

ON RESTORATIVE JUSTICE CONCEPTS AND THEORIES

RESTORATIVE JUSTICE IN THE INTERNATIONAL ARENA

GENERAL REMARKS

The presentations that are assembled under this heading have emerged as a special group in the course of preparations for the conference and collecting workshop proposals. A few, more theoretical issues as well as questions of conceptualisation that were regarded as of pivotal importance for 'doing' restorative justice were proposed and it was decided that they were allocated a special place. Therefore we find now in this section the contributions from Francesca Zanuso, from Federico Reggio, and from Martin Wright, the considerations of Ian McDonough regarding the differences between the concepts of mediation and that of restorative justice, the contribution of Rob Mackay, as well as the presentations from Bas Van Stokkem and Antony Pemberton addressing the standing of restorative justice as public or private way of dealing with wrong-doing.

We have added presentations that deal with global or trans-national issues: Ines Staiger on restorative justice for victims of terrorism, Kerry Leigh Clamp on a comparison of restorative justice approaches in two transitional societies, and Ann-Claire Larsen on Mobilising Human Rights for promoting restorative justice.

The conceptual roots of restorative justice in Italian legal tradition

Presented by: Francesca Zanuso (Italy)

Chair: Marta Ferrer (Portugal)

The Italian legal culture has some good reasons to appreciate *Restorative Justice*: such an approach to justice, in facts, seems to be able to give the right attention to the victim - providing him/her with the adequate respect; it seems also to offer some interesting tools for settling a lawsuit, to re-establish the social communication, to strengthen the perception of social security and, therefore, to support a better comprehension between victims and offenders. Nevertheless, it must be also taken into account that - in the general perception, as well as in the academic debate - RJ is commonly understood as an alternative way for sentencing as well as an alternative to punishment in criminal justice matters; this is probably one of the reasons why it is usually 'bordered' - to say limited - to the sector of juvenile justice, or to misdemeanours (minor crimes).

In my opinion, such a way of considering RJ - as well as the activity of mediation - is restrictive and prevents from taking advantage of all their innovative potentiality.

There is in facts a different way of thinking a reparative approach to justice, and that can be rooted in the teachings and thoughts of an Italian Philosopher of Law: Francesco Cavalla (see F. CAVALLA, *La pena come riparazione. Oltre la concezione liberale dello stato: per una teoria radicale della pena*, in AA.VV., *Pena e riparazione*, Padova 2000, pp.1-109). I personally share this view, and - according to that - I am convinced that the reparative function of criminal justice - set as the base and justification of punishment itself - is the only authentic response to the questions and the doubts that emerge (and always trouble us) when we're supposed to face the choice and the problem of punishing someone else. It is thanks to such an approach that, in my opinion, we can be able to break free from the theoretical contradictions, as well as of the practical limits of the modern approaches to punishment.

Therefore, we ought not to consider RJ only as an alternative track to the application of penalty or to the carrying out of trials. We ought to go beyond - in terms a deep analysis of the problem of punishment, as well as of the concept of mediation: there we will discover that the only way to find a justification to punishment - which means that it can be grounded

in reasons that do not meet contradiction - is to verify whether it enhances the re-establishment of the intersubjective dialogue which was interrupted by the crime. It is only when the reaction to crime aims to restore a dialogue, that this reaction seems to be philosophically justified.

For this purpose, mediation appears to be very important, since it engages the victim and the offender in a dialogue, to be held in front of an institutionalised and public third party. In this context, the word 'mediation' has to be understood in a strong, classic sense, as a unending research activity, that tries to let the real truth appear, knowing that truth is a common base that involves conflicting parties beyond their differences. In facts, we can try to respect differences only if we try to find out what - beyond these differences - can be shared as a commonality.

The real challenge we have to face, then, is to find an ordered pattern of relations that does not become overwhelming. And we have to try to avoid, when we punish, not only overwhelming the victim but also overwhelming the offender.

So, this is the point: crime creates disorder. It compels in a violently way relations; and this cannot be accepted by the victim, nor by the society. Crime is a violent and undue 'absolutization' of one's subjectivity that becomes an attempt of annihilation of the other, in some or all his/her expressions. The offender claims to impose an "order" (but I should say a disorder!) which doesn't imply the chance to go over: he/she tries to refrain from oppositions and critical objections (and his behaviour is the best evidence of such an attitude). His/her "order", that pretends to be settled, static and ultimate, results from annihilation of the other.

The real problem is how to oppose the crime, to respond to it, avoiding a further violence; it is how to avoid a new "order", which, being imposed itself, can be overwhelming or can be perceived as such.

Francesco Cavalla correctly underlines that the only prescriptive order, which is logically acceptable, is the one which gives the possibility to go over; we are talking about a dynamic order, which is the result of a constant inter-subjective dialogue, based on a continuous mediation activity. This order is not rationalistic: it is dialectic.

We can reach this type of order only if we remember that to punish means *unicuique suum tribuere*, to give everyone one's own (see F. ZANUSO, *A ciascuno il suo. Da Emmanuel Kant a Norval Morris: oltre la visione moderna della retribuzione*, Padova 2000). This means - according to my view - to respect and support the subjectivity within the dialogue: that is *suum*, that is one's own.

Punishment can be justified only if it re-establishes the inter-subjective relationship that was interrupted by the crime. It is justified if it enhances the mediation activity, leading the offender to recognize that his/her violent action was illegal and therefore compelling him/her to repair.

By that I do not mean just 'to provide a restitution', but to restore the broken relationship.

Punishment should obtain this result not only because we ought to care about the victims but also because Cain - the offender - must have the opportunity to understand "the well he fell in" when he denied the other, when he tried and succeeded in reducing Abel to silence.

We ought to do this not to be a 'good fellow' but to respect the philosophical principle of subjectivity that is to be found and placed in unavoidable relationship of dialogue with everybody else (even if someone forgets such a 'task').

Let us focus on this question, now: what does it mean to repair, to restore? It is not a matter of mending a building or of restoring some old furniture; it is not a matter of mending a bike. When we punish we are not dealing about mechanics or with static 'objects', but with inter-subjective relations and their stories. The inter-subjective relation cannot be re-built as it was before the harm suffered because of crime. Suffering, pain and powerlessness cannot be 'sponged out' from the victim's life as old spots. And so it is for remorse, for shame, for the criminal *hybris*.

But the relation can be re-established by respecting the possibility of going over more than what it was in the past. The past, that is so important for retributive idea (just desert), has weight here only to prepare the future, so it has important consequences for deterrence.

We can try to repair with any mean which appears to be adequate to let the criminal understand the reasons of social relations; but also to stop the social alarm and so to allow the criminal to get back in the society, after he/she has paid for his/her crime.

Sanctions must not be strong, must not be light but just the one necessary to reach two goals: let Cain understand his mistake and let the society, and Abel too, (if he is still alive!) be ready to welcome back Cain.

If all this seems too abstract we can remember a historical reference which is more than just a suggestion: the court of Eliasti in Athens, as we know from Plato's narration of Socrate's trial (*The Apology of Socrates*).

This court was concerned with no blood crimes (they were treated in the Aeropagos) and the judgement procedures were particularly articulated. There were two steps in the trial: in the first one the jury has to verify the guiltiness of the accused; if the accused was charged and found guilty there would be a second step, during which the jury had to decide the appropriate penalty for the crime.

The guilty had the possibility to propose to the popular jury (composed by more than 500 members) an alternative punishment to the one proposed by the public prosecution.

We can remember that Socrates used this opportunity to further provoke the people of Athens: therefore he was sentenced to death by drinking a poisonous herbal infusion.

But we do remember Socrates as a hero, a martyr for freedom and truth.

In fact, this possibility of choice had surely been created to let the guilty accept the whole meaning of his sentence; so he/she could propose a different and lighter penalty. This penalty could be accepted by the jury only if it was really restorative, and specially more adequate than the one that was proposed by the prosecutor.

The guilty could hope for a lighter punishment only if he was able to understand how his crimes had wounded and spread alarm among the community he belonged to. This was the only way for him to understand what kind of penalty could be adequate to re-establish peace between him and his community. Still - as Socrates' example reminds us - the adequacy of a punishment cannot be taken for granted, neither when it's evaluated through a participatory process. The refusal of Socrates' provoking proposal had as an outcome a death sentence, in fact, to remind us how a participatory process is not a guarantee of a restorative outcome. It is fundamental but not enough.

Anyway, I do believe that what was going on in the ancient Athens seems the best way to give a response. The adequate consideration of his guiltiness and his capability of comprehending the reasons of social living and of legal respect could let the criminal be charged with a lighter and more meaningful penalty.

I know there are a lot of risks in this suggestion but the challenge that comes from this far away time is very attractive. My hope is that taking dialectics and mediation into the trial (such an antique idea!) could be the right way to give Restorative Justice all its potentiality and its depth (see F. ZANUSO, *Giustizia riparativa e mediazione: un modello classico*, in AA.VV., *Pena, riparazione e riconciliazione*, Varese 2007, pp.35-59)

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Workshop notes by Jaume Martín

The workshop participants agreed on the fact that two different aspects for discussion can be distinguished. On the one hand the conceptual discussion concerning Zanuso's presentation who argues that there is a need to transform the traditional justice system into a restorative justice one. On the other hand, the debate on how this transformation can actually be brought to life in practice.

Focusing on the conceptual debate, two main issues were addressed:

- a) Reparation as a 'third way'. In accordance to C. Roxin thesis who proposes a vicarious system of penalties and alternative measures (or sanctions), the introduction of the reparation of the damage would represent the 'third way'.
- b) The controversies flowing from the 'minimalist' and 'maximalist' approach to restorative justice practices.

According to Francesca Zanuso it is necessary to bring about a change of paradigm in the justice system. This in its turn requires a change of mentality and of the social vision of justice in the criminal field.

The workshop participants raised the concern that this change will only be possible by the accumulation of practical experiences.

It was mentioned that although the weight is usually placed on drafting legislative instruments, more attention should be devoted to integrate restorative justice practices into the implementation of alternative sanctions. These should overcome the rehabilitative paradigm and be guided by the restorative paradigm.

To this end it is argued that mediation and other restorative justice practices should not only have a diversionary nature but should have a predominant role at the stage of the execution of the sentence and should bear an independent relation *vis-à-vis* the criminal justice system.

Accepted or acceptable justice? The problem of rational control in restorative justice practices

Presented by: Federico Reggio (Italy)

Chair: Marko Bosnjak (Slovenia)

The increased attention on consensual models of conflict resolution in criminal matters appears to be bound to a moment of deep crisis that affects criminal justice in Western countries, and which emerges in terms of:

- a lack of theoretical justification (legitimacy);
- a lack of practical effectiveness.

Their most evident outcome is a general lack of *consensus* (among scholars, practitioners, civil society) on Criminal Justice's goals and tools.

Consensual models emerge as a possible reaction, therefore, and appear to show an alternative track (at least for some types of crimes) to traditional process and punishment.

Consensual models, in facts:

- Seem to imply a more participatory model of justice that may involve people who are usually peripheral to the traditional justice process (victim, stakeholders);
- In a moment of 'lack of legitimacy' for 'state justice', they seem to distribute, to 'spread' the authority of the decision among a plurality of subject (therefore, it is often felt not only more participatory, but probably also more 'democratic');

- Can provide a simpler and quicker solution of the conflict (although it could be also the opposite), avoiding (partially or completely) the human and economic costs of traditional court trials

Let me state a first critical thought, though:

- There is surely an interconnection between lack of theoretical justification and lack of effectiveness (a system that is not effective can easily lose legitimacy, and a system that is in lack of legitimacy may sooner or later meet forms of civil resistance that prevent its effectiveness as well).
- But we must also take into account that increasing effectiveness does not necessarily imply increasing legitimacy! In fact, while legitimacy deals with the theoretical (philosophical, ethical, political) justification of the system, and therefore with its goals, effectiveness is simply the degree of achievement of a set of goals (but it says nothing about their content) (from this viewpoint, we can notice, for example, that the CJS in the Nazi regime was quite effective, although we all agree that it had a few to deal with what we'd define today as a 'substantive' justice).

Such a problem should be - in my opinion - seriously taken into account, especially if we think that:

- The enthusiasm that some European institutions and legislators have for RJ seems to focus mainly on the potentials that RJ-inspired practices have in terms of 'deflation' (decreasing the amount of trials that enter tribunals or courts). (Such an interest seems to be focused mainly in recovering effectiveness to the criminal justice system);
- If we remember, nevertheless, that effectiveness is neutral, or, better, indifferent to the content of its goals, we must not forget on the other hand that RJ represents a lively and ambitious attempt to promote a deep rethinking of justice's goals (and therefore of its tools and methods).

The questions I would like to address at this point are:

- Are consensual tools/models in any case adequate to RJ's goals (and ethics)?
- Are they the best way to achieve a restoratively-oriented criminal justice system.

To try answer these questions - or at least to set a compass that could help in a reflection about these topics - it is necessary to take two further steps:

- to briefly analyse the structure of some of the most widespread consensual tools in modern criminal justice (dangers, limits, potentials);
- try to understand why RJ sympathises for consensual models of conflict resolution;

The most common examples of consensual justice in criminal matters - within the traditional paradigm of criminal justice - are those inspired to the Anglo-Saxon 'plea bargainings' (plea-charges-sentence bargaining; *nolo contendere*; no-contest plea; the Italian 'patteggiamento', the 'Informelle Absprache' in Germany).

The basic structure of these instruments is grounded on an exchange of utility (between prosecutor and attorney). The agreement on plea/charge/punishment produces, as an outcome, a 'discount' on the punishment.

The most evident advantages, in utilitarian terms, are: for the prosecutor the exemption from the need of proving facts that support the accusatory thesis; for the accused a lighter punishment and a quicker process (especially in those cases when the process has a high cost in terms of economic expenses and personal/emotional exposure); for the 'system', there is a saving of time and (human/economic) resources.

Could the fact of leaving aside the problem of verifying facts (with all that's here connected in terms of proof/factual basis/right to defence and presumption of innocence) as well as the confrontation on the 'reasons' of what happened embody some dangers?

As Mary Vogel has underlined, consensual models can also represent situations of ‘coercion to compromise’: the promise of a sure but lighter punishment (better than a trial whose outcome is still open) can be seen as an acceptable way out, especially if the accused is brought to think that it is convenient to stop resisting (as it happens in situations of imbalance of power).

The agreement on the punishment could be, here, the ‘peaceful face’ of a system that prizes those who renounce to resist on trial (which seems to be, in my opinion, a mutated form of deterrence). (Questions: is there a conceptual space for a restorative lens here? would implementing victim involvement and including restitution to the victim be enough in that sense?)

About the sympathy that RJ advocates express towards consensual solutions of the conflict, this can be explained through 3 different (but not reciprocally alternative) elements:

- a. preference for informal practices, which reflects a critical attitude to formalistic abstractions of the legal pattern applied in substantive/procedural justice (also, the use of informal practices and forms of community justice emerges in countries informed by a tradition of indigenous populations, as it happens with the Maori in NZ or with the Native Americans in some zones of USA and Canada);
- b. The research of an agreement is seen as a very important way of conflict resolution, since it can help parties to focus on solutions and, most of all, requires a dialogue between conflicting parties;
- c. Searching for an agreed-upon solution appears also to be a more democratic and participatory process, more able, for this reason, to produce results that the parties will respect.

Here a further question, nevertheless, emerges: is consensus the source or the outcome of acceptability? Does it stand merely on an act of will or should we also analyse how it came out?

- Is consensus itself the source of an acceptable solution? → if so, consensus is relevant as a fact (enough to verify if it is there or not). Here consensus merely lays on an act of will and abstractly its contents are fully disposable.
- Or is a solution acceptable (and therefore agreed-upon) because it brought to the light elements and contents which appear to justify an agreement?

Here consensus is relevant as the result of a ‘rationally’ analysable dialogue/confrontation between parties? Here consensus has also a rational root, its contents can be subjected to a critical analysis and are not fully disposable. The focus is not only on consensus as a fact but on the reasons that lay behind it (so it is not fully disposable).

This point can be resumed with a single question: “is an accepted solution acceptable just because it has been accepted?”

This alternative assumes also a specific cultural meaning if we think that in our pluralistic societies - that also means in the context of the highly anti-foundational development of Western culture - agreement is seen as the only way to solve conflicts without recurring to force (see e.g. MacIntyre, Rorty, Taylor, Rawls, Engelhardt).

Such a view, nevertheless, is insufficient and not even effective, at least as long as the agreement is seen to lay merely on an act of will.

In facts:

- a. many agreements, for instance, in business relations (exchange of utilities) are the outcome of an imbalance of power. They certify a state of force (my reference here goes mainly to the interesting thoughts and examples expressed by J. Auerbach in “Justice without Law”, NY 1983);

- b. the presence of consensus is not a guarantee of its contents. No need to remember how many totalitarian regimes in the XX century went to power thanks to a widespread popular consensus;
- c. if crime emerged as the outcome of conflicting wills (at least the will of the offender that overcomes the will of the victim not to be offended) why should the offender accept to have a dialogue with the victim and try to make things right?

The only way to solve conflicts without recurring to force is dialogue and dialogue requires a confrontation of reasons and arguments.

The refusal to enter a dialogue shows a contradiction:

- to rationally refuse the need of dialogue one must use the structure of dialogue (see, i.e., Habermas);
- an offender which refuses the necessity of a dialogue about the situation that qualifies him as an offender potentially accepts any act of power against him, since he dispenses the legal order with providing a reason to its punitive reaction (i.e., a limit, a measure).

The question at stake, then, is: what kind of rational control can we apply to consensual models of conflict resolution? (if we agree, of course, that the mere presence of an agreement does not prevent from arbitrary solutions).

How can we be sure, in facts, that the agreement reached the roots of the conflict, met the needs of the victim/offender/community? Do we have to postulate, instead, that the only presence of a consensus guarantees it?

The question is all but abstract, because it helps us to understand that also restorative practices seem to require (at their base and during their development) some forms of 'cognition' (verification of facts/logical control of argumentations/adequacy of claims-requirements).

This leads me to a statement that I found in an essay by Albin Eser: opening to a more dialogic and participated form of conflict management requires that "parties be involved - in a clearer and stronger way than ever before - in the research of the truth, as well as in forming the decision". (see Eser 1998).

Eser underlines a relationship - that nowadays could even not meet a high consensus - between truth and mediation. I think that this is the line that can help us to avoid many potential dangers of negotiated justice, on one hand, and on the other hand the limit of reducing mediation to a pure psychological-empathical process of communication (which is an ingredient but not the whole essence of RJ).

Such a point is all but a sterile academic question: the shadows of plea bargaining-types seem in facts to re-emerge in some kinds of restoratively-inspired practices. I am thinking in particular about those legislations which introduced VOM as an alternative to trials by stating the public prosecutor in the role of 'gate-keeper'.

The alternative would be between:

mediation → *reparation*

and

incrimination → *trial* → *traditional punishment*

Could VOM/reparation become a 'easy way out' from the human/economic costs and risks of a traditional legal process?

What would be the price for this 'way out'?

- Renouncing to self-defence?
- To contesting a yet-to-be-proved accuse?

A choice that could be convenient for some offenders, too, for which entering a negotiated reparative process could be seen as 'paying the price' for their crime without being exposed to traditional punishment methods.

Could this leave aside the attention to persons and needs (of victims but also of offenders) that so strongly characterized the rise of RJ's claims?

Along this path, the possible (dangerous) consequences could be the following:

- a. process/trial (with their coercive structures) become a way to induce to compromise;
- b. admission of responsibility, if seen as the premise for entering the alternative track of mediation becomes a 'technical requirement' for accessing forms of mild justice. Will this admission also allow a 'taking responsibility', a real understanding for the offender?
- c. Mediation and RJ remain alternative tracks to traditional trials but this way then there is the risk (see Walgrave 1999) that the restorative lens remains completely outside the traditional justice system (which remains in lack of legitimacy, of humanization, but still appears to be useful for its 'persuasive' function, for inducing people to enter informal processes of conflict resolution).

(But.. if we still need the sword of the traditional justice to persuade people to enter mediation.. RJ issues have remained at the borderline of criminal justice - as Walgrave would say, in a reservoir!).

FINAL QUESTION: can mediation be something more than an empathic communications which tends to obtain a 'settlement' between conflicting wills?

If we consider the classical origin of mediation as a word and as a concept we would discover two interconnected dimensions:

- Mediation: putting a 'medium'. By that it creates parties (they are partial only when a medium shows that they are parties); prevents their self-absolutising attitude; helps the restart of a communication, because it breaks the me-or-you conflict;
- By putting parts in communication/dialogue (if the communication implies a higher level of mutuality), it also requires from parties to express their reasons and to confront them in a rational way (although emotions can have a space in this).

The presence (and the role) of the mediator, his being a third subject (lacking of the power of taking a final decision of the controversy) is finalised to help showing "which principles, facts, statements a party must accept in order to make his/her claim rationally acceptable, logically valid not only for him/her but also for others", at least for the parties involved (cfr. Fuselli 2001)

The mediator has no power to decide but helps showing what's rationally acceptable or not in the parties' argumentations and claims:

1. Parties who are involved in this process are honoured as responsible beings, since this structure promotes their capability of responding (taking responsibility) and providing reasons to their behaviour;
2. The problem of method, the role of rational control, becomes vital in mediation.

It is not enough to reach accepted solutions, but acceptable ones!

I believe that here classic rhetoric/dialectic might help in outlining a method of rational control, since, as the classics taught to us, by receiving Socrates' immortal lesson: "it can be called 'acceptable' only the idea that cannot be critically denied, if not by getting to contradictory and violent outcomes".

References:

- AA. VV.¹, *La giustizia contrattata, dalla bottega al mercato globale*, a cura di S. Mocci, Napoli 1998
- AA.VV. *Lo spazio della mediazione. Conflitto di diritti e confronto di interessi*, Milano 2003
- AA.VV., *Diritto penale, controllo di razionalità e garanzie del cittadino*, a cura di M. Basciu, Padova 1998
- AA.VV., *Il processo penale negli Stati Uniti d'America*, a cura di E. Amodio e M. Cherif Bassiouni, Milano 1988
- AA.VV., *Patteggiamento allargato e giustizia penale*, Torino 2004
- AA.VV., *Relational Justice: Repairing the Breach*, a cura di J. Burnside e N. Baker, Winchester 1994
- ACKLEY G., *Plain Talk about Plea Bargaining*, in "Pepperdine Law Review", X, 1/1982
- AUERBACH J.S., *Justice without Law?*, New York 1983
- BALDWIN J. - MC CONVILLE M., *Negotiated Justice*, London 1977
- CANNITO M. - ZEHR H., *Una Prospettiva di Speranza: La Giustizia Rigenerativa*, in "Satyagraha" 4/2003, pp. 83-96
- CAVALLA F., *Dalla 'retorica della persuasione' alla 'retorica degli argomenti'. Per una fondazione logica rigorosa della topica giudiziale*, in AA.VV., *La retorica fra scienza e professione legale*, a cura di G.A. Ferrari e M. Manzin, Milano 2004,
- CAVALLA F., *Retorica giudiziale, logica e verità*, in AA.VV., *Retorica, Processo, Verità*, Padova 2005, pp. 1-100
- CAVALLA F., *La pena come riparazione*, in AA.VV., *Ripensare la Pena* (a cura di F. Zanuso e S. Fuselli), Padova 2004, pp. 1-100;
- COGAN H. G., *Entering Judgement on a Plea of Nolo Contendere. A reexamination on N. Carolina vs Alford and some Thoughts on the Relationship Between Proof and Punishment*, in "Arizona Law Review", 1975
- COSI G., *Mediazione: un'alternativa al giudizio*, in *Id*, *La responsabilità del giurista. Etica e professione legale*, Torino 1998
- DAMASKA M., *Negotiated Justice in International Criminal Courts*, in "Journal of Criminal Justice", 2/2004
- ESER A., *Giustizia Penale 'a Misura d'Uomo'. Visione di un sistema penale e processuale orientato all'uomo come singolo e come essere sociale*, in RIDPP 11/1998
- EUSEBI L., *La pena "in crisi". Il recente dibattito sulla funzione della pena*, Brescia 1990
- FERRUA P., *Contraddittorio e verità nel processo penale*, in *Id*, *Studi sul processo penale, II, Anamorfosi del processo accusatorio*, Torino 1992
- FUSELLI S., *Processo, pena e mediazione nella filosofia del diritto di Hegel*, Padova 2001
- LANGBEIN J. H., *Torture and plea bargaining*, in "University of Chicago Law Review", XLVI, 1978
- MAIELLO V., *Fuga dalla sanzione e postmodernità penalistica*, in AA.VV., *La giustizia contrattata. Dalla bottega al mercato globale*, a cura di S. Mocci, Napoli 1998
- MANNOZZI G., *Commisurazione e negoziato sulla pena nell'esperienza statunitense: spunti di riflessione con riferimento alla legge n. 134 del 2003*, in AA.VV., *Patteggiamento Allargato e Giustizia Penale*, Torino 2004

¹ meaning ,numerous authors exceeding six - according to the Italian quotation protocol

Report of the fifth conference of the European Forum for Restorative Justice, *Building restorative justice in Europe: cooperation between the public, policy makers, practitioners and researchers*, Verona, 17-19 April 2008

PERONI F., GIALUZ M., *La giustizia penale consensuale. Concordati, mediazione e conciliazione*, Torino 2004

VOGEL M. E., *Coercition to Compromise: Plea Bargaining, the Courts and the Making of Political Authority*, New York 2005

JOHNSTONE G., *Restorative Justice. Ideas, Values, Debates.*, Cullompton 2002

WALGRAVE L., *La Justice Restaurative: à la recherche d'une théorie et d'un programme*, in "Criminologie", n. 1/1999, vol. XXXII, pp. 8-29

WEITEKAMP E. - KERNER H.J., *Restorative Justice: Theoretical Foundations*, Devon 2002

ZANUSO F., *A Ciascuno il Suo. Da Immanuel Kant a Norval Morris: oltre la visione moderna della retribuzione*, Padova 2000

ZANUSO F., *Giustizia riparativa e mediazione: un modello classico*, in: AA.VV, a cura di G. Mannozi e F. Ruggieri, *Pena, riparazione, riconciliazione*, Como 2007, pp. 37-62.

ZEHR H., *Changing Lenses. A New Focus on Crime and Justice*, Scottsdale 1990 (e, III ed, Scottsdale 2005)

ZEHR H., *The Little Book of Restorative Justice*, Intercourse (Pennsylvania) 2002

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How far can and should RJ distance itself from criminal justice?

Presented by: Martin Wright (U.K.)

Chair: Marko Bosnjak (Slovenia)

Many advocates of restorative justice see it as a new philosophy of justice, based on reparation and dialogue. To the extent it had been implemented, it has shown very promising results: the great majority of victims are satisfied, offenders feel that the method is fair, and re-offending rates as good or better in almost all cases. But in some countries restorative justice is being put into effect in a very piecemeal fashion, omitting many of the features that the full-blown philosophy would require: for example, victims are often not involved, or if they are, they are not empowered. Some do not involve members of the public. The workshop will invite participants to take on the roles of researchers, practitioners and policy-makers, and explore how they could work together to consider the uneasy relationship between restorative justice and the established criminal justice system. Can they be combined, or is there a fundamental division between them? An alternative model will be considered in which the service would be provided by a network of voluntary organizations, with an ethos and standards governed by a national NGO. It has been suggested that such model would inevitably remain marginalized - can that be overcome, or would it be a price worth paying for holding to the core restorative principles? Cases which could not be dealt with in this way would have to go to the conventional system; is it conceivable that it too could, in time, operate on restorative lines, in 'restorative prisons' as John Blad has called them?

Martin Wright studied modern languages (M.A., 1954) at the University of Oxford, and obtained a PhD in criminology at the London School of Economics in 1990. He has been librarian at the Institute of Criminology, University of Cambridge; director of the Howard League for Penal Reform; and policy officer for Victim Support. He is a senior research fellow at the Faculty of Health and Life Sciences, De Montfort University, Leicester. He was a founder member of the European Forum Restorative Justice and until 2006 a member of

the board, and is currently a board member of the Restorative Justice Consortium. He is a volunteer mediator in Lambeth, south London. Publications include *Making good: prisons, punishment and beyond* (1982, reprinted 2008), *Justice for victims and offenders: a restorative response to crime* (2nd ed. 1996), and *Restoring respect for justice* (1999, 2nd ed. 2008). He has an honorary

Discussion (Federico Reggio and Martin Wright) (notes by Martin McNeese)

Concerning emotions Martin Wright pointed out that a Canadian sentencing circle decided to make a shoplifter wear a dunce cap and sign stating “*I am a thief*” while standing at the entrance of the store he stole from. Clearly the sentencing circle allowed its emotions to get in the way and focused on humiliating instead of rehabilitating the offender. Federico Reggio added that a community’s feelings can be manipulated and whipped up into a frenzy feeding on itself and the emotions involved, instead of focusing on repairing the damage done. These emotions can lead to “destroying” instead of “rehabilitating” a offender, the victim, and the community. Federico Reggio gave the example of the crowd which ordered the judge Pilate “free Barabas” (a known terrorist) and “kill Jesus” (a known pacifist); therefore crowds do not exercise rational control and a crowd is not a rational being.

According to Federico Reggio lawyers do not like mediation very much because of their duel / shoot-out mentality.

Federico Reggio also points out that during an RJ mediation that we cannot deny that emotions will be involved but we should not get caught up with these emotions. The scope of RJ is not psycho-therapy but it is to mediate the conflict. Therapy is something that the victim (and offender) may need prior to or following mediation, but the mediation session is not a psychotherapeutic session.

Federico Reggio also points out that for a process to be fair I need a rational process to measure it. Martin Wright, a panellist, points out the following:

- Legal reason versus Mediation reason
- Legal culture versus Mediation culture

During the session McNeese asked Martin Wright to go into further detail on the above two points and Martin Wright explained that: The legal reason asks:

What law was broken - who did it - how should they be punished?

The RJ / Mediation reason asks:

What happened - who was hurt - how can amends be made (how can it be repaired)?

In legal reasoning certain assumptions are being made starting from someone must be guilty; therefore, someone must be punished. Wright’s question, “Which approach do you prefer?”

Conceptual clarity and its impact on RJ policies

Presented by: Ian McDonough (U.K.)

Chair: Bas Van Stokkom (The Netherlands)

This workshop showed how different concepts and models of intervention are easily confused by policy makers and practitioners. We will argue that confusion between Restorative Justice and Mediation is commonplace and can have unjust and inappropriate results.

We are concerned to make sure both Restorative Practitioners and Mediators are clear about the purpose of their intervention in situations which involve conflict. Many practitioners still consider the terms "restorative justice" and "mediation" to be synonymous or interchangeable. In this workshop, we will argue that there are good theoretical and practical reasons to question this assumption, and that a clear understanding of the differences between Restorative Justice and Mediation is essential for those who are evaluating, funding or commissioning work in this field. Above all, clarity is critical for practitioners, as confusion between the two processes could potentially harm those with whom they are working. This is particularly important in schools where children and young people can be involved both as participants in the process and as facilitators (i.e. peer mediators)."

Ian McDonough is Sacro's Mediation Adviser and manages their Community Mediation Consultancy and Training Service, which assists local authorities in providing mediation services. He is an experienced mediator and trainer and a previous Chair of both the Scottish Mediation Network and Mediation U.K.

Workshop notes by Martin McNeese

Mediation has different meanings in different languages and different cultures. The Anglo-Saxon culture is very adversarial (including the media) and this is diametrically opposed to the RJ approach of problem-solving. According to Sir Pollard, quite contrary to popular belief, “the more serious the crime, the better RJ works.” Restorative conferencing is important for conceptual clarity amongst researchers, practitioners, and policymakers.

The difficulties RJ faces are the following:

- A) Complexity.
- B) Pre-conceived notions, ideas, and stereotypes (i.e. anything but punishment for a crime is “getting off”).
- C) RJ is counter-intuitive.
- D) Facts versus feelings and emotions.
- E) Vengeance is “sexy”.

(Note by McNeese: Punishment comes from the Latin “punire” which comes from the latin “poena” or “penalty” in English (δίκη in Greek). But punishment and vengeance are not necessarily the same. In the Judeo-Christian texts, the Supreme Being says “ ‘vengeance’ is mine” and does not say “ ‘punishment’ is mine,” so punishment is not synonymous with vengeance, and vengeance is not to be exercised by human beings. Therefore, other forms of “punishment,” other than “vengeance”, should be sought. Aristotle in his writings proposes “listening to reason” in his account of praise, blame and the voluntary. According to Aristotle praise and blame are important for the prospective purposes of behavioural improvement and correction and for the retrospective purposes of moral responsibility concerning what a person deserves for what he or she has done. One is forward looking, one is backward looking. In Aristotle’s the *Nicomachean Ethics* he points out the differences between parts of the soul and comments that we praise morally strong and morally weak men. Therefore, all of us are strong and all of us are weak, and all of us deserve praise, blame, and must bear responsibility for our actions but that does not equate to giving someone a blanket license to exert vengeance upon us every time we are weak. What it does mean is that men and women need to be treated with a holistic approach, an RJ approach that praises our strong points, and builds from them to overcome our points to make us all stronger people, re-educating offenders and treating victims with empathy and professional care. If you make the offender weaker than he is and do not help heal the victim, you will have two losers in society and that makes three loses because the third element is the community and the community is the weaker for it. If you only treat the victim you have one healed person and one broken person, so society still loses. Only a holistic approach that treats victim and offender will lead to a society that is healthy.)

Problems of conceptualization: RJ and peace-making

Presented by: Rob Mackay (U.K.)

Chair: Bas Van Stokkom (The Netherlands)

This presentation addressed the question: 'What do we mean by restorative justice', and what happens when we survey the answers.

This simple question has a range of answers, many of which are, apparently, mutually contradictory. It does, however, expose real differences within the restorative justice movement.

The author is not interested in trying to resolve the problems by coming up with a new definition, but is instead concerned to explore common underlying themes which, in his view, lead to a more powerful conceptualisation of what is going on in the 'restorative justice' movement. He argues that the most satisfactory account of what is happening is that *restorativistas* are, at bottom, concerned with peacemaking. The author maintains that 'restorative justice' is a limited but valuable concept within the arena of legal action, but that peacemaking, underpinned by a 'constitutive' principle of justice, makes greater sense of the plurality and heterogeneity of 'restorative' practice and thinking.

Rob Mackay set up the first victim-offender mediation project in Scotland. He has worked on a theoretical basis for restorative justice using legal and ethical theory. He was Vice-chair of the COST Action on 'Restorative Justice - Developments in Europe', and convenor of the Action's Theory Working Group. He is Chair of Restorative Practice Scotland. He is an Honorary Research Fellow at Perth College, Scotland and Youth Justice Co-ordinator with Perth and Kinross.

Mediation in penal matters: Strengthening the public aspect

Presented by: Bas van Stokkom (the Netherlands)

Chair: William O'Grady (Canada)

Restorative approaches seem to underestimate the public dimensions of much crime, and are arguably more individualistic than traditional approaches to crime. Crime is understood primarily as a matter between the offender and the victim, rather than an offence against society as a whole. Restorative justice reflects a pronounced anti-statist ethos and tends to privatise the response to crime: only the perspectives of the immediately interested parties are deemed relevant.

The procedure should leave decisions primarily to the stakeholders; individual offenders and their victims "own" their case. What matters is not how culpable the offender is, but the particulars concerning how much the victim has been hurt.

To enlarge the societal status of restorative justice, instruct the public and incorporate principles of law, it might be worthwhile to strengthen the public aspects of mediation procedures, and extend the scope of public aspects in mediation in penal matters. I will not plea for pr-strategies, but give some hints how to rearrange mediation, in such a way that the broader public can take notice of the fruits of (discussing) reparation.

1. Socioprudence

One possibility is to improve extern publicity: mediation outcomes could be published. Analogous to jurisprudence it could develop a 'socioprudence', informing about social and pedagogical aspects of the case, the agreed redress or restorative obligations and possibly reasons why the agreement is not or only partly accepted (Blad 2004).

Socioprudence could illustrate how the principles of social conflict resolution are adopted in concrete cases in diverse mediation spheres (neighbourhood; social work; youth work; schools; hospitals; nursing; geriatric care etc.) and in which respects these principles are compatible with other principles (learning; care; minimising harm; etc.). Socioprudence illustrates whether social sanctions and compensation do fit the principles of proportionality and subsidiarity. The case histories function as instruction material in social conflict resolution training & education.

I think no proponents of rj would criticize this option, because the mediation principles of voluntariness and confidentiality are warranted.

2. Community justice

A second strategy could be targeted on broadening restorative justice settings to the rehabilitation of offenders and giving them social support, as is done in community justice in some states in the US (and less democratic: referral orders in England). In these restorative settings layperson participants and volunteers living in the same neighbourhood of the offender, are invited to join a reparative board (or sentencing panel), to determine the offender's probation contract, and to support offenders in carrying out community sanctions. In this way citizens are becoming involved in, and responsible for, the lives of young offenders. They function as co-producers of sanction regulation (Schiff & Bazemore 2001).

This democratization of social control is often criticized (power imbalances; giving sanction-discretion to local neighbourhoods; etc.). A rj hardliner as Paul McCold (2004) complains that this development leads to paradigm muddle: neighbourhood volunteers ('civic minded strangers') do not own the incident and 'steal the conflict from those most directly affected'.

They work together with government services and professionals and adopt their punitive habits.

My response would be: community justice is a fruitful challenge to pull professionals into the social world of the involved parties, let them leave their offices and set up social support networks, and bring together significant persons around the offender. So community justice is an opportunity to break through bureaucratic management and ‘humanize’ the work of the criminal justice professional, directing it towards reparation.

3. Public norm confirmation

Mediation in penal matters occurs in a confidential, private setting, but at the same time it is regulated by public law. It generally contains clear public aspects such as the presence of a police officer (or an other official), while the persecutor or judge ratifies the agreement (and if necessary corrects disproportional obligations, for instance by adding a sanction) (Walgrave 2005).

One might reason that - contrary to negotiating reparation - morally addressing the offender should be a public act. The victim’s justified resentment and the reasons for it may provide significant information to the community, especially about the human impact of the crime. The victim’s ‘truth’ is not merely a subjective report on the harm suffered, but a report on the status of the community as a moral order.

This does not mean we should consent with retributive theorists, when they say that the negotiations during restorative conferences should be constrained by public understandings concerning the blameworthiness of the criminal conduct (Von Hirsch et al 2004). In doing so they tend to depersonalise crime-handling: justice on this account is concerned with abstract wrongs and not with persons. This focus on abstract wrongdoing fails to instruct the public. Above all through the co-experience of personal tragedies the importance of public norms gets clear. For that reason the participants, the harmed victim and the repentant offender, must be given a face. Personal testimonies lend themselves to identify with; they allow recognition. By contrast, the judge’s censure has the same ills as any “rhetoric from above”: moralising messages without much opportunities of “living through”.

So, whereas in traditional judicial processes the crime is denounced in a formal, impersonal way, restorative conferences allow forms of personal communication between the stakeholders involved. The victim, his or her supporters, but also the offender’s family and friends may act as powerful denunciatory agents. Through communicating “private” harms and feelings of indignation they contribute to public norm-confirmation.² It is also acknowledged that victim satisfaction and victim empowerment actually constitute a part of the public interest.

4. The public apology

Symbolic reparation, it seems, will only be satisfying when offenders apologize sincerely and are genuinely moved by their victim’s plight. Thus the benefits of the restorative justice conference are conditional on the offender’s emotional engagement with the process. But what happens when offenders do not feel much regret, for instance because they have another view on the offence or because they think they are unfairly treated? Apologizing may become a strategic ploy, one in which the offender does not have a true emotional involvement. If the apology is tied to discussions about redress, it easily gets the contours of a ‘buy off’.

² A possible problem is that many victims do not really want to express these feelings during restorative conferences with serious juvenile offenders (Vanfraechem, 2005).

Some theorists try to avoid these difficulties by developing 'proofs' of sincerity. This claim to detect signs of sincerity raises the spectre of 'forced confession'. It would be both impracticable and insulting if we would search for conclusive evidence of the person's sincerity before we accepted the apology. Offenders shouldn't be required to express attitudes they do not believe in.

To prevent strategic use of expressing regret the apology could be transferred to a public setting. After all, the victim, supporting persons and the public want a validation that the offender's behaviour was unacceptable. A formal apology, read aloud in public and containing specifications, could better meet the expectations of the victim and the public. Discussions whether the apology was sincere or not can be avoided.

Apologies have an important role to play and many victims adhere to its moral message. Philosopher Christopher Bennett (2006) has formulated an elegant (and provoking) way out. He proposes to arrange a formal, public ritual after the conference, in which the offender reads aloud a written apology. This text contains concise specifications that may better meet the expectations of the victim, other participants and the community. Public phrases read by the offender as 'I regret' and 'I apologize' are not necessarily reports of sentiments, but speech acts aiming at moral persuasion. Of course these words might have effects on the sentiments of the audience. But the function of the ceremonial expression of apology is to communicate a moral viewpoint impersonally.

In sum, after the parties have decided which reparation-obligations the offender will have to take upon himself, the case should be lifted out of the shadow of the law. The agreement could be expressed publicly and thus could produce public effects (like general prevention). This is what happens in New Zealand: the meeting of the juvenile court confirms the agreement and the compliance with the agreement is publicly assessed by a judge in a court session later on (Blad 2004).

Literature

Bennett, Christopher 2006, Taking the sincerity out of saying sorry: Restorative Justice as Ritual, *Journal of Applied Philosophy*, 23(2), 127-143.

Blad, John (2004), Genoegdoening en rechtshandhaving in herstelrechtelijk perspectief, *Delikt en Delinkwent*, pp. 369-387.

Cavadino, Michael en James Dignan (1998). Reparation, Retribution and Rights, in A. von Hirsch en A. Ashworth (eds.), *Principled Sentencing. Readings on Theory and Policy*. Oxford: Hart, 348-359.

Community Justice, *Contemporary Justice Review*, 7 (1), march 13-35.

Schiff, Mara and Gordon Bazemore, Dangers and Opportunities of Restorative Community Justice: A Response to Critics, in: idem, *Restorative Community Justice*, Cincinnati: Anderson.

Vanfraechem, Inge, 'Evaluating conferencing for serious juvenile delinquency', in Elliott, E. and Gordon, R. (eds.), *Restorative Justice: emerging issues in practice and evaluation*, Cullompton, Willan Publishing, 2005, 278-295.

Van Stokkom, Bas 2008, The expressive function of restorative punishment. A public interest perspective, in R. MacKay et al. (eds.), *Images of Restorative Justice Theory*, Frankfurt: Polizeiwissenschaften.

Von Hirsch, A., Ashworth, A. and Shearing, C., 'Specifying Aims and Limits for Restorative Justice: A "Making Amends" Model?', in von Hirsch, A. et al (eds.), *Restorative Justice & Criminal Justice. Competing or Reconcilable Paradigms?* Oxford, Hart Publishing, 2003, 21-42.

Walgrave, L., 'Retributivism and the Quality of Life: A Reply to Duff', in Claes, E. Foqué, R. and Peters, T. (eds.), *Punishment, Restorative Justice and the Morality of Law*, Antwerp - Oxford, Intersentia, 2005, 145-156.

Private versus public features of restorative justice: the cases of terrorism and intimate partner violence

Presented by: Antony Pemberton (The Netherlands)

Chair: Sonia Sousa Pereira (Portugal)

One of the recurring debates within restorative justice concerns the question is how to reconcile the public law qualities of restorative justice with the private micro-processes concerning victims and offenders. Bas van Stokkom's paper will suggest a possible way of structuring the process in a way that will extend the possibilities for restorative justice to fulfil its public function, while attempting to keep the beneficial qualities of the private setting.

This paper makes three points. First of all it will discuss some main issues whereby the private and public functions of victim-offender encounters may be at odds with each other and will question the wisdom of striving to meet both these functions at the same time, in particular in the case of more serious and violent offences. Like Van Stokkom's paper the effects of apologies will be discussed. That will in the second place lead the presenter to assert that in these cases it may be preferable to view restorative justice as a complement to criminal justice rather than an alternative.

Thirdly the discussion of the public and private features of restorative justice may be furthered by examining different crime contexts that have inherently public or private features. In the final section of the presentation the presenter will reflect first on terrorist acts, which have a highly public dimension, due to the fact that the act was committed to scare, frighten or threaten a wider audience rather than the direct victim. Second it will discuss the issue of intimate partner violence, which by contrast has more private features. The presenter will contend that these differences in crime contexts should also affect the positioning and structuring of restorative justice procedures in general, but in particular their relationship to its public and private features.

Antony Pemberton MA (1975, London) studied political sciences at Nijmegen University in the Netherlands. Previously he was a senior policy officer for Dutch Victim Support and, from 2005 onward, scientific adviser. He has been involved in restorative justice for over five years now as programme manager for DVS activities in this field, as a representative of the European Forum for Victim Services on this topic and on the editorial board of the Dutch-Flemish Journal for Restorative Justice. He has published regularly on the position of victims within restorative justice and recently cooperated in the EU-funded Victims of Terrorism project promoted by the European Forum for Restorative Justice. Currently Antony is senior researcher at the International Victimology Institute of Tilburg University. Besides victims in restorative justice, his research interests there relate to the needs of victims, victims of terrorism, risk-assessment and management for victims of domestic violence and generally the (social) psychology of victims within the criminal justice procedure.

Restorative Justice for Victims of Terrorism - Policy Implications

Presented by: Ines Staiger (Belgium)

Chair: Borbala Fellegi (Hungary)

In this workshop, the possible role of restorative justice for victims of terrorism was discussed. A short outline of restorative justice principles and values for a framework of restorative justice at the micro-, meso- and macro-level was presented. Against the background of restorative justice processes in cases of other forms of serious violent crime, like victim-offender mediation, family group conferencing, circles and victim impact panels, the relevance of these practices in the context of terrorism is analysed. Comparable situations with terrorism (such as hate crime and large-scale conflicts) are highlighted, and the specific dimension of terrorism is addressed. Finally, two special types of terrorism (that is suicide and religious terrorism) are discussed in order to learn from these approaches for the applicability of restorative justice in cases of terrorism. The main focus is placed on primary and secondary victims of terrorism. Further, additional focus is put on the impact of mass terrorist victimisation on vicarious victims. Examples of restorative justice practices at the micro-, meso- and macro-level are presented, on the basis of which a conceptual framework for restorative justice practices for victims of terrorism in the EU shall be developed with the input of the workshop participants.

Ines Staiger works as a researcher and project manager of the EU project "developing standards for assistance to victims of terrorism" at the Catholic University of Leuven, Belgium and the European Forum for Restorative Justice. She is a jurist and holds an M.A. in European Criminology.

Workshop notes by Borbala Fellegi

The presentation by Ines Staiger discussed the possible role of restorative justice for victims of terrorism. Firstly, an outline of restorative justice principles and values for a framework of restorative justice at the micro-, meso- and macro-level was presented. Secondly, the relevance of restorative practices in the context of terrorism was analysed. Comparable situations with terrorism (such as hate crime and large-scale conflicts) were also highlighted, and the specific dimension of terrorism was addressed. Finally, two special types of terrorism - suicide and religious terrorism - were discussed in order to learn from these approaches for the applicability of restorative justice in cases of terrorism. The main focus was placed on primary and secondary victims of terrorism. Additional focus was put on the impact of mass terrorist victimisation on vicarious victims. Examples of restorative justice practices at the micro-, meso- and macro-level were presented.

Following the presentation, participants questioned about whether there are really possibilities to offer any restoration for victims of terrorism. If so, how many meetings should take place and in what ways are such encounters followed up. Also, there were questions about what an offender can gain from such an encounter.

The presenter mentioned some examples that show: primary or secondary victims of terrorism do have certain questions to offenders, such as the latter's motivations, feelings towards their offence and other details of the act. They also like sharing some individual consequences of the terrorist attack and they often have a need to hear accountability and responsibility-taking from the offender. Consequently, such encounters are primarily for the interests/needs of victims. However, sometimes it can help offenders also in realising the impact of their act, and if they do feel remorse, they might get a chance to take responsibility, accountability and can express to the victim their circumstances at the time of the offence. If they do not consider their act as unacceptable - i.e. they still think it was necessary to make those offences to satisfy a more significant goal - they still might feel that the victim has the right to ask questions and meet the offender in person.

An important challenge in any restorative encounter in case of terrorism that even though the offender might be willing to disclose some of his feelings and the circumstances of the offence, they hardly can mention any detail about the terrorist organisation behind them, therefore, such information sharing will necessarily remain limited.

Discussion

During the discussion the participants highlighted that even though the state has to react with punishment in case of any terrorist attack, it is also important that the state provides the possibilities for the victims, if they wish to, to participate in restorative programmes and ask their questions as well as share their feelings directly with those responsible for the offence.

It is also important to emphasise that restorative justice can only be offered to help victims; however, it is important to note that this approach cannot be applied as an instrument to tackle terrorism.

The politics of restorative justice in juvenile justice reform: a comparative analysis of two transitional states

Presented by: Kerry Leigh Clamp (U.K.)

Chair: Borbala Fellegi

Both Northern Ireland and South Africa, in the wake of their respective political transitions, have formulated proposals for reform of their youth justice systems based upon restorative principles, which have largely been well received in Northern Ireland, yet have struggled to be implemented successfully in South Africa. The perceived purpose of conducting this investigation is that while restorative justice has been successfully implemented in a number of countries and cultural contexts, there still remains an unanswered question about the transferability of the approach, and the conditions under which it is likely to take root within different jurisdictions.

Northern Ireland can be seen to have had a relatively straightforward policy formulation and implementation strategy through the Criminal Justice Review which was established as a result of the signing of the Belfast 'Good Friday' Agreement in April 1998. The Criminal Justice Review Group commissioned a report on restorative justice and its applicability in Northern Ireland, which led to a recommendation that restorative and reparative justice should become a central part of the criminal process for juveniles (Dignan and Lowey 2000). After an initial consultation period and the publication of an implementation plan, many of the recommended changes to the system outlined in the Review were passed into law in the form of the Justice (Northern Ireland) Act 2002 (Campbell et al 2005).

South Africa on the other hand has had a somewhat more *ad hoc*/sporadic approach to policy formulation, and practice is arguably going ahead of policy with regard to the use of restorative justice in criminal matters involving children. Despite a completed Child Justice Bill being tabled in Parliament in 2002 which was subsequently debated by the Portfolio Committee on Justice and Constitutional Development in 2003 and the fact that the Bill was at an advanced stage of the Portfolio Committee deliberations, after the general elections of 2004, Parliament busied itself with other legislation. No further discussions on the contents of the Bill occurred in Parliament until January 2008.

This investigation found that there are clear similarities and differences in the process of pushing restorative justice onto the policy agenda in both South Africa and Northern Ireland:

Similarities:

A perceived legitimacy deficit within criminal justice institutions, created by many years of conflict, provided an opportunity for restorative justice to take a leading role in reform initiatives. In both jurisdictions, restorative justice can be seen to have 'indigenous' roots - in Northern Ireland through the development of community schemes and in South Africa with traditional justice practices guided by the philosophy of *ubuntu*. However, restorative justice arguably was pushed onto the policy agenda through the inquiring of best international practice: South Africa through the transplantation of restorative practices from other countries by NGOs such as NICRO and in Northern Ireland through the Criminal Justice Review.

Differences:

Immediate issues particular to South Africa include: an unacceptably high crime rate and a society gripped by fear; hyperpunitiveness; a lack of resources; a lack of training or awareness of restorative justice; a lack of interest and cooperation by some government departments; a perception that restorative justice is 'soft' on crime; and finally, an association of restorative justice with diversion. Arguably, therefore, the focus by representatives of the criminal justice system in South Africa on law breaking rather than

community making (Samara 2007) is directly hampering the effective development of official restorative justice policy.

We often speak of the 'institutionalisation' of restorative justice which arguably implies 'barriers and limits the process as one happening from the top-down' (Skelton 2007: 242). However, this investigation has demonstrated that it is a mistake to imagine that there is a linear relationship to the formalisation of restorative justice policy and practice. In other words, the experiences of both Northern Ireland and South Africa has demonstrated that restorative justice is not a straightforward path from ideological conception, to policy prescription and then to implementation (Samara 2007). One may conclude that the transformation of rhetoric into action - in the form of legislation and subsequent implementation - is influenced by many factors that are particular to the jurisdiction in question.

Kerry Leigh Clamp is currently studying for her doctoral thesis at the University of Leeds in the United Kingdom. Her research considers the factors that promote and stunt the development of restorative justice policy in three transitional jurisdictions, namely: Northern Ireland, South Africa and the Czech Republic. Very little is known about what makes jurisdictions receptive to restorative justice and her research aims to fill this gap of knowledge.

Workshop notes by Borbala Fellegi

The presentation by Kerry Lamp discussed the transferability of restorative justice in various cultural and political settings. The presenter mapped the conditions under which restorative justice is likely to work in different jurisdictions. As the presenter pointed out, within many transitional societies, criminal justice reform plays a pivotal role in helping to foster reconciliation and peace-building. Both Northern Ireland and South Africa, in the wake of their respective political transitions, have formulated proposals for reform of their youth justice systems based upon restorative principles. The presentation compared and contrasted the attempts to roll out these reforms in both jurisdictions, and attempted to unpick some of the reasons why they have largely been well received in Northern Ireland, yet have struggled to be implemented successfully in South Africa.

Discussion

Questions and the discussion by the participants mainly related to the issue of trust and community cohesion. It was emphasised that if a community does not trust the state, i.e. the government cannot be considered legitimate in the eyes of the citizens, it is highly difficult to implement community-based restorative justice from top-down. Consequently, bottom up and top-down approaches concerning the implementation of restorative justice need to be well-balanced in any countries, especially in those societies that have recently been in a transition phase. It was also highlighted that the cultural, historical and political background of any country needs to be considered while implementing restorative justice. In the highly complex sociological process of how to integrate the restorative principles into a country's judicial system, the best role for the state is to act as a facilitator amongst all the stakeholders motivated in stimulating the implementation and application of restorative processes.

Mobilising human rights to promote restorative justice

Presented by: Ann-Claire Larsen (Australia)

Chair: Marian Liebmann (U.K.)

Restorative justice has made small in-roads into the legal land-scape in Australia. This paper uses a restorative justice conference to illustrate that developments in restorative justice at the international human rights level have been under-utilised in Western Australia in the bid to amend harms done by offending behaviour. A restorative justice attempt involving the police as offenders is explored to highlight problems in not adhering to a set of principles. Using an example of a restorative justice conference involving 50 offending police officers, an opportunity for closure was lost for all involved.

Ann-Claire Larsen is a sociologist who has a keen research interest in human rights, which she teaches at Edith Cowan University in Western Australia. She is adding another dimension to her academic work by studying law.

Workshop notes by Anniek Gielen

In the beginning Ann-Claire Larsen shortly points out some general aspects of human rights: the UN has no prescription of how to conduct restorative justice, the UN gives guidelines, what's happening at the international level about RJ and human rights?

Ann-Claire proceeded to give a restorative justice example. First the example is presented in all its aspects: It happened a few years ago in Australia. Two young men travelled in the desert with a 30 year old truck. They were ill prepared for the travel. They died in the desert. Their bodies were found and the police came to examine everything. A report was written and all the images were added. Over 600 policemen saw the report and all the images. Some of them deleted the documents, but others did send them to other policemen, people. Suddenly the pictures appeared on a pornographic website. The family was very angry and wanted an explanation from the police.

Over 50 policemen were involved in the case. Originally the police was very punitive but now it was different. With so many involved policemen and the high media profile, they wanted to stop victim proceedings. They moved to a less punitive way. The decision was to do a restorative conference (family and involved policemen). → this change is the setting she is presenting.

The conference was held in a great theatre. Everything was recorded by the media. But a few things went wrong:

- some persons of the family spoke about feelings (distressed, angry, ...)
- head of the police describes how angry he was on the officers
- policemen did not say a word, they didn't want to speak: BREAKDOWN OF THE WHOLE SYSTEM !!!

→ The family was faced with a blank wall. The policemen didn't want to explain themselves. The family felt re-victimised. Since that time: policemen said to be distressed that they were not there voluntarily.

Ann-Claire Larsen summarized that we have to think clearly about all the issues (voluntary, agenda, etc.). Was this a good example? What about the human rights? ... Much can be learned from this case...

Reflections of one small group (involving Norway, Iceland, Spain, Italy and Belgium):

When it comes to the police, they were forced (instructed by the union). It is very strange to do it, because in Iceland they are not involved in cases because they normally are facilitators. Example: when a policeman arrests a person that resists, then it's a minor crime. → Policemen are very open for RJ but not when they are involved themselves, like in the example. They do not like it. → it is strange that policemen think like that because most policemen who did it, liked it. How can this problem, that policemen don't like to be part of a RJ process, be solved? In general and in the Australian case? (first discussion point)

- It certainly should be voluntary. If you are forced it is not good. The example in the session made a big mistake on this.
- If you let policemen share good experiences, it can make the difference. They can motivate each other to be open for it.
- In the Australian example, the meeting could have been better prepared. You had to be sure that the officers were going to speak.
- Also in the Australian example, it was not confidential. Involving the media was not good. Privacy is a human right.
- Another general solution can be that policemen follow a conference, involving an officer, in an other room.

A second discussion point concerned the media. Everybody was not ok by the idea involving the media like that. In the Australian conference the media taped everything and broadcasted it live. What about confidentiality, privacy, ignorance of the public?

- we need a balance between media and the aspects of RJ. For example the media could tape it, but only broadcast it if there was an agreement about it.
- Example Norway: the media taped a conference but with all respect of the participants. The fact that it was private was insured to all participants, unless they gave permission to broadcast it afterwards.

A third discussion point is about the idea that policemen are facilitators. Is it a good idea to have police as facilitator?

- Yes (Iceland) good experiences with it. Very good results.
- It is not very common: they are not social workers. But it's a good idea!
- You have to find the right policeman. Not everybody is suited.

Last, and fourth discussion point, how about human rights? They reflected in the group which human rights have to be considered. Voluntary and privacy are the main issues. These are fundamental and can not be forgotten (like in the Australian example).

Main points of the discussion:

- Agreement that a RJ conference can't be forced.
- Media: don't broadcast like that. You need permission of every participant. (privacy) Broadcasting like this has a very negative impact in the people.
- Preparation is necessary → they have to feel safe.
- Problem with police. Why don't they want to participate? How can we solve this?

Interesting points:

- The Australian example was doomed to go wrong. It was not voluntary and there was a lack of privacy. It's normal that they had problems to speak. And there were no preparations.
- Broadcasting can be good when you do it the right way. Film the meeting and only broadcast when everybody agrees.

- The police had problems: how to change the problem of involving? Prepare well or its will have a negative result. Preparation is fundamental.
- RJ is not to be taken lightly. Certainly because of the problem of re-victimization. The Australian example was wrong. Politics where involved, policemen where forced but also warned to be careful of what they could say.
- Lack of training. Victims were ignored. So there was a lack of trust en professional work.
- Lack of evaluation of this presented case afterwards. Argument in this: so many victims were created by this conference that they left the people alone. No evaluation was done because of this reason.
- The whole package of this conference went wrong. No voluntariness and privacy, media broadcasting it life, political involvement.