RESTORATIVE JUSTICE, RESPONSIVE REGULATION AND THE GOVERNANCE OF CRIME

CSABA GYŐRY

Department of Criminology
Telephone number: (36-1) 411-6521
E-mail: gyorycs@ajk.elte.hu

1. Introduction

In this essay we will seek to analyze the emergence of restorative justice in the context of the transformation of legal regulation entailed by the post-war model of the welfare state. Under the concept of welfare state, we not only refer to a form of social policy where all citizens are entitled to a certain social security through social benefits provided by the state, but a form of government, with a specific state organization, institutional setting, and mode of legal regulation. The changes we are referring to are characterized by a shift from *government to governance*, meaning a shift away from the government taking responsibility and authority for guaranteeing services and traditional spheres of state activity towards provision by other actors, both private and public. The state then merely orchestrates or guides policy by retaining power over resources, policy decisions/regulation, whilst others actually deliver the services (Giddens 1998; Braithwaite 2002, Castells 2000). The interplay between the state and non-state actors such as firms, non-governmental organizations in formulating policies also increases in intensity. This allows the state to be reduced both in terms of budget expenditure and in terms of the size of public administration (Williams 2001). Citizens and communities are to take more responsibility for dealing with their own affairs ("responsibilization").

Although criminal justice and criminal law had been left relatively untouched by these transformations for a considerable time, we will put forward the thesis here that this is no longer the case. The emerging new, tort-like forms of criminal liability (criminal liability of organizations such as states and corporations, the proliferation of strict liability and vicarious liability in the continental legal tradition), the criminalization of breaches of administrative and regulatory norms, the growing role of local communities and non-governmental organizations in the administration of criminal justice and crime prevention: these are all entailed by transformation of legal regulation and state functions.

The approach we take in this essay follows John Braithwaite's somewhat heretical proposition (Braithwaite 2002, 2005) that criminology should focus not only on the societal choice whether or how to punish, but on the question on whether to regulate by punishment or by a range of other strategies.

This implies the suggestion that analyzing criminal law as one of the means of regulation is not a *cum hoc ergo propter hoc* argumentation but a legitimate approach which can deliver new insights into the recent transformations of criminal law and criminal justice. The obvious interplay between business and administrative regulation and criminal law is a potent argument for this approach: crimes such as insider trading, breaches of environmental standards or the regulations of consumer protection mostly lack the direct and obvious link to the traditional moral core of criminal law; they have much more in common with the aim of effective business and administrative regulation and the goal of reducing risks, than with the moral obligation of one individual towards others and the whole community. The traditional assumption on criminal liability based on an individual's moral responsibility proves to be inadequate when the act which constitutes a crime is an outcome of organizational practices[1].

The approach followed here also implies that the administration of criminal justice, even though it seems largely independent of other state functions, indeed depends on how the role of the state in general is perceived. Since the power to punish has always been considered as a core of state sovereignty, private prison, the involvement of non-governmental organizations and local communities in criminal justice presupposes the transformation of state sovereignty from an unitary to a more diffuse exercise of power.

Restorative justice is a response to crime where all parties with a stake in a particular offense (victims, affected communities and offenders) engage in a direct dialogue to discuss the harm caused by the offence, and resolve collectively how to deal with the aftermath, and finally reaching an agreement on the proper restoration of harms done, on the most effective form of redress and on appropriate measures to prevent future harms (Tonry 2001; Braithwaite 2002:13).

Since the birth of the restorative justice movement in the beginning of the eighties, the body of literature about restorative justice has grown with such a pace that it is now quite redundant (Ashworth 2001) and almost unmanageable.

---

[1] Corporate crime, regulatory crime and white collar crime are overlapping categories. In this essay, we will be referring to crimes committed by natural persons acting in the interest of a corporation and bussiness entity as corporate crime; criminal breaches of regulatory norms such as consumer protection, competition law, regulations of financial markets or environmental regulations as regulatory crimes. White collar crime refers to crimes enabled by the higher socioeconomical status (wealth, formal position in an organization, occupation, academic qualifications) of the offender.

The vast majority of books, readers and articles, however, are dealing either with abstract theorizing of restorative principles from a penological or political philosophical point of view, or with the fine-tuning or critical analysis of the mechanisms and schemes of a particular restorative program. Unfortunately a very few of them address the crucial issue of the micro-sociological and psychological prerequisites of communication in the restorative context,[2] and a rather small number of them deals with the problems of legal implementation and the regulatory context of restorative mechanisms (McEvoy, Mika, Hudson 2001). One might even say that there is some discrepancy between the ambitious agenda of transforming criminal justice as a whole in accordance with restorative principles (Christie 1986; Zehr 1978) and the relative lack of systematic analysis of the problems of its legal and regulatory implementation, at least one which goes beyond youth crime, and petty crime against property and person.

The emergence of restorative justice practices is usually characterized by restorative justice scholars as *a return* to an intrinsically human, emotional and moral approach to crime which had been temporarily hampered by the welfarist experiment (Christie 1982). It is certainly true that the trend to de-emotionalize the reaction to crime contributed to the failures of penal welfarism (Gönczöl 2006), by ignoring the positive effects of emotions and moral sentiments in reintegration and rehabilitation, and by having no regard to victims, ultimately fostering the rise of punitive sentiments in the public, which, having spun out of control, manifested in the harsh criminal policies in some US states and to some extent, Great Britain. (Garland-Sparks 2001)

We will argue here, however, that it is not only the reconfigured field of crime control, but also the new, emerging pattern of governance, coined "the new regulatory state" that gives the context of the implementation of restorative practices. These are not entirely separate issues, as there is much interplay between them. But they represent different opportunities and different dangers for the implementation of restorative justice. In sum, it can be said with Braithwaite (2002) and Shearing (1998), that while the former might entail the de-criminalization of criminal justice by forcing it into tort-like litigation about compensation and damages, the latter bears the danger of "over-emotionalization", public humiliation and disrespect of human rights and the rule of law (Ashworth 1999).

---

[2] A good example is the use of the concept of „community", the buzzword of criminologists and policy-makers on both side of the political spectrum. The difference between community as a notion of political philosophy and as a sociological phenomenon is usually blurred in order to avoid the disturbing question about the empirical base of the particular communities in question.

In this essay we intend to address the first problem. Before going on to discuss it, however, we will outline the major trends which, in our understanding, shaped the contemporary configuration of regulatory practices and crime control.

2. The context

2.1. The crisis of the welfare state and the emergence of the new regulatory state

The post-war welfare state was based on the idea of an unitary government, which took responsibility for a whole range of issues: not only for health service and social security, but for transportation, industrial infrastructure and industrial safety, product safety or consumer protection. This was, on the one hand, seen as a necessary response to market failures: to systematic dysfunctions such as natural monopolies and oligopolies, or information asymmetry; to the existence of externalities like environment, where the allocation of resources as provided by the market proved to be insufficient to handle them (Stiglitz 2000). The idea of social citizenship (Marshall 1950), on the other hand, formed the moral basis for the welfare-state ideal: it was up to the state to constrain the commodificative tendencies of the markets and provide de-commodification through social benefits and legally guaranteed access to public services such as education (Esping-Andersen 1990:21). The social citizen status was also destined to promote equal opportunities irrespective of class status.

The welfare state brought about an unprecedented expansion of the sphere of law and regulation. Competition (antitrust), taxation, workplace safety, standards for housing, health care, or education: an enormous body of lower-level, detailed and technical norms were created, and professional government bodies to enforce and further develop them. These government bodies addressed economic and social problems in a manner of a scientifically founded social engineering. A professional, administrative response was the natural reaction to social and economic problems.

This institutional setting and regulatory strategy soon began to face mounting challenges. With the technological development, the growing complexity of the subject made informed regulation in areas like environmental safety more and more challenging. Welfare institutions designed to address the needs of the population in housing, health, education tended to discover more and more "new" needs, which entailed the further expansion of budget, administration, creating new fields of regulation. Mergers leading to the creation of complex mega-corporations, and free trade made the consequences of the breach of

regulatory norms of financial markets, consumer protection, and antitrust more severe while simultaneously negatively affecting the efficiency of state regulation and control.

As the economic recession reached western European welfare states in the seventies, its primary consequences such as inflation, unemployment, mounting taxes to uphold the welfare regime combined with rising concerns, about defects of social cohesion such as the dissolution of traditional class-culture communities, family breakdown, triggered the collapse of the post-war social-democratic political settlement. By articulating all these concerns conservative political forces gained more and more momentum, eventually recapturing government control in most western European welfare states. The ideology of the new right[3] was based on the sometimes contradicting combination of economic liberalism (privatization, regressive taxation, cut of budget expenditures, free trade, limited state intervention), value conservativism (favoring the return to traditional values, family structure and gender roles, preferring enhanced social control over individualism perceived to appear in consumer culture, sexual freedom or avant-garde art) and a commitment to the return to a "minimal state" (in terms of expenditure, the size of state apparatus, and deregulation).

As coherent as it seems, the implementation of these principles went much more subtly as it is usually suggested, sometimes even causing rather adverse effects to its intended goals. Since middle class-voters formed the electoral basis of the new right, welfare provisions that benefited them remained firmly in place (Offe 1985:49). While in Britain it was possible for the government to cut back taxes and reshape welfare expenditure, in states with a rather corporatist and statist legacy such as France and Germany, welfare reforms were far less dramatic, and returning to the regulation by the market in healthcare, pensions or housing had never been an issue (Offe 1985:59).

Privatization led to the separation of provider from regulatory activities. Government departments regulated the provision of services (elaborating policies, setting down standards, monitoring and enforcing compliance) while private firms, independent agencies, non-governmental bodies dealt with the practical administration (Scott 2006:12). Thus, even though the state had retained control over the implementation of its policies, the context of the implementation changed: in case of privatized services it had to do with actors of a (although sometimes limited) market. This led to an intensive interplay between the state

[3] Under the term „new right" we do not want to refer to a single political movement, rather to a set of principles which shaped the political program of conservative parties across Europe. The emphasis of particular party programs depended on the social context, political traditions, constitutional and political system, the depth of the economic crisis during the seventies and early eighties, and many other factors.

and the market: privatization created markets for public services, which were, on the other hand, subjected to regulation; but the way markets operated also influenced the regulation of public services (since it had to be taken into account that the subject of the regulation was no more the state administration but a market actor). This necessary adjustment at the bottom met policy incentives from above[4] calling for the withdrawal of the state based on the assumption of the moral superiority of markets.

Welfare institutions were also affected by the transformation of state functions. Here, however, it was not the logic of the market, but an emphasis on the principle of responsibility and self-reliance which underlay the changes in policy. The political ideology of the new right saw a casual link between the breakdown of the traditional family structure, the transformation of gender roles, the dissolution of traditional social control (by the family, local community etc.) and "welfare dependency", engendered by the tendency of welfare states to take away social functions which played a crucial role in the reproduction of a "decent" society. Rising unemployment and falling tax revenues as a result of the economic recession and industrial transformation further increased the pressure on welfare institutions. The convergence of policy incentives to reduce welfare expenditure, to restore individual responsibility and traditional social control and the strategic consideration to retain the political constituency of conservative parties resulted in a contradictory mixture of preserving welfare institutions that benefited the middle classes, while cutting back others (such as unemployment benefit) on the one hand, and using welfare provisions to create an enhanced social control by coupling social rights with social obligations (through work-for welfare schemes, for example) (Offe 1986:232).

Thus, the economical and political watershed of the seventies and eighties did not manifest in an aggressive restructuring of the state administration. But it fundamentally changed the way the state operated (Braithwaite 2004:1; Hirst 2001:48). This change is characterized by two distinct lines of government action: an adaptive strategy stressing partnership and shared responsibility and a control strategy emphasizing control and expressive punishment (Garland 2000:123).

The growing complexity of the subject of regulation, coupled with a constant pressure for cutting back the state administration, led to the evolving involvement of private corporations, industry associations, NGOs, transnational networks in regulation and control. Financial markets, for example, are predomi-

[4] As we have already stated above, these policy incentives were far more potent in anglo-saxon countries – especially Britain and New Zealand -, while in states with a corporativist-etatist tradition they were much more subtle. See e.g.: Jordana/Levi Faur (2004), Braithwaite (2005).

nantly regulated by self-regulatory organization of market actors; NGOs monitor the compliance of companies with environmental regulation and force them to reformulate their corporate policies in case of non-compliance. The state in this context *enables* self-regulation by "gradually reducing its responsibility to balance out the powers of the state and the self-regulatory powers of civil society"(Schuppert 1999:231).

The other line of action, however, is often overseen both by regulatory scholars and scholars of the history of punishment (Braithwaite 2001; 2003): the growing criminalization of the breach of regulatory norms. Besides "traditional crimes", such as murder, assault or theft, a new body of crime emerged in criminal law, usually described with the overlapping categories of economic crime, corporate crime, administrative criminal law or regulatory crime.

2.2. The crisis of penal welfarism

Initially, criminal policy was not seen as an integral part of the emerging post-war welfare state model. Nevertheless, with its basic assumptions on the causes of crime it supposed the very model of the post-war welfare state–inclusive, solidaristic social policy, equal rights and equal opportunities – as an ultimate remedy, so that the social vice of crime can be eliminated.

According to these assumptions, crime was seen as a social phenomenon caused by the reproduction of social inequalities and social exclusion. Thus, the most effective instrument against it was social integration through welfare, and not retribution: it was suggested, that social reform and affluence would reduce the frequency of crime dramatically (Garland 2001:39). The moral core of punishment was considered as a hindrance of the proper operation of criminal justice, which had rather victims of social exclusion and deprivation to deal with, and not rational actors who did a moral wrong: not only the retributive elements of punishment, but also the liberal principles of proportionality and uniformity were corrupted by archaic thinking. Morals and emotions were to be excluded as much as possible form the criminal justice. The proper treatment of offenders required individualized corrective measures and not formal uniform responses. The acts committed by the respective criminals, therefore, were up to welfare professionals, social workers, psychologists to address, and not legal professionals. The authority of welfare workers was founded on scientific evidence provided by a positivist science of criminology, sociology and psychology.

The criminological mindset which underlay this approach entailed several "blindspots" (Garland 2001:44): there was no trace of substantive interest in crime events and victim behavior for example; the operational mode of crime control was a reactive stance towards already committed crime – there were no

complex and specific measures other than welfare provisions for crime prevention. Furthermore, as the positivist criminological theories which shaped criminal policy in western European welfare states saw crime as an ultimate product of class inequalities of capitalist societies and social exclusion, penal-welfarism addressed crimes which were heavily concentrated on the poorer sections of the society (Garland 2001:48). In this respect, it was, as later its neomarxian critics (eg. Taylor/Walton/Young 1973) put it, indeed a "punishment of the poor project". The behavior of "persons of respectability and upper social-economic class committed in the course of their occupation" (Sutherland 1949:35) exploiting their social status to pursue unmoral goals and unlawful interests, was not seen as criminal and not much attention (both in terms of scientific research and criminal policy) was given to it.

Welfarist criminal policy, being a field of policy with one of the weakest political and social legitimacy within the welfare state, with no direct benefit for the middle class, offered a primary target for the new right. First, it failed to reach its own goals: despite the affluence, equality and social stability the welfare state managed to provide, crime continued to rise. In the light of this, the apparent dysfunctions of the welfarist criminal policy, with its indeterminate sentences administered by welfare personnel, its scientifically designed treatment measures which tended to regard offenders as subjects and not as autonomous individuals, seemed to be a too high price for nothing. This impaired the self-confidence of the positivist criminology, a major legitimizing force behind welfarist criminal policy, making it vulnerable to its critics from the progressive left, liberals and conservatives. Second, the treatment-oriented, scientific approach to crime with its tendency to eliminate moral and emotional considerations in crime control contradicted with the new right's ideology of individual moral responsibility and enhanced social control. These factors again, led to a transformation highly paradoxical in its nature.

First, it initiated a turn away from comprehensive macro-sociological theories on the causes of crime as a foundation of criminal policy towards micro-sociological theories of social control; it also entailed the re-recognition of moral and emotional elements in punishment and crime control. Second, an actuarial stance towards crime, which saw social theories of crime discredited by the failure of the welfare state, gained momentum: crime was increasingly seen as a calculable risk rather than a cognizable social phenomenon. Third, criticism of the welfarist practice and the resurrection of retributivist ideals resulted in a shift to a more transparent, rights-respecting criminal procedure and sentencing with less discretionary power of welfare professionals. Fourth, criminal law and criminal policy became an important mean in restoring traditional values and social control: institutions of crime control – both punishment and crime prevention –, along restructured welfare provisions, were regarded instrumental

in enhancing social control. Finally, privatization of public services reached criminal justice: private security firms took over functions formerly served by the police, such as providing security on public events, airports, government offices; prisons are built and operated by private companies.

Although these trends were present in almost every western European country, the actual outcome of their interaction again depended on several factors, the constitutional and political system, the nature of the welfare regime, the political or legal traditions. In Britain, these trends cumulated in a highly punitive criminal policy with an emphasis on stronger social control; in other countries, especially in those where the transformation of the welfare state itself was not so dramatic, the criminal policy of the welfare state could remain more intact, allowing more subtle transformations in criminal law and the administration of criminal justice.

3. The governance of crime in the new regulatory state

We have so far depicted two apparently independent developments: the transformation of regulatory strategies in the post-keynesian state and the crisis of penal welfarism. Yet they are much more intensively interrelated than it is usually suggested in criminological theory, since they are both responses to the very same development: the decline of the scientifically founded social engineering approach in policy and the cuts in welfare expenditure entailed by the turn from Keynesian economic policy towards a monetarist one in face of the recession in the seventies.

The decline of the social engineering approach was triggered by its apparent failure to effectively address social problems. As the economies became larger and other subjects of regulation more complex, the state simply could not acquire enough structured knowledge to intervene effectively. As the hero of neoliberal reformers, August Hayek put it, "knowledge of circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of frequently contradictory knowledge which all separate individuals possess" (Hayek 1949:77). Hayek (and subsequently, new right governments) thought that the tool for the optimal distribution of local knowledge was the market. Thus, the state must withdraw and *enable* local knowledge to address local problems. For example, it is beyond the capacities of the state to design comprehensive crime control strategies, they suggest; people are responsible for their own safety, since they are the ones who can define their needs. Local demands for the reduction of crime and insecurity will then generate a market which is the most effective tool to create and allocate solutions which meet those demands. Ideologists of the new left retained the idea of the primacy of local knowledge (Giddens 1994), but tended to ac-

knowledge that pure marketization engenders new inequalities as well as "old" ones which the welfare state already managed to moderate (Esping-Andersen 2002). Thus, governments of the new left emphasized the "shared responsibility" of those affected (to work out solutions for the problem) and of the state [to provide financial means to *ensure* that these solutions would materialize (Schuppert 1999)]. If there is a local initiative in an unemployment-ridden suburban housing estate, for example, to involve unemployed youth in social work based on the assumption that their daytime engagement would reduce the risk of drifting into drug addiction, the initiative is likely to fail if there is no funding in place to finance rehabilitation and their allowance.

But the shift from government to governance was not only an issue of empowering local knowledge in light of the failure of administrative-bureaucratic responses. It was also about cutting back budget expenditure: the state had no capacity to continue regulating and sanctioning (Esping-Andersen 1998). However, as many scholars of regulation demonstrated (Braithwaite 2001), deregulation, although always a policy, never materialized in the scope as it was envisioned. Instead deregulation, most of the western European welfare states experienced the transformation of regulatory strategies.

This emerging new scheme was coined "responsive regulation". This new approach to regulation is centrally concerned with designing regulatory institutions and processes which stimulate and respond to the regulatory capacities which already exist within the subjects of regulation, attempting to keep regulatory intervention to the minimum level necessary to secure the desired outcomes, while retaining the capacity to intervene more (Scott 2001, Braithwaite 2003). This approach envisages a "regulatory pyramid", with a gradual set of sanctions ranging from warnings up to criminal sanctions. The core of responsive regulation is the communication between the regulator (the state), the subject of regulation (a corporation which runs an electricity plant breaching some environmental regulation, for example) as well as those who are otherwise affected (the local community who is at risk in case of an accident). The communication responsive regulation envisages both sanctioning and prevention. It is not about monitoring compliance: it is a reaction to non-compliance. But instead of a unified and pre-set reaction it utilizes a wide range of sanctions from which those involved in the process can choose the most appropriate. Let us say that due to some avoidable breakdown in the above mentioned electricity plant some dangerous gases leak into the environment. As a reaction, responsive regulatory strategy envisages a direct discussion involving the representatives of the electricity plant, the state and the local community affected. They might come to an agreement in which the plant obligates himself to revise its safety regulations and pay damages for those who were at risk, and as a return, eludes harsher sanctions like license revocation or the indictment of executives.

The criminal liability of executives is an important element of the regulatory pyramid. As David Nelken (Nelken 2007) convincingly argues, this is the rationale behind the proliferation of economic, corporate and regulatory crimes during the past two decades. It might well be interpreted as part of the general punitive turn taken after the crisis of penal welfarism. However, it has very different reasons. Holding executives criminally responsible for the acts of their employees or their whole organization in cases like insider trading, breach of antitrust laws or environmental regulations simply seemed to be an effective tool in enforcing compliance with regulatory norms. However, the traditional forms of fault-based criminal liability in the continental legal system seemed to be inadequate in case of crimes committed in an organizational setting. In order to make economic and corporate crimes a more effective regulatory tool, criminal liability in regulatory crimes has begun to move towards more objectified forms such as the common law institutions of strict liability and vicarious liability (Kis 2006).

3.1. Restorative Justice and Responsive Regulation

Empirical evidence exists that regulatory agencies (such as those responsible of environmental protection) had already adapted restorative-like measures long before the restorative justice movement emerged from the relative marginality of pilot programs – a practice which sometimes flourished even without a legal base (Shearing 2001; Braithwaite 1998, 2000, 2001). Under constant pressure to cut expenses and save resources, regulatory agencies were willing to engage in negotiation with victims and those who were responsible for the breach, eventually trading in the notification of the prosecution or law enforcement of criminal activities for a commitment to change corporate policies or safety regulations and to pay compensation (Shearing 2001). This has been a widespread practice in Australia and Canada (Braithwaite 2002), and a recent report on responses to regulatory crimes published by the British government (The Macrory Report, 2006) cites empirical evidence that it was a common policy in British regulatory agencies. Such a flexible approach could be consistent with common law criminal procedure, where the prosecution is not legally obliged to indict an offense even with sufficient evidence present to support beyond reasonable doubt that a crime had been committed. But Schuppert suggests (Schuppert 1999), that such practices were followed in continental legal systems, too. In Germany, even though the principle of legality (Section 152. subsection 2 of the Criminal Code) obliges the prosecution to indict, it nevertheless has to rely on regulatory agencies, or even self-regulatory business organizations in gathering evidence (for example, in case of the criminal breach of antitrust laws to define the relevant market).

Articles addressing responses to regulatory crimes tend to blur the distinction between responsive regulation and restorative justice (Braithwaite 2001). But they are not identical, even if responsive regulation involves a communication between regulators, offenders and the victims. First, restorative justice shall not be confused with mediation in general. Restorative justice is a reaction to non-compliance with the law, not a tool of monitoring compliance (Braithwaite 2002: 36). Restorative justice comes only into play when a breach of law has already occurred; furthermore, this breach of law must attain criminal character. Third, in order to initiate restorative procedures, one needs victims. "Victimless" crimes cannot be subject to restorative procedures. Fourth, the notion of victim must be strictly defined. This is probably the greatest problem with these restorative processes: that they *not always* involve natural persons: sometimes only representatives of a company, and not those personally who are in the danger of being prosecuted and convicted, and, on the other side sometimes NGOs or, in cases with a large number of victims, only the representative of victims (Braithwaite 2002: 258).

Responsive regulation thus rather provides a broader framework for restorative practices in dealing with corporate and regulatory crime. Restorative mechanisms occupy the bottom of the "regulatory pyramid".

Critics of restorative justice often raise doubt about its actual practice pointing to empirical evidence that victim-offender mediation, the most acknowledged and wide-spread restorative practice, actually resembles a civil litigation about compensation and damages in most of the cases (Ashworth 2001), as the parties ultimately end up measuring the harm done in financial terms. But paradoxically, in cases when the regulatory agencies are engaged in the communication between the victims and the offenders as a facilitator, the offenders usually cannot get away with paying for the damages (Braithwaite 2002: 47). It is because it is embedded in the wider framework of responsive regulation which ultimately aims to influence the self-regulatory capacities within the organization or company in question (Braithwaite 1993:123)

4. Conclusion

Restorative Justice has several faces. In this essay we have depicted a new narrative of the emergence of restorative justice. This was not made with the intent to downplay the mainstream narrative about the failures of welfarist criminal policy with its trend to de-emotionalize criminal justice. We only intended to shed light on parallel developments in regulation and administration of public services, which – on entirely different grounds and entirely different way – arrived at strikingly similar institutions. This new narrative also enables us to

recognize the interrelation between changes in regulatory policy and the emergence of new forms of crimes such as regulatory offenses or corporate crime. Criminological theory so far failed to reflect on these changes.

One reason for this "blindness" is the fact that mainstream criminological thinking still remains preoccupied with traditional crime (Braithwaite 2001:14). White collar crime, corporate crime still belongs to the lesser researched areas of crime. Crime surveys may suggest that these crimes occupy a minor role in the criminal landscape. But both quantitative and qualitative researches arrived at the conclusion, however, that the reason for the relatively small number of convictions could be the fact that these crimes are not prosecuted, and not the fact that they do not occur (for a recent overview of evidence see Nelken, 2007). These cases tend to be difficult, the investigation lengthy and complex, and might require specially qualified staff. Given this context, victims of these crimes are especially powerless (Braithwaite 2002). We have tried to show in this essay that regulatory agencies and law enforcement bodies already tried to address these problems in several countries and developed practices which incorporate restorative measures. We also tried to show that this applies both to common law countries and to those in the continental legal tradition.

Another reason might be that criminologists and scholars of criminal law tend to disregard the regulatory context of economic and regulatory crime. Criminologists and scholars of criminal law are more easily lured into this misconception if all crimes are incorporated in a single criminal code. This policy takes these crimes out of their regulatory context, and makes the implementation of a flexible approach with an enhanced consideration of victim interests more difficult.

The tremendous influence of the "post-Foucaldian" critical criminology of David Garland, Malcolm Feeley, Jonathan Simon or Jock Young on criminological thinking may have contributed to the blindness. First, this paradigm explicitly concentrates on Britain and the USA, where criminal policy has taken a different path after the "crisis" in the seventies. The "punitive turn", with clearly alarming consequences in these two countries, proved to be much more subtle and moderate in other parts of Europe. Furthermore, this paradigm remains fixed with responses to the traditional forms of crime, and, as Braithwaite convincingly argues (Braithwaite 2002:8), systematically disregards corporate and regulatory crime.

We also tried to show that these developments do not lead to the hollowing out of the state when it waives its right to prosecute or applies more lenient punishment in return for the restoration of damages to the victims. We have rather argued here that restorative justice can, in fact, improve the efficiency of law enforcement in corporate and regulatory crime cases, since it will be able to re-

allocate resources from cases where the restorative process is successful, and thus ultimately a smaller number of these crimes remain unpunished. We have also intended to demonstrate that applying restorative practices in these cases better serves the victims by undoing the harm easier and faster, and by involving them in the transformation of corporate policies or organizational mechanisms which facilitated (or failed to avert) the criminal act; that it better serves the wider community because it also involves a commitment from the side of the offender to modify organizational practices.

The restorative measures described here are not always the result of a deliberate government policy; they were rather developed spontaneously as law enforcement and regulatory agencies adapted to the changing environment of crime and regulation.

In this essay we were only able to depict the changes which led to the evolution of such practices. But we believe that they deserve more attention from restorative justice scholars and policymakers, since they are capable of empowering victims in crimes where they are especially powerless.

References

1. Ashworth (2002): Responsibilities, Rights and Restorative Justice. In.: The British Journal of Criminology. Vol. 42, No. 3, pp. 578-596.
2. Braithwaite (2002): Restorative Justice and Responsive Regulation. Oxford University Press, 2002.
3. Braithwaite (2000): The New Regulatory State and the Transformation of Criminology. In.: The British Journal of Criminology. Vol. 40, No. 2, pp. 222-239.
4. Braithwaite (1993): The Nursing Home Industry. In: Tonry/Reiss (ed.):Beyond the Law: Crime in Complex Organizations, Crime and Justice: A Review of Research.
5. Braithwaite (2005): Neoliberalism or Regulatory Capitalism. Occasional Papers Nr. 5. Regulatory Institutions Network, Australian National University.
6. Esping-Andersen, Gösta (1990): The Three Worlds of Welfare Capitalism. Polity Press, London
7. Garland, David/Sparks, Richard (2000): Criminology, Social Theory and the Challenge of Our Times. In.: The British Journal of Criminology. Vol. 40, No. 2, pp. 189-205.
8. Garland, David (2001): The Culture of Control. Crime and Social Order in Contemporary Society. Oxford University Press.
9. Gönczöl, Katalin (2005): A szolgáltatott igazság. In: Élet és Irodalom. 40. szám
10. Hirst (2000): Statism, Pluralism and Social Control. In.: The British Journal of Criminology. Vol. 40, No. 2, pp. 279-296.
11. Hoffmann-Riehm (2001): Modernisierung von Recht und Justiz. Eine Herausforderung des Gewährleistungsstaates. Suhrkamp, Frankfurt am Main.
12. Jordana/Levi-Faur (eds.) (2004): The Politics of Regulation. Examining Regulatory Institutions and Instruments in the Governance Age. Edward Elgar, Cheltenham.
13. Kis, Norbert (2006): A bűnösségi elv hanyatlása a büntetőjogban. BCE-Unió, Budapest

14. Ligeti, Katalin (2005): A humánus büntetés. in : Élet és Irodalom 44. szám.

15. Macrory, Richard (2006): Regulatory Justice: Sanctioning in the post Hampton world. Cabinet Office of the Government of the United Kingdom. http://www.cabinetoffice.gov.uk/regulation/news/2006/060522.asp

16. Pearce/Snider (1995): Corporate Crime: Ethics, Law and State. University of Toronto Press.

17. Posner, Richard (1977): The economic analysis of law. Little Brown, Boston.

18. See/Spoo (2003): Wirtschaftskriminalität, kriminelle Wirtschaft. Diestel Verlag, Heilbronn

19. Schuppert, Folke (1999) (ed.): Jenseits von Privatisierung und „schlankem Staat“. Verantwortungsteilung als Schlüsselbegriff eines sich verändernden Verhältnisses von öffentlichem und privatem Sektor. Nomos, Baden-Baden.

20. Richardon (1986): Strict Liability in Regulatory Crime. Criminal Law Review, pp. 294-326.

21. Stiglitz, Joseph (2000): Economics of the Public Sector. W.W. Norton &Co. New York

22. Shearing, Clifford (1995): Reinventing Policing: Policing as Governance. In: Privatisierung staatliche Kontrolle: Befunde, Konzepte, Tendenzen. Interdisziplinäre Studien zu Recht und Staat. Bd. 3 Nomos, Baden-Baden.

SUMMARY

Restorative Justice, Responsive Regulation and the Governance of Crime

CSABA GYŐRY

The essay examines the emergence of restorative justice practices in the context of the transformation of exercise of state power in the mature welfare state. The latter is characterized by a shift from centralized-bureaucratic regulatory strategies towards a somewhat diffuse exercise of power, one that is based on the partnership of the state, market actors and the civil society. This partnership covers the cooperative formulation of policy strategies, joint regulation and joint review of policy outcomes.

We argue in our essay that this transformation has already reached criminal justice. One of the most obvious components of this change is the growing involvement of local communities and NGOs in the administration of criminal justice. In this paper we examine another less known, and so far less-researched tendency. Relying especially on British, Canadian Australian and German literature, we show how the authorities – faced with the double challenge of a growingly complex regulatory environment and a constant call for cutting staff and expenses – acquire strategies that are similar to the mechanism of restorative justice when handling economic and regulatory crime.

RESÜMEE

Täter-Opfer-Ausgleich, responsive Regulierung und Kriminalität

CSABA GYŐRY

Die Studie untersucht die Praxis der wiederherstellenden Rechtssprechung im Kontext der Veränderung der Ausübung der staatlichen-öffentlichen Gewalt. Diese Letztere wird durch eine Verschiebung von den zentralisiert-bürokratischen Regelungs- und Kontrollstrategien in Richtung der diffuseren Machtausübung gekennzeichnet, die auf der Partnerschaft des Staates, der Marktprotagonisten, der NGOs und der lokalen Gemeinschaften aufbaut. Diese Partnerschaft erstreckt sich auf die Gestaltung, Regelung und auch auf die Kontrolle der Durchführung der öffentlichen Politik.

Diese Veränderung der Ausübung der öffentlichen Gewalt hat auch die Strafrechtssprechung erreicht. Ein Element dieser Veränderung, das in der kriminologischen Fachliteratur bereits seit langer Zeit untersucht wird, ist die Einbeziehung der zivilen Organisationen, lokalen Gemeinschaften in die Tätigkeit der Strafrechtssprechung. In unserer Studie versuchen wir eine andere, viel verborgenere Tendenz aufzuzeigen. In erster Linie auf Grund englischer, kanadischer, australischer und deutscher Fachliteratur stellen wir vor, wie die Behörden, die mit einem immer komplexeren Regelungsumfeld konfrontiert werden, bei der Handhabung der Wirtschafts- und Regelungsverbrechen zur Anwendung von Strategien gelangen, die den Mechanismen der wiederherstellenden Rechtssprechung ähnlich sind.