

Conferencing: A way forward for Restorative Justice in Europe

Expert seminar
14-16 September 2010

❖ Day 1 14-09-2010

1st session: Conferencing: a way forward for restorative justice in Europe

- (1) Presentation by Estelle Zinsstag on the preliminary research results of the conferencing project
- (2) Discussion: participants can ask questions concerning the project and the survey

In the survey, was a question on “context” addressed? Are the respondents of the survey talking about conferencing in prison, as a diversion from court, in schools or as pre-trial? Kathleen Daly insisted that this information should be part of the results and that we have to be very precise on that. She also mentioned that in the analysis of the survey a distinction had to be made between respondents from police contexts and community contexts. This distinction can be important, because it may explain differences in responses between respondents. According to Estelle the respondents were operating from or referring to many different contexts, but this was not so specific in the questionnaire. Nevertheless, in the beginning of the project a broad discussion on which contexts to include and to focus on led to the conclusion that crime is at stake and therefore the criminal justice system is the focus point.

→ After the seminar this topic on the context of conferencing was included in the analysis of the survey.

Kathleen Daly asked three more questions concerning the survey and the answers of the respondents. Firstly, with regard to the establishment of guilt: can a conference only take place when the guilt of the offender is established? The second question entailed whether an apology is a prerequisite for the conference to have a positive outcome. According to ten respondents who filled in the part on conferencing an apology is indeed a prerequisite for the conference to have a positive outcome. According to Kathleen Daly it is important to mention in the survey who these respondents are and for which country they are answering the survey. The third question she raised dealt with the type of cases that can be referred to a conference. According to the results of the survey mentioned in the presentation 19 respondents say a case of sexual violence can be referred to a conference. Again, Daly thinks it is important to mention who these respondents are and for which country they are answering the survey.

→ After the seminar the answers to these questions were included in the analysis of the survey.

The subject of an apology being a prerequisite for the conference to have a positive outcome then was the topic of a discussion, in which ‘HALT’ was mentioned. In this programme in the Netherlands, the youngster must apologize for the procedure to start. But, it was acknowledged that HALT is not

entirely the same as conferencing. Erik Wiersma said that HALT is a diversion programme and that apologies are expected.

The choice between a conference or mediation session was discussed. Vince Mercer said that he practices both VOM and conferencing and is not worried so much about the distinction between these two practices. In their practice, they leave the choice to the person depending also on the context and type of the crime. It must be the system that fits the person, not the person that fits the system. The question on the main differences between conferencing and mediation was also addressed. Kathy Daly said that in Australia, many conferences are in reality mediation. There is a lot of false advertising in conferencing in terms of practice. Lode Walgrave asked whether it is the size that makes a difference between conferencing and mediation, and whether we can think of conferencing as an extended mediation. For him this is however not the most important point, there are instead intrinsic differences between the two practices. For example, in the New Zealand model the police represent public order and for Lode that is the most important differentiating element. Otmar Hagemann said he is not very happy about the framing mediation versus conferencing. He would rather be more careful and frame what we mean by mediation as Victim Offender Mediation. Conferencing is represented by mediation in the draft law in Germany (mediation: VOM and conferencing), but if one would place it vis-à-vis mediation then there would be a problem to include conferencing under the law.

Borcsa Fellegi asked about the innovation that the survey will bring. She said that in Hungary everything is called mediation, so what are the implications of this research?

Ivo Aertsen asked a question about the role of the official actors and the role of the supporters in conferencing. He said that these roles are very different from each other and asked why these roles are important.

Gert Jan Slump made a comment about a slide of the presentation which showed that victims are not informed about the process and the fulfilment of the agreement: he thinks this is not good news and that we should do better. Joanna Shapland said that we indeed sometimes perform very similar to the criminal justice system when it comes to (informing) victims. Otmar Hagemann added to this discussion that the criminal justice system (CJS) does not inform RJ practices on the process once the file has gone to the CJS. Gert Jan Slump said RJ practices are responsible up until the point where the file goes to the criminal justice system. Kathy Daly commented that there is no place in the world where victims might have more strength, because all jurisdictions are offender-centred. According to Otmar Hagemann and Koen Nys there is no conference when the victim is not present.

The question posed at the end of this discussion was whether there is a difference concerning informing the victim between procedures with young and adult offenders.

Possible subjects were mentioned that could be added in the analysis of the survey: does the victim have a veto right concerning the conference?; victim involvement; victim services and victim participation.

2nd session: Conferencing: Theoretical reflections and international developments

- (1) Presentations by Lode Walgrave on the need for clarity about restorative justice conferences and by Joanna Shapland on conferencing in relation to criminal offences
- (2) Discussion: participants can ask questions and make remarks on the subjects the speakers addressed

Concepts used in restorative justice (and conferencing) are always different; there is no consensus in the field! An example can be found in the definition of restoration. A good definition has so far not been found, "restoration" is a complex concept and is used for a lot of things. According to Lode Walgrave a good way to define concepts is not to start from the theory, but from the practice (so ask the victim and the offender). A remark may be that if the restorative justice field does not know how to define certain concepts, how could victim and offender/community members know? You can not just ask the victim, you would need to have some ideas of your own. Annemieke Wolthuis wonders whether it is not possible to come up with some standards on what conferencing is. Lode Walgrave said that research also has some weak points, but Joanna Shapland added that this is always improving. For example: now we know how to examine reoffending. To still get better, schemes could be asked to be very open on their procedures/process. Dan Van Ness concluded this discussion by saying that this is very fascinating about restorative justice: we have not been able to agree on anything. He hopes that at some point we can come to something.

New Zealand conferencing, is it only practiced in New Zealand? Youth Offending Teams (UK) think they use the NZ model of FGC, but it is not put well in practice.

Bas van Stokkom asked whether conferencing is the same thing as restorative policing. Joanne Shapland answered by making clear that conferencing is not necessarily facilitated by police officers. The most important aspect of a conference is the fact that the parties have the opportunity to say what they have to say, while peacemaking is the major component of restorative policing.

❖ Day 2 15-09-2010

3rd session: Conferencing in Australia and Northern Ireland

- (1) Presentation by Kathleen Daly on conferencing in Australia and New Zealand and by Kelvin Doherty on outcomes and challenges for youth conferencing in Northern Ireland
- (2) Discussion

There is a difference between courts concerning victim attendance. A huge amount of conferences means a huge amount of facilitators: does this affect the quality of the facilitators?

The role of the victim and their veto right for the conference to take place or not are crucial. According to Kathy Daly, the victim should not have a veto right.

The role of the family is difficult to balance in a conference. The youngster might not want his family to know about that side of his behaviour and therefore does not want his/her family to know about the conference.

In Belgium, there are some conditions that need to be met for a conference to take place in case of severe crimes: there needs to be a known victim and the victim has to be present during the conference. The question then was asked whether the quality of a conference is higher when the victim is present. It is also very important that the victim is well prepared about what is going to happen, what to expect. Ivo Aertsen mentioned that guarantees to protect and respect the victim should be built in, or at least a victim dimension. These guarantees have to be theoretical, practical and institutional. The question to include the victim more and the request for guarantees for the victim are a pressure on organisations, which are often offender-oriented.

The difficulty with repeat offenders was addressed: they do not want to participate again in a conference. Dan Van Ness asks the question how this is possible, given the high satisfaction rates after participating in a conference. Rob van Pagée questioned why family group conferencing cannot be applied with offenders who keep committing offences. He reasons that a young offender who repeatedly commits offences has a problem. The family of this youngster then can participate in a conference and try to resolve this problem.

Estelle Zinsstag asked a question on good experiences with sexual offences around the world. Kathy Daly said that she is looking for innovations and ways of treating these cases as a real justice option for victims for whom there is not justice at all. According to Vince Mercer, all the referrals come through the offenders and there are no pathways in Europe which are victim-led, except for Karin Sten Madsen's work with victims.

The discussion also dealt with the idea that we should always keep in mind the responsibilities of the state in such and other cases and be aware of the privatization of justice.

4th session: Conferencing in North America, the Netherlands and Scandinavia

- (1) Presentations by Dan Van Ness on conferencing in North America, by Rob van Pagée on conferencing representing civil society and by Anna Eriksson on conferencing in Scandinavia

(2) Discussion

What is the role of the community? Sweden was already very progressive on this topic, maybe that's why there is not really a call for restorative justice. Restorative justice in Sweden mainly started from the idea 'everyone is doing it, so we should do it too.' In Belgium there is a welfare system: youth cannot be punished and restorative justice is a way to avoid punishment.

Participants in the discussion mentioned that as long as you stay close to the values of restorative justice, the process itself may vary, processes can be flexible.

Lode Walgrave commented on the status of restorative justice in prison. He thinks that it is not really 'justice', because justice has already been done by the criminal justice system. According to him a better term is Restorative *Therapy*, which is good for the victim as well as for the offender. Bas van Stokkom however does not agree on this. Justice is a process, but agrees on the idea to call it restorative practice instead of restorative justice. Inge Vanfraechem also does not agree, she says that victims may then still be looking for justice, even after a trial. It is considered to be important to distinguish between things done before prison/sanction and things done after sentencing. Lode Walgrave is in favour of a correct use of language: 'restorative *justice*' belongs at the *justice* system. For him it is important to recognize victims' demands for justice, but for the criminal justice system justice has been done when the offender was sentenced: he/she paid his/her debt. Ivo Aertsen added that a distinction should be made between justice as a process and justice as an experience (it does not stop when the judge makes a decision, which is part of the strength of RJ). But Antonio Buonatesta reminded everyone that restorative justice in prisons is offered in the framework of the justice procedure and that it can lead to conditional release. Therefore restorative justice in prisons can also have practical and systematic outcomes and not only emotional outcomes.

5th session: Conferencing in Norway and Belgium

(1) Presentation by Ethel Fjellbakk on conferencing in Norway, Bie Vanseveren on the developments concerning conferencing in Flanders: a special focus on sexual assault cases and Antonio Buonatesta on conferencing in the French speaking community: flexible use of a multipurpose tool

(2) Discussion

Bie Vanseveren mentioned in her presentation that there is a careful screening of the appropriateness of the case before applying a conference. Vince Mercer asked whether there is a checklist for this screening. According to Bie Vanseveren this is not the case, so the next question was whether this could lead to inconsistencies. Vince Mercer also asked who is deciding for what is appropriate and what is not. There is moreover a timing that suits the system and a timing that suits the parties. Joanna Shapland found out in her research that the timing of the system coincided with the timing of the victim. According to her, the professionals that run a certain scheme might choose the scheme that best fits the victim and the offenders, not the judge. Bie Vanseveren added that the decision is made by talking to the victim and see whether he/she wants to participate in a conference. There is also an organization in Brussels that can decide whether a youngster has to follow therapy: this organization can be asked whether a conference is a good or bad idea. Joanna

Shapland asked what the right time is for a conference. Research shows very different results and the victim is more flexible than thought.

Sometimes the offender/victim has to choose between conferencing and mediation. Who should decide this? Lode Walgrave said there are always possibilities and risks; you have to weigh these in order to be able to make a decision. He also added that more research is needed, for the offender and the victim to be able to make a rational choice.

With regard to Norway the question was posed on how you become a mediator/facilitator in Norway? According to Ethel Fjellbakk you have to follow a training to become a mediator and you have to follow an extra training to become a facilitator. The second question was on the function of the script: the mediator can still ask questions to the participants that are not mentioned at the script, scripts are only used in order for everyone to get the same type of questions. The final question dealt with the follow-up: Dan Van Ness asked whether a follow-up meeting is scheduled. According to Ethel Fjellbakk it is decided at the meeting whether a follow-up meeting will be scheduled, but most of the time it is not. Antonio Buonatesta added that in Belgium facilitators do the follow-up, but a social worker can also carry out part of the follow-up. The social worker can for example check whether the youngster goes to the therapy sessions.

Ethel Fjellbakk mentioned that mediation in prisons is possible in Norway, but only as a supplement and not as the sole reaction to the crime.

What could be done to change the fact that there are still rather low rates of referral? Efforts are made to speak about the benefits to judges/prosecutors, but this does not seem to help right now in Belgium (Flanders). Estelle Zinsstag said that in her interview with a judge a different story emerges: the judge said that they would be happy to refer many more cases but that they stopped by the organisations dealing with conferencing due to lack of staff and funding and because they think that a mediation session is easier and faster to organise than a conference. Ida Helene Asmussen agrees that judges are not afraid to lose control, but they are rather happy to share the workload. According to Ivo Aertsen, the situation is more complex than that; there is an indication that referrals do not work. Judges very often do not refer cases, because sometimes the rationale behind a certain decision is very different for these two systems (CJS and restorative justice). There are different individual attitudes and different professional cultures involved. Joanna Shapland confirmed that when mediation depends on the criminal justice system, there are only little referrals. The discussion also emphasized that there is a difference in judicial culture depending on the country. Mervin Bates added from this point of view that in Northern Ireland referrals have not been left voluntary to the judges, but referrals were to be systematic and this is the only way to make it work.

Kathy Daly asked a question about when two mediators are involved in one case. In Belgium there are two mediators responsible for one case in case of medium and sexual crimes, in Norway there are two mediators in case of violence crimes.

Ethel Fjellbakk mentioned in her presentation that mediators/facilitators are volunteers in Norway. Is it appropriate to work with only volunteers? Ethel Fjellbakk thinks it works, because she has a colleague who has volunteered over 14 years as a facilitator. She only knows the system with volunteers, so she cannot say this system is better or worse than a system with professional facilitators.

6th session: Conferencing in Latin America and Germany

- (1) Presentations by Daniela Bolivar on restorative justice in Latin America: reflections from three countries and by Otmar Hagemann on restorative justice in Schlesweig-Holstein and other Federal states of Germany
- (2) Discussion

It seems to be difficult to promote restorative justice in Latin America. There is no national project, rather more small projects. Trying to define the concept of conferencing is now the main concern in Latin America.

Otmar Hagemann commented on the drawback of the monoculture of victim-offender mediation. Bruna Pali asked if the case of Brazil or conferencing in general could be an inspiration for Europe and a better model to deal with multicultural crimes. Ivo Aertsen gave further examples e.g. a Finnish social mediation model and other examples which target multicultural crime. Borcsa Fellegi presented the example of the Roma community where conferencing has been a more relevant model.

Restorative justice does not exclude any type of crime, but some crimes can not be referred to a conference in Latin America like rape and homicide. Right now, only minor and moderate crimes can be referred to a conference: when conferencing would also be used for severe crimes, politicians and mass media would probably be against it. So it is considered to be better to start slow.

❖ Day 3 16-09-2010

7th session: Conferencing: the police, the courts and the facilitator

- (1) Presentations by Bas van Stokkom on Restorative justice and the police, tensions in theory and practice, by D.J. Mervyn Bates on a judge's view of the benefits of restorative practices especially for young people in Northern Ireland and by Vince Mercer on the application of restorative justice to cases of Sexual Harmful Behaviour
- (2) Discussion

When a restorative justice practice is applied when the case is also processed by court, there is always the risk of double punishment; we should always be concerned about this possibility.

During a conference, a police officer can be present. This police officer cannot *do* the conference, but can only participate. A social worker can do this too, why does a police officer have to be present? It depends on the problem/conflict: a social worker may for example deal with children playing on grass when they are not allowed, but when the crime/problem is reoccurring the police are needed/wanted. Joanne Shapland commented that it is extremely important to bring back context here, because there is a difference between countries concerning the role of the police. Some police officers can indeed do a conference. There are so many people who can represent the community, why does it have to be represented by the police? It could be to support the victim and because they know the philosophy of conferencing. Another aspect concerning the police addressed in this discussion by Borsca Fellegi is the fact that the police have a high level of legitimacy in society. If they can change their negative attitude/behaviour, they can be important in conferencing or decrease the number of crimes.

Daniela Bolivar wonders how far you can go as a facilitator in an interfamilial conflict, for example a conflict between a brother and a sister. According to Vince Mercer, limits are set by the participants and not by the mediators.

8th session: The future of conferencing in a European context: research, practice and policy

- (1) Presentation by Otmar Hagemann (University of Kiel)

Mediation is victim-offender mediation, which evolves to conferencing and circles. The presenter insisted to use mediation to convey an umbrella or broader meaning and victim-offender mediation, circles and conferencing as narrower practices of mediation. People should have the opportunity to make a choice: for some crimes a conference is better. The presenter said we should use conferencing and mediation as complementary and inform the participants very well. There are indications that a time consuming conference might address some crimes and conflicts better and more effectively than mediation. The name of a procedure is not the most important thing; different names *can* mean the same thing/procedure. We should instead deal with ideas. The procedure must fit the people. Learning from other countries can be interesting as well as confusing, with the different names and cultural differences.

Hijacking restorative justice is the danger of the future. We should therefore stick to the elements specific for restorative justice and be careful to label some programmes as restorative justice

programmes when they are not. What is the meaning of restoration? The concept of restoration is heuristic and we do not know the meaning of that. Maybe the participants can be asked to explain that in future practices.

What is the adequacy of restorative justice for Sexual Harmful Behaviour? Applying restorative justice practices for Sexual Harmful Behaviour requires specific procedures and specific qualifications of facilitators.

What is the function of supporters; why should we bring in the public dimension? There are articles on banning some supporters, like parents. Supporters are a good idea: the public dimension or groups know more than individuals, but what is the function of some supporters, like lawyers or victim organizations?

Should mediators and facilitators be volunteers or professionals? This is a reflection of the dilemma of a co-option of restorative justice by the system versus empowering life-world people.

The criminal justice system is offender-focused. Restorative justice practices are struggling with the demands of the offender centred criminal justice systems.

Is punishment really needed? The presenter does not know, but is sceptical from a pedagogical point of view. Rewards can have very positive outcomes, which is good. In a mediation or conference, the process is the most important thing. Restorative justice is not about sentencing, but about insights. A good process will nearly automatically lead to a suitable and adequate outcome.

An important remark made throughout the seminar is the fact that there is still much more research needed.

(2) Presentation by Lode Walgrave (University of Leuven)

In the future, three tracks of approaching crime may be distinguished: the rehabilitative track (what needs to be done to reintegrate?); the punitive track (intentional infliction of pain); and the restorative track (what's the damage, what needs to be done to repair this?). These three tracks will always exist, but how will these tracks relate to each other?

Three actions will be needed: ensure the quality through good facilitators (need for training, intervention and follow-up); ensure the relation between practice and theory (academics are better placed to collect/compare isolated practices; without academics, restorative justice would not stand where it stands now; but practitioners are also valuable); and develop politics. Numbers are not enough; politics and rationality do not go together. Emotions are also important. Good surveys show great potential for restorative justice in public opinions. These results however are different from the results presented in the media. A strategy should therefore be more nuanced and needs to address more civil services/servants and less politics. It is important to work with staff judiciary, for example judges.

(3) Presentation Levent Altan (European Commission)

The objective of the European Commission is to improve the situation of victims, asking questions like how are they being treated? Are there any problems? How may these be solved? Five needs of

victims are distinguished: recognition; respectful treatment; support; respect by the system; access to justice; and compensation – restoration. For the moment, these needs are not being met!

RJ processes could meet the needs of victims if they are carried out well! But it is difficult to ensure that restorative justice works well, because there are so many different ways to practice it.

In Europe we are looking for minimum standards and uniformity. To accomplish this, more research is needed. The objectives are to fit restorative justice into the concept of working for victims; working towards an equal balance between victim and offender; address the question how to work legitimately to get the right model of restorative justice and the questions whether restorative justice is available in all member states, for all sorts of crime and for all types of offenders. Restorative justice is an essential part; we have to be sure that what we do on RJ is the minimum needed.

(4) Discussion

The current criminal justice system is so difficult to change, why not think of a parallel system?

When “victims” are mentioned, which victims are meant? Victims who are objectively seen as victims or victims who feel as if they were victimized? It is important to determine what a “victim” is.

The punitive aspect of restorative justice, which is a matter of debate according to Lode Walgrave: retribution is not a sustainable way of dealing with crime.

Conclusion by Inge Vanfraechem (NICC, Belgium)

- 1) Why was this project set up? It was noted that victim-offender mediation was more developed than conferencing in Europe while conferencing is more developed in non-European countries (especially in New Zealand and Australia). Some questions arose: why is this the case? Could conferencing be developed more? Can we learn from existing examples?
- 2) Some big questions were raised throughout the seminar: is there a difference between mediation and conferencing? What is the difference? Is one definition of conferencing possible/needed/useful? Should we maybe opt for a multi-method approach? Leave it to the parties to decide? Offer them a choice? Who decides? Practices seem to develop quickly and we should not forget that restorative justice today is not the same as what it may entail tomorrow. It seems to be difficult to define conferencing and the option was therefore put forward to rather stick to underlying values? BUT: what are these values?
- 3) The policy context plays an important role. Big differences exist on the national level big, even within countries. Conferencing has to be adapted on the national level. We also have to think on the European level. We should be able to work on minimum standards and look at what has been done at national/European level? Should we keep restorative justice in the criminal justice systems?
- 4) The context is important. On a country-level, it might be important to find out what the differences are and why the procedure is adapted in different countries. As to the profession: why can we not look at how other sectors work (e.g. therapy for sexual offenders and their assessment tools) and maybe include it in the conferencing system? They know how to do it,

why would it be necessary to invent our own tools? But then there is the risk that they will take over, we have to be careful for that.

Victims and restorative justice: there is still some work to be done on the concept "victim". The victim's side/story should be presented in conferencing. The offender's perspective is already presented because of the criminal justice system, but often victims take part because of the offender: they want him back on track. Is it in a conference easier to forget about the victim compared to victim-offender mediation, since there is a group of people present?

