

RESPONSE

Restorative justice in France and French-speaking Belgium: not on the same track?

*Antonio Buonatesta, Philippe Gailly and Denis Van Doosselaere**

Belgium is a federal state continuously reforming and deepening its process of federalisation, which basically means more and more competences being transferred to the regional parliaments and governments. The sixth and last state reform (2015) has had some influence on the way restorative practices are and will be considered and practiced in the different parts of the country. From a legal point of view, we will refer either to the so-called federal laws (provisions adopted by the central state or federal parliament) or to the decrees (or draft decrees) adopted (or prepared) by the French-speaking community of Belgium, which is increasingly called the Federation of Wallonia-Brussels (FWB).

With regard to the juvenile justice system, the 2015 reform granted authority to the regional governments to legislate on the measures imposed on, or proposed to, the *juvenile* offenders (under 18 years of age). As far as restorative justice (RJ) is concerned, the main question is what will happen with the current legal provisions (included in 2006 in the federal Youth Protection Act), which require magistrates to give priority to restorative offers. The same state reform also determined that the competence regarding accreditation and funding of the mediation services active in *adult* criminal law is assigned to the regional governments.

In 2016, a new decree addressing the different partner organisations of the so-called 'houses of justice' has been passed in the regional parliament.¹ The houses of justice are official agencies that exist in each judicial district; they are – together with other tasks – in charge of penal missions with the help of their partner organisations. 'To support communication (between the stakeholders)' is one of the six missions of these partner organisations as determined in the decree: it is defined as 'any assistance aiming to establish communication and, if necessary, a mediation between the stakeholders affected by a penal offence in order to deal with its material and emotional consequences'. This definition aims precisely at victim–offender mediation (VOM) and refers clearly to RJ: the decree states that 'This mission is practiced in the spirit of restorative justice.' However,

* Antonio Buonatesta is the Director of Médiante Asbl, Namur (Belgium). Philippe Gailly is Criminologist and Mediator, Arpège-Ouverture Médiation Asbl, Liège (Belgium). Denis Van Doosselaere is the Director of Arpège-Ouverture Médiation Asbl, Liège (Belgium). Contact author: dvandoosselaere@gmail.com.

1 Décret du 13 octobre 2016 relatif à l'agrément et au subventionnement des partenaires apportant de l'aide aux justiciables, M.B. 22/12/2016.

the FWB provision allows the scope to be broadened: e.g. giving the opportunity to involve more stakeholders, dealing with unreported crimes such as sexual abuse or crimes affected by a statute of limitations.

Nevertheless, an important part of the restorative practices remains within the scope of federal rules. The Code of Criminal Procedure and a General Prosecutors circular regulate the link between the restorative practice and the criminal procedure, notably the information duty of the magistrates and the information flow between the practitioners and the legal authorities.

1. French and FWB restorative frameworks: similarities and differences

1.1 Juvenile justice system

In the FWB, a draft decree is being discussed in the parliament. It is a reworking of the current *Decree of 1991 on assistance to young persons* with, in particular, the addition of a chapter devoted to juvenile delinquents, still called *minors who have committed acts categorised as an offence*. Current legal provisions that name explicitly the restorative offers as ‘mediation’ and ‘conferencing’ (only at the stage of the judge for the latter) will be maintained in the decree to come.

Current practice nevertheless reflects an unequal development of restorative offers as well as a long-lasting resistance in some parts of the FWB. The development of restorative offers depends too much on the will or desire of persons or agencies that are subsidised and accredited to develop such services. Some of the agencies prefer to focus on educative measures such as community service. That is why the draft decree tries to enhance the priority given to restorative offers by reformulating the special obligation of the public prosecutor to justify a decision *not* to propose mediation, and also by clarifying the hierarchy between the offers and measures.

In France, the Taubira law covers both the adult and juvenile system and offers the opportunity to implement restorative measures in general, without specifying any such measures. Cario and Sayous point out that, until now, ‘penal reparation’ in juvenile justice is not organised in a restorative spirit. Although they are applied in a rather limited way, the restorative offers in the FWB always prioritise the involvement of the victim even in quite serious crimes. In recent years, this Belgian experience in mediation and conferencing with juveniles has become an inspiring model for French practitioners and policy makers who want to apply the opportunities opened by the Taubira law.

1.2 Penal system

Penal mediation as an alternative to the prosecution was adopted in Belgium in 1994 (Art. 216ter Code of Criminal Procedure), one year later than in France. The number of cases represents less than 0.5% of the total number of files treated by the public prosecutor (including dismissals).² This small percentage includes

2 Banque de données du Collège des Procureurs généraux – analystes statistiques – Bruxelles. Retrieved from www.om-mp.be/stat (last accessed 15 January 2018).

other practices than mediation, like therapy, training or community work. The term ‘mediation’ was chosen at that time for euphonic reasons: the idea was to find a name to help pass a law essentially devoted to an early and quick penal reaction. However, the term and the efforts of some practitioners to promote mediation in this framework can be considered as the first appearance of this restorative practice in the penal procedure.

The possibility of VOM on a larger scale was introduced in the federal Code of Criminal Procedure in 2005, nine years earlier than in France and following a period of twelve years’ practical experiences aiming at evaluating the basic requirements to implement mediation with no limits as to the seriousness or the type of offences. In this field, mediation takes place at the request of the parties and runs parallel to the criminal procedure.

In the FWB, only professional mediators are in charge of restorative practices. They work in accredited and fully subsidised non-governmental organisations. So far, only one organisation³ is accredited to work on the entire territory of the FWB. This guarantees equal treatment or, at least, the use of the same methodology everywhere. The French law does not provide a specific accreditation. However, training is emphasised.

As in France, providing VOM at all stages of the criminal procedure can also be considered as the recognition of RJ in (or next to) the criminal justice system but with important differences. The first difference relates to the ambiguity of the French law concerning the link between restorative practice and the penal procedure: in France restorative measures are clearly complementary to the penal procedure but cannot interfere with it in any way. In contrast, this connection is explicitly mentioned in the Belgian law: if the parties decide to inform the judge of the outcome of the mediation, then the judge can take that outcome into account in his/her decision making. This difference can be understood as the consequence of the experiences prior to the law: whereas in France encounters between convicts and victims not involved in the same offence are promoted, in Belgium communication through mediation between stakeholders of the same offence is more central.

The second difference is that restorative practices in Belgium are not placed under the supervision of a judicial authority. In France, a judicial authority will evaluate the appropriateness, will consent to the measure and will control its quality process. In Belgium, the opportunity given to both parties to have an equal access to mediation at any stage of the penal procedure proved to be the key factor in confirming the feasibility and the value of applying mediation in serious crimes on a large scale. We can easily guess that very few magistrates would dare to propose mediation in cases of murder, rape or severe cases of violence. In the year 2000, a post of ‘restorative justice adviser’ was temporarily created in all Belgian prisons; it played an important role in boosting mediations involving victims and detainees. More recently in 2014, a General Prosecutors circular finally defined that the principle included in the 2005 law (*to ensure that the parties are informed about their right to ask for mediation*) concretely requires that an informa-

3 Médiante asbl. See www.mediante.be (including annual reports).

tion letter concerning the offer of mediation is sent at the different stages of the procedure to the parties: at the lodging of the complaint, before trial and even after sentence.⁴

1.3 Training

The establishment of a systematic training programme in France seems to show interesting initial results. Moreover, our French colleagues speak of the increasing enthusiasm for the restorative philosophy among professionals as well as stakeholders. Training could be much improved in the FWB: currently juvenile courts' magistrates undergo a training (on restorative offers) of just half a day. Restorative practices and RJ should receive a better treatment in the FWB higher education: there is no longer a single course at the universities specifically devoted to this topic. More generally, VOM is not well represented in courses dedicated to mediation in other official or non-official training institutions.

Finally, it is interesting to notice that to us, promoters and practitioners of RJ in the FWB, it seems a bit odd that French people, speaking of 'justice restaurative', created an Anglicism, a term directly inspired from English, while we use the French words 'justice restauratrice' or 'réparatrice' in the FWB. Even so, we are equally inspired by the Anglo-Saxon approach, notably through our Flemish colleagues.

2. Restorative justice related to victim policies

As far as juvenile justice is considered, victim policies do not seem to interact with the way RJ is defined in the future decree. Even if many FWB practitioners work in a restorative spirit and see RJ as a path to recognition of the victim's role in the legal process and as a reparatory instrument, the legal regulations tend to use RJ mainly as an educational tool. The draft decree focuses indeed on the 'alternative' nature of the offer at the stage of the public prosecutor: if stakeholders achieve an agreement and if the commitments are met, there is automatically an extinction of the public action (the prosecution). Even when attractive to many people, the alternative nature of restorative offers lends itself to criticism. In this case, mediation responds to a choice of criminal policy and not to the needs of the stakeholders; furthermore, it puts pressure on the victims and risks manipulating and making them feel guilty; finally, at the stage of the prosecution, the alternative character enhances the risk of limiting the proposal of mediation to petty offences.

The impossibility for the stakeholders (victims or offenders) to ask directly for mediation or conferencing was another limit, for victims mainly, but also for juvenile delinquents, who did not have the right to benefit from mediation, as opposed to offenders over 18 years old who enjoy this right. Promoters of RJ have finally succeeded in convincing the government to change the draft in a

4 Circulaire du Collège des procureurs généraux (Col 5/2014) relative au devoir d'information du Ministère public sur l'offre de médiation. Retrieved from www.om-mp.be/?q=fr/savoir-plus/circulaires-2015 (last accessed 31 January 2018).

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more restorative spirit. The new decree (2018) allows victims and offenders to ask the public prosecutor and the judge to propose a restorative offer. They still cannot contact directly a mediation service.⁵

Is this another sign that restorative practices form an 'edge-field', as Lemonne (2016, referring to Bourdieu) shows in her study of RJ in Belgium? She concludes that RJ in Belgium is not only guided by restorative issues but also by rationales from other fields; RJ in Belgium is not breaking off from traditional penal justice.

In the adult criminal law context, we can realistically be more optimistic about the interaction between RJ and victim policies in the FWB as long as victims can have direct access to mediation. Furthermore, as said before, VOM renamed in the regional decree as a 'supporting communication' mission, is placed administratively at the same level as social or psychological assistance, including victim support services. 'Supporting communication' will specifically apply to each level of collaboration between the different partner organisations and with the administration. And that goes together with a strong will of the regional government to enhance cooperation between all partners in general and thus to promote referrals to mediation.

Conclusion

Parallels can be drawn between the evolution of RJ in France and in the FWB but clear differences show that legislations and practices are not on the same track. The link with the judicial system seems indeed crucial. Unlike France, the Belgian choice of making RJ complementary to the traditional system does not rule out a possible impact on judicial measures or procedures. It appears to give more visibility to restorative practices, with the aim of making the criminal justice system more restorative.

We appreciate the kind of belief of Cario and Sayous and encourage their enthusiasm and great desire to promote restorative practices in France. They are, of course, well aware of the long way to go to reach a generalised practice and of the ignorance, the resistance and the opposition to overcome. Their colleague Jacques Faget (2015) is not so optimistic and lists some fundamental reasons why, according to him, RJ encounters so many difficulties in its development in France. Among others, he points out the French model of centralised government, which condemns any form of communitarianism. At the institutional level, Faget mentions that practitioners are not looking for new ways of action. Ideological reasons are also highlighted: the concept of RJ seems obscure (as if it could be a way of promoting normative deregulation and jeopardising law and state foundations) and even mystic (referring to quotations of the New Testament in Zehr's *Changing lenses*). And he adds that some Belgian French-speaking scholars think that the concept of RJ is not useful at all ...

5 Decree of 18 January 2018 on the prevention, support and protection of youth (Le décret portant le code de la prévention, de l'aide à la jeunesse et de la protection de la jeunesse promulgué le 18/01/18 (Art. 97, §1er al.3 et art. 115, §3 al.1)).

Supposing that these difficulties can be overcome, we think that the development of an RJ culture is at least a question of time, patience and unrelenting efforts at different levels. Inserting the possibility of initiating restorative practices in the law is of course a crucial step in the process of implementation. But ten years after the passing of the vote of the Belgian laws, we can confirm that a continuous awareness-raising programme still has to take place in order to maintain and/or increase restorative practices. What is required is an efficient information mechanism for all stakeholders at each level including the 'persons in conflict'.

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Further reading

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