminal procedure. The substantive rules define the crimes that are to be punished in the particular state or country and are in this respect at the centre of the criminal justice system. These rules are paradigmatically divided into a general and a special part. In addition, the rules of substantive criminal law are most often taken to protect the most fundamental interests of a certain (national) society. The rules of procedure determine how the state enforces the substantive rules of the criminal law by assessing the occurrence of crime and convicting and punishing those responsible for the crime. At the core of the traditional view of criminal justice lies in particular this view that it is the state that is exclusively responsible for the administration of criminal justice, which means, *inter alia*, that the victim is not part of the process.[3]

On a deeper legal theoretical level, the system of norms of the criminal justice system, in particular the rules of substantive criminal law, is typically understood as a monistic system of rules (founded in one constitutional source only) that is internally consistent and coherent and that consists of a hierarchical structure with mechanisms for resolving legal inconsistency. In more general terms, the traditional model rests upon the idea of the rule of law, at least in its formal sense (*cf.* legality). The basic requirement of legal certainty is at the core of the criminal justice system.

Regarding its institutional organisation, the criminal justice system is typically a system with a certain separation of powers, consisting primarily of three levels – where a certain kind of power is exercised by certain authorities on each level. These levels are the 'level of legislation (or criminalisation)', the 'level of adjudication of guilt and punishment' and the 'level of administration of punishment'. On these levels, legislators, courts and administrative authorities respectively exercise different powers.[4] In addition there are other important actors that are attached to the functioning of the criminal justice system (primarily to the level of adjudication of guilt and punishment), such as the police, the prosecutors and the defence.

As a state-based system, the criminal justice system is viewed as

3 See, *inter alia*, A. Ashworth and M. Redmayne, *The Criminal Process*, 4th edition (New York: Oxford University Press, 2010), p. 54.

4 See N. Jareborg, *Straffrättsideologiska fragment* (Uppsala: Iustus, 1992) pp. 136–137.

subordinated to the basic requirements of legitimacy of the democratic *Rechtsstaat*,[5] above all the criteria of democratic legitimacy and protection of individual rights.

At the same time as the national criminal justice system is considered a subsystem of the legal order of the state, it is also considered a particular system with an idiosyncratic 'grammar of criminal law', which is centred on the notions of crime and punishment and which embodies principles and concepts that distinguish the criminal law from other branches of law. In this respect, the principle of guilt and the closely connected idea of penal censure (*i.e.*, the idea that punishment expresses moral blame; crime as wrongdoing), the principle of *ultima ratio* (*i.e.*, the principle that criminalisation should be used as last resort) and the principle of proportionality (between crime and punishment) are all principles that often are underlined as distinguishing features of the criminal justice system.

1.3 Introducing an alternative: The restorative justice approach

Restorative justice, as understood in the contemporary debate, in essence signifies a process in which offenders, victims, their representatives and representatives of the community come together to agree on a response to a crime. Through the multitude of different restorative justice processes – such as victim–offender mediation, sentencing circles or restorative cautioning schemes – perspectives of restorative justice often underline equal emphasis on victims, offenders and community, emphasis on relationships and a forward-looking approach.

Judging from the label by which this position is known, its aim is justice, and it seeks this aim by some kind of restitution or similar re-balancing of some kind of imbalance. This short description may remind us of different kinds of retributivism, as for instance the approaches of Kant and Hegel. In terms of the latter, punishment is a necessary negation of a negation.[6] Punishment confirms

5 See footnote 2.

6 See Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts oder*

and secures the rights of the citizens. Here, we may in other words speak of a retributive justice version of the larger term 'restorative justice'. This approach does not seem to be particularly popular nowadays, despite, for instance, certain adherents of this emphasis on norm-confirmation in German criminal law science (as in the position held, *e.g.*, by Günther Jakobs).[7] The retributive drive in the current, in particular media-driven, development of the criminal justice system seems to have less in common with these sophisticated theoretical positions on criminal justice. Additionally, the approach to the criminal law that today usually goes under the label 'restorative justice' seems to have less in common with this line of thought. Still, it may be useful to bring with us this position, too, in order to understand the currently more popular version of restorative justice.

The currently more popular version of restorative justice, both in theory and in practice, is on its own not quite easy to grasp. It is for instance not easy to explain what the 'restorative' aspect of this approach consists of. Despite the manifest difficulties in grasping the essence of restorative justice, what we can perhaps say, is that, starting out from Nils Christie's famous lecture regarding 'Conflict as Property', the approach to restorative justice that we shall look at in this book is first and foremost asking the basic questions: whose conflict is it in the first place – and what is the proper way for solving the conflict by those who own it?[8] One classic response to these questions within the restorative justice movement is that it is those individuals who are personally involved in the conflict who own the conflict and, hence, it should be solved by them. It is also worth noting that those that are personally involved are not just the offender and the victim of the act. Rather, the restorative justice approach is often connected to a more 'communitarian' view, where the violation of the victim concerns the (local) society itself.

This redistribution of the conflict is in itself a main aim of the restorative justice position, and it often leaves the way of solving it

Naturrecht und Staatswissenschaft im Grundrisse [1821], Frankfurt am Main, 1986, §§ 82–103, in particular § 100.

7 See Günther Jakobs, *Strafrecht - Allgemeiner Teil, Die Grundlagen und die Zurechnungslehre*, 2. Auflage, (Berlin: De Gruyter, 1993).

8 Nils Christie, 'Conflicts as Property', *The British Journal of Criminology*, 17 (1) 1977, pp. 1–15.

to those who are involved in the conflict; it is at least to a certain degree 'open-ended'. It is also to a large extent open to a range of different processes for dealing with the conflict. One could in general say that this openness is the proper way of redistributing the conflict, giving the owners of it authority both with regard to procedure and outcome. *Pace* the retributive version sketched above, it should be emphasised that the focus is not on a norm that is to be restored. Norms may rightly be one component both in the views held on what has occurred and in the (re-)constitution of a community, but only one, and probably not the most important of the several components relevant to this matter – at least not when speaking of norms in the sense of legal rules. The most important component is rather the bonds between participants of the community, bonds created by interaction, care, emotional ties – and even wrongs. As such, we might perhaps even call it, as an interpretation of the underlying idea of this approach, justice as restoration of a community, at minimum; the 'community' of a victim and an offender. In the following, however, we shall use the more established term 'restorative justice' when referring to this approach.

However, this description of restorative justice is certainly imprecise, but as mentioned, it is not easy to give a short description of this phenomenon. Indeed, it is rather some kind of movement, with several approaches with – at best – some kind of family resemblance in between them. In the words of Andrew Ashworth, who with regard to the question of what restorative justice is, states that '[this] is probably a too large and unspecific question to have a clear answer. Vessels of widely differing shapes, sizes and modes of propulsion sail under this particular flag, not least because RJ (as it tends to be called) is to some extent a practice-led movement'.[9] For more precise understandings of the phenomenon, we direct the reader to the literature on the subject. In this book we shall try to come nearer to a more precise understanding of the potential of this movement with regard to the criminal justice system. We will do so by means of discussions looking for exchanges – and even clashes – between the criminal justice system in its traditional

9 Andrew Ashworth, 'Is Restorative Justice the Way Forward for Criminal Justice', *Current Legal Problems*, (2001), p. 347.

shape and ideas and procedures that have their origin or at least familiarity with (branches of) the restorative justice movement.

Before sketching these different discussions that the contributions to this book address, something should be said about why one should pay attention to the ideas of restorative justice with regard to the continuous development of the criminal justice system. After all, the approach of restorative justice challenges in different ways the core assumptions of the traditional model and in particular the idea that the state has the 'monopoly' of administering justice.

1.4 Why look for exchanges?

Why are we investigating this movement of restorative justice? For our part, we see the following reasons in particular for carrying out such an investigation into the phenomenon of restorative justice and its potential for challenging the criminal justice system in its traditional shape.

When working on developing a criminal law theory for Norwegian criminal law, one important means to develop such a theory is to understand the ideas and principles that are already embedded in the criminal law. However, we cannot stop short there. There is also the question of the correctness of these embedded principles: can the criminal justice system as it is traditionally conceived and as it finds its expression in the current criminal justice systems be justified? When developing a criminal law theory, one cannot reject the possibility of this being a critical, or even radical, project. An evaluation of its correctness must in other words also involve a thorough discussion of the more radical alternatives to the established ideas and principles of punishment. The restorative justice movement, at least in its core aspects, does represent a radical alternative to the traditional criminal justice system – not unlike the rehabilitation movement did in the first part of the last century. Such radical alternatives are useful in order to question the existing concept of criminal justice.

The core ideas of the restorative justice approach do in essential aspects represent a different perspective from the established principles of the criminal justice system with regard to dealing with social conflicts. Returning to the traditional model of the

criminal justice system it can, for example, be stated that the restorative justice model is in potential conflict with the idea that the response towards a crime is almost exclusively an issue for the state. Furthermore, the restorative justice approach is in conflict with the formalistic or rule-oriented character of the criminal procedure. In addition, the restorative justice approach seems to be in some tension with the basic aims of general deterrence and the strong link between punishment and moral blame, and as the extension of this, the tendency to require a certain level of repression.

It should be added that the restorative justice movement does express certain values that call for attention: inclusion, communication, empathy, compassion, and absence of (physical) force. From a criminal law point of view, it can easily be acknowledged that these values are not the prime quality of the criminal justice system in its traditional shape. The focus on these evidently important values inherent in the restorative justice movement is in other words a good reason for making use of restorative justice as way of challenging and discussing the criminal justice system in its traditional shape.

Even if the exchange with the restorative justice movement does not result in a radical reforming of the criminal justice system in its traditional shape, one should expect that the criminal justice system will still have something to learn from an exchange with restorative justice. Once more the parallel with the exchanges with the rehabilitation movement can be made. There are clear signs of a fruitful inclusion of some particular ideas and approaches of restorative justice into the established criminal justice system, as the contributions to this book illustrate.

A specific Norwegian perspective could be made here. At least apart from some of these changes that will be addressed by the participants in this book, for instance the *Konfliktråd* that has been established, the most notable feature in the Norwegian criminal justice system has perhaps been the strong drive towards improving the place of the victim in the criminal procedure. In this process a central contribution was made by Anne Robberstad, in particular her thesis *Mellom tvekamp og inkvisisjon* ('Between battle and inquisition'). Later on, the White Paper NOU 2006: 10 discussed the place of the victim in the criminal law and made suggestions for

improving this position.[10] To a certain extent the improvement of the role of the victim in the criminal procedure seems like a desirable development. The possibility for a fruitful exchange between the criminal procedure and restorative justice should still be further investigated into.

At the same time, however, this development within the Norwegian criminal justice system illustrates a certain problem inherent in such an exchange, with such radically opposing positions in the middle, a problem that gives further motivation for not only looking for exchanges between criminal justice and restorative justice, but also for investigating different kinds of problems originating at deeper levels when seeking such reform. In particular, one cannot disregard the potential problem of the criminal law and the criminal procedure being built upon potentially conflicting ideas and principles, resulting in a manifestly incoherent criminal justice system. As we see it as one of the tasks of legal science to produce coherent conceptions of, for example, the criminal law and criminal procedure, there is good reason to investigate these models in order to reach a more complete conception of both of them, in order to evaluate them and their potential, and to make an informed choice from them. As part of this larger process of designing a coherent theory of the criminal justice system in general, including its different more concrete levels – the criminal procedure in particular – we shall embark in this book on the road towards a more thorough understanding of restorative justice that is capable of taking us further in the understanding of contemporary criminal law and its future.

1.5 An overview of the book

In Chapter 2, David Chelsom Vogt approaches the relationship between restorative and criminal justice, from a philosophical perspective, and explores to what extent these are reconcilable. As Vogt's text makes clear, reconciliation between criminal and restorative justice is hard to achieve at a principled level. The two

10 See Anne Robberstad, *Mellom tvekamp og inkvisisjon: straffeprosessens grunnstruktur belyst ved fornærmedes stilling* (Oslo: Universitetsforlaget, 1999) and NOU 2006: 10 *Fornærmede i straffeprosessen – nytt perspektiv og nye rettigheter*.

ideologies are at a basic level founded on quite different concepts of justice – where the criminal justice ideology has its origin in a universal concept of justice, restorative justice for its part seems to depart from a more context-based and intersubjective account of justice. The only possible way of achieving a harmonisation of criminal justice and restorative justice is to accept the presence of conflicting principles within the same system.

Vogt's conclusion concerning the difficulties of reconciling the restorative and the criminal justice ideologies is in a sense supported by the next text, that of Katja Jansen Fredriksen and Eirik Hovden. They address the current absence of a criminal justice system in Yemen comparable to those found in Western legal systems. Here, one finds instead means for conflict resolution that resemble ideas claimed by current restorative justice theorists. Jansen Fredriksen and Hovden give an overview of these means for conflict resolution and make it clear at the same time that this way of solving conflicts is intimately tied to the societal and cultural context of Yemen. In a similar way then, it seems as if one cannot understand the Western criminal justice system without taking into account the societal and cultural context of Western modernity. These different ways of approaching conflicts seem as such closely tied to, respectively, a small-scale society dependent on informal social bonds and integration, and a large-scale society with a high level of differentiation and impersonal relations between the participants in the community. These presuppositions are to a large extent beyond the possibility of the criminal law to create, even if of course it seeks to, and does, contribute to the forming of the cultural and societal context.

However, the conclusion that the criminal and restorative justice ideologies are difficult to reconcile at a principled level, at the same time as their relevance seems to be intimately tied to the societal and cultural context, does not mean that an exchange is impossible either by means of adoption of more concrete mechanisms or by ideological imprints that at concrete points can provide a counterbalancing where certain perspectives have not been taken sufficiently into account. The next three texts all discuss the possibility of integrating restorative justice elements at a more concrete level within the criminal justice system.

Hendrik Kaptein addresses the position of the victim and dis-

cusses how this position can be improved. Kaptein questions if it is possible to make changes with regard to the traditionally honoured principle of *in dubio pro reo* in order to secure more convictions as one possible means for protecting the rights of the victim. As Kaptein argues, the possibility of modifying this principle without negative consequences seems limited. As such, it is advisable to look for other possible solutions that could secure the protection of the interest of the victim. Kaptein sees one such mechanism in a state liability for crime and financial compensation.

The lack of taking the victim's point of view into account has not been the only downside of the traditional criminal justice system. On the offender's side, too, there have been some less desirable solutions. This is particularly evident with regard to juvenile offenders, to whom the traditional approach of criminal justice seems to have had less to offer. In a historical perspective, it is no exaggeration to say that the way of dealing with juveniles represents one of the most manifest failures and even injustices of the criminal justice system. At this point, the restorative justice movement may seem to have a lot to offer. Ingun Fornes describes the actual, possible and future impact of restorative justice with regard to dealing with juvenile offenders within the criminal justice system. This text also makes clear the complexity of the criminal justice system that necessarily must lead to a quite nuanced judgement as to what extent and how restorative justice ideas and means could be implemented in the criminal justice system.

This complexity is also a core point in the last and longest contribution to this book. Elizabeth Baumann discusses the possible impact of restorative justice on the level of international criminal justice in the wake of gross violations not only of individuals, but also mass atrocities: what potential is there for making use of restorative justice elements in this process, and can the traditional criminal justice approach be substituted by such means? The experience of South Africa and the use of truth and reconciliation commissions may at a superficial level give a certain romantic picture of the potential of such means. However, a closer look reveals a much more complex picture, and as Baumann's text makes clear, there is at this level, where politics, justice and peace are intimately interwoven, no easy answer to how such conflicts should be dealt with.