

## Plenary session: *Restorative justice and beyond – An agenda for Europe*

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### **Lode Walgrave (Belgium): *RESTORATIVE JUSTICE AND BEYOND – AN AGENDA FOR EUROPE***

Restorative justice is obviously an attractive concept. So called restorative justice practices are being implemented far beyond the field of criminalizable matters, such as in schooldiscipline, neighbourhood conflicts, or in peacemaking and peacebuilding. However, it needs deeply different actions and even different expertise, for example, to bring a victim and an offender of a burglary together to find a constructive solution which is satisfying for both protagonists, to set up meetings with representatives of population groups as a pathway towards reconciliation after a period of systematic mutual violence and gross violations of human rights, or to try and find a peaceful way of living together in a conflictuous neighbourhood. And still, these practices all are called 'restorative justice'. What is common to them?

It is the set of values and beliefs which is driving them. Restorative justice is more than a series of techniques. It is a philosophy which may penetrate different actions in different degrees. "Restorative justice is a compass, not a map"<sup>1</sup>. Without the philosophy, only techniques remain. Mediation, for example, without the restorative justice philosophy is a simple technique, and an easy prey for cooptation. It can be used and misused in many different contexts, for many different purposes.

#### **A set of values and beliefs**

Let me try to summarize the essentials of the set of values and beliefs driving restorative justice.

- Restorative justice advocates are focussed on the quality of social life as the central value of social behaviour. This quality is considered independent from – not necessarily contradictory to – legal order and the existing societal organisation.
- It is believed that the quality of social life depends most of all on the motivation and the commitment of all those taking part in social life. It is, in Putnam's words, the social capital which is the lubricant to make democracies work<sup>2</sup>.
- It is believed also that, if adequate conditions are met, the great majority of people are willing and capable to find constructive solutions to all kinds of conflicts between them through deliberation.
- An offence, a conflict or an injustice are seen first of all as threats or infringements to the quality of social life, and not simply as law transgressions.
- The answer to such threat or infringement is focussed directly at the preservation or restoration of the quality of social life at the level of the individual victim, of the interhuman relations, of the community and of the social order (insofar it frames the quality of social life).
- The response to offences, conflicts or injustices is sought by priority through deliberative processes including all those with a stake in the aftermath of the offences, conflicts or injustices just mentioned.

Not all issues of this list are the monopoly of restorative justice. The first three statements are shared by many other movements and practices. They are inspired, enlightened and guided

<sup>1</sup> H. Zehr, (2002), *The Little Book of Restorative Justice*, Intercourse (PA): Good Books, p. 10.

<sup>2</sup> R. Putnam (1993), *Making Democracy Work. Civic Traditions in Modern Italy*, Princeton (NJ): Princeton University Press.

by several social philosophies and theories like communitarianism or the republican theory. The broader dissemination expresses a social ethical movement driven by what I have called a kind of communitarian social ethics, based on respect, solidarity and taking active responsibility<sup>3</sup>.

### **Confusion about restorative justice**

The obvious attractiveness of the restorative justice rhetorics has given rise to thoughtless expansion and misuses of the notion. "The literature of restorativism needs not yet greater enthusiasm but more reflection"<sup>4</sup>. Governments isolate some practices from the restorative philosophy, but keep calling them restorative justice because it is fashionable. Treatment promoters use restorative justice as a buzz word to get their programmes funded. Restorative justice is sometimes used to indicate proactive pedagogical practices, prevention initiatives, even 'states of mind'. It is an unfortunate development.

Paradoxically, filling up a notion with too many different things is emptying it from meaning. The strength and renovating appeal of a concept is best preserved by clarity and delimitation. Some admirable, constructive practices deserve intensive support, because they help to create a social climate which is favourable to the quality of social life. It is very worthwhile that, for example, schools learn children to resolve their conflicts through respectful deliberation. But they are not necessarily restorative justice. Based on the broader philosophy I just mentioned, a good stricter definition must try and make clear what restorative is and also what it is not.

REstorative justice is by definition REactive. It is a response to an event<sup>5</sup>. It is meant to REstore justice (in the broad sense of the word) after the commitment of an injustice. The blurring of the restorative justice notion is due to the way it is defined. Mainstream literature in restorative justice characterizes it basically through its deliberative process: "The essence of restorative justice is not the end, but the means by which resolution is achieved"<sup>6</sup>. Restorative justice advocates promote informal voluntary settlements as crucial for achieving restoration maximally. The communicative potentials of mediation and family group conferences, for example, indeed favour the authentic assessment of the harm suffered and may more easily lead to a genuine agreement on how it can be reasonably repaired or compensated.

### **Restorative justice is an outcome based concept**

Nevertheless, restorative justice cannot be reduced to such process, for two reasons. First, a process cannot be defined and valued without referring to the purpose it is undertaken for. The process is valued not because of the deliberation on its own, but because of the outcomes it helps to achieve. A deliberative process is more 'restorative' because the expressions of remorse, compassion, apology and forgiveness which it facilitates, may readily yield feelings of being respected, of peace and satisfaction. These feelings are outcomes, even if they are not explicitly written down in the resulting agreement.

Secondly, restricting restorative justice to voluntary deliberations would limit its scope drastically<sup>7</sup>, and doom it to stay at the margins of the system, as a way of diversion. The mainstream response to crime would remain being coercive and punitive. The gate keeping criminal justice system would probably refer a selection of the less serious cases only to deliberative restorative processes. Victims of serious crimes who need restoration the most would be excluded from it. Moreover, giving up the principled priority for restoration would hand over a category of citizens to the punitive apriorism, including its problems.

<sup>3</sup> L. Walgrave (2003), *Imposing Restoration instead of Inflicting Pain: Reflections on the Judicial Reaction to Crime*. In A. von Hirsch, J. Roberts, A. Bottoms, K. Roach and M. Schiff (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms*, Oxford: Hart, 61-78.

<sup>4</sup> A. von Hirsch (1998), *Penal Theories*. In M. Tonry (ed.) *The Handbook of Crime and Punishment*, New York/Oxford: Oxford University Press: 659-82, p. 676.

<sup>5</sup> G. Johnstone (2002), *Restorative Justice. Ideas, Values, Debates*, Cullompton (UK): Willan Publishing.

<sup>6</sup> P. McCold (2004), *Paradigm muddle: the threat to restorative justice posed by its merger with community justice*. *Contemporary Justice Review* 7 (1): 13-35, p. 15.

<sup>7</sup> J. Dignan (2002), *Restorative justice and the law: the case for an integrated, systemic approach*. In L. Walgrave (ed.), *Restorative Justice and the Law*, Cullompton (UK): Willan Publishing, 168-190.

It is this too exclusivist focus on the deliberative process which has provoked the confusing extension of the restorative justice notion towards other forms of deliberation which do not lead to reparation.

That is why restorative justice must be understood first of all through its reparative goal. I have defined it as “*an option on doing justice after the occurrence of an offence which is primarily oriented towards repairing the individual, relational and social harm that is caused by that offence*”<sup>8</sup>. The processes are tools only to achieve reparation, though very important ones. Deliberative processes hold the highest potentials, but if voluntary agreements cannot be accomplished, coercive obligations in pursuit of (partial) reparation must be encompassed in the restorative justice model. Possible examples of such obligations are formal restitution or compensation, a fine or doing work for the benefit of a victims’ Fund, community service. Such sanctions, of course, do not achieve completely the potential of the restorative paradigm, but restorative justice is not a simple black and white option. It can be achieved in different degrees<sup>9</sup>.

The option to pursue reparation or even more comprehensive restoration after the occurrence of a crime, is based on a social ethical vision. I believe in restorative justice, first of all, because I simply think it is more just and more socially constructive to respond by priority to the harm and suffering of the victims and to the social problems caused by a crime, rather than to be obsessed by the wish to punish the offender.

### Feasibility questions

But is this actually feasible?

We need more than peptalk. Nice ideas may appear to be beautiful naïve dreams only, or may generate awful practices. Do the practices based on the restorative justice options actually achieve what they seem to promise? Reliable answers to this question can only be found by cautious and systematic scrutiny of the practices, based on adequate scientific methodology. The social ethical option for restorative justice must be completed by systematic self critical assessment of what is achieved in reality.

“Empirical research on restorative practices is a mile wide, but only an inch deep”, Paul McCold wrote<sup>10</sup>. There is a lot of research available, but it does generally not fulfill sufficiently scientific standards, so that the credibility of the outcomes is doubtful. Currently, we can document vaguely that restorative justice does mostly work well in practice for the great majority of the participants. We do not know enough, however, about the nuances and conditions. When does restorative practice work and when not, for whom, for what exact purposes, dependent on what variables?

### Which practice?

A first question is what exact practice we investigate empirically. Many evaluation projects are focussed in one peculiar practice in a specific context carried out with a certain type of problem, but do not limit their conclusions. If you investigate police led conferencing only, you cannot draw conclusions for restorative justice in general, not even for conferencing in general. Conferencing according to the New Zealand version in family group conferencing is quite different a practice from conferencing in the Real Justice model<sup>11</sup>. The Real Justice version is almost exclusively explored for rather benign offences committed by first time offenders, and its applicability for serious recidivists has not been demonstrated, as has been done with family group conference New Zealand style. Like in other practices, you find also among mediators and conference facilitators brilliant performers, and bunglers. This variation

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<sup>8</sup> L. Walgrave (2004), Restoration in youth justice. In M. Tonry and A. Doob (eds.), *Youth Crime and Youth Justice. Comparative and Cross-national Perspectives*, Chicago: University of Chicago Press, Crime and Justice Vol. 31, 543-597, p. 552.

<sup>9</sup> D. Van Ness (2002), The shape of things to come: a framework for thinking about a restorative justice system. In E. Weitekamp and H.J. Kerner (eds.), *Restorative Justice: Theoretical Foundations*, Cullompton (UK): Willan Publishing, 1-20.

<sup>10</sup> P. McCold (2003), A Survey of Assessment Research on Mediation and Conferencing. In L. Walgrave (ed.), *Repositioning Restorative Justice*, Cullompton (UK): Willan Publishing: 67-117, p. 106.

<sup>11</sup> I. Vanfraechem (2006), *Herstelgericht Groepoverleg. Op zoek naar een constructief antwoord op ernstige jeugddelinquentie*, Ph.D. Criminology, K.U.Leuven.

in talent and in technical adequacy can influence more the results than the intrinsic value of the conference or mediation does. Restorative practices in a context with very cooperative police and justice officials may yield results which are considerably different from those achieved in practices working in a sceptical, resistant context.

This is why all empirical projects must describe extensively the type of restorative practice evaluated, the referral system, the preparation of the meeting, the way how the meeting was monitored etcetera, because this description does contain lots of indications for possible successes or failures. Its clear limitation to what has actually been done will enhance the credibility of the conclusion.

### **What outcomes?**

The second series of questions concern the outcomes. But they can only be defined if the objectives are defined clearly. What are the goals of the restorative practice? How do we measure them? The answers range from material restitution or compensation till complete peace, reconciliation and reintegration. Many variations and graduations exist between both extremes. One of the most researched outcomes is 'satisfaction' in participants. The satisfaction measured is probably relative. Participants after a restorative meeting are presumably not entirely happy. But they may feel that, after all, it was less bad than they feared. Moreover, satisfaction in fact is a container concept which may hide a great variety of good feelings about the way the facilitator acted, the respect experienced, the apologies felt to be honest, the procedural justice, the comprehensiveness of the agreement and many other aspects. And still, what shall we conclude if the victim is very satisfied, but the offender totally disillusioned, or vice versa?

And what is the status of reoffending research? Restorative justice is about repairing the harm, and if that is taken seriously, the offender's reoffending can only be a secondary objective. One might even consider reoffending rates as irrelevant for restorative practices, as long as the victims do feel restored. From that standpoint, reoffending might be a secondary concern only, because we are aware that more reoffending after restorative practices would be detrimental for their public acceptability. Measuring reoffending would then be a check only to be sure that it is not worse than after a traditional punishment.

Another major problem here is comparability. It is not enough to conclude that participants are in general satisfied after a restorative processing, the question is whether their satisfaction is higher than after a traditional procedure. How can you assess that? Are victims more satisfied because they could voluntarily choose for restorative practice, while the others could not? Or is it really the intrinsic quality of the restorative process itself?

The outcome measurement is still more complicated according to time and to stakeholders. Immediately after the meeting, participants may feel differently from what they experience later, when the agreement has been carried out or not. On the longer term, victims may recover totally from their victimisation or continue to suffer negative consequences. Offenders may be very positively motivated after the meeting, but slide back into their earlier life style later, or reintegrate completely. What would the impact be on public security, and on community life in general if restorative responses were used predominantly and systematically?

### **Conclusion**

Evaluating the impact of any intervention is one of the most difficult undertakings in empirical social sciences, and so it is for evaluating restorative practices. But it is crucial to continue trying it in the best possible way. It is crucial, for three reasons:

- It is necessary to avoid restorative justice becoming only a system of beliefs and convictions. Social ethical convictions are very important drives for renovative actions and systems, but they risk turning into a kind a religious sect if they are not completed by self critical assessment about the practical feasibility.
- It helps to find out the (provisional) limits and to improve practice. Systematic empirical evaluation, if well done, in fact holds a mirror for the practitioners, so that they can see what goes well and what not, under what circumstances, why and when. Based on these findings, corrections can be made (and evaluated again).

- It is a crucial argument to gain credibility in judicial and political authorities and in the public. Accurate and systematic evaluations show the seriousness of the restorative work undertaken, and deliver knowledge about why and when to implement restorative justice.