

Restorative Justice and the Rights of the Accused

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Talk delivered to *EU Forum for Restorative Justice Conference*, University of Leiden, 26th June, 2016.

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Introduction

{Thanks....}

I beg your indulgence as I bring three seemingly disparate conversations into dialogue with one another:

- My work on entryways to criminal justice systems — the *lore of accusation as a starting point* but also a selective gateway to criminalization (In my work I have focused specifically on overlooked entryways to governing wrongdoing by exploring what I have called the *lore — not Law — of accusation*. Restorative justice is meant to offer responsive and so fluid ways of governing wrongdoing and harm. But what protections are available to subjects accused of wrongdoing in restorative justice contexts?);
- The rights of the accused discourses — not as a species of human rights, for critics (Agamben, Esposito) who detect a pervasive global inability to claim rights at the very moment that fixed human rights are exulted. I will draw on Foucault's sense of rights as part of political processes to offer a framework that might sit better with the

responsive procedural aspirations of restorative justice — the intent of such rights is always to limit dangerous, tyrannical exercises of power (this is the basis of the rights I address, not some purportedly fixed notion of human being as in various liberal formulations);

- Victim perspectives and visions of rights have become central guides to restorative practice, but I want to focus on something that critics (e.g., Johnstone, Skelton, Ashworth) have isolated as not always considered: the rights the accused with restorative justice.

So let us start with a reference to the Nobel Laureate and South African Novelist, JM Coetzee.

The magistrate character in his novel, *Waiting for the Barbarians*, evokes this sense of justice:

‘all creatures come into the world bringing with them the memory of justice. ‘But we live in a world of law’ ... ‘the world of the second-best. There is nothing we can do about that. We’re all fallen creatures. All we can do is uphold the laws...without allowing the memory of justice to fade’ (Coetzee 1980:139).

Restorative processes may be said to recall the memory of a justice beyond the modern state’s criminal laws. Re-imagining justice, they work from older paradigms of reparation, atonement, redemption and healing through community participation.

But such justice always starts from somewhere. There are ritualized restorative gateways that open up to ‘accused wrongdoers’; usually requiring that they can participate only if they accept responsibility for wrongs and are willing to ‘make things right’ (Zehr, 2015:188). Whether ‘diverted’ from the state’s crime controls as offenders or not, restorative justice requires its participants to adopt specific kinds of identities as a condition of entry — often backed by the threat of courts and prisons. {Explanation: the accused ‘wrongdoers’ at entrances to restorative justice practices}

Earlier critics have perceptively noted how ‘suspects’ — what I will call the accused — of restorative justice potentially face procedural despotism and discretionary oppression (Johnstone, Skelton, Ashworth). They note the victim centred focus of restorative justice practice, but I want to ask: is there something akin to broader ‘rights of the accused’ that might apply to restorative contexts?

I think there is. However, we have to re-envisage the concept of rights here. The basic drift of my argument is this: since procedural flexibility distinguishes restorative from criminal justice, restorative programs often move in unstable relational terrains. A key danger here is that if left unnamed and uncontested, restorative powers do not avoid the possibility of coercing distorted accused identities and one-sided settlements. But insisting on fixed ‘rights of the accused’ found within criminal justice contexts may not work well with communal responsiveness. A broadened concept of rights — as instruments of ongoing political struggles — could provide for indeterminate and changing procedural restraints for the restoratively accused.

1. A Problem: Rights and Flexible Restorative Rites

Like Kafka’s gatekeepers to law, authorized state representatives decide which accused persons to admit and who to turn away. Those admitted are purportedly accorded certain (universal, absolute) procedural **rights** — e.g., the right to silence; to know the charges brought; a fair and timely trial, etc. Packer hailed such rights as part of a ‘due process’ model of criminal law designed, in part, to limit arbitrary discretion in accusatorial entryways.

Whether such rights are consistently enforced is another matter — especially given the paradox of relying on sovereign states and laws to enforce limitations on their own ruling powers over the accused. Or what of the stateless, or those too marginalized to claim such rights?

In any case, accused people appear in restorative contexts in various way — diverted from the courts, directly from community channels, after sentencing, etc.. Though they may be in some

cases legally defined as ‘criminal offenders’, all participants face restorative justice entrances as those accused of doing something harmful and/or wrong — what I want to call *accused wrongdoers according to a local lore of accusation*.

Now how might procedural protections for the accused be secured from communally responsive and intentionally flexible restorative processes? Some argue that since fluid restorative processes are not concerned with guilt, are non-coercive and are ‘voluntarily’ entered into by empowered participants, procedural rights may not actually be necessary. Johnstone (rightly in my view) rejects such arguments as ‘unconvincing and dangerous’ (2011: 26). He worries that restorative justice participants may not be accorded procedural protections against possible leviathans — a point that also leads Skelton and Sikhoyane to consider the significance of ‘victim and offender’ rights within restorative justice (2007: 580).

But to better appreciate what is at stake here, let us consider certain procedural dangers that the accused within restorative justice practices may face.

2. Dangers, the Accused and Restorative Justice

Within the movement, some argue that restorative procedural protections for the accused could be assured by proper training for authorized mediators, agreement review, declarations of appropriate practice.

There is, however, a broader issue at stake: restorative justice — like all forms of governance — should be vigilant of the power relations it deploys in its name. That is, its justice should contest undemocratic intrusions into accused people’s lives.

Entryways to restorative justice programs typically require that the accused accept culpability for an act. The perils of its subtle coercions could potentially take many forms. For instance, suppose the accused simply accepts responsibility, and enters a mediation program, in the hope of ending

a matter as soon as possible. S/he might agree to participate and even settle simply to avoid the threat of trial or prison. Voluntarism would be distorted here, especially if agreements are reached not by thwarting, but rather by sustaining social hierarchies (Radzik in Johnstone, 2007: 203).

Suppose further that a panel or mediation breaks down — criminal jurisdictions may then rely on the what is disclosed in the mediation as evidence for criminal trials. Of course, in such instances the right of the accused to a presumption of innocence and right to silence may be seriously compromised (Skelton and Sikhoyane 2007:583).

Moreover, it may be that dealing with a particular matter justly often requires paying attention to the power imbalances of race, wealth, gender and age. They may even create conditions for particular kinds of wrongdoing or harm, suggesting the need for broader transformations and interventions — over and above efforts at individual reparation. In any case, these very social inequities could play themselves out in fluid restorative processes, and may too result in unjust outcomes. This is a complicated issue. But here I want here only to suggest that the internal politics of programmes that seek conflict settlement, restoration and so on, need to be engaged directly. The point may become particularly clear in communities where a fear of crime propels punitive calls to make sure the accused is punitively shamed or dealt with.

With such concerns in mind, one can understand why critics support preserving the 'rights of the accused' within restorative procedures. But Skelton and Sikhoyane usefully sense that, 'the way forward may lie in broadening the discourse around rights' (2007:592).

But how precisely are we to broaden a discourse on rights? To respond to this, let us pay further attention to restorative politics by which the accused are governed.

3. Governing Accused Subjects through Restorative Justice

To contextualize how to expand our notions of rights, one might say that – following Foucault's work on avowal — accusers, accused, victim and mediating authority should not be assumed to be fixed identities. On the contrary, such subject identities are at least partially created out of a politics of restorative justice, and the responses programmes demand of their participants.

If this puts a particular emphasis on the politics of conflict resolution, it also focuses our gaze on techniques to constrain unfettered powers of restorative justice.

Stated another way, procedural protections need not ensconce pre-conceived visions of what the accused's essence is, or assume that the accused is necessarily an individual. Rather procedural limits could be designed to check unfettered powers however they appear, and so engage the way accused identities are created by restorative governance. These identities then are never absolute; they are indeterminate. But they are also fashioned out of responses to restorative powers.

Thus restorative justice could develop procedural immunities as part of its flexible processes. It could look beyond fixed images of the 'rights of the accused' and seek instead viable opportunities for accused subjects to name, challenge, and contest unfolding powers that they see as unfair, unjust and so on. Such challenges may lead to the dissolution of given restorative encounters, but they could also set new directions for the same.

In any case, evoking amorphous rights to contest governing powers need not refer back to a purportedly static human nature. It could surface out of historical configurations of power. Seen as a political encounter between subjects — often but by no means necessarily conceptualized as accused, victims and mediating authorities — restorative justice could forge procedural protections by securing spaces where perceived injustices can be voiced. There is nothing absolute about this.

Rights here surface as political techniques used by political struggles that shape social relations and unfolding subject identities. Procedural safeguards for accused subjects may then involve contingently calculated and asserted rights that are meaningful by virtue of the governmental rationales and techniques used in context.

4. Rights?

What sort of rights might be imagined here? Of course, what I have said implies that appeals to rights need not emulate the criminal justice system's granting of a supposedly fixed, universal and essential quality to human subjects — applying these to accused persons. Instead, it is possible to understand rights differently — that is, as ungrounded, non-universal and indeterminate discursive instruments with which to refuse problematized aspects of given political processes.

Indeed this view runs counter to the lingua Franca of many liberal rights domains. It may be sobering to realize that human rights are historical rather than absolute claims, as protagonists might loftily proclaim. After all, let us recall Esposito's and Agamben's sense that at a moment in history when such rights are so ebulliently proclaimed to apply to all, as with repeated performative declarations, so few people appear to have the capacity to assert those rights in any meaningful way. This is not only so for the many stateless people (Agamben — Lechte and Newman, 2015), but equally for those without the economic or cultural capital to claim basic rights.

Furthermore, as Moyn (2010: 3) notes, understandings of human rights today depart significantly from past images, even if an overall aspiration might have been to constrain rulers. He also notes how our rights discussions may be conceived as utopias — as discursive weapons to assert new futures.

One might agree with Ashworth's sense of the need to enable procedural rights within restorative justice; but not with his apparent sense that the state's criminal law is a neutral force best equipped to manage and enforce due process rights.

After all, as noted, to what extent can a sovereign state and its law's be relied upon to enforce rights that limit its powers? Indeed, some (Agamben) might even suggest that sovereignty only emerges through a capacity to declare exceptions to law and the enforcing of rights.

Of course, the debates here are complex, but Ben Golder's recent interpretation of Foucault's rights discourse provides a way to understand how rights may be used to contest and transform particular kinds power.

He reads Foucault as providing an 'anti-foundationalist, non-anthropologically grounded' approach to rights — 'tactically oriented towards intervening into existing formations of law, state and power' (3). As such, rights do not need to be founded on fixed visions of the accused, but could — like Foucault's sense of human rights — be considered as potential instruments in political struggles that contest problematic forms of governance.

They can be evoked in political struggles by the subjected, and by those that rule, especially where some aspect of power is rendered problematic. Foucault thus cast rights as 'ambivalent': as means to govern subjects but also to contest particular governing practices. In other words, contingently framed 'rights' could be used by governors and opponents who seek to limit specific governing forms.

In restorative justice settings, rights could — if this view of rights is accepted — be called upon to regulate, or to resist. They might then be asserted by authorized restorative agents in bids to offer fair practices and outcomes for participants; but they could also be evoked by participants to challenge the way given mediations, panels, conferences, etc., unfold. For example, it may be that by paying attention to the politics of specific restorative encounters, the accused and victim

— without overlooking the real harms of a specific conflict — could come to the view that their situation was contoured by wider social structures, and so demand that part of the reparations at hand might include the need to focus attention on transformations of precipitating social relations.

5. What are the implications for Restorative Justice?

First, if we agree to a lore (rather than law) of accusation as a key to declarations of wrongdoing, then questions of oppressive procedures, and rights for accused subjects, applies to both state criminal **and** restorative justice. Yet, how one conceives of rights is critical. I have argued that the rights of the accused may be directed beyond a fixed individual subject nature. Such rights could be framed and understood as ways to name and contest excessive powers within rituals of restorative accusation. In this respect, asserting rights for the accused does not simply revolve around enforcing fixed subject natures; it is rather about using rights to name, contest and problematized specific restorative ways of governing the accused. In other words, appeals to the rights of the accused in restorative contexts may be understood as an attempt to hold rituals of accusations to account – are they legitimate, for what purposes are mounted in context, and what perils do they imply for those accused of wrongdoing? Furthermore, one might ask whether or not transformative restorative programs should in certain instances direct accusations not simply to individuals, but to unequal structures, cultural precepts, political practices and so on.

Secondly, it is important to recognize that accusing someone of wrongdoing evokes a politics by which to negotiate subject identities. In this respect, the accused does not face restorative processes as a predetermined being – rather the responses that are required by particular processes are involved in framing and shaping accused subjects as they move towards unknown futures. The emphasis on the rights of the accused is precisely to allow contestations of who or what is accused, why or how such accusations are launched, and what this means for particular

people. How might problematic accusation be curtailed by providing exit ramps to short-circuit politically dangerous practices?

Thirdly, within rituals of accusation that renegotiate social relations behind particular kinds of wrongdoing, it is important to enable diverse kinds of storytelling. It is not simply a matter of soliciting victim or offender stories, or stories that confirm the altruism of communal relations; rather, it is also important to provide spaces for critical narratives that contest existing power relations, and problematic aspects of restorative governance. This would likely involve making permanent way for critical 'limit attitudes'. The right to fundamental criticism is precisely what is at stake here.

Finally, the use of rights as weapons in struggles to prevent oppressive relations from despotically coercing accused subjects is part of a much broader question: to remain vigilant to the ubiquitous dangers that contour power relations — no matter what kind of justice they serve.

Of course, much of this needs to be developed further; however, it is clear that the vigilance required in restorative justice systems may not be well served by closures that preserve historically championed conceptions of the 'human' as universally appropriate. Postcolonial, feminist and critical race critiques have indicated the imperialist dangers of so doing.

I also worry about demanding absolute, comforting but politically dangerous *final solutions* to intractable social problems. Calling for static human rights might enable the appearance of absolute solutions. But any comforts of determinism threaten in one stroke to reduce us to 'bare life', and to emaciate ethics and politics whose lifeblood is indeterminacy.

In conclusion, as I have argued, there are no guarantees or certainties. All that we have to ward off totalitarian closures is our unceasing ability to contest socio-political limits. It is here that we glimpse the indeterminacy that permanently undermines the absolute, and allows us to entertain promises of justice always still to come. The latter approach to justice underscores a fundamental

indeterminacy and incalculability that renders possible any calculations of right and how to arrive at procedural fairness in context. On that contingent platform one might echo a permanent warning of the ancient Greeks, no matter who governs: ‘Beware the rulers bearing gifts of justice.’

Thank you for your kind attention.

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