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EPISTEMOLOGICAL REFLECTIONS ON THE EVALUATION OF RESTORATIVE JUSTICE PRACTICES¹

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Abstract

This paper presents a reflection on the reasons which motivate the evaluation of restorative justice practices. In a social and institutional domain crowded with beliefs and symbols it debates what this need for understanding means. With the help of simple questions: who evaluates, for what reasons, what is evaluated and how, it proposes to researchers a small exercise in scientific hygiene useful both for improving their necessary distance and for understanding better the difficulties of evaluative reasoning within the field of restorative justice.

Key Words: Epistemology, Restorative Justice, Evaluation, Criminal Justice system, Methodology, Mediation

Introduction

One might legitimately think that the best way of developing restorative justice is to provide proof of its effectiveness (although it would be necessary to define the kind of effectiveness one is talking about). But this idea is somewhat naïve. No researcher has ever been able to prove the effectiveness of prison in preventing recidivism, yet imprisonment has universally been adopted as a sentence. It is unlikely that it would suffice to prove the effectiveness of an experiment in order to gain the support of political and judicial decision-makers or of the public.

It is important to keep in mind that the function of the penal system is more symbolic than instrumental. Let us not forget Durkheim's words from a long time ago saying that punishment "does not, or only secondarily, serve the purpose of punishing the guilty or deterring their potential imitators: from either point of view its effectiveness is dubious and in any case poor. Its real function is to keep social cohesion intact by lending the

collective social conscience energy.” Punishment thus exercises its function of social defence in reviving collective feelings, the communion of spirits around these feelings, and it does so all the better as it is expiatory. So one can say without paradox that punishment is above all destined to put pressure on honest people (Durkheim, 1893).

It follows that it would be pointless to wear oneself out trying to provide proof of the instrumental effectiveness of mediation or of conferencing without taking into account the fact that criminal justice is replete with symbols whose political function is basically the production of images of a certain conception of social order. Even when the judicial apparatus puts the resolution of penal conflicts in the hands of community authorities, accepting a more democratic logic, it does not negate its institutional role.

This introduction is not meant as an indictment of evaluation as pointless. As a researcher, I am very attached to any reasoning concerned with bringing into daylight the institutional shade and unveiling what hides behind appearances. It is simply that we need to ask ourselves about the reasons that make us want to evaluate. One good reason is expressed in Recommendation R (99) 19 of the European Council of Ministers, which states that “the governments of member states should promote research and evaluation on mediation in penal matters”. One can understand the concern of the European governments to develop a public policy which rests upon tangible elements. Yet in most of the countries which have widely developed mediation, Norway, France and others, this has been done without prior scientific investigation. Most mediation practices have been institutionalised (Faget, 2006) on the basis of a belief which has no empirical foundation. Consequently, the a posteriori concern with evaluation and, especially, the desire of militant supporters of mediation to subject it to the rigours of evaluation, should probably be seen as a need of recognition and a search for legitimacy.

Thus, what I want to argue here is that the motivation to evaluate is not as rational as one might believe. One should never forget that social practices – especially those which are the most institutionalised – have at the same time both an instrumental and a symbolic impact. I shall give a single example of this. The community service order, unpaid work for the community’s benefit by young perpetrators, has been a visible success in the majority of countries where it has been adopted. This is not, or at least it is not solely, because researchers have been able to demonstrate its pedagogical effectiveness. It is rather a result of the public’s very positive image of the measure. Here is a penalty which is in essence retributive and expiatory (which is why I do not consider it as part of the field of restorative justice) and which revives in the collective unconscious the idea that delinquents must repair the wrong they have done in the form of concrete work, and no longer solely through the abstract sanctions of suspended sentences or imprisonment. This example demonstrates that it is the public perception, or that of the political or judicial decision-makers, which count for more than the reality of a sentence in practice or its effectiveness. Of course there are links between the image one has of a measure and its reality, but such links are not as obvious as one might believe. Here, we are examining “reality as given” though it is in the symbolic world that “the matrix of all significations” is to be found. (Berger & Luckmann, 1966). Evaluation is only one means among others which might contribute to the construction of a positive vision of restorative justice.

After this preamble which poses the question of the meaning of the act of evaluation, I propose a small exercise of scientific hygiene for evaluators which underlines the difficulties of developing an evaluative reasoning within the field of restorative justice. Here again, the methodological deconstruction exercise to which I am proceeding is not intended to discredit the researchers’ work, but simply to inspire reflexive reasoning. Following a questioning procedure which has become classical in human sciences, one asks oneself: who evaluates, for what reasons, on which social issue, and how?

Evaluation by Whom?

One must insist, especially in the discipline of criminology where our values and our fears come into play, that scientific reasoning in the observation of social reality cannot be reduced to simply applying techniques. The first endeavour of the researcher is epistemological. It is essential to analyse the political, economic and social context which condition the scientific knowledge production. Equally, the researcher must think reflexively about his actions, question his relationship with the object of the research, accept that he is a part of the research himself – “because the explanation we apply to the world is always to some extent the explanation we give of ourselves. It is not an easy task as the importance of the ‘socially internalised’ obstructs the awareness of this interference to one’s understanding. However, only by making an effort of this kind can the researcher avoid resembling the stranger mentioned in an African proverb, “who can see only what he already knows” (Faget, 2002).

This necessity is all the more important given that restorative justice is peopled by ‘believers’ preoccupied with a ‘confessional’ desire to re-establish harmony among humans, or by a political motivation to fight the iniquities of laws and the bureaucratisation of judicial institutions. However, simply unveiling the personal orientation of the researcher is insufficient to guarantee an outcome which is “the least subjective possible.” It is also necessary to evaluate the conditions under which the research is conducted, in order to measure the degree of independence of the researcher and his or her impartiality. It is particularly important to know the researcher’s institutional affiliations. Is the researcher part of a government ministry, a university, or a restorative justice practitioners’ organisation? What is the source of the funding for the research – the state, a court, a mediators’ lobby group, a political body (municipal or regional), or a NGO? This information can help us to understand the degree of distance between the researcher and the subject of the research. One might fear, for example, that an activist researcher might be blinded by subjectivity; that a researcher based in a ministry might be less objective than one in a university; that members of an association of mediators might, due to market forces, tend to advocate the supremacy of their own organisation as compared to others; that a university law school might have a more normative vision than a sociology department; that a psychologist might be more likely to miss the socio-political factors and concentrate upon social interactions and the psychological repercussions of the restorative process instead.

Why Evaluate?

It is necessary, then, to ask oneself what the aims of one's evaluative approach are. They may be numerous: some explicit, some obscure, others secret. They naturally depend upon who is conducting the evaluation and the context in which it takes place. The reasons for conducting an evaluation may not be the same for a university researcher wanting to increase knowledge about social practices, as for practitioners who might be more interested in justifying the relevance of particular practices – and sometimes their own salaries, managers wanting to reduce costs, “believers” wanting material for proselytizing or producers of restorative justice programmes interested in making profit.

Thus, one can formulate an indicative list, in no particular order, of propositions, some “reasonable”, almost naïve, others more critical, for the purposes of illustration and debate. Among the more “reasonable”, I would cite the following:

- evaluation helps to establish a public policy
- evaluation helps to understand how things work
- evaluation helps to improve existing practices
- evaluation helps to legitimate some practices, at the expense of others
- evaluation helps to overcome opposition
- evaluation gives direction to unduly empirical experiments.

More critical, sometimes cynical propositions can also be formulated:

- evaluation can serve to rationalise an existing public policy
- evaluation can serve to justify economic decisions
- evaluation can serve to legitimate a new profession in the penal marketplace
- evaluation can serve to legitimate the power and prestige of those who control organisations of practitioners
- evaluation can serve to obtain further funding
- evaluation can earn money for evaluators
- evaluation can provide opportunities to meet people, and to travel in order to speak about one's practice – or one's evaluation methods.

Evaluation of What?

Research on restorative justice is developed to an unequal extent in different western countries. It is often more descriptive than evaluative. Preferred themes are the degree of satisfaction of participants in mediation, the communication between the mediator and participants or between the participants, the numbers of agreements signed, and the recidivism rates of offenders (Aertsen, Vanfraechem & Willemsens, 2004). But all research on these themes is subject to methodological bias of greater or lesser degrees of importance.

Measuring levels of participants' satisfaction seems, on the face of it, meaningful. All the research seems to show high levels of participant satisfaction with mediation. These levels always seem to be higher when compared to satisfaction levels of those who have been through traditional criminal justice processes. But it is difficult to control for the bias due to the consensual nature of the investigation. Those who have agreed to take part in the research are not representative: one might hypothesise that those who are most disappointed or have decided against taking part in mediation refuse to take part, along with those who have decided to ‘move on’ and do not wish to discuss an unhappy conflict.

Measuring communication between participants and between the mediator and participants necessitates direct, systematic observation which is bound to influence the behaviour of the parties. It is ethically difficult to set up such research using one-way mirrors or hidden cameras, so most researchers proceed using interviews. This method is flawed in that it depends upon selective memories of what went on, and it captures only participants' descriptions of the communications between the parties.

Much research has shown admirable levels of agreements reached in mediation, ranging from 50% to 90% depending on the programme evaluated. However, this is not a valid indication of the success of mediation. Many agreements are signed in an apparently spontaneous or ritualistic way by people who want to put a conflict behind them without discussing its causes or envisaging the reopening of a relationship. On the other hand, some people have serious difficulty coming to terms with the situation and are far from ready to sign any agreement. In such cases is it appropriate to speak of success? Which is the most relevant criterion of a successful mediation? Everything depends upon the model of mediation privileged by the particular evaluator. If, for example, like many mediators with a legal background, the evaluator favours the ‘problem solving model’, the focus is likely to be on the treatment of symptoms and the signing of an agreement. If, on the other hand, the evaluator is a fervent adherent of the ‘transformation model’, like many mediators with a psychoanalytical background, greater attention will be paid to work on the causes of the conflict and relatively little value will be given to signing agreements. I have noticed myself a relationship between the low level of competence (little or no specific training on mediation, little or no reading or participation in seminars or colloquia, no supervision or analysis of practice) of mediators and the high percentage of agreements they obtain at the end of mediation sessions. Observation demonstrates that the least well trained mediators are the most directive whereas the best trained favour a non-directive approach (Faget, 1999). This conclusion underlines the great importance of taking into account the ways mediators work in all evaluation. It is important to know the ethical stances they have towards their work and the theoretical basis of their practice.

Analysis of recidivism statistics after restorative interventions plunges us into an abyss of confusion. On the one hand, the existence of important ‘dark numbers’, well known to all criminology undergraduates, hinders us from having any certitude about such statistics. We can only know about the recidivism of those who happen to be “caught”. On the other hand, there is another mode of reasoning apart from this legal rationality:

psychological approaches look at recidivism completely differently. Through this lens, there may be frequent reoffending, but it may be less often than previously, or the offence types may be less serious, and this is seen as significant.

Finally, trying to analyse inputs and outputs of restorative justice practice without also looking at the system in which it takes place (the black box) is like tasting a wine without knowing where it was grown, what variety of grapes was used, and in what climate. For this reason it is particularly difficult to carry out sound comparative studies. Institutional, ideological, cultural and procedural contexts are so different from one country to another that restorative justice has different meanings.

How to Evaluate?

The results of an evaluation are probably less important than the manner in which it is carried out. Yet as soon as a practice seems to us more humanistic, more respectful, more democratic, as is the case with restorative justice as opposed to traditional criminal justice, we tend to obscure the methodological weaknesses of our reasoning. Our scientific standards collide with our moral or philosophical standards. The temptation of humanistic do-it-yourself is strongest of all when we know, from our own experience, how difficult it is in the human sciences to master all methodological biases.

We tell ourselves that it is a necessary condition of scientific methods to be able to use a control group to compare the respective performance of the traditional criminal justice system with the restorative processes. However, putting in place a control group is a thorny issue. On the one hand the adoption of a method of random distribution between the two groups, in order to avoid selection bias, sometimes collides with procedural principles which send cases in particular directions. Another procedural bias arises from the consensual character of restorative processes (Latimer, Dowden & Meuse, 2001). Whereas judicial processes are imposed upon the parties, individuals referred to mediation or restorative conferences can refuse to take part. This possibility of refusal is far from a minor issue in reality. The people who take part in restorative interventions are those who are favourably disposed towards the idea, or at any rate, those who are not unfavourably disposed to it. This tends to increase the 'success' rate.

Methodological pluralism is essential. Quantitative methods can give us descriptive elements such as number of cases, types of offences, types of participants, numbers of agreements signed, which are interesting but relatively unhelpful. Qualitative methods give us a deeper understanding. The researcher's personal experience is fruitful, as always. A researcher can only understand what goes on in a mediation meeting or a conference if he has emotionally experienced the situations he observes. The necessary distance can be maintained, however, if this experience was obtained in programmes other than those being evaluated. Interviews are widely used. It is relevant when using interviews to record the discourse employed by the key actors – to know how they define the situations they are experiencing. Nevertheless, questionnaires or semi-structured interviews may turn out

to be biased. Questions like “are you satisfied with the mediation process?” or “how would you describe the attitude of the mediator?” are biased in that they express the manner in which the researcher has constructed the field of analysis. Only the non-directive method inspired by Carl Rogers (Rogers, 1961) which starts with initial broad questions such as “what do you think of the mediation you have experienced?” and continues by following up and deepening the enquiry, respects the actor's subjective experience of the situation.

Conclusion

Stating these epistemological and methodological obstacles must not lead us to renounce the evaluation of restorative justice practices. It simply encourages researchers to evaluate their own evaluations and to limit their heuristic ambitions. Modesty is essential and, given that, there is no need to abandon the social mission of revelation. Indeed, it is necessary to go beyond the simple logic of proof (to prove that restorative justice produces good results for an institution or for individuals) practised in most research, and to place oneself in a logic of discovery (to identify, for example, the unexpected or perverse consequences of mediation or community conferencing). We know that institutions should not solely be analysed in terms of the purposes for which they were created. They always produce outcomes that are different from the goals they were meant to achieve.

End Note

1. Many thanks to Brian Williams for his translation from French to English.

References

- Aertsen, I. Vanfraechem, I. Willemsens, J. (2004). *Restorative Justice in Europe : empirical research*, Leuven: University Press.
- Berger P., Luckmann T., (1966). *The social construction of reality: a treatise in the sociology of knowledge*, New York, Anchor Books.
- Durkheim, E. (1893). *De la division du travail social*, Presses Universitaires de France, (1st ed.).
- Faget, J. (1999). L'évaluation des pratiques de médiation pénale en France, Gerico. See a synthesis in English in Faget, J. The double life of victim-offender mediation, (2005). *ADR bulletin, The monthly newsletter on dispute resolution*, Sydney, vol. 7, number. 10, June 2005, (pp.191-195) and Faget, J. French experiences with mediation in criminal justice. The double life of victim-offender mediation, *World Arbitration and Mediation Report*, New York, Vol. 16, n°7, July 2005, (pp. 207-210).
- Faget, J. (2002). *Sociologie de la délinquance et de la justice pénale*, Erès.
- Faget, J. The French phantoms of restorative justice : the institutionalization of 'penal mediation'. In Aertsen, I. Daems, T. Robert, L. (Eds.). (2006). *Institutionalizing Restorative Justice*, (pp. 151-166).
- Latimer, J. Dowden, C. Muise, D. (2001). *The effectiveness of restorative justice practices : a meta-analysis*, Department of Justice, Research and Statistics Division, Ottawa, Canada.
- Rogers, C. (1961), *On becoming a person*, M.D. Houghton Mifflin Co.