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Responsive Freedom

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A restorative justice strategy is about the idea that because injustice hurts, justice should heal. It should repair harm and meet fundamental needs, such as the need for safety. A responsive strategy is about the idea that justice should be responsive to how actors are behaving in a particular legal environment. Restorative and responsive justice means that a business regulator may be less punitive with a firm that breaks the law if the firm is subject to a self-regulatory regime that disciplines those responsible and repairs harm. This puts restorative and responsive justice in tension with other justice values. For example, will a lawbreaker, who has no access to a self-regulatory scheme, who is not in a position to repair harm to victims, be more vulnerable to the full force of the law? One radical strategy is to give up on the impossibility of reconciling equal justice for lawbreakers and equal justice for victims. Equal concern for the justice claims of all stakeholders to be free from domination by injustice is one alternative.

1. Introduction: Limits of Law in a Justice Strategy

Trained lawyers are a scarce commodity, especially in poorer societies. Legal adjudication is expensive. Consequently, courts do not or cannot provide much of the justice that is done in a society. The challenge for the law is to provide a framework that enables better justice ‘in many rooms’ beyond courtrooms. This might seem to legal formalists a strategy that gives law a smaller role in our institutional architecture. In fact, it gives law a grander role. This essay considers two strategies for a law that enables continuous improvement in the quality of justice that occurs in other rooms, and in courtrooms. These are restorative justice and responsive regulation.

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2. Restorative Justice

Restorative justice is something the law can enable to occur on a much wider front – to deal with school bullies, workplace bullies and bullies in international affairs – to mention just one genre of injustice rarely within reach of the courts. Like therapeutic jurisprudence, restorative justice is about the idea that because injustice hurts, justice should heal. It is a relational form of justice that gives stakeholders opportunities to put their most just self forward in a dialogue about who has been hurt by an injustice, and what might be done to repair the harm and meet the needs of all affected. We entice stakeholders who may have behaved badly in the past to put their most socially responsive self forward. This is accomplished by a move from a jurisprudence of passive responsibility – holding someone responsible for what they have done in the past – to active responsibility – the virtue of taking responsibility for putting things right in the future. After armed conflict, we see important forms of this vision of ‘justice as a better future’, the way Clifford Shearing expressed the justice aspirations of South Africans.

Formal law brings many assets to the task of encouraging restorative justice meetings. At these meetings all stakeholders are encouraged to sit in a circle to seek a shared view on who has been hurt and what might be a plan to put things right that stakeholders could sign. First, most law-breakers do not agree to restorative justice in the absence of at least some remote threat of resolution by formal law. Second, formal law brings many rights and imposes many limits on the restorative process. In a visionary legal and justice strategy, restorative justice learns much from formal law, and vice versa.

There is a more important way for a legal strategy of leavening the quality of restorative justice to increase the centrality of law in a society. Part of the aspiration for restorative justice should be to make the judicial branch of governance the branch that does more to energise democratic sentiment than the legislature and executive government. Ordinary people are increasingly jaded and cynical about how much democratic meaning is to be found in electoral politics. Politicians seem remote from them and close to the few who control great wealth.

Now consider the participation of ordinary people in restorative justice circles that are empowered by the state to make important decisions, and which the judicial branch may learn from and vindicate. This gives

people real participation rights over things that matter to them personally. The opinion poll evidence shows that community members, victims, perpetrators and their supporters all value this aspect of restorative justice. For children, restorative justice in schools is one of the best ways for them to learn how to become democratic. We are not born democratic. We must learn to be democratic citizens through participation in decision-making. Courts act wisely when they empower children to deal with incidents of schoolyard violence or bullying in a restorative circle, rather than having courts or police impose a solution. One reason is that this strategy implemented by courts nurtures participatory citizenship and democratic sensibility in the society. The strategic vision of the judicial branch acts as the engine room for re-energising wilting democratic citizenship.

3. Responsive Regulation

Responsive regulation is an approach that started with business regulation, but is now applied in some other areas such as tax and child protection. It is about the idea that a regulator should have a strategy that is responsive to how a regulated actor behaves, and that is also responsive to the environment and context that surrounds the regulated actor. The responsive regulatory pyramid is a key idea. The pyramid is also the strategy for integrating restorative justice into responsive regulation. The idea is to organise a variety of different sanctions and supports at different layers of the pyramid. The presumption is to start at the base of the pyramid with strategies that are less interventionist, less punitive and more participatory. At the peak of the pyramid are maximally interventionist and punitive strategies that involve incapacitating or shutting down the actor who continues to pose a risk to the community. Imprisonment and revoking the license of a business or that of a legal practitioner are the classic strategies at the peak (see the example of a pyramid in Figure 1 below).

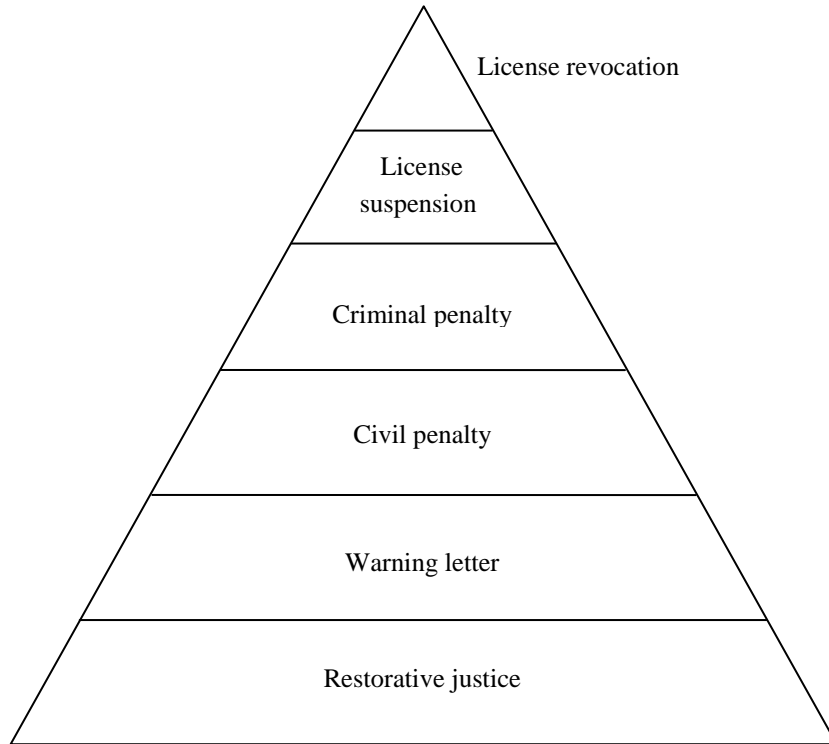


Figure 1: Simple example of a regulatory pyramid.

Restorative justice is the classic strategy at the base of the responsive regulatory pyramid. But there are many layers in a pyramid between, say, incapacitation at the peak, and restorative justice at the base. These might include, moving up from the base to a second or third restorative justice conference with wider participation, a wider circle, after the first circle has failed. Then there might be escalation to different kinds of preventative and deterrent approaches such as cease and desist orders and fines. The idea of the pyramid is that most legal strategies fail much of the time, so the pyramid puts each layer of strategy on top of many others. Each strategy at each layer of the pyramid is crafted to cover the weaknesses of other strategies.

Responsive regulation encourages deliberative, conversational regulation at a wide base of the pyramid. The ideal is to empower victims of injustice around the table with alleged lawbreakers in a conversation as the first port of call. It is only a presumption that it is best to try problem-

solving dialogue first. Sometimes responsiveness to extreme circumstances means it is best to override this presumption and start the regulatory response higher up the pyramid. Wherever we start, the ideal is to stick with a determination that serious law-breaking will be made to stop, however many layers we must escalate through. The pyramid is a meta-strategy that allows for the ordering of strategies so that our response can be dynamic and forward-looking toward fixing injustice. Providing for the capacity to escalate to tough enforcement at the peak of the pyramid drives more of the justice down to the base of the pyramid. The paradox of the pyramid is that a benign big gun rests at the peak, which we hope not to use, combined with determination to keep escalating intervention until justice is restored, creating incentives to play the game at the cooperative base of the pyramid.

4. What about Equality before the Law?

A legal worry concerning both restorative justice and responsive regulation is that these flexible and forward-looking approaches undermine backward-looking equality before the law. Lawbreakers who have perpetrated equal wrongs may get non-punitive restorative justice at the base of the pyramid if they cooperate, while others who resist restorative justice may get prison at the peak of the pyramid. Within a restorative justice conference, one offender may confront a victim who wants to give the gift of forgiveness, whereas another may not.

A broader conception of equality before the law is needed to resolve this dilemma. This conception is of equal concern for the justice claims of all stakeholders in an injustice. If the healing that flows from forgiveness is the justice one victim wants, while the satisfaction of punishment, deterrence to protect future victims, is what another wants, these victim justice claims must be balanced with offender-oriented justice claims. Contemporary criminal law jurisprudence tends to be narrowed to a concern for equal justice for perpetrators in proportion to the wrongs they have committed. Is it just for the claims of criminals to be given more weight than the justice claims of victims? At one level it is. Perpetrators usually, though not always, have more to lose in a criminal process than victims. Here is where the constraining values of the law must impose punishment limits and rights limits on both restorative justice and responsive regulation. For example, the criminal law must lay down that for

an offence of a particular level of seriousness (and culpability) punishment beyond a specified maximum is never allowed.

Defending infrangible upper limits on punishment and other interventions does not justify lower limits. It means we might find no fault with the International Criminal Court if it fails to punish one war criminal in circumstances where it imprisons another, if the first offender has submitted to a restorative justice process that has helped to heal victims, and provided practical remedies to repair harm. The normative ideal that can justify the principle of equal concern for the justice claims of all stakeholders is republican freedom as non-domination. This ideal has been developed by the philosopher, Philip Pettit. It is the ideal that a just outcome is that which will maximise freedom as non-domination. So in the balancing above, we weigh the loss of freedom as non-domination a criminal suffers from imprisonment, against the improved freedom as non-domination that past and future victims gain from this outcome.

In this calculus, the freedom from domination of victims counts equally with that of criminals. Pettit's work also gives a republican account as to why no one can be free in a society in which they cannot count on the law to protect them from punishment beyond specified maxima for specified wrongs. Without this, we are subject to the arbitrary power of those who might dominate us. Only the law can be the last bastion of our freedom in this regard. Republican freedom as non-domination in Pettit's account is a subjective value. It is a justified belief that one is assured of legal protection against arbitrary power. This subjective freedom cannot be delivered unless the limits and rights in the law are constraints, which cannot be broken on the basis of some utilitarian reasoning.

5. Conclusion: Continuous Improvement in Delivery of Justice

When courts do a good job of enabling the spread of restorative justice, the hope is that this will put a stop to an increased number of injustices, and more injustices get a remedy. It will mean that some of the caseload pressure is taken off the courts, enabling the courts to allow access to courtroom justice in cases where it is currently denied. When responsive regulation works well, more of the work of regulating injustice will be done through education, persuasion and restorative justice. Again, this frees up the interventionist regulatory tools at the peak of the pyramid for more of the most intransigent cases. But much more importantly, it solves

an increased number of problems of injustice conversationally near the base of pyramid.

This is at least the theory of how a more restorative and responsive regulatory strategy should work. One way to evaluate whether any progress is being made in making this theory a reality could start with an annual survey of how many injustices of various kinds people experienced during the year, and whether they got a remedy in each case or saw each problem of injustice solved. If they got a remedy, if the injustice they were suffering ended, they would then be asked how this was achieved: by a court; a problem-solving police officer; restorative justice; some kind of intervention by a family member or a regulatory agency; or by an industry self-regulatory scheme. Over time, this kind of methodology could be refined to monitor continuous improvement (or deterioration) of justice, and to identify which institutions and methods are achieving most success in fixing the injustices that worry people most. If the theory of the legal and justice strategy in this essay is correct, it would show a growth in restorative justice and responsive regulation would deliver more justice to more people. This global legal and justice evaluation strategy is just a tweak to current crime victim surveys, which also ask about each crime suffered whether it was reported to the police and if victims were satisfied with how the police handled it.

6. Sources and Further Reading

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