RESTORATIVE JUSTICE IN COLOMBIA: AN INSTITUTIONAL ANALYSIS*

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ABSTRACT: This work explores the reasons why there is no significant use of restorative justice in Colombia. For that purpose, we resort to institutional theory as a heuristic strategy from which to build three explanatory variables. Through our field work, we identified that the decision-making process (behavior) of justice operators at Bogotá are strongly conditioned by rules and incentives derived from their duties, as well as by the characteristics of the administrative routines and procedures that are used in justice administration. However, the justice operators' "views of the world" are not relevant to explain the matter. Lastly, we propose some modifications of administrative rules and procedures that could facilitate a greater use of this procedural concept in ordinary criminal jurisdiction.

KEYWORDS: Institutionalism, restorative justice, retributive justice, justice administration policy in Colombia.

INTRODUCTION

The increase of the population of jail inmates in Colombia has surpassed the capacity of practically every imprisonment center in the country from 1993 to 2018. Just between 2006 and 2016, the jail inmate index went from 14.5% to 51.2%, respectively. In 2017, this index was reduced by almost six percentage points to 44.9%. However, said index closed 2018 with 47.7%. During the last thirty years in Colombia, jail overcrowding has been a problem on the rise.

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A common point of view among the actors that have positioned the matter of jail overcrowding in Colombia (UN, CRI, Constitutional Court and The Superior Council of Policy on Crime) is to understand it as a problem caused by the punitive approach of crime policy, which is based on the increase of sentences, in the creation of new types of crimes and the excessive use of deprivation of liberty as punishment.

In the last twenty years, the Colombian State has driven actions in public policy in order to face the problem of overcrowding in the country's jails, but now, not even the construction of new imprisonment centers (increase in capacity), nor the dispositions for regulating the measures of confinement for the deprivation of liberty (like being imprisonment inside your home, for example), nor the recommendations to change the punitive approach of crime policy have obtained the expected results.

To a lesser extent, actions have been taken in public policy for fostering the use of alternative mechanisms of justice in ordinary crime jurisdiction, which were defined in the Colombian regulations in 2004, when the Oral Accusatory Criminal System was installed through the Code of Criminal Procedures (Law 904).

Because of the aforementioned, in this work we propose an exploration of the decision-making moment of justice operators (judges, prosecutors and public defendants) to solve their cases in ordinary criminal jurisdiction through restorative or retributive justice. The goal is to answer the following question: why isn't restorative justice used in more cases in Colombia's ordinary criminal jurisdiction if the possibility to apply it exists within the country's regulatory framework?

This article is organized in the following manner: in the first section, we establish the differences between the traditional model of retributive justice against the alternative model of restorative justice, and we describe the regulatory framework of the application of this procedural concept in Colombia.

In the second section, we present the regulative, normative and cognitive versions of institutional theory used for exploring the problem at hand and we describe the arena of action as well as its key actors. Also, we present a brief explanation of the methodological design of our field work for gathering and analyzing information.

In the third section, we present the obtained results of our field work and show the empirical evidence gathered for explaining why the decision-making process of the actors is more inclined at retributive justice than restorative justice.

As a conclusion, we propose recommendations for increasing the use of restorative justice in the ordinary criminal jurisdiction. We are aware that these

results are exclusively limited to the application of restorative justice in the city of Bogotá. In the future, it would be interesting to see what would the situation be in different regions of Colombia.

I. RETRIBUTIVE JUSTICE AND RESTORATIVE JUSTICE

Retributive justice is the traditional model in which modern western societies have responded to crime. Restorative justice is an alternative that presents an approach to crime from a different point of view. While the first model is a justice system with the finality of regulating the relation between citizens and the State, setting regulative and normative criteria that would define a punishment and sentence for containing, preventing and controlling crime, the second model is a justice system with the finality of managing the conflict between the victim or community affected by the action of the aggressor for restoring the rights and satisfying the needs of said victim or community.

These two forms of justice administration are significantly different in their finality, but this does not imply that they are mutually exclusively or that restorative justice should substitute retributive justice. These two models of justice operate simultaneously in most of the judiciary systems of western countries. And even though retributive justice is the dominant model for administering justice, we should also acknowledge the rise of restorative justice in different branches of the law, like civil and labor, and that criminal cases would be a field of opportunity for applying this model.

1. Retributive justice

This model is based on the State's right for repressing and punishing, as well as the power it has over assigning liberty deprivation sentences and controlling the body of prison establishments. It finds its antecedents in the contractual theory, from Thomas Hobbes's famous Leviathan, to Jean Jacques Rousseau's Social Contract –the moment in which the ideas of the common good, the general will and, in short, the idea of the sovereign State were configured as the most sophisticated forms of organization that occupy the legitimate monopoly for administering justice. The State is the entity in charge of defining sentences and punishments for redirecting the conduct of those who deviate from what is socially agreed and legal –a process that is completed through the codification and the creation of complex legal catalogues (Barney, 2006).

As Foucault suggests it (1975), the Enlightenment was a time of great proliferation of penal codes directed towards the categorization of criminal conducts and the disciplining of convicts within prisons, in what has been

historically known as a process of the compilation and rational ordering of laws (Barney, 2006). Once the times of tortures at the town square were over as a common strategy for administering justice, by the end of the Middle Ages and the beginning of Modern Times, several catalogues of crimes were developed as well as procedures for reforming inappropriate conducts through discipline inside prisons. By coercion, society accepted the State as the party in charge of this work and that is how the most recognized model of justice administration today was configured, based on the retribution of damages through a liberty deprivation sentence, i.e. retributive justice.

This model summarizes the following factors: a) above all, that criminal conduct is against the State; b) that crime is socially categorized and recognized as an action that should be penalized and punished; c) that a sentence and punishment must be proportional to the damaged caused; d) that the end intended with said sentence and punishment is to maintain social order; e) and that the victim and the aggressor must maintain a passive attitude during this process.

In this traditional form of justice administration, punishment should be proportional to the damaged caused. This means that the assignment of the sentence to be carried out is directly related to the quantity and the kind of damage incurred, as a mechanism that can guarantee a retribution for the disturbance of the common good. This idea of a proportional punishment that pays back through a liberty deprivation sentence is admitted by society as a morally acceptable answer to a criminal action and is the main reference for administering justice.

One more element that characterizes this model is the goal it pursues in relation to sentences and punishments aimed at repressing the infringement of the law by preventing, containing and controlling crime. This is an abstract idea that indicates that, the greater the sentence and punishment, the greater impact it will have in the prevention and containment of crimes, since citizens will be afraid of committing said conducts because of the sentences that could be assigned to them.

The role of the victim and the aggressor in this traditional form of retributive justice administration has a passive character. Retributive justice emphasizes the aggressor and the penalty that should be paid for affecting the integrity of a particular individual –but particularly for having committed an action against the State as an entity that guarantees the common good and the full exercise of rights in a society made by individuals and regulated by a social contract (Britto, 2010). Since the main affected party by the crime that was committed is the State, this approach of retributive justice focuses its attention on the aggressor and reduces the role of the victim to that of a simple observer that, without further ado, is involved in the legal process only in the civil action

of assigning the sentence and, whenever the case is, in receiving a possible economic compensation (Duymovich, 2007).

2. *Restorative justice*

Restorative justice finds its antecedents in the criticism towards the repressive institutions of the State and in the strong questionings of the effectiveness of the rehabilitation that goes inside an imprisonment centers. Authors like Howard Zehr (1984), Tony Marshall (1999), Daniel Van Ness (1997), John Braithwait (2004) or Virginia Domingo (2010) are usually mentioned whenever this form of justice administration is discussed as an alternative to retributive justice. The heart of this form of justice administration lies in repairing damages and satisfying needs (victims, communities, aggressors), instead of repressing through sentences and punishments.

While crime is conceived as an attack against the State in retributive justice, in restorative justice, crime is a conflictive situation that affects individuals and communities alike. Justice administration falls mainly on them, depending on their degree of affectation. The aggressor, viewed as an offender but not as a criminal, is also included as a central actor during the whole process.

In restorative justice, crime is not reduced to committing a categorized felony. Above all, due to their conflictive nature, crimes are understood as susceptible conflicts of direct processing by whoever was affected. Here, the focus is on the victim's integral compensation and the satisfaction of his/her needs, as well as the fact that the aggressor recognizes his/her responsibility before the damages caused by his/her conduct and commits to make amends for it.

Sentences and punishments are not central aspects of restorative justice. In this approach, what is most important is repairing the harm done, the restoration of the rights and the reconstruction of the affected interpersonal relationships. What is essential in this approach is the interaction and dialogue process between the affected parties themselves due to the conflictive situation for satisfying their needs.

Restorative justice is not focused on sentences and punishments. The goal of this model is not to repress in order to exercise fear in society and to prevent, contain and control crime. Instead, its goal is to manage conflict in such a way that satisfying results can be achieved with a positive effect on the people, groups and communities involved and, therefore, with a positive impact also on society.

Of all of the aforementioned, then, the role of victims, aggressors and of the groups and communities involved are essential inasmuch that they actively participate in the management of a conflict, since its very beginning with the

damage's affectation, until its conclusion with the satisfaction of the involved parties' (specially the victim's) needs.

In summary, restorative justice is characterized by: a) crime viewed as an act against specific people and communities and not against society as represented by the State in abstract; b) crime mainly recognized because of its conflictive nature, which is why there is no talk of crime but of conflict; no references to delinquents but to aggressors or offenders; c) talk of accepting responsibility and acquiring commitments, instead of sentences and punishments; d) a pursued goal that, through the recognition and the acceptance of the damaged caused, is the integral reparation of the victim, the reestablishment of the rights of all people involved in the conflict and the reconstruction of the interpersonal relationships that were broken; e) the passive attitudes of both the victim and the aggressor that become active during the whole process, from its beginning to its very end.

TABLE 1. DIFFERENCES BETWEEN RETRIBUTIVE AND RESTORATIVE JUSTICE

Retributive Justice	Restorative Justice
Above all, criminal conduct is considered as an act against the State.	Crime is an action against specific people or communities.
Crime is socially characterized and recognized as an action that must be sentenced and punished.	Crime is mainly recognized because of its conflictive nature, which is why it is referred to as conflict instead of a crime.
The sentence and the punishment must be proportional to the damaged caused.	Recognizing the aggressor's responsibility, who acquires obligations and commitments for repairing the damage caused.
The goal of the sentence and punishment is to suppress for maintaining social order.	The pursued goal is to repair and reestablish rights, as well as to reconstruct relationships.
Passive attitude on behalf of the victim and the aggressor during the process.	Active attitude on behalf of the victim and the community during the whole process, from its beginning to its conclusion.

Source: Created by the authors based on document revisions. Britto, Duymovich, Howard.

3. Legal framework of restorative justice in Colombia

Restorative justice was incorporated into the Colombian legal code shortly after the Economic and Social Council of the United Nations submitted Resolution 2002/12. As Márquez (2010) points it out, the basic regulation that created Restorative Justice in Colombia is 2002's Legislative Act 03, which is why Article 250 of the Political Constitution was reformed (p. 253). According to this author, the aforementioned "places the content of the fundamental principles of justice for crime victims within its context, adopted by the General Assembly of the United Nations" (Márquez, 2010, p. 253).