



PLENARY PRESENTATIONS



Chair: Siri KEMÉNY (Norway)

1. RESTORATIVE JUSTICE IN CENTRAL AND EASTERN EUROPE: COMPARISONS, ACHIEVEMENTS AND CHALLENGES (*abstract*)

by Mária HERCZOG, National Institute of Criminology and National Institute for Family and Social Policy (Hungary)

The political-economical transition found the countries of the region in very different conditions depending on the former social and political situation in the given society. The region has never been homogenous not only because of the centuries of previous history but because of the history of the last 50 years as well. Therefore it is very interesting and useful in itself to explore the different approaches to the transition, the influence – and pressure sometimes – of the western world such as the international recommendations, agreements, requirements. There are several questions that can and should be raised concerning the current and desired situation in these countries not only in relation to RJ, but to the justice system as a whole just like the overall economical-political system.

Through the adaptation process of RJ we also have to face the challenges of discussing matters as co-operation, non-violent communication, partnership, equal opportunities, power shift etc. Countries have different answers and relations to these issues and the implementation of alternative ways of handling conflicts and crime.

2. DIALOGUE WITH THE PUBLIC – A NEGLECTED ELEMENT OF RESTORATIVE JUSTICE?

by Gerd DELATTRE, Head of the Servicebuero for Victim-Offender Mediation and Conflict Settlement (Germany)

Ladies and gentlemen, dear colleagues.

Before dealing with the pictures you find on your chairs, I would like to introduce myself and the organisation I am representing in a few words: My name is Gerd Delattre and I am head of the Servicebuero for Victim-Offender Mediation and Conflict Settlement in Cologne, Germany. This Servicebuero is an NGO which is mainly funded by the German Ministry of Justice. Its mission is to promote the development of amends in a broad sense as an alternative to punitive reactions to crime.

We try to fulfil this mission mainly in three ways:

- by qualification:
Our one-year in-service training course “Mediation in Penal Matters” has been held for over 13 years now. Additionally we do further qualification for prosecutors and judges.



- by quality assurance:
One example for this field of activities is the development of standards which was achieved in cooperation with practitioners. The fourth amended edition is available now. Another example: the seal of approval for VOM services. It is being issued by the Servicebuero together with the German association for mediators in penal matters.
- by information:
Apart from various publications, one of our tasks is to edit a professional journal three times a year. Every second year we organise the national professional congress "TOA-Forum". Rasim Gjoka, Christa Pelikan and Martin Wright had been keynote speakers and contributed with impressive speeches to its success.

I myself had worked as a mediator in penal matters from 1985 till 1995. I had been dealing with over 1000 cases and tried to reach a conflict settlement. I am pointing this out, because I still take a practitioner's view although I have worked as a trainer of perspective mediators afterwards and my tasks today are those of a functionary – already since almost 9 years. My remarks should be seen from this point of view. It is important to keep in mind that I will talk – and encourage discussion - about impressions and experiences which I got from various talks with colleagues, from visits to other countries and from taking part in several working groups on the European level. These are not meant to be empirically collected data.



Now I would like to explain the pictures on your seats. I am sure you are already curious what is meant by that. I would like to ask you to put the horses and the cowboys in such a way, that the two cowboys are sitting on the horses correctly. Folding or tearing the paper is not allowed!

I am afraid I can only give you little time (1.5 minutes) to find the solution. The organisers and the following speakers would not be happy if we waited till the last of you have found the solution.

You can have a go now! Well, who has found a solution?

Here you can see the solution!



F. K. Sprenger has defined creativity as follows: You are creative when you see the same as others but think differently. And that's the case with these pictures, too. As long as you are sticking to your own thought pattern, you will not be able to find a solution. It is necessary to look beyond the end of one's nose.

We have tried that with the horses and the cowboys in a playful way. Now I would like to try to find out together with you, if what we see and hear is the reality and if there are other facts and other solutions to be found if we look at things differently.



Dialogue with the criminal justice system?

Some months ago I came across a report in EForum Restorative Practices about a survey by Paul McCold. The purpose of this survey was to point out the great differences in how restorative justice and victim-offender mediation is applied in different countries. Here you see his graphic which shows that in Norway victim-offender mediation is applied 10.7 times per 10,000 inhabitants, in Austria it is applied 5.7 times and in France at least 1.5 times.

Maybe out of pure frustration – as you can see, the result for Germany is not very flattering – I took another critical and more thorough look at this diagram. I took the liberty of capturing the results in another, I think more realistic, picture than this diagram.

In this picture you can see the start of the Berlin Marathon. Approximately 20000 persons are represented here. I have included the results of the above mentioned survey by blackening the number of people who got in contact with VOM. In this picture for Germany I have just blackened one person's leg. I am sure, you will find this person very quickly. For Norway, I could completely blacken 22 persons.

Could you tell me, please, which country is meant here? Or here?

I hope it becomes clear now that the differences between the countries are not important but how low in rank restorative justice and VOM is in most countries. The situation of restorative justice in the different European countries is not characterised by great differences but by the fact that restorative justice as such plays a minor or marginal role in the sanction systems of the different countries.

At the beginning of this year the European Forum launched a project under the AGIS programme of the EU. Experts from 8 countries took part and we developed a training module for prosecutors and judges. It was generally agreed that *“the gap between actual and potential use reflects the difference between legislative intentions and the limited understanding by many representatives of the criminal justice system of the role mediation can play.”*

One should bear in mind that we have not started only yesterday with striving towards extending and accepting restorative justice. Countless international seminars and conferences bore the subtext “How to convince the prosecutor?” Countless events for prosecutors and judges have led to some understanding and making use of VOM individually. It is a pleasure to say that some of them became quite enthusiastic about restorative justice. However, I cannot get rid off the impression that the traditional justice system as such, not the individuals, reacts in a more reserved and declining way. Meanwhile I have come to the conclusion that it is an insufficient (*inadequate??*) instrument for selecting suitable cases.

It is right that we have concerned ourselves and pointed out again and again, that nobody should take part in VOM without his/her consent. It is mentioned in many national standards as well as in the Council of Europe's recommendation on mediation in penal matters: *“Mediation in penal matters should only take place if the parties freely consent. The parties should be able to withdraw such consent at any time during the mediation.”* And more explicitly: *“Since mediation has no chance of succeeding unless the parties are willing to participate, voluntary participation is a prerequisite for all forms of mediation. This distinguishes mediation from traditional criminal justice proceedings and indicates that the parties in mediation “own” their case to a large extent. Free consent must be given at the outset. Parties may withdraw their consent at any time. The criminal justice authorities and the mediator should make this clear to the parties before and at the beginning of the mediation respectively.”*

Changing one's perspective one can realise that a big number of potential clients and supporters of VOM and restorative justice actually don't get to this programme because they don't know about its existence or a legal practitioner doesn't take a referral into account - out of varying reasons.

Experiences in my country lead to the assumption that there is hardly any profession which is as resistant towards innovations within the criminal law as the people working within the criminal justice system. Already some years ago, Prof. Klaus Sessar confronted ordinary citizens and groups for comparison consisting of judges and prosecutors with a list of different types of crime and asked which kind of reactions they would prefer. The result was as follows: Among the ordinary citizens reparation was top-ranking, among the judges the preference was declining and among the prosecutors the preference was extremely reduced. One might exaggerate and say that the need for punishment is mainly existing within the heads of the judiciary – I have to point out again: not in everybody's head.



How else could it be explained that a referral to VOM is still depending on the personal attitude of each prosecutor, although our laws provide a check for suitability in every case.

I don't think it is a German specialty, that often only minor cases and seldom also serious cases are referred to the VOM services. We know by now, however, that especially the victims in cases with serious crime appreciate the advantages of alternative forms of reaction.

The tendency towards a self-reference within the systems gives cause to assume that the traditional criminal justice system would build up even bigger resistance if restorative justice was actually successful, if judges were reduced in favour of well established networks of restorative justice, if lawyers had to fear that in future the majority of legal disputes were referred to an out-of-court conflict settlement.

Powerful professional associations will keep still only as long as citizen-oriented criminal policy is merely a fig leaf to cover obvious deficiencies within the traditional criminal justice system and doesn't seem to turn into a real alternative.

I don't intend to claim that individuals within the criminal justice systems are not willing to look into the ideas of restorative justice or even support it. I know many colleagues within the criminal justice system who did a lot for the development of VOM. Nevertheless, those colleagues are being seen as somehow exotic or lateral thinking persons. They are rarely really prototypes of their profession.

I don't want to be mistaken that I would like to quit the cooperation, the information and qualification, the development of common concepts together with the judiciary. However, more than ever I come to the conclusion that a single or even focusing orientation in this direction wouldn't promote a further qualitative and quantitative extension of restorative justice in such a way which could be possible according to the unanimous opinion both of researchers and practitioners.

Dialogue with the public

The dialogue with the criminal justice system should not be neglected. However, it is not sufficient at all for achieving an extended application of restorative justice. If one tries to focus more on the public, one will run the risk of producing only general descriptions and diffuse appeals. Therefore it seems to be very important to have a more thorough look at the groups which could be subsumed under the term public for our purposes:

First of all one should mention the general public, i.e. the citizens of a country, who are in no way concerned with the justice system or even with restorative justice. They know only little and are seldom – if at all – and mostly unexpectedly forced to deal with our topics. Mostly they are dependent on information from the mass media which - I think it is fair enough to say - tend to propagate the repressive reaction to crime.

Nevertheless, they play an important role because they contact people who have to deal with the justice system and often they are the first to give some advice to victims and offenders concerning the question what to do in that special case. They constitute a potential that should not be underestimated and plays an important role for the political formation of opinion. They influence legislation processes with their attitudes and remarks. In short: We cannot afford to keep this group out of our efforts to spread the knowledge of restorative justice. Why don't we turn the public into an ally? Why don't we talk WITH those people above all and not ABOUT them? They are the ones who are supposed to solve their conflicts autonomously if they are allowed to.

Are we afraid that the result might be different in the end? Or are we reluctant because we don't want to step into the sometimes dirty business of influencing public opinion via the mass media? Or is it just due to the fact that we cannot present any coherent and promising concepts? That could still be caught up!





Up to now, I have not come across any such concepts which are geared at informing and enlightening broad classes of population. Many information brochures are characterised by a kind of academic soberness and at the same time a glut of facts. And their target groups are those who are directly affected by a crime, be it a victim or an offender. As far as I know, nobody has ever organised advertisements all over the country, like this anti aids campaign you can see here.

It should not be off-limits to develop a concept for a TV series at prime time where usually the court shows dominate the programme. Why not with a lurid title: “The Mediator”? In such a series, a retired judge could solve cases from different fields of society by using mediation.



Spots in cinemas could inform a huge audience about the advantages of restorative justice just in a few words. They could provoke people to ask for this offer and expressing the wish to make use of it.

All this might sound utopistic and unrealistic to you. I also have to admit that those ideas only represent some kind of creative brainstorming. An implementation of those ideas seems to be quite difficult – due to limited resources. On no account the professional help of professionals in this field should be dispensed. But I know that there are accredited advertising agencies which time and again develop concepts for non-profit organisations just for free. Why should not we try such a way?

With the support of the EFVOM, we might get some funding for some meetings to explore the first steps towards an organised and well planned and ongoing dialogue with the public in general.

A second group of potential contact persons, which I also assign to the public, are the so called multipliers. By this I mean persons or groups who are open-minded and interested in the ideas of restorative justice. People, who see a high priority in restoring peace under the law due to their socialisation, their profession, their religion etc. People, who regard the implementation of restorative justice as a realisation of their interests and don't perceive it as a danger for their own career. Above all, I have in mind doctors, priests, teachers, victim advisors, trainers etc. The other day I was quite astonished to hear from a friend who is a doctor that there is a high number of patients who he thinks of having become victims of crimes. Maybe priests also have more contact with offenders and victims of crimes than generally assumed? But do those people know about the existence of our programme? Are they equipped with plenty of adequate information material? Are they tied into a network which encourages them to bring in own ideas and accept their role as multipliers?

In my opinion, multipliers are much too important not to be mentioned as a separate group and not to be dealt with separately according to their importance. In contrast to the general public, which needs to be addressed in the media in a well planned way, the multipliers demand more precise and comprehensive information and – I would go so far to say – the building up of some kind of relationship.

It seems to be almost a law: Wherever positive approaches and concrete projects are emerging and are supposed to be implemented successfully, there is one or more powerful pressure groups that tries – that's all too obvious – to stop this development. An example: For several years, the German beverage industry has fought powerfully against the introduction of the mandatory deposit of cans.

In this context I would like to mention a group which belongs under the headline of public: Allies for a citizen-oriented justice policy. This group could play an important role, too.

The term “citizen-oriented justice policy” (in German “bürgernahe Rechtspolitik”) could also be translated as a “citizen-based” or “citizen-friendly” or “grassroot” legal policy. It is a typical German collective term which loses clarity when translated, as I was told. This term describes all endeavours which are aimed at more autonomy, more enlightenment, more clear and understandable information and a reduction of administrative paternalism. Initiatives for simplifying official forms or associations for the protection of civil rights also belong to this group.

I dare to make the following assumption: Restorative justice will be doomed if it does not foster these initiatives and does not form alliances with other institutions and initiatives in the field of “citizen-oriented criminal justice policy”. Citizen-oriented criminal justice policy itself has to become a lobby! Starting out on this premise, the



representatives of restorative justice are supposed to contact those institutions and initiatives without any fear of contact, to inform them about the citizen-oriented principles of restorative justice and to develop common strategies on how to take political influence.

I would like to sum up: The results of the empirical research on success and acceptance of restorative justice are better than expected, but they are not taken into account and are not implemented adequately by the legal practitioners. Due to the internal perspective and the fact that referrals are dependent on legal practitioners, the full potential concerning application and efficiency of restorative justice cannot be tapped satisfactorily.

The dialogue with the public is a neglected element in the development of restorative justice and has to be intensified. Those affected by crimes should be informed very early about the possibility of out-of-court conflict settlements and reparation. It is important to take increased efforts to establish agreeable offers of conflict settlements which are at the same time top-quality and within close range. Apart from informing the general public via various media, the extension of a network with new cooperation partners (schools, police, district offices, quarter managers, church communities, priest, doctors, crisis line, victim support, crime prevention organisations) is of vital importance.

Maybe we will have the opportunity to discuss several points later on in one of the conference cafes. I think that will be necessary. I could only mention several points which should be explained more in depth. I would appreciate if we were able to consider in a practical way how to start such a dialogue with the public not only on national but also on the European level. I think the EFVOM could take a key role in this effort.

I have a vision: I will be a retired person some day and visit some European capitals. I will ask ordinary people on airports or railway stations: What is restorative justice? Or: Could you tell me the way to the next conflict settlement agency? And I will get a satisfactory answer. Be it in Berlin, Brussels, or Budapest as today. In my opinion, it is worthwhile thinking in this direction. I would like to invite you to follow me!

3. RESTORATIVE JUSTICE: A GIANT LEAP OR JUST ANOTHER TOOL FOR THE CRIMINAL JUSTICE SYSTEM?

by Sturla FALCK, NOVA (Norway)

It is an honour to be invited to this important conference to speak on the theme “Restorative Justice: A giant leap or just another tool for the criminal justice system?”. Key questions are involved here, which I will problematise rather than answer dogmatically.

My vantage point is that of the outsider, in the sense that I have not been directly involved in conflict resolution but have followed developments on and off as a sociologist or criminologist for more or less a quarter-century.

I will start by taking a look back at the origins of some of the main ideas of restorative justice, both in Norway and elsewhere.

After that I will take a look at developments from an outsider’s perspective. Since I am from Norway my main examples will be drawn from that country, although I draw on international trends to some extent.

Ultimately the outcome could point in two directions, either towards restorative justice as a new tool for the criminal justice sector, or towards restorative justice as offering the possibility of gradual transition towards a new understanding of conflict resolution.

The first ideas

In order to discuss whether restorative justice represents a major leap forward towards a new understanding, it is necessary to take a look at its origins. In order to see the direction where you’re headed, you need to know where you’re coming from. How did the ideas behind restorative justice start at all?

The starting point was a recognition that the traditional criminal justice system was not working. One thing was, or is, that it does not have a habilitating effect on criminals but rather stigmatises them and accelerates their criminal career. Another equally important concern is that the criminal justice system removes the victim and



offenders from participating in and having a say in decisions made in their own cases. It is the professional conflict solvers in the law courts, i.e. the lawyers, and not the parties involved, who take over the case and decide the content of the response. The court is the lawyers' arena, and their language and understanding reign supreme.

Conflict resolution in the traditional criminal justice system is largely lifted away from the parties involved and turned into a relation between the perpetrator and society. In this context restoration is understood to mean what is necessary to make amends to society.

In criminal justice it is the actions that are in focus – whether or not they conflict with the law. The individuals behind the acts are of secondary importance. A court's decision is based on proportionality between action and reaction. In the current penal regime, reactions are justified in terms of general deterrence (the deterrent effect of the threat of punishment) and/or special deterrence (the deterrent effect of the actual punishment of the offender). To the extent they come into the picture, the victim's interests are supplemental, usually in the form of compensatory damages.

New thinking was needed on what kind of conflict a crime represents, on who owns the conflict and on restoring the damage done as fully as possible and in a way that is acceptable to the parties involved and to their environment.

In Norway, but also internationally, Nils Christie's article from 1977 entitled "Conflicts as Property" was a shot in the arm for innovative thinking. Nils Christie wrote that lawyers steal the conflicts from those involved, the original owners of the conflict, i.e. the victim, the offender and the local community. The professionals involved in conflict resolution in the criminal justice system – the lawyers – are professional conflict thieves.

The idea behind restorative justice, or at least behind the mediation and reconciliation service, was to create an alternative to the traditional criminal justice system. The victim entered the picture as a central party. Conflicts and their resolution should be brought back to the involved parties and to the local community.

Restorative tradition

At all times and in all societies restoration has been a key element of the solution. The parties to conflict resolution are more than just victim and offender. Crime also violates society's central norms. The idea behind the mediation and the conciliation service was to bring conflicts and their solution back to the local community where the offender and the victim belonged. Crime collides with cultural and social norms of the local community, requiring restoration. The local community is in turn responsible for re-including the parties involved once they have arrived at a solution or reconciliation. In many cases offender and victim live in the same neighbourhood, and a way has to be found to enable them to meet again in various contexts.

Celebrating reconciliation has been a key element in many cultures. Nils Christie takes an example from Sicily, but I look to Greenland. The Eskimos used a special method of conflict solution: Song duels. Since precise records are not available from a people without a written language, we are limited to missionaries' descriptions of this heathen custom. Conflicts and violence could be driven away by song. When a conflict arose either party would challenge the other to a song duel. Once the challenge was made, neither party could take any action against the other. The waiting period, which could last for months, was spent thinking through the conflict and preparing the chant or satirical song. With the entire local community in attendance, the duellers faced each other and sang out their frustration, to the accompaniment of drums and dancing. The audience decided the duel and celebrated the reconciliation.

"The song duel lifted these conflicts out of their original context and clothed them in a ritualised form" writes Finn Breinholt Larsen (1928 p. 81). Everyone was dependent on restoration and reconciliation if the community was to be able to continue to function.

In parallel with this, Hiroshi Wagatsuma and Arthur Rosett (1986: 466-467) write the following about present day Japan: "In a society that emphasises group membership as a basis for personal identity, it is important to maintain the sense of "insideness" after a rupturing conflict. There must be a ceremony of restoration to mark the establishment of harmony. The process of "conciliation" (chotei) and "compromise" (wakai) and the show of benevolence by the insulted superior party are important, but an apology, and most of all a mutual apology, are better as the explicit acknowledgement of commitment to future behavior consonant with group values."



The mediation and conciliation service in Norway was intended to bring the conflict back to the parties involved, with the mediator representing the local community. Restoration is achieved in the process between victim and offender and at the same time in the relationship with the local community. The mediators would be ordinary people, layfolk, representing the local community. They would not take over or steal the conflict, but act as communicators and mediators who would help the parties to arrive at an understanding of the consequences of the act committed and to reach an agreement on restoration. The mediators could receive training – without thereby becoming a new profession with a monopoly on conflict resolution – and would contribute to strengthening the local community's ability to solve conflicts.

In Norway the mediation and reconciliation service started life as a trial scheme in 1981 under a project entitled "Alternative to imprisonment of children and youth". The service continued on a trial basis for ten years. Legislation on local-level mediation went into force in 1991. Since then, all 435 local authorities in Norway have, either on their own or together with other municipalities, established a mediation and reconciliation service.

It is generally the police who refer cases to the mediation and the conciliation service, although the service can also deal with civil cases, i.e. juveniles under the age of criminal liability and conflicts which the parties themselves choose to submit without any criminal violation necessarily being involved. In some localities civil cases make up about half the caseload dealt with by the service¹. Each year it is referred about 6000-7000 cases to the mediation service. Although the persons involved range from below the minimum age for criminal liability (15) to the over-sixties, almost three-quarters of them are aged between fifteen and twenty.

In order for a case to be dealt with by the mediation service, both the offender(s) and the victim(s) must want this to happen, and the case must not be serious enough to qualify for unconditional imprisonment. They arrive at an agreement together with a mediator. If the offender sticks to the agreement, the offence will not be recorded in the register of fines or the criminal register, i.e. the offender will not have an entry made in his police certificate of good conduct. If the offender fails to stick to the agreement, the prosecuting authority may bring criminal charges, although in practice such cases are usually dropped.

Alternative values

Restoration does not lie in the agreement alone, but in the entire process which starts with voluntary acceptance of mediation, continues with the meeting at the mediation and reconciliation service and ends with the carrying out of the agreement.

Alternative conflict resolution should build on traditional, cultural values that give emphasis to interaction between victim and offender. The meeting between victim and offender is the basis for the mediation scheme. The process that takes place in the mediation and reconciliation meeting is particularly important. Mørland (1999) draws attention to the significance of the content of the interaction between the parties: "We should not underestimate the force inherent in the actual meeting." Key terms and values in the process of conflict resolution are: Shame, sorrow, consolation, remorse, penance, forgiveness, absolution and restoration. This contrasts with the traditional system's emphasis on guilt, punishment and retribution.

Gehm (1991) has shown that the most important thing for the victim in a mediation situation is not to obtain damages or retribution, but to be given the chance to express his/her feelings about the criminal act. This is at the heart of mediation based on alternative values. Hudson (1991) has pointed to the victim's right to hold on to his anger or indignation and not to forgive straight away. Forgiveness is not something that happens on an on-off basis, but in a process between the parties.

Punishment alone can never give back what an act has destroyed. The ethics of an alternative approach must lie in the hope of achieving restoration by providing something to build on in the period ahead. If mediation is to be something quite different from punishment, it must be distinguishable from the criminal justice system in terms of looking ahead to solutions that are best for the future.

These were, and are, ideas that few would disagree with. As a result, there has been virtually no political debate on the activity of the mediation and the conciliation service. The service has developed without significant criticism to keep it on the right track. Right-of-centre parties have stressed the positive aspect of a rapid

¹ This includes criminal cases with offences below the age of criminal responsibility



response and the fact that fewer offenders get away without facing up to what they have done. The left-of-centre parties have viewed the mediation and reconciliation service as an alternative to the traditional criminal justice regime, and both sides have agreed on the importance of strengthening the victim's position. In the absence of political debate the service has been free to develop without anyone asking whether it was a supplement to, or alternative to, the traditional response regime.

Developments

How then have developments turned out? Has restorative justice become a genuine alternative to the prevailing system or helped to change it?

Creating change has always been one of the most difficult things to take in hand.

Niccolo Machiavelli wrote in 1532:

“There is nothing more difficult to execute, nor more dubious of success, nor more dangerous to administer, than to introduce a new order of things; for he who introduces it has all those who profit from the old order as his enemies, and he has only lukewarm allies in all those who might profit from the new. This lukewarmness partly stems the scepticism of men, who do not truly believe in new things unless they have actually had personal experience of them”.

Others have also described resistance or defence mechanisms (Thomas Mathiesen 1965, Harriet Holter 1970) that come into play in opposing change. Defence techniques describe obstacles to change in social organisations. They explain why change processes often result in slippage back to a previous order of things, or they end up with an entirely different aim than they had at the start. I will mention just three that come into play in differing degrees:

1. Absorption. Nominal changes are made, but in practice the new elements become part of the old system. In our context this means that restorative justice is absorbed into the criminal justice system. The content of the original system is retained and the ideas behind restorative justice are compelled to adapt to the old system. The content of restorative justice is redefined to allow it to adapt to current political trends.

2. Incorporation/co-option. Integration with a view to solving tasks which would otherwise have fallen outside the scope of the old system. Restorative justice is incorporated as a means of widening the use of reactions. For example, politicians are under pressure to do something about juvenile offenders below the minimum age for criminal liability. The mediation and reconciliation service proved to be a handy solution in this respect since it can be claimed that offending juveniles escape punishment at the same time as alternative reactions are available. Not without cause has restorative justice been criticised for turning into a form of net widening that captures cases which would not otherwise have resulted in any reaction.

3. Double communication. Much of the force of a proposal or criticism is lost when it is given a positive reception but nothing is actually done. If someone claims that it is important to retain the basic ideas, he/she is given a favourable response such as “That’s important”, but is in practice overlooked.

The mediation and reconciliation service is an example of how innovations are absorbed into, and become a supplement to, the old system. Once the 1991 legislation was passed, the mediation and the reconciliation service was no longer a separate alternative outside the traditional reaction system but a reaction in its own right within the reaction system. The central administrative responsibility was concurrently transferred from the Ministry of Social Affairs to the Department of Civil Affairs at the Ministry of Justice.

While this put an end to the mediation and the reconciliation service as an alternative, on the other hand it gave the service a boost. It is quite likely that the service would otherwise have died a slow death due to a lack of cases and other resources.

The mediation and the reconciliation service had few, and rather trivial, cases where the alternative was usually to drop the case. Since mediation became a reaction in its own right, the number of cases received from the police has ten folded, but the most cases are still not particularly serious. Of course not all types of cases lend themselves to mediation, but the Director General of Public Prosecutors are at least willing to discuss the option of referring more serious cases to mediation that might otherwise have led to prison sentences. Although the gravity of cases submitted by the police has been raised, the mediation and the reconciliation



service is hardly likely to be inundated. Compared with other countries, Norway has a relatively low incidence of crime; at all events of crime that lends itself to the mediation. Moreover, the service “competes” with other bodies that deal with behavioural problems. Where the under-eighteens are concerned, for example, the police may find it more relevant to refer a case to the child welfare service, without also recommending an additional solution involving mediation and reconciliation.

Restorative justice contains widely differing measures

Restorative justice has never been a uniform model in terms of the design of its programmes (Messmer and Otto 1992). The programmes move along a scale. At one end are alternatives based on an ideological starting point. Their supporters are concerned by the fact that the traditional criminal system offers inadequate solutions to inter-human conflicts, that the parties themselves should own their conflicts, and that the local environment should be strengthened in order for conflicts to be resolved in the community where they belong. At the other end of the scale are models that share a number of features with, or are part of, the traditional system and whose main task is to compensate for problems of efficiency and rationality within the traditional criminal justice system, or to give a new lease of life.

The Norwegian mediation and the reconciliation service started life at the first end of the scale and is now an extension of the reaction system, while at the same time retaining its main principles. In a way this fits in with an international trend. It is a process in which both the understanding and practice of restorative justice are undergoing change. Thinking and problematisation have both come much further elsewhere than in Norway.

New solution models have arrived at both ends of the scale. I will confine myself to two examples from each end of the scale: In “Family group conferences”, inspired by the aborigines of New Zealand, the main emphasis is on solutions associated with the primary social network. School mediation is the next example in which pupils are given a chance to mediate in various types of conflict that arise at school. At the other end is “restorative policing” in England where the police act as the local community’s mediator and try to find solutions outside the criminal justice system. A final example is from the prison system where inmates are asked to mediate in conflicts between other inmates.

Definitions and understanding

Can such different models come under the same definition of restorative justice? A large number of different definitions exist. I can neither reproduce them all, nor am I familiar with them all. I am pleased to see that their fundamental ideas are set out in the United Nations draft resolution from the Commission on Crime Prevention and Criminal Justice (2002):

“Emphasising that restorative justice is an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities;

Stressing that this approach enables those affected by crime to share openly their feelings and experiences, and aims at addressing their needs;

Aware that this approach provides an opportunity for victims to obtain reparation, feel safer and seek closure; allows offenders to gain insight into the causes and effects of their behaviour and to take responsibility in a meaningful way; and enables communities to understand the underlying causes of crime, to promote community well-being and to prevent crime.” This is an important, but long definition. Tony Marshall has defined restorative justice as a process in which all parties affected by a crime collaborate in deciding how to handle the after-effects of the crime and its implications for the future.

The shorter the definitions, the wider the variety of initiatives that fall within their scope: For example, Hans Boutellier (2002 p.11) defines restorative justice as: “every action that is primarily orientated towards doing justice by restoring the harm that has been caused by a crime”.

Definitions of this type risk losing sight of the fundamental principles built into the UN draft resolution just quoted, and open the way for more traditional forms of victim compensation, or to new or old initiatives that



need new legitimacy. Strengthening the victim's position and doing justice by restoring the harm is important and ethical rethink of penal law, but is not necessarily restorative justice.

The UN draft resolution also has its complicated aspects, however. It contains the following passage: "*Recognising* that the use of restorative justice does not prejudice the right of states to prosecute alleged offenders."

In my view this passage opens the way for twofold criminal prosecution for the same offence. Since restorative justice, at any rate in Norway, is a specific type of reaction to given acts, criminal action cannot subsequently be brought for the same offence. Anything else would conflict with the European Convention on Human Rights protocol seven, article 4, which prohibits repeated trial or punishment for offences which formed the basis for the hearing undertaken by the mediation and the reconciliation service. The passage quoted would in principle amount to a twofold punishment regardless of what agreement the parties had arrived at during mediation. In Norway the only justification for renewed criminal prosecution is that the offender fails to stick to the agreement.

A further complicated point in the UN draft resolution is:

"Restorative justice programmes may be used at any stage of the criminal justice system, subject to national law."

This could be interpreted as a positive option, but it could also be understood as a potential for twofold punishment for the same offence, or as an extension bringing restorative justice into the picture alongside the initial sentence.

The positive aspect can be interpreted as an opportunity for restorative justice to be brought in as a genuine alternative at all stages of the criminal process. It enables the victim's position to be better represented through restoration as opposed to retribution. The offender can be given the chance to make amends to the victim, and not merely to society as in the case of the traditional system.

Various models are practised here, for example in Belgium and Austria where the outcome of mediation is taken into consideration in sentencing, or the criminal justice system does away with conviction altogether if the parties have arrived at an agreement.

When Lode Walgrave (2002) writes: "Without neglecting the restorativist dream, we must look for ways to implement possibilities for restoration as far as possible in the real world", I hope he would agree that this does not amount to compromising with the main principles of restorative justice. It is easy to understand that the traditional system, when faced with such important innovations as restorative justice, will seek to adapt them to the status quo. The danger is that models of restorative justice will be absorbed rather than implemented, which is more likely to legitimise the existing penal system, or that restorative justice will be kept to the side in order to deal with problems that the traditional system fails to capture.

Restorative justice is built on interaction between the parties with a voluntary deliberative settlement. In order to take the hard core reactions to crime away from the traditional justice system, it has been argued in favour of including coercive impositions of restorative sanctions (Walgrave 2002, Bazemore and Walgrave 1999). The possibility of use of coercion might at the same time change the power between the parties, retreat from the mediator as a layman and turn the restorative process into a look a like penal process. The lawyers will find their way back on stage, first as advisors and then in all the traditional roles with legal principles of due process, proportionality and equality. Perhaps it is true that this will extend the caseload of serious offences, but at the same time restorative justice may become a new penal system or just adopted into the old system.

Conclusion

The title of my presentation asks the question: Restorative Justice: A giant leap forward or just another tool for the criminal justice system? I trust that my discussion demonstrates that there are several possible answers to that question.

One answer is that restorative justice has landed after its giant leap and has become a new tool for the criminal justice system. Another answer is that it has indeed landed, but heavily enough to make its mark and contribute



to changes and to new perceptions both within and outside the criminal justice system. A third is that it is still in mid-air and has a chance to influence where it will land.

Probably all three answers are correct within the range of current possibilities. Seeing that the basic ideas behind restorative justice have succeeded in growing over such a long period, there is every reason to hope that it will remain a key driving force for alternative conflict resolution in the future.

References

- Christie, Nils (1977) Conflicts as property. *British Journal of Criminology*, 17(1):1-15.
- Bazemore G. and Walgrave L. (eds) (1999) *Restorative Juvenile Justice: Repairing the Harm of Youth Crime*. Monsey, Ny: Criminal Justice Press.
- Boutellier, Hans (2002) Victimization and restorative justice: moral backgrounds and political consequences. In Walgrave, Lode (2002) *Restorative Justice and the Law*. Willian Publishing, Devon.
- Haley, John O. (1991): Victim-Offender Mediation: Japanese and American comparisons. Paper at the Advanced Research Workshop "Conflict, Crime, and Reconciliation". Il Ciocco, Italy, april 1991.
- Hudson, Joe (1991): A Review and Assessment of Opinion on Financial Restitution. Paper at the Advanced Research Workshop "Conflict, Crime, and Reconciliation". Il Ciocco, Italy, april 1991.
- Gehm (1991): The Function of Forgiveness in the Criminal Justice System. Paper at the Advanced Research Workshop "Conflict, Crime, and Reconciliation". Il Ciocco, Italy, april 1991.
- Kriminalpolitiske handlingsplan, Justisdepartementet, oktober 1990.
- Messmer, Heinz and Otto, Hans-Uwe (eds) (1992) *Restorative Justice on Trial. Pitfalls and Potentials of Victim-Offender Mediation – International Research Perspectives* -. Kluwer Academic Publishers. Dordrecht/Boston/London.
- Mørland, Liv (1991): "Ja" til et handlekraftig konfliktråd. Nordisk Tidsskrift for Kriminalvidenskab, 78.årgang. Nr.3.
- Wagatsuma, Hiroshi & Rosett, Arthur (1986): The Implications of Apology: Law and Culture in Japan and the United States." Law and Society Review. Vol.20, No.4.
- Walgrave, Lode (2002) *Restorative Justice and the Law*. Willian Publishing, Devon.