

JusQUID
SCIENTIFIC SECTION

Restorative Approach and Social Innovation:

From Theoretical Grounds to Sustainable Practices

Edited by
Giovanni Grandi and Simone Grigoletto



PADOVA
UP

P A D O V A U N I V E R S I T Y P R E S S

JusQuid sezione scientifica

The scientific section of *JusQuid* contains works undergone an evaluative revision (double blind peer review process) that keeps anonymous both the authors and the reviewers. Reviewers are professors of proved scientific expertise or researchers in reliable research institutes. Reviewers, who accept this assignment, express their judgment by applying a score from 1 to 10 (6 being the first positive mark) in regard to the following aspects: structure (coherence, clarity and methodology); normative and jurisprudential references; exposition accuracy; critical arguments; bibliography; scientific relevance at the national and international level. Reviewers also provide a comment that specifies if the work can be published without revision or with some minor revision or needs to be rejected. In case of discordant judgments by the two reviewers, the Editor in Chief and the Editorial Board will make the final decision, with the exception of cases where the Editor in Chief decides to assign a third reviewer who will evaluate the work. If necessary, reviews are shared, keeping the reviewer and the author of the work anonymous. The list of reviewers and the evaluation forms are stored at the *JusQuid* offices by the director. The deadline for the execution of the review assignment is twenty days (save for extension), after which, without any negative response in the following ten days, the Editor in Chief and the Scientific Board, in case they consider the work worthy, accept the submission. Works by members of the Scientific Board and the Editors in Chief are excluded from evaluation. At the discretion of the Editor in Chief and the Scientific Board are also excluded from evaluation works of undeniable value or already sufficiently evaluated at the academic level with a positive response; for example works by invited or prestigious authors, conference proceedings, and collective works of academic source.

JusQuid

Editors in Chief

Silvio Riondato and Riccardo Borsari

Editorial Board

Riccardo Borsari, Elena Cadamuro, Chiara Candiotta, Paolo Capoti, Elisabetta Palermo Fabris, Lorenzo Pasculli, Debora Provolo, Marco Rebecca, Silvio Riondato

JusQuid scientific section

Scientific Board

Paolo Benciolini, Riccardo Borsari, Lorenza Carlassare, Marcello M. Fracanzani, Manuela Mantovani, Francesco Moschetti, Elisabetta Palermo Fabris, Paolo Patrono, Silvio Riondato, Rino Rumiati, Daniele Rodriguez, John A. E. Vervaele, Paolo Zatti

- E. Pavanello, *La responsabilità penale delle persone giuridiche di diritto pubblico*, 2012.
- S. Riondato (a cura di), *Dallo Stato Costituzionale Democratico di Diritto allo Stato di Polizia? Attualità del "Problema penale". Nel trentesimo dall'Ultima Lezione di Giuseppe Bettiol*, 2012.
- L. Pasculli, *Le misure di prevenzione del terrorismo e dei traffici criminali internazionali*, 2012.
- S. Riondato, R. Alagna (a cura di), *Diritto penale della Repubblica di Turchia*. Criminal Law of the Republic of Turkey, 2012.
- R. Borsari, *Reati contro la Pubblica Amministrazione e discrezionalità amministrativa. Dai casi in materia di pubblici appalti*, 2012.
- C. Sarra, D. Velo Dalbrenta (a cura di), *Res iudicata. Figure della positività giuridica nell'esperienza contemporanea*, 2013.
- R. Alagna, S. Riondato (a cura di), *Studi sulla riforma penale post-socialista*. Studies on the Criminal Law Reform in the Post-Soviet Countries, 2013.
- R. Borsari (a cura di), *Profili critici del diritto penale tributario*, 2013.
- R. Borsari, *Diritto penale, creatività e co-disciplinarietà. Banche di prova dell'esperienza giudiziale*, 2013.
- S. Riondato, *Cornici di «famiglia» nel diritto penale italiano*, 2014.
- I.G. Antonini, *La duplice natura della società pubblica: tra garanzia della concorrenza e alternativa all'appalto*, 2014.
- D. Provolo, S. Riondato, F. Yenisey (eds.), *Genetics, Robotics, Law, Punishment*, 2014.
- A. Aprile, A. Fabris, D. Rodriguez, *Danno da perdita di chance nella responsabilità medica*, 2014.
- R. Borsari (a cura di), *Crisi dell'impresa, procedure concorsuali e diritto penale dell'insolvenza. Aspetti problematici*, 2015.
- R. Borsari, L. Sammicheli, C. Sarra (a cura di), *Homo oeconomicus. Neuroscienze, razionalità decisionale ed elemento soggettivo nei reati economici*, 2015.

- R. Borsari (a cura di), *La corruzione a due anni dalla Riforma Severino*, 2015.
- F. Mazza, *La premeditazione del delitto tra dogmatica giuridica e neuroscienze*, 2016.
- R. Borsari (a cura di), *Processo alla scienza*, 2016.
- R. Borsari (a cura di), *Responsabilità da reato degli enti. Un consuntivo critico*, 2016.
- D. Provolo, *L'identità genetica nella tutela penale della privacy e contro la discriminazione*, 2018.
- R. Borsari (a cura di), *Itinerari di diritto penale dell'economia*, 2018.
- C. Sarra, M.^a Isabel Garrido Gómez (a cura di), *Positività giuridica. Studi ed attualizzazioni di un concetto complesso*, 2018.
- G. Fornasari, L. Picotti, S. Vinciguerra (a cura di), *Autodeterminazione e aiuto al suicidio*, 2019.
- G. Grandi, S. Grigoletto (a cura di), *Restorative Approach and Social Innovation: From Theoretical Grounds to Sustainable Practices*, 2019.

JusQuid Theoretical-Practical Section

- S. Cardin, *L'illecito punitivo-amministrativo: principi sostanziali, procedurali e processuali*, 2012.
- A. Giuliani, *I reati in materia di "caporalato", intermediazione illecita e sfruttamento del lavoro*, 2015.

**Restorative Approach and Social Innovation:
From Theoretical Grounds
to Sustainable Practices**

Edited by

Giovanni Grandi, Simone Grigoletto

**PADOVA
UP**

FISPPA - DIPARTIMENTO
DI FILOSOFIA, SOCIOLOGIA,
PEDAGOGIA E PSICOLOGIA
APPLICATA



UNIVERSITÀ
DEGLI STUDI
DI PADOVA

AREA
SCIENCE PARK
■ ■ ■ ■

This publication has been funded by Department of Philosophy, Sociology, Pedagogy and Applied Psychology (FISPPA) of the University of Padua and Area Science Park.

First Edition 2019, Padova University Press

Original Title *Restorative Approach and Social Innovation: From Theoretical Grounds to Sustainable Practices*

© 2019 Padova University Press
Università degli Studi di Padova
via 8 Febbraio 2, Padova
www.padovauniversitypress.it

Graphic Design
Padova University Press

Cover Image

“College of the Doctoral Jurists from Padua who gives an opinion to the Doge”. From the fresco by Gino Severini in the Room of Jurisprudence Faculty - Bo Palace, Padova

ISBN 978-88-6938-161-4



This work is licensed under a Creative Commons Attribution International License (CC BY-NC-ND) (<https://creativecommons.org/licenses/>)

Table of Contents

Restorative Justice as Social Innovation GIOVANNI GRANDI, SIMONE GRIGOLETTO	11
Restorative justice beyond crime: A vision to guide and sustain our lives HOWARD ZEHR	21
Restorative Justice: a Strategy for Disrupting the School-to-Prison Pipeline LUCILLE RIVIN	29
Restoring relationships, community building: from social inclusion to wellbeing PATRIZIA PATRIZI, GIAN LUIGI LEPRI, ERNESTO LODI	45
Imagining a Restorative Approach to Individual Reintegration in the Context of (de)Radicalization ANA PEREIRA	61
Restorative Justice and social conflicts: a focus on the issue of hate incidents ELENA MILITELLO	83
Restorative Justice within Italian Criminal Law: Another Step Beyond Retributive Justice (with Some Contradictions) CHIARA PERINI	105
Restorative Justice and Probation: Limits and Unexplored Opportunities – Considerations Based on the Experience of the RJ Center, Autonomous Region Trentino-Alto Adige / Südtirol ELENA MATTEVI, DANIELA ARIETI, KATJA HOLZNER	117
Neurosciences and Restorative Justice MARIA BEATRICE MAGRO	131
Using Restorative Justice in Post-Conflict Societies: The Case of Bosnia-Herzegovina ADRIANA MICHILLI	149
Restorative Justice Within Legal System of Bosnia and Herzegovina ENA KAZIĆ, RIALDA ĆORVIĆ	167
Authors' Bio	187

*Restorative Justice as Social Innovation*¹

GIOVANNI GRANDI AND SIMONE GRIGOLETTO

University of Padova – Area Science Park

1. Introduction

Restorative approach and social innovation: how can we connect these two topics? In what sense Restorative Justice is not simply an innovative practice for the public administration of justice, but also a paradigm for social innovation? Questions like these have guided and characterized the 2018 Restorative Justice International Conference at the University of Padova². The present volume collects some of the best contributions of that event and some other works that try to focus on a possible expansion of the reach of the Restorative approach. In these regards, the notion of Social Innovation is crucial. We live in an era characterized by a fast and revolutionary innovation. Although this innovation is mostly considered to be technological, we should not ignore the social changings that come with it. Our contemporary society casts upon us new challenges and goals even (and mostly some would say) from a social point of view. The case of *cyberbullying* represents just one of the many examples that

¹ Giovanni Grandi is the author of the section entitled “*The Social Dimension of Restorative Justice*”. Simone Grigoletto is the author of the sections entitled “*The Reach of a Conflict: Restorative Justice as Social Innovation*”, “*Presentation of the Volume*”. Both authors have conjointly worked to the “*Introduction*”.

² The conference has been possible thanks to the support and vision of Antonio Da Re, Stephen Taylor, Giovanni Osti and Francesca Samogizio. The editors of this volume want to express their deepest gratitude to all of them.

show how the dimension of conflicts has expanded beyond what we were used to think. Acknowledging this, also means to acknowledge the fact that we need to expand our conflict-management tools. The paradigm of Restorative Justice appears to be a good candidate for this sort of development (both on a theoretical and practical way) that our society very much needs. Although many theoretical efforts have been carried out in order to implement such approach to Justice, they have mostly focused on its application to penal justice. This collection of papers wants to introduce a new possibility: Restorative Justice is a valuable tool to manage and handle conflicts in our everyday environment. This will ultimately mean to improve our lives and this sort of goals is what we take to be a social innovation.

2. *The Social Dimension of Restorative Justice*

Restorative Justice is a fruitful and rich approach to Justice. While its roots go back many centuries in the history of human kind, its formal and well-structured application is relatively recent. However, this paradigm of Justice still presents some unexplored potential. It is interesting to focus on possible implementation of the Restorative Approach outside the penal system. This expansion of the paradigm would certainly be innovative and looks like a promising and much needed upgrade for its social benefits.

If we aim to connect “innovation” and “restoration”, we probably have to discuss the pertinence of the restorative paradigm in justice to a wider range of human experiences, connected to conflictual relationships. Probably, the first step in that direction should be the development of the philosophical reflection on this topic, particularly looking at the anthropological thought.

It must be noticed that the expression “the philosophy of restorative justice” is quite often used meaning the general “thought perspective” of restoration in criminal matters, or intending the theoretical reflection on practices³, but it still lacks a solid connection between Restorative Justice and Philosophy itself, particularly between RJ and classic philosophical anthropology and moral thought.

This lack is probably due to the history of the “restorative movement” – if we can use this expression –, that started in the late Fifties of the Twentieth Century from urgent and practical questions about the managing of wrongdoings: the failure of punishment in reeducation of the offenders was the problem of Albert Eglash⁴ for example. Similarly, later in the Eighties, caring about vic-

³ See for example the collective work Gavrielides T. and Vasso Artinopoulou V. (ed. by), *Reconstructing Restorative Justice Philosophy*, Surrey, 2013.

⁴ See Eglash A., *Creative Restitution. A Broader Meaning for an Old Term* in “Journal of Criminal Law and Criminology”, Vol. 48, No., 1958, pp. 619-622.

tims' needs was one of the main issues in the first theoretical works of Howard Zehr. The "clinical" approach connected to a general, and very sharp, reflection on the differences between retribution and restoration guided to the definition of a "paradigm" of justice, which still works clearly, as very understandable mainframe for an increasing number of conflict management proposal.

Simplicity is perhaps the principal theoretical strength of the restorative paradigm: the definitions of "Restorative Justice" used in the international institutional documents are now – after only more or less fifty years – convergent and officially recognized from public institutions⁵.

However, theoretical simplicity of definitions risks to become a limit for the development of the debate: it could seem that we need no more work, no more exploration of the foundations. What basically remains to do – this could be the general perception – is to deepen the dialog between a stabilized theory and practices or new fields of application, in order to expand the undoubtable good effects of restorative perspective in wrongdoing and injustice problems. Briefly: "philosophy" is clear, what principally remains is to care about applications.

Nevertheless, what could happen if we consider "philosophy" not in its general sense of "way of thinking" but in the sense of the philosophical thought, developed from the ancient Greek to our days? The whole history of Philosophy – we can use the capital to distinguish from the term used as generic expression – deals with the problem of injustice, particularly from the perspective of the arising of "evil". The relation between "good" and "evil" is central in justice issues, but how deep is it explored?

If we simply consider the basis of the restorative approach, we can easily understand how a dialogue with the moral and anthropological tradition in Philosophy could be important exactly to deepen the paradigm and to broaden its strength.

Every kind of wrongdoing evocates a context in which all the actors are involved in an experience of evil, and a restorative approach ultimately suggests that taking care of the situation should mean to increase the good where it lacks and shows, at the same time, that inflicting new forms of evil to people who acted evilly is not an effective strategy to manage wrongdoing.

In this perspective, it immediately appears that the context where the restorative approach applies, the context of relationships marked by evil, is not simply the one of public administration of justice, but it appears to be the hu-

⁵ See for example the definition included in the United Nations document ECOSOC 2002/12, *Basic Principles on the Use of Restorative Justice Programs in Criminal Matters*: « "Restorative process" means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles».

man condition in itself.

Moreover, the great anthropological and moral issue of the ancients was not the question “why do we act evil?”, but the ordinary fact that in most occasions we act evil exactly when we are trying to answer to the evil that affects us, when we are trying to “put things right” as Howard Zehr says.

Augustin of Hippo elaborated for example the well-known concept of “original sin” meditating on human condition and on the third chapter of the book of Genesis.

This concept tries to take in account exactly the fact that when we act responding to evil, we are always already affected by experiences of evil, and this sort of moral burden that everyone carries within him or herself inclines us towards retribution. According to Thomas Aquinas, “pena” means “*every kind of deprivation that not allow to act something good*”⁶ and in that sense is clear that the passive experience of evil – the experience of being a victim – affects exactly the capability of responding to evil in a non-destructive way.

Being passively involved in wrongdoings, we are inclined to answer to evil that affects us by introducing new evil, becoming active in this transmission, if we do not pay the necessary attention. We are inside a sort of chain, and the problem is exactly how can we break this chain, and which is the point we have to force to interrupt the transmission of evil.

Moreover, we have to notice that this chain is not so linear in its development. As René Girard demonstrated⁷, evil and violence are not predictable in their lines of transmission. We are acting in a retributive way not only when we ask, as victims, to inflict, first of all, severe punishment to perpetrators, or when in ordinary life we adopt the perspective “eye for an eye”. According to the lesson of René Girard, we act in a retributive way even when we dump the evil we suffered on other people, who have nothing to do with facts that made us suffer.

For example, when I come back to home very tired and, let us say, I have strongly argued with my colleagues, and I find chaos at home and the first thing I do is to scold my daughters and my son, I then act exactly in a retributive way: I transmit to my family an amount of the evil that was charged to me in a totally different context.

Retributive approach and restorative approach are not two equally balanced possibilities in answering to evil. Retributive approach remains stronger insofar as we do not find how to break the chain that connects suffering and perpetrating evil. This is, for example, an anthropological and moral issue that should be very relevant for the “theory” of Restorative Justice. We can also notice that this problem affects potentially all our relationships. Every time and everywhere

⁶ Thomas Aquinas, *De Malo*, q. 1, a. 4, res.

⁷ See principally R. Girard, *La violence et le sacré*, Éditions Bernard Grasset, Paris 1972.

evil touches our life, we are immediately ready to expand the chain effect, if we do not find a way to be aware of this dynamic and to contrast it. If retribution and restoration are two different ways in answering to evil that affects our lives, we also have to observe that we have the most concrete possibility to break the chain exactly when we feel as victims. In every situation in which we have to decide how to react to an action that we feel offensive, we are concretely challenged, inside ourselves, to react to the inclination of retribution. And those are the situations that reveal us how strong or weak is our moral power to adopt a restorative approach.

From a moral point of view is quite easy to recognize that Restorative Justice concerns our ordinary life, the management of ordinary conflicts, and in that sense is a paradigm of living and not only an alternative way of managing crime within judicial systems. Some experiences of humanistic mediation confirm this view. What does happen when restoration in a deep sense succeeds? People involved in criminal facts recognize humanity in each other. The labels of “enemies” and “monsters” leave place to real suffering faces. Anonymous social functions, impersonal presences, or social rules leave place to real injured people. In some way, what happens through mediation is the discovering of common humanity suffering from evil and the drama of remaining without power to break the chain. Criminal facts, always considering things from an anthropological point of view, are points in which perpetrators have lost both the awareness of the dramatic chain of retribution and the power, as victims of evil, to react in a different way. This sort of topics could be explored through a deeper dialogue between Restorative Justice and Philosophy and this dialogue could reveal the restorative approach as a social innovation path, as a perspective that – as Howard Zehr says – shows a different way of living and solving ordinary life conflicts, also, beyond criminal justice systems.

As far as restorative approach takes fairly into account the human condition, it reaches – particularly thanks to the practices of humanistic mediation – the great result of rebuilding into people the power to break the chain of evil. Moreover, as a way of thinking, it shows to be a perspective that can also enlighten every sort of social initiative that arises as an answer to different kinds of evil.

In that sense a restorative approach to social innovation could also mean a specific moral awareness: every time we introduce something new (a new social solution, new technologies applied to services, a new way to organize people’s work...) to solve problems or to “put things right”, first, we have always to pay attention to the dynamic of the evil chain, and particularly to its less predictable ways of reproducing experiences of deprivation and suffering; every change, despite the best intentions, could produce losses or damages; second, we have

always to consider how an innovation could sustain or rebuild the power of the people to choose a restorative reaction to evil instead of a retributive one.

This point of view represents the research program of the group of scholars of the University of Padua, that organized the international conference *Social Innovation and Restorative Approach* with the aim to introduce anthropological and moral perspective in the fascinating field of Restorative Justice studies.

3. *The Reach of a Conflict. Restorative Justice as Social Innovation*

It seems clear how the future of Restorative Justice let us envisage an expansion of its ordinary subjects. Expanding the area of competence and action of Restorative Practices, however, is both a theoretical and practical move. It is practical insofar as we have to make possible to share and apply Restorative Justice in different ways than usual. It is also theoretical, as we need to focus more on the philosophical principles that ground these mediations tools. The development of Restorative Justice along these lines is guided by well-established belief: practice without a strong theoretical background can be misguided and theory without a reference to practice is empty. As moral philosophers, we think we can contribute to this development in virtue of a millennial tradition of conceptual and theoretical research on concepts that Restorative Justice considers of primary relevance. The philosophy of Restorative Justice, however, has been generally overlooked (at least as an explicit standalone subject). In is important to remind that, as underlined above, the word “philosophy” can have at least two understandings. On the one hand, we could understand “philosophy” as a general term that refers to any attempt to identify the aims and the scope of a practice. In this regard, the debate on Restorative Justice has seen some interesting works⁸. On the other hand, “philosophy” could refer to the specific subject that has characterized the intellectual inquiry of human beings for over two millenniums and half. In the recent years, we have seen an increasing spreading of Restorative Practices (and hopefully this will soon be the case in Italy as well), but how about the theoretical work that grounds and sustains these practices? I recall Jonathan Doak and his reflection on the relationship between RJ theory and practice⁹. One of his claims has particularly struck me as I still remember it very well: “*Restorative Justice Practices have outpaced theory*”. Theories of Restorative Justice, Doak claimed, have not moved fast enough so as to deepen our understanding on why and how Restorative Practices work. The second, more technical, understanding of philosophy can become very handful

⁸ The works of Howard Zehr, for example, are considered the most fruitful example of this sort of grounding investigation on Restorative Justice.

⁹ As all the other active participants of the EFRJ 2018 International Conference in Tirana do.

to guide the sort of practical and theoretical expansion that Restorative Practices are ideally going through. Restorative Justice Practices deal with many theoretical concepts. Restoration, Forgiveness, Responsibility, Punishment, Agency are all concepts that have been addressed by the philosophical tradition. Surprisingly, the Philosophy of Restorative Justice appears to be a quite unexplored area of theoretical knowledge. We suggest that bridging the gap between theory and practice means drawing from the philosophical tradition all the conceptual analysis that can support the existing practices of resolution of the conflict.

A second more general question, then, arises: how can Restorative Justice be linked to Social Innovation? To (briefly) answer to this question I think we need to expand the scope of RJ outside the field of conflict management as intended by judicial systems. This is possible if we highlight how RJ practices are typically focused on the reestablishment of damaged relationships. However, this relational damage is not an exclusive of conflicts that have led to formal judgement and have been assigned a punishment by a code of law. A wide range of conflicts that produce a similar relational stress (even if with different degrees) characterizes our everyday working and domestic lives. Claiming that the dimension of conflict is wider than Penal Justice means to realize how relational conflict characterizes many fields of human life. Accordingly, all these cases would benefit from Restorative Practices and its guiding principles.

Before moving on and analyze how all this is relevant for Social Innovation, I want to focus on conflicts¹⁰. Take a broad definition of conflict such as the following:

A conflict is a relationship that has been damaged by the contrast of two (or more) parties who hold, in the given situation, opposing values.

Now, understanding a conflict through the relational damage that comes with it allows us to see how deep and wide the dimension of conflict is. Again, we could possibly face damaged relationships in most of the areas of our everyday life. Moreover, such a conception of conflict makes us understand how much Restorative Justice can be helpful in these regards. The primary goal of the restorative approach is to take care of the relationship between the stakeholders by reestablishing a *relational equilibrium*. To understand this point an analogy with the concept of *health* can be useful. In the healthcare professions, how can we consider a specific treatment to a patient to be pursuing her health? To answer this question we need to focus on an appropriate conceptual redefinition of *health*. Does the pursuit of *health* entail the going back to the pre-patho-

¹⁰ I consider conflicts to be at least of two kinds: *interpersonal* (conflict between the others and me) and *intrapersonal* (conflicts with myself). I will refer here to conflict in its *interpersonal* understanding.

logical state? What if such a return to the original state is not possible? Some authors suggest that we need to understand health in a different way. Georges Canguilhem has suggested a conception of *health* as the equilibrium of the vital functions of the patient¹¹. Accordingly, if going back to the pre-pathological state is not possible, we need to aim at new equilibrium that allows the patient to live a healthy life. Similarly, Restorative Justice, in dealing with conflicts, is aiming at a *relational equilibrium* between the stakeholders of a given conflict. If necessary, this might lead to a brand new way of relating with the other. In these terms, the focus of Restorative Practices remains the possibility of creating (rather than *re-creating*) a dimension that allows for a safe relationships of the parties involved.

Following this understanding of Restorative Justice allows us to highlight a new possible role of this approach in socially-relevant issues. Social Innovation has been defined as follows:

*“Specifically, we define social innovations as new ideas (products, services and models) that simultaneously meet social needs and create new social relationships or collaborations. In other words, they are innovations that are both good for society and enhance society’s capacity to act”*¹²

The creation of new social relationships is an explicit goal of Social Innovation. Given the ability of Restorative Justice in creating new relationships, we understand how much a valuable tool it can be. Nevertheless, this move requires an innovative use of Restorative Practices. We need to expand the reach of the guiding principles of Restorative Justice even beyond its regular fields of application, in deep connection with our everyday lives. Differently from a common perception of the word “innovation”, such an innovation on the use of Restorative Justice is not a technological one. Social Innovation, broadly conceived as the enhancement of the wellbeing of a community through the improvement of its working and living places, services and educational processes, deserves a similar attention. Restorative Justice, by taking care of the relational equilibrium of related parties, appears to be a valuable tool that aims at the improvement of our living conditions. Again, if we want to consider Restorative Justice guiding principles as socially innovating, we need to expand the reach of Restorative Practices beyond the sphere of penal justice. Conflict management is a much wider field, and we believe that Restorative Justice will provide us the proper tools to dig into this unexplored ground.

¹¹ See Canguilhem G., *The Normal and The Pathological*, Zone Books, 1991 [1966].

¹² Murray R., Caulier-Grice J., Mulgan G., *The Open Book of Social Innovation*, The Young Foundation, 2010, p.3.

4. Presentation of this volume¹³

This volume includes a selection of papers that have been presented at the international conference *Restorative Approach and Social Innovation: From Theoretical Grounds to Sustainable Practices* held at the University of Padova the 7th - 8th November, 2018. This event has involved more than one hundred participants in the discussion of how we can expand the reach of Restorative Practices. The keynote speakers (that featured Howard Zehr, Brunilda Pali and Ivo Aertsen) introduced a series of questions that have been analyzed in different panels. These sessions have dealt with issues that ranged from the theoretical aspects to the more practical challenges of Restorative Justice.

This volume offers a good sample of the variety and the quality of the papers presented at the conference. We are proud to start with an essay that summarizes Howard Zehr's opening speech. Zehr has been invited November, 6th 2018 at the annual Jacques Maritain Lecture in Trieste. The following days he was invited speaker and participant at the International conference held at the University of Padova. The original paper presented here introduces his thoughts on the relationship between the Restorative Approach and Social Innovation.

Lucille Rivin, in her essay *Restorative Justice: a Strategy for Disrupting the School-to-Prison Pipeline* highlights the possibilities that the Restorative Approach has in the school environment. She claims that practitioners should undergo a specific Restorative Justice training in order to reintegrate those students who risk to drop school following serious cases of conflicts in their communities.

Patrizi, Lepri and Lodi also focus on a possible expansion of the Restorative Approach at the community level. RJ, they claim, does not exclusively belong to a specific context. In order to explain this sort of expansion of the paradigm they focus on a study case of Tempio Pausania, the first Italian case of a Restorative City.

Ana Pereira, analyzes the concept of *de*-radicalization in the prison context. In her essay, *Imagining a Restorative Approach to Individual Reintegration in the Context of (de)Radicalization* she claims that Restorative guiding principles are very much needed if we want to prevent prisoners to undergo a radicalization that would affect their possibility to be reintegrated in the society.

Another attempt to expand the reach of Restorative Justice is suggested by Elena Militello who tries to highlight the possible role of this paradigm in the social dynamics of trust and inclusion with a particular attention to hate crimes. These phenomena, that are increasingly affecting our societies, seems to be han-

¹³ This publication has been funded by Department of Philosophy, Sociology, Pedagogy and Applied Psychology (FISPPA) of the University of Padova and Area Science Park.

dled more effectively according to the Restorative Principles.

Chiara Perini, with her article entitled *Restorative Justice within Italian Criminal Law: Another Step Beyond Retributive Justice*, analyzes the Italian penal system and reminds us that we still need to work on the theoretical background that grounds the relationship between Restorative Justice and Retributive Justice. The two models of Justice should be considered to be compatible, while neither of them should be considered exclusive.

Mattevi, Arieti and Holzner, drawing from the experience of the Restorative Justice center of the Autonomous Region Trentino-Alto Adige / Südtirol, highlight the limits and the possible development of Italian probation. The legal framework is a crucial point when it comes to this alternative approach to Justice. The second part of this essay focuses on the most significant cases of Restorative Practices in light of future development of the legislation.

Maria Beatrice Magro introduces, in an explorative paper, possible insights from the neuroscientific point of view. This kind of research, she suggests, would allow us to dig deeper into the victim and offender psychology in order to understand new aspects of the conflict management process.

A similar path from practical needs to theoretical implementation is the one proposed by Adriana Michilli. In her *Using Restorative Justice in Post-Conflict Societies: The Case of Bosnia-Herzegovina* she takes into consideration the case of post-conflict countries and the different ways of dealing with the polarization of conflict. This interesting area of study, where Transitional Justice combines with Restorative Justice, wants to show how Restorative Practices can work along other forms of International Justice rather representing an alternative that rules out other forms of conflict transformation.

Analyzing the same study case of Bosnia and Herzegovina Kazic and Corovic claim that Restorative Justice has witnessed a few decades of introductory work of the paradigm within the various national Penal Justice Systems. It appears helpful, they claim, to see now, after all these years, how much these practices have been accepted in the community and what their actual usage is.

We believe, as editors of this volume, that these papers well represent a first step towards different possible expansion of the Restorative Approach. It is our hope to see a further development of Restorative Justice that shows how this paradigm can become a useful tool of Social Innovation.

*Restorative justice beyond crime:
A vision to guide and sustain our lives*

HOWARD ZEHR

Center for Justice & Peacebuilding, Eastern Mennonite University

On November 4, 1995 at 4:40 in the afternoon, Jackie Millar was shot in the head at close range with an exploding bullet. Two boys broke into the friend's house where she was resting while waiting for him to return from working on his tree farm. They took her car keys, then debated which of their guns they would use to shoot her.

I died, she told me with quiet conviction, and then I got resurrected. The Lord told me, 'maybe you can stop one youth if you tell your story...'

When I met her, she was legally blind, her right hand paralyzed, and she walked with difficulty and talked slowly. But Jackie was visiting prisons, speaking with young men like those who shot her – including one of them men who did shoot her - doing "hug therapy."

She insisted that Craig, who pulled the trigger, is like one of her sons. A long-time prisoner recounts how she transformed his life when she told him, You are a human being, and don't let anyone else tell you differently, then gave him a hug.

Most of us don't experience the call or motivation to improve the world, to serve others, this dramatically. Many of us may, in fact, be uncomfortable with the term service, but my guess is that most involved in the work of peace and justice have experienced some sort of push or call to make the world a better place.

Many other lifers described this sense of call, but so also did many of those

survivors of violent crime.

I often hear this commitment to serve others from those who seek to find peace and justice in their lives and beyond. Serving others is a way to make life and life experiences meaningful, and so very important in today's world.

But service to others can be exhausting and it is easy to give up, to burn out. A commitment to make the world better is not enough to keep us going. We need a moral vision to guide and sustain us.

For some, this vision comes from religious faith. For some, it comes through philosophical commitments. For a growing number of people, restorative justice serves as the needed moral and cultural vision. As we will see later, this vision can be framed in either secular or religious terms.

As individuals we need a moral vision, then, but the issue is larger than us. The world as a whole is facing a kind of social/cultural crisis – some would say a spiritual or moral crisis. I will name some elements of this crisis, starting with my own context, here in the United States.

We are a highly individualistic and materialistic society that emphasizes rights over responsibilities. Ours is a punitive culture that often glorifies violence. Today it is a highly polarized society in which few public figures are modeling integrity, respect or true dialogue.

Globally, we see tremendous religious and ethnic diversity. This provides for rich possibilities, but also has become politically and socially divisive. The need to belong is a fundamental human need. In threatening and uncertain circumstances, we tend to withdraw until our “clans” and see others as enemies.

Racism runs deep and wide, taking different forms in various contexts. It represents in part an unhealthy way of finding a sense of belonging and defining social boundaries.

The split between the haves and the have-nots is dramatic and, at least here in the U.S., is growing. The visibility of this divide through the media and the internet results in high degrees of what is sometimes termed relative deprivation. The awareness of deprivation relative to others makes for a highly volatile situation, fueling crime, rebellion, even so-called terrorism.

Relative deprivation is one of many factors that contributes to feeling of shame and humiliation. James Gilligan and others argue that shame is a – maybe the – primary cause of violence, from domestic violent to political terror and hate crimes.¹ According to Gilligan, shame is at the heart of what makes structural injustice into structural violence.

Awareness is growing of how widespread trauma is, how trauma contributes to harm and to violence, and how trauma is transmitted to others. As is often said in our program's STAR trainings (Strategies for Trauma Awareness and

¹James Gilligan, *Violence: A National Epidemic*, Vintage Books, 1997.

Resiliency) at Eastern Mennonite University, “trauma that is not transformed is transferred;”²trauma that is not addressed is re-enacted in the lives of those immediately affected, but also in the lives of those around them, including their families and even future generations.

And then, of course, there is our disregard of what we humans are doing to the environment.

Technologically, we live in exciting times, when things are possible that those of us who are older could never have dreamed. Innovation is constant and promises all sorts of possibilities. I am somewhat techie, and very much enjoy parts of this.

Cell phones, the internet, inexpensive electronics are giving access to this technology to many marginalized people, making it possible for them to tell their stories, to connect with others who have similar interests, and to have a direct impact on events.

But many are still left out. The visibility of the “haves” increases the alienation, the sense of relative deprivation, and the feelings of shame of the have-nots. The anonymity of the internet reduces factors that encourage empathy, making it possible to say and do things that we would not in person,

Manipulative use of media and the internet is negatively affecting politics, contributing to polarization and undermining democracy.

In short, while contributing to connection for some, these forces are also encouraging disconnection and depersonalization. Powerful forces are discouraging empathy and encouraging “othering,” an emphasis on how others are different from us. Violence to others becomes most possible when we “other” people, turning them into our enemies. All of this contributes to unhealthy ways of finding a sense of belonging.

Albert Einstein has famously said, “We can’t solve problems by using the same kind of thinking we used when we created them.” What is required, I would argue, is a fundamental rethink of our values and assumptions not only about justice, but about life in general. We need a new “lens” – a cultural and moral vision, if you will - that can span some of our differences.

This calls for an approach that favors compassion and collaboration above competition; emphasizes responsibility as well as rights; encourages respect and dignity instead of promoting shame and humiliation; promotes empathy and discourages “othering;” acknowledges the subtlety and power of trauma and the importance of trauma healing; and reminds us that we as human beings are not isolated individuals but are interconnected with one another.

Restorative justice offers an example of a moral vision or compass that points in this direction. It also provides some practices that can operationalize

² <https://emu.edu/cjp/star/>

the vision.

Restorative justice may or may not be “the” vision, but perhaps, at least, it can be a catalyst. It is, at minimum, a call to re-examine our assumptions, to take stock, to have a dialogue. It may also be viewed as part of a larger effort to build a culture of peace, a peacebuilding approach to justice.

The concept of restorative justice has roots and resonance in many indigenous, cultural and religious traditions. It connects with these, sometimes help to legitimize them, yet is not necessarily rooted in any one of them.

As a field of practice, restorative justice arose as an attempt to respond to “crime” but today has moved far beyond that to many other areas of application. It is increasingly popular in education settings but also is being applied to transitional justice and historical wrongs such as the legacy of slavery in the U.S. and is helping to reframe conflict resolution practices.

I will first provide a brief overview of restorative justice as a conceptual framework and moral vision before looking at specific practices or applications. As I will demonstrate later, this framework can provide a guide for intervention even when specific programs or practice models are not present.

Restorative justice is essentially a needs-based, relational approach to justice issues that focuses on repairing harm and promoting responsibility and favors dialogue and consensus as a process for doing so.

I like to summarize restorative justice in three principles or pillars.

1. Harms and resulting needs. Unlike our legal and rule-oriented criminal justice and school discipline systems, restorative justice is concerned first with the people and relationships that are harmed, and the needs that result. This means that those harmed should be central to any process of justice.
2. Obligations. Emphasis is placed on the obligations that result from the harms. The primary obligation may be on the part of those who directly caused the harm, but the surrounding community may have obligations as well. As much as possible, those who cause harm should be encouraged to understand, acknowledge and take steps to repair the harm.
3. Engagement or involvement. Justice is best served when those who have been part of the situation or who have been affected by it are involved in the resolution through process of dialogue, collaboration and consensus.

Central to a restorative approach is an effort to put right the wrong, to the extent possible, in order to promote healing and wellbeing.

Underlying these three principles are three key values.

1. Respect. A sense of dignity or respect is essential for well-being. I’ve found that much offending is motivated by an effort to gain respect in

some way. If we treat those who offend with disrespect, we may only encourage the cycle of disrespect. I've often found that part of the trauma of victimization is the disrespect those who have been harmed experience on the part of the one who caused the harm, by the justice system, even by their loved ones who may compound the disrespect by blaming them and by not respecting their feelings or realities. Essentially restorative justice is about treating people respectfully.

2. **Responsibility.** In the U.S., at least, we live in a society that emphasizes rights but talks much less about responsibility. Restorative justice reminds us that we are responsible for our actions and decisions and when they harm others, we have a responsibility to acknowledge and address these harms.
3. **Relationships.** Again, many of us live in an individualistic society. However, as most indigenous and religious traditions emphasize, each of us lives within a web of human relationships. Interestingly, neuro-science is confirming this; our brains are "wired" to connect with others. Because we are interrelated, the prior values of respect and responsibility are especially important.

The overall goal of a restorative justice approach is to promote individual and relational wellness – to improve the health of individuals and communities.

Restorative justice changes the questions, or the emphasis, of the questions we ask about harmful behavior. Instead of a preoccupation with what laws were broken, who did it, and what punishment the "offender" deserves, restorative justice asks questions like these:

1. Who has been harmed? (The harm may be to individuals, communities, relationships)
2. What are their needs?
3. Whose obligation is it to address those needs?
4. What has caused this to happen?
5. Who has been affected or has a stake in this?
6. What is the process that can involve them in the resolution and prevent future harms?

Questions like this can be used to guide responses to harm, even when no restorative justice program may be easily available.

But Restorative justice is not just about responding to crime or even harms; it is a way of approaching life.

I was slow to understand what people mean when they said that restorative justice was "a way of life." How, I wondered, could an approach initially designed to address the shortcomings of the criminal justice system be thought of so grandly? Eventually I realized that it was the values and principles, the

overall vision, of restorative justice that was meant.

Legal systems are designed to say something about how we live together, but they only define minimum permissible behavior in a society. They usually draw these boundaries by threatening harm to those who cause harm. Because they are based on rules and threats, including the threat of violence, other “outside” values and norms must be brought to bear as a way of limiting it and keeping it humane. This is less effective than when the needed values are inherent in the concept itself.

Restorative justice, on the other hand, provides a more comprehensive moral vision of how we should live together. The values we need are built into the concept. It is a vision that acknowledges our interrelationships and provides some values and principles for maintaining and repairing those relationships.

Based on this, I suggest some life guidelines that encompass restorative principles and values.³

1. Take relationships seriously, recognizing you are one part of a web of people, institutions and the environment.
2. Be aware of the impact of your actions on others and the world around you.
3. Take responsibility for injuries you have caused--acknowledge and try to repair harm.
4. Treat everyone with respect, including those who offend you.
5. Whenever possible, involve people in decisions that affect them.
6. View conflicts in your life as opportunities.
7. Listen to others deeply and compassionately--try to understand even when you disagree.
8. Engage in dialogue with others even when that’s difficult--remain open to learning from them.
9. Be cautious about imposing your “truths” and views on other people and situations.
10. Sensitively confront everyday injustices such as sexism, racism and classism

Our “new” world requires a new, more life-giving ethic – one that can transcend some of our religious and even political differences while yet encompassing some of their core values, one that aims at making our communities healthier and more just. Maybe restorative justice can encourage us to consider these some possibilities.

But restorative justice is not new. In fact, it is very old. Often my students

³ Originally published here: <https://emu.edu/now/restorative-justice/2009/11/27/10-ways-to-live-restoratively/>. See also *Changing Lenses, 2015*, and *The Little Book of Restorative Justice, 2nd edition 2015*.

from indigenous traditions around the world have said that it captures the essence of their own traditions. Some have returned to their contexts and used restorative justice as a framework to restore, legitimate and modernize those traditions. Graduate students from various religious traditions have found that it resonates with core principles of their own.

Restorative justice must not be considered a blueprint to be followed in detail. Practices, even the concept, must always be contextualized, and even after more than four decades, there are still many questions.

Restorative justice is not a blueprint, but perhaps it is a compass, pointing a direction and providing an invitation to question and explore our values, our needs, our traditions, our visions.

In the Afterward to *Changing Lenses*, first released in 1990, I described restorative justice as *an indistinct destination on a necessarily long and circuitous journey*.⁴ Now, nearly three decades later, I can confidently say that, although it is still a journey with many curves, many detours and wrong turns, the road and its destination is not as indistinct as it once was.

I believe that if we embark on this journey with respect and humility, with an attitude of wonder, it can lead us toward the kind of world we want our children and grandchildren to inhabit.

⁴Herald Press, 25th anniversary edition 2015, pp. 227-228.

Restorative Justice: a Strategy for Disrupting the School-to-Prison Pipeline

LUCILLE RIVIN

The Leadership Program

Introduction

The school-to-prison pipeline is a uniquely American phenomenon. It is a nationwide systemic funnel from the public education system into the prison industrial complex. This pipeline operates throughout the USA, potentially affecting approximately 50.7 million public school students, pre-kindergarten through 12th grade, as of fall 2018 (National Center for Education Statistics, 2018).

Many studies about U.S. school discipline policies and their effects are conducted on specific state-wide bases or by individual school districts, because laws, educational policies and regulations, and funding levels differ from state to state and among municipalities. However, the data collected from these various geographic locations, whether from urban, suburban, or rural areas, tell the same story about the adverse effects of zero tolerance policies on American youth and the beneficial effects of Restorative Justice Practices (RJP).

The roots of the school-to-prison pipeline lie primarily in the establishment of zero tolerance policies and the advent of School Resource Officers (SROs) in schools in the late 1980s and early 1990s. Strongly influenced by institutional racism and implicit bias, the school-to-prison pipeline disproportionately affects Black and Latino youth, especially young men, as well as students with disabilities and those who identify as LGBTQI. Over the last several years Restorative

Justice Practices in schools have emerged as a force for shifting the mindset of educators away from a punitive and retributive approach to discipline, toward one that is preventive and reparative; Restorative Practices are in the vanguard of transforming school cultures from adversarial settings, where even minor infractions are often criminalized, to welcoming and safe communities where the focus is on building positive relationships among all stakeholders. In turn, this transformation process has started to disrupt the school-to-prison pipeline. But we still have a long way to go to dismantle it entirely.

Defining the School-to-Prison Pipeline

What is this phenomenon and why is it called the school-to-prison pipeline?

“The combination of policies and practices that push kids out of school, arresting them for misbehavior, suspending them at the drop of a hat, are what we call the school-to-prison pipeline. And we call it that because we know—and it’s documented statistically in New York and around the nation—that when kids are pushed out of school, the likelihood that they will land up in jail is significantly increased.”

Donna Lieberman (Growing Fairness, 2013)

Zero Tolerance Policies

The school-to-prison pipeline grew out of a series of laws passed in the USA at the end of the 20th century. In the 1970’s, much of the response to drug abuse in the USA was focused on funding for treatment. As the use of cocaine increased over the next decade, and especially among American military personnel returning from Viet Nam, Richard Nixon framed the problem as a War on Drugs. Over the next decade, addiction to cocaine and crack cocaine began to devastate many struggling communities, particularly in economically depressed urban areas. In 1986 Ronald Reagan signed the federal Anti-Drug Abuse Act into law. In addition to the previously incorporated funding for addiction treatment and anti-drug education, this law for the first time provided substantial funding—\$97 million—for building new prisons. Thus began the expansion of incarceration as a response to drug addiction. Most importantly, the law included mandatory minimum sentencing for possession of specified quantities of drugs, taking sentencing options out of the hands of judges. Over the next ten years, the federal prison population increased over 230% (Frontline, 2014).

In 1994 the national Gun-Free Schools Law was enacted. This law was intended to keep students safe by preventing weapons from entering schools. It

mandated that any student bringing a weapon to school be expelled. This was the beginning of harsh school discipline policies; unlike the Anti-Drug Abuse Act, this law did not include any provisions for an educational component that could support students in developing social and emotional learning skills and help them improve their behavior (American Psychological Association Zero Tolerance Task Force, 2008). It simply pushed them out of school and made them someone else's problem.

Strict enforcement of these two federal laws together became known as zero tolerance policies because neither judges in criminal cases nor administrators in schools had the option of meting out a less harsh penalty. No mitigating circumstances would be considered in deciding appropriate consequences for violations; minimum school punishments and minimum prison sentences were now mandated.

Given that all states and school districts in the United States rely on federal funding to support their public education systems, and that as of the passage of the 1994 Gun-Free Schools Act federal funding for school districts was tied to compliance to the new law, application of these policies quickly became universal. By 1997, at least 79 percent of schools nationwide had adopted zero tolerance policies toward alcohol, drugs, and violence. In many places, these policies were expanded to include a wide range of misbehavior. (DeVoe et al, 2002). Students were, and in many cases still are suspended from school—a suspension from school can cover a period of time from one day to a full school year—for such infractions as talking back to a teacher or disrupting class, and even for hugging a friend (Tomaszewski, 2011; Public Health Post, 2017).

Once zero tolerance policies were adopted, expulsions from schools also skyrocketed. After just one year of the new policies, the expulsion rate in Chicago public schools rose to 3 times higher than previous years, and increased by a factor of more than 10 times over three years (Chicago Public Schools, 1999, as cited in Koch, 2000).

According to a 2003 study by Mendez and Knoff (2003), reasons for suspensions in high school include not only substance abuse, property damage, and minor infractions, but also absenteeism. So, zero tolerance policies mean that to solve the issue of students being absent, educators remove these students from the school—clearly a counterproductive policy that prevents the students from achieving two key indicators of school success: improving their class attendance and establishing a stronger connection to school. This in the very cases where it is clear that enhanced school connection is most needed (CDC.gov, 2018).

The American Psychological Association (APA Zero Tolerance Taskforce, 2008) published a landmark study, reviewing published research related to zero tolerance discipline methods, that found that these policies may negatively af-

fect academic outcomes and increase the likelihood of students dropping out. Compounding the negative effects of these policies, further analysis shows that it is not only those students who are suspended and lose academic instruction time who are negatively affected by suspension. A study tracking over 16,000 middle and high school students over three years found that non-suspended students' grades fall when the classroom is perceived as unsafe due to harsh punishments such as suspensions for other students (Perry et al, 2014).

To make matters worse, since their implementation these policies have been applied disproportionately to students of color, students with disabilities, and LGBTQI students. In both the 2014-15 and 2015-16 school years, black students with disabilities lost roughly three times as much instruction from discipline as their white peers did (Sparks, 2018). One recent California study showed LGBTQI students were almost twice as likely to be suspended as gender-conforming peers (Choi et al, 2017).

Implicit bias among educators cannot be discounted as one of the factors in the disproportionate targeting of students of color, students with disabilities, and LGBTQI and low-income students. "...the general consensus is that race contributes to discipline disproportionality independent of socioeconomic factors" (Kirwan Institute, 2014).

A 2016 University of Massachusetts Amherst doctoral dissertation by Kristine A. Camacho titled *Disproportionate Suspension Rates: Understanding Policy and Practice in One State*, cites thirteen studies showing that "students from lower socioeconomic status backgrounds were disproportionately suspended compared to their peers" (Camacho, 2016) and that lower socioeconomic status was particularly a factor in increased suspensions for white students while "having a higher income served as a protective factor from suspension" (Camacho, 2016). This lower socioeconomic status and increased risk for exclusion from school includes students living in poverty, those receiving federal assistance (e.g., SNAP—Supplemental Nutrition Assistance Program), and those living in families where the head of household has a limited level of education.

Into the Pipeline

Data consistently shows the correlation between students being pushed out of school and the decreased probability that these students will graduate, as well as the increased likelihood that they will land in the criminal justice system: After a student is suspended 1 time in first year of high school, their chance of graduating decreases 23%. If a student is suspended 4 times in the first year of high school, the chances of graduating decrease 52% (Balfanz et al, 2013).

“If someone were to design a system that was intentionally set up to push students out of school, to set up hurdles and obstacles and all kinds of traps and pitfalls so that they wouldn’t finish college well-educated, they wouldn’t even get to college in the first place, they would design the school-to-prison pipeline.”

– Damon Hewitt, (*Growing Fairness*, 2013)

Moreover, students who have been suspended are 3 times more likely to be involved in juvenile justice system than their non-suspended peers (Thomas, 2017). In 2011-2012, 92,000 students were arrested for in-school offenses nationwide (OCRdata.ed.gov, 2009). Over 70% of these students were Latino or Black (www2.ed.gov, 2012).

Along with instituting zero tolerance policies, school districts began to employ school resource officers (SROs) as an additional preventive strategy. The SROs’ directive was to focus on monitoring students entering the building to prevent them from bringing in drugs or weapons. Virtually all SROs are affiliated with police or other law enforcement agencies (National Association of School Resource Officers, 2019), and as such they are de facto police in schools, often influencing which students are suspended and which are arrested or processed through the juvenile justice system—or in some cases processed as an adult through the criminal justice system—for in-school infractions.

Over the last 25 years zero tolerance policies in schools have been increasingly applied for lower and lower level infractions. Reasons for arresting students directly from school have included a student scribbling on a desk, a kindergarten student throwing a temper tantrum, and a high school student whose science experiment went wrong (Thomas, 2017).

As of 2016, nearly 200,000 youth nationwide enter the adult criminal justice system each year, most of them for non-violent crimes (Campaign for Youth Justice, 2016). Becoming part of the juvenile or adult justice system and having a criminal record frequently results in youth being deprived of educational and job prospects (Justice Policy Institute, 2014). Several factors contribute to the obstacles youth face when they have been incarcerated or in juvenile detention centers: they frequently miss out on significant instruction and qualifying exams, and are therefore ineligible to graduate with their peers. If they do return to school, they struggle with feelings of shame about being over-aged and under-credited, still in high school at 19 or 20 years old, and have difficulty relating to their classmates and connecting to school. Their graduation rates plummet—they are from 13%-39% less likely to graduate than their non-incarcerated peers. Moreover, they are 23%-41% more likely to find themselves back in prison as adults (Aizer, 2013).

The long-term effects of going to prison are devastating. In many parts of the country, people who have been convicted of a crime are excluded from

contributing to the economy either “by law or by stigma” (What We Don’t Mention About Unemployment, 2015). That is, they are legally barred from holding certain jobs, and numerous employers are reluctant to hire them for anything more than menial work with no opportunities for advancement. In some states, formerly incarcerated persons have also had certain civil rights, such as the right to vote, rescinded. Even after Florida’s recent (November 2018) restoration of voting rights to persons having served their prison sentence, there are still eight states in which for some offenses voting rights will not be restored or must be petitioned for individually in order to have them reinstated (Nonprofit VOTE, 2019).

Disrupting the Pipeline

The best-case scenario for American youth to have opportunities to pursue higher education, a successful career, and a chance at life as a positive contributing member of society is for them to remain in and graduate from secondary school. In a 2007 study published in the *American Journal of Community Psychology*, Mattison and Aber found that students who had a positive perception of school were less likely to be suspended compared to students who had a negative perception of school (Mattison and Aber, 2007). Restorative Justice community building practices foster an increased positive perception of school, giving students agency to express themselves in a safe environment, consider peaceable methods of problem solving, and request circles when needed, contributing to a reduction in suspensions.

Restorative Practices programs and their funding levels vary among the 50 states and the many school districts within those states. Yet with all these differences, a range of studies across the nation show very optimistic results. In California where robust Restorative Justice programs have been implemented in combination with other positive behavior supports, over just two years 131,349 fewer students were suspended than during the year prior (Brookings Institute, 2017). At Cole Middle School in Oakland, California there was a dramatic 87 percent decline in suspensions, and expulsions were reduced to zero during the implementation of whole-school restorative justice (Schiff, 2013).

Upon implementing restorative circles, West Philadelphia, High School in Pennsylvania (PA) saw a 50 percent decrease in suspensions, along with a 52 percent reduction in violent and serious acts during the 2007/08 school year, followed by a further reduction of 40 percent during the 2008-2009 school year (IIRP Graduate School Report, 2009). In the small town of Kintnersville, PA over the course of a 4-year Restorative Justice pilot program, Palisades High School saw behavioral incidents reduced 44% and out of school suspensions declined

over 38% (IIRP Graduate School Report, 2009). In Minnesota, during just one year of Restorative Practices in two schools, suspensions were reduced by 63% and 45% respectively (Minnesota Department of Education, 2003).

With Restorative Justice implementation in schools being relatively recent, studies are primarily short-term. Still, results throughout the country are proving quite hopeful for the efficacy of Restorative Practices, when implemented as a school culture transformation, in disrupting the school-to-prison pipeline. In Denver, Colorado a combination of Community Building Restorative Practices, along with “victim impact panels and restorative conferencing resulted in a 68 percent overall reduction in police tickets and a 40 percent overall reduction in out-of-school suspensions in seventeen schools” (Advancement Project, 2010, as cited in Schiff and Bazemore, 2012).

In Chicago, Illinois when Restorative Justice Practices were implemented at one high school, there was a greater than 70% reduction in school suspensions, more than a 60% decrease in student misbehavior, and significantly, a 93% decrease in police referrals (Dignityinschools.org, 2017).

In a New York City high school with a reputation for disciplinary problems, summonses decreased by 25% from the first quarter to the fourth quarter of the year, and arrests decreased by 13% after just two quarters of restorative justice implementation school-wide (NYPD). Applied city-wide, that 13% reduction would mean 26,000 students who stay in school (NYPD).

In 2013-2014 a nationwide 20% reduction in suspensions—from 3.5 million to 2.8 million—meant that 700,000 students were not suspended that year from schools using Restorative Justice approaches to discipline (National Center for Education Statistics, 2014), giving them a chance to graduate, go to college, avoid involvement with the juvenile justice system, and become positive contributing members of society.

Statements from students in schools implementing Restorative Justice Practices offer a strong testimonial to the positive effects of RJP.

“Restorative Justice came into my life during a really bad period. ...You guys held on long enough until I was ready to really stride on my own. I feel like Restorative Justice means you don’t give up on me.” - Laurent, former student at Diploma Plus (Pai and Bennett, 2017).

Challenges to Expanding Restorative Justice Practices in Schools

The USA needs to boost its implementation of Restorative Justice Practices throughout the country’s educational system, provide ongoing training and support for educators, and institute programs that help students develop social

and emotional learning skills. In the examples above, 2.8 million students were still suspended nationwide discipline (National Center for Education Statistics, 2014) and 174,000 youth were still arrested in New York (NYPD). These numbers reveal the work that still needs to be done to enable the majority of American students to complete high school and graduate in good standing.

The implementation of whole school Restorative Justice Practices is starting to turn the tide. However, even faced with the documented successes of RJP and studies showing that zero tolerance policies do not reduce violence in schools or make them safer (Boccanfuso and Kuhfield, 2011), there is a great deal of resistance among educators to implementing whole school Restorative Justice and to expanding its reach.

There are a number of reasons for this resistance. For one thing, 2019 marks 25 years that zero tolerance policies have been in place in American schools. That is a whole generation of educators who have been trained and conditioned to use punitive and exclusionary discipline protocols in response to student behavioral issues. These protocols look at responses to student misbehavior through a retributive framework. They can be characterized as:

- Shame-based,
- Relying on SROs and police as enforcers,
- Determining who to blame and punish,
- Isolating and expelling the person(s) deemed responsible for harm,
- Punitive measures without efforts to educate or rehabilitate,
- Mechanisms for maintaining authority over youth. (Thelton E. Henderson Center for Social Justice, 2010).

To develop a Restorative mindset, educators first have to unlearn this punitive mindset, which is broadly held by teachers and administrators throughout the nation, and then learn to look at student and staff behavior through a restorative, reparative lens. Think of skills you have mastered and convictions you have held for decades; now imagine what it might take to dislodge you from your strongly held beliefs and adopt a whole new approach. This is a big ask. In a New York City Restorative Justice professional development workshop that I co-facilitated in January 2019, one educator, frustrated that the perfunctory version of Restorative Practices he had tried with a disrespectful student had not worked, queried “Doesn’t she have to be punished?”. Under the traditional punitive system, the answer would be yes. Coming from a Restorative Justice approach, the answer is a more complex ‘Not necessarily.’ This poses problems for skeptics and resisters to RJP.

Under what I will refer to here as “old thinking” educators falsely equate consequences with punishment. A particularly difficult-to-dislodge misconception about RJP is that because it is not focused on punishment, there are no

consequences and therefore it is the easy way out for students. Looking at student misbehavior through an outdated punitive lens directs educators to find who is to blame and decide on an appropriate punishment. The person harmed is ensured medical treatment if they are physically injured, but no one asks them what they need beyond that. The punished person is made to suffer, but not asked to self-reflect on the effects of their actions on others or on what led up to those action, and taught no skills that will help them make choices that are more beneficial to themselves and others in the future. Frequently these students are labeled the ‘bad kids’ and greeted with negative comments and low expectations upon their return to school.

The Restorative Practices lens flips this perspective, appropriately framing suspension as the easy way out for adults in the school. Suspension means educators don’t have to find out what underlying causes of misbehavior are (Pai and Bennett, 2017), they don’t have to self-reflect on their contribution to the relationship dynamics that have developed with the offending student, and usually a dean or other administrator will be the one to face the student and impose the punishment. But this old lens misses an important element in the picture: there is good reason for many young people to be angry, scared, anxious, or insecure. They may have a parent who is incarcerated, addicted, disabled, or unemployed; they may live with relatives other than their parents and siblings, or be in foster care, or their family may be homeless, moving from shelter to shelter. Some of the burdens and responsibilities that fall on children’s shoulders are the result of “very difficult family situations created by poverty, health problems, violence, addiction, and the weight of the criminal justice system” (Weissman, 2015).

If teachers and administrators take the time to get to know their students and learn about their lives outside of school, they may discover previously unknown conditions and circumstances that contribute to the attitudes and behaviors that they find problematic. Forming these foundational relationships provides an opportunity for teachers and administrators to create a youth support system, and in doing so signal to the students that the adults in the school community care about them. RJP community circles provide a safe space within which the students and staff can begin the process of building positive and productive relationships. The effects of these positive relationships have been well documented. Incorporating simple actions that are naturally a part of Restorative circles and chats can have a profound effect on students’ behavior and on their academic achievement. These actions include making eye contact, greeting students when they enter the classroom, and asking students for their opinion (Miller, 2008).

The premise that suspension is easier for teachers and administrators is further supported by a frequent response of educators when they are first intro-

duced to a Restorative Practices approach to school discipline. As a Restorative Justice training facilitator, I am often asked by teachers “If student X throws a book at student Y, what do I do?” These educators are looking for a one-size-fits-all, “cookie-cutter” solution to disciplinary issues. Suspension provides that solution. ‘Misbehave, and you are out!’, regardless of the cause or the extenuating circumstances. But there is no single answer to that question when taking the RJP approach. A restorative response is more nuanced and individualized. What were the circumstances that led up to the action? What is the relationship between student X and student Y? How is student Y responding to the incident and what does he/she need to feel safe? Did Student Y contribute to the conflict in some way? How does student X feel after the fact about what he/she did? All these factors determine the answer to the teacher’s question, which will necessarily be different for each specific incident.

Individualized responses take time, a precious commodity of which educators are perpetually short. They are under enormous pressure to improve their students’ grades and teach a full curriculum with limited instruction time. Many feel it takes too much time to formulate an appropriately effective restorative response with all the parties affected by an incident or conflict. It’s much easier for them to just send the offending student to the dean’s office and get on with teaching. Likewise, they feel they can’t spare ½-hour once or twice a week to sit in circle and build relationships. But these attitudes don’t take into account that the better the relationship among students in a class and between students and teacher, the more effective the teacher’s instruction time becomes. Time invested in one way is made up for with fewer disruptions in class and more investment in learning by students (Rimm-Kaufman and Sandilos, 2019).

It is vital to examine deeply how inadequate punitive measures, including suspension, are when it comes to addressing what the “victim” or the community needs. Do they need/want reparations? What is needed to restore feelings of safety for the individuals affected and the community? Retributive discipline focuses on punishing the perpetrator, and often ignores the victim(s). RJ Practices turn this protocol around, ensuring that the community and “victim(s)” have the opportunity to express how they were affected and what they need. This process includes the “harmer” hearing from the persons harmed and taking responsibility for his or her actions. With a restorative facilitator guiding the process, the parties can work together to determine what appropriate action will make amends and right a wrong wherever possible. This approach holds someone accountable through actions that are meaningfully reparative, rather than meaninglessly punitive. The community comes together to let the person who caused harm know that making reparations and adjusting his or her behavior also means that they can work at re-building trust and eventually be wel-

came back into the fold. This can be a powerful incentive for positive change (Goodenow, 1992). Restorative responses to discipline can be characterized as:

- Building community and respecting everyone's voice,
- Supporting a sense of belonging in the community,
- Creating safe space for brave conversations,
- Considering the needs of the person(s) harmed from their perspective,
- Relying on counselors and social workers,
- Developing SEL skills,
- Positioning youth as leaders. (Thelton E. Henderson Center for Social Justice, 2010)

Conclusion

Whole school Restorative Justice is a school-wide culture transformation. It requires the investment of all stakeholders in the school community, an investment of time and funding, and a shift in mindset. Piecemeal adoption of restorative justice strategies with no plan and no whole-school vision does not have a widespread effect in improving school environment or in reducing incidents of conflict and violence. Adoption of RJP by some staff while others continue their punitive approach will not work (Brummer, 2016). Without adequate and appropriate training, teachers mistakenly view RJP as another set of reactive disciplinary tactics to set aside and use when there is a conflict or harm is done. They may call what they are doing Restorative Justice, but it is not. They are taking an approach that does not incorporate the essential proactive restorative practice of community talking circles, which builds and improves relationships among all students and staff and forms the foundation of true Restorative Justice in the school community. Developing these positive relationships is crucial to the success of RJP; without this foundation there would be no community affiliation to repair and restore.

We can, and must, support teachers, administrators, students, and families in the transition to a Restorative School Community. In order for teachers, administrators, and other adults in a school community to embrace Restorative Practices fully, they need thorough training, a clear understanding that the process of transformation to a restorative culture takes a minimum of two to three years, ongoing opportunities for practice and professional development, and consistent and strong support from school leadership (Rand Corporation, 2018; Brummer, 2016). Teachers who have participated in schools applying these strategies are shown to have greater success rates with RJP, feel more positive about their school climate, and have improved relationships with their students (Rand Corporation, 2018). These are the schools that have been successful in

transforming to a restorative culture and in providing a positive path for their students to stay in school and thrive.

In order to dismantle the school-to-prison pipeline, relying on individual schools and school districts to make the transformation is not enough. As a nation we need to follow and expand on the whole-school Restorative model. If we have the will, we can do this.

To move the U.S. toward a restorative educational model and increase the number of students who graduate from secondary school with an optimistic outlook for their future, we need to start with some basic steps:

- Repeal zero tolerance policies nationwide,
- Increase awareness of systemic racism and implicit bias in individuals and school communities,
- Cultivate empathetic communication,
- Invest time, money and human capital in implementing social-emotional learning and Restorative Justice Practices,
- Take educators' concerns into consideration and provide thorough training and ongoing professional learning communities to support educators. (Safir, 2016; Brummer, 2016; Suttie, 2016)

Only when we adequately train and provide ongoing professional development and support for educators in Restorative Practices and bias prevention, and create opportunities for them to experience the power of community building to foster positive culture in schools, prevent conflict, and successfully reintegrate those who have done harm into the community, will we begin to truly dismantle the school-to-prison pipeline.

Bibliography

Aizer, A., J.J. Doyle Jr. (2013). Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges. Cambridge, MA. National Bureau of Economic Research, p.3.

American Psychological Association Zero Tolerance Task Force. (2008). Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations. *American Psychologist*, pp.852-862

Balfanz, R., Byrnes, V., & Fox, J. (2013). Sent Home and Put Off-Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the Ninth Grade. *UCLA: The Civil Rights Project / Proyecto Derechos Civiles*. Retrieved from: <https://escholarship.org/uc/item/4sq993qd>

Boccanfuso, Christopher, Megan Kuhfield. (2011). Boccanfuso, Christopher, Megan Kuhfield. (2011) Multiple Responses, Promising Results: Evidence-Based Nonpunitive Alternatives to Zero Tolerance. *Child Trends*,. *Child Trends*, 2011-09(March 2011), p.1.

Brookings Institute (2017). *Brown Center Report on American Education: Part III Race and School Suspensions*. Race and school suspensions. Houston, TX: Brookings Institute, pp.24-25

Brummer, J. (2016). *5 Reasons Implementation of Restorative Practices Fails in Schools*. retrieved from <http://www.joebrummer.com/2016/02/28/5-reasons-implementation-of-restorative-practices-fails-in-schools/>

Camacho, Kristine A. (2016). *Disproportionate Suspension Rates: Understanding Policy and Practice in One State*. Ph.D. University of Massachusetts Amherst.

Campaign for Youth Justice (June 2016). *Key Facts: Youth in the Justice System*. Campaign for Youth Justice

CDC.gov. (2018). School Connectedness | Protective Factors | Adolescent and School Health | CDC. [online] Available at: https://www.cdc.gov/healthyyouth/protective/school_connectedness.htm [Accessed Oct. 2018].

Choi, S. K., L. Baams, B.D.M. Wilson. (2017). *LGBTQ-Youth-in-CA-Public-Schools: Differences Across the State*. Los Angeles: The Williams Institute.

DeVoe, J., K. Peter, P. Kaufman, S. Ruddy, A. Miller, M. Planty, T. Snyder, D. Duhart, M. Rand. (2002). *Indicators of School Crime and Safety*. Washington, D.C.: U.S. Departments of Education and Justice, p.135

Dignityinschools.org. (2017). *Inspiring the Future. Case Study: Alternatives' Restorative Justice Work at Paul Robeson High School 2014-2017*. [online] Available at: <https://dignityinschools.org/wp-content/uploads/2017/11/RJ-at-Robeson-case-study.pdf> [Accessed 15 Oct. 2018].

Frontline report: Drug Laws and Snitching: A Primer (2014) [TV Program] 13: PBS

Goodenow, Carol. (1992). School Motivation, Engagement, and Sense of Belonging among Urban Adolescent Students. *Society for the Psychological Study of Social Issues*. Retrieved <https://eric.ed.gov/?id=ED349364>

Hewitt, D. of the NAACP Legal Defense Fund, *Growing Fairness*. (2013). [video] New York City, NY and Oakland, CA: Teachers Unite.

IIRP Graduate School Report, (2009). *Improving School Climate: Findings from Schools Implementing Restorative Practices*. International Institute for Restorative Practices

Justice Policy Institute, (2014). *Sticker Shock: Calculating the Full Price Tag for Youth Incarceration*. pp.17, 28. retrieved from http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf

Kirwan Institute (2014). *Implicit Racial Bias and School Discipline Disparities Exploring the Connection*. Columbus, OH: Kirwan Institute, p.6 citing Skiba, et al (2011).

Koch, Kathy. (2000). *Zero Tolerance for School Violence: Is Mandatory Punishment in Schools Unfair?* CQResearcher, citing: Chicago Public Schools, (1999). *Measuring Progress Towards Goals*.

Lieberman, D. of The New York Civil Liberties Union, *Growing Fairness*. (2013). [video] New York City, NY and Oakland, CA: Teachers Unite.

Mattison, Erica and Mark S. Aber. (2007). Closing the Achievement Gap: The Association of Racial Climate with Achievement and Behavioral Outcomes. *American Journal of Community Psychology*, 40.

Mendez, Linda & Howard M. Knoff. (2003). pp.26, 30-51. Who gets suspended from school and why: A demographic analysis of schools and disciplinary infractions in a large school district. *Education and Treatment of Children*

Miller, Richard M. (2008). *The Influence of Teachers' Caring Behavior on High School Students' Behavior and Grades*. Ed.D. Seton Hall University.

Minnesota Department of Education. Riestenberg, Nancy. (2003). *Restorative Schools Grants Final Report: A Summary of the Grantees' Evaluation*

National Association of School Resource Officers. (2019). *Frequently Asked Questions - National Association of School Resource Officers*. [online] Available at: <https://nasro.org/frequently-asked-questions/> [Accessed 10 Jan. 2019].

National Center for Education Statistics (NCES) (2018). *Fast Facts: Back to school statistics*. U.S. Department of Education.

Nonprofit VOTE. (2019). *Voting as an Ex-Offender - Nonprofit Vote*. [online] Available at: <https://www.nonprofitvote.org/voting-in-your-state/special-circumstances/voting-as-an-ex-offender/> [Accessed 10 Oct. 2018].

NYPD (New York City Police Department) data. Retrieved Oct. 2018 from <https://www1.nyc.gov/site/nypd/stats/reports-analysis/school-safety.page>.

Ocrdata.ed.gov. (2009). [online] Available at: <https://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf> [Accessed 20 Oct. 2018].

Pai, Sung-Joon (Sunny) and Laurent Bennett. (2017). "How Can We Hold You?": Restorative Justice in Boston Schools. Retrieved Oct. 2018 from [https://books.google.com/books?id=16VhDwAAQBAJ&pg=PT127&lpg=PT127&d-q=Sung-Joon+\(Sunny\)+restorative&source=bl&ots=LI7FGqBCLN&sig=AC-fU3U2MgNmaRuGoKm5okpWM2UeDvHb1vw&hl=en&sa=X&ved=2ahUKEwiLw4nStZHhAhXIYd8KHSrfAB4Q6AEwB3oECAkQAQ#v=onepage&q&f=false](https://books.google.com/books?id=16VhDwAAQBAJ&pg=PT127&lpg=PT127&d-q=Sung-Joon+(Sunny)+restorative&source=bl&ots=LI7FGqBCLN&sig=AC-fU3U2MgNmaRuGoKm5okpWM2UeDvHb1vw&hl=en&sa=X&ved=2ahUKEwiLw4nStZHhAhXIYd8KHSrfAB4Q6AEwB3oECAkQAQ#v=onepage&q&f=false)

Perry, Brea L. and Edward W. Morris. (Nov. 2014). Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools. *American Sociological Review*, 79, 6, pp.1067-1087.

Public Health Post (2017). *The School-to-Prison Pipeline*. [image] Available at: <https://www.publichealthpost.org/databyte/school-prison-pipeline/#> [Accessed 3 Oct. 2018].

Rand Corporation. (2018). *Can Restorative Practices Improve School Climate and Curb Suspensions? An Evaluation of the Impact of Restorative Practices in a Mid-Sized Urban School District*. Santa Monica, CA: Rand Corporation, pp.28, 32.

Rimm-Kaufman, Sara and Lia Sandilos. (2019). Improving Students' Relationships with Teachers to Provide Essential Supports for Learning. *American Psychological Association, Pre-K to 12 Education*. retrieved from <https://www.apa.org/education/k12/relationships>

Safir, Shane. (2016). 5 Keys to Challenging Implicit Bias. *Edutopia, Education Equity*. Retrieved Jan. 2019 from <https://www.edutopia.org/blog/keys-to-challenging-implicit-bias-shane-safir>.

Schiff, M. (2013). Dignity, Disparity and Desistance: Effective Restorative Justice Strategies to Plug the School-to-Prison Pipeline. *UCLA: The Civil Rights Project/Proyecto Derechos Civiles*.

Schiff, Mara and Gordon Bazemore. (2012). Whose Kids are These? Juvenile Justice and Educations Partnerships Using Restorative Justice to End the School-to-Prison Pipeline, p.74, citing *Advancement Project*, 2010.

Sparks, S. (2018). Suspension Rates Higher for Students of Color with Disabilities, Data Show. [Blog] *Inside School Research*. Available at: https://blogs.edweek.org/edweek/inside-school-research/2018/04/Civil_Rights_data_discipline_gaps_special_education.html [Accessed 10 Oct. 2018].

Suttie, J. (2016). Four Ways Teachers Can Reduce Implicit Bias. *UC Berkeley Greater Good Magazine*. [online] Available at: https://greatergood.berkeley.edu/article/item/four_ways_teachers_can_reduce_implicit_bias [Accessed Oct. 2018].

Thelton E. Henderson Center for Social Justice (2010). *School-based restorative justice as an alternative to zero-tolerance policies: Lessons from West Oakland*. Berkeley, CA: University of California, Berkeley, School of Law.

Thomas, Maggie (Feb. 2017) *The School-to-Prison Pipeline*, Public Health Post. Infographic retrieved Oct. 2018 from <https://www.publichealthpost.org/databyte/school-prison-pipeline/#>

Tomaszewski, J. (2011). *Student Suspended for Hugging Classmate | Education World*. [online] Educationworld.com. Available at: https://www.educationworld.com/a_curr/student-suspended-for-hugging.shtml [Accessed Oct. 2018].

U.S. Department of Education Office for Civil Rights, Civil Rights Data Collection (Mar. 2014) *Data Snapshot: School Discipline* Issue Brief No. 1.

Weissman, Marsha. (2015). *Prelude to Prison: Student Perspectives on School Suspension*. Syracuse, NY: Syracuse University Press, p.90.

What We Don't Mention About Unemployment. (2015). *The Atlantic*. [online] Available at: <https://www.theatlantic.com/sponsored/allstate/what-we-dont-mention-about-unemployment/267> [Accessed 10 Oct. 2018].

www2.ed.gov. (2012). *Revealing New Truths About Our Nation's Schools*. [online] Available at: <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf> [Accessed 20 Oct. 2018].

Restoring relationships, community building: from social inclusion to wellbeing

PATRIZIA PATRIZI, GIAN LUIGI LEPRI, ERNESTO LODI

*Team of Restorative Justice Practices, Department of Humanities and Social Sciences,
University of Sassari, Italy*

Restorative justice is a paradigmatic perspective that does not belong to a specific context (e.g. criminal justice), or to a specific phase of the conflict and its management. Restorative justice is a way of understanding social dynamics, relationships between people and relationships between systems and within them. Due to its transversal nature, it is applicable to very different contexts, such as schools, neighbourhoods, organisations and others. These contexts have the same interest because their actions define the characteristics of their community.

So, we can view *community* as the *unit of analysis* that is most appropriate to welcome the restorative vision, which is: relational, participatory, inclusive and based on responsibility as its premise and a result of intentionality from all parties concerned. For these reasons, the criminal justice system should be considered part of a wider systemic review of the social, psychological and relational model of sustainability. This is the focus of the Europe 2020 strategy and Agenda 2030 to achieve a greater social cohesion (Patrizi, & Lepri, 2011; Patrizi, Lepri, Lodi, & Dighera, 2016).

In this framework, new models of community are able to promote lifestyles and management of conflicts marked by respect, trust and peace and are capable of generating positive dynamics of inclusion. Principal constructs of this vision are: *well-being* (capabilities: Sen, 1993; positive psychology with resilience,

hope, courage, optimism; *ecological responsibility* (De Leo, 1996) and *generalized reciprocity* (Putnam, 1993).

From inclusion to well-being there is an important *shift from a re-active to a pro-active mode*. Inclusion is necessary but it's an action to rebalancing dynamics of marginalisation, social exclusion, imprisonment, etc. Well-being is the vision and the main goal; it benefits everybody. *The community, as a unit of analysis and intervention, can be a current challenge that can find answers in the principles of restorative justice.*

Introduction

This article is placed in the topic of *Restorative Justice Beyond Law (Restorative Living)*, with regard to the first and last generative question of the international conference *Restorative Approach and Social Innovation: From Theoretical Grounds to Sustainable Practices* (Padova, November 2018): a) Restorative Approach as a cultural paradigm. Is it possible to expand restorative justice beyond its usual fields of application (legal systems)? b) Is it possible to delineate restorative ways of dealing with conflicts in our everyday life? Is it possible to intend restoration as a way of living (contra retributive way of living)? In this article we will discuss these questions. In the article, the role of restorative elements will appear more evident in the sphere of education and social work.

The background for our views on restorative justice is a belief that we express with the words of H. Zehr (Zehr & Gohar, p. 5):

[...] in spite of all efforts to the contrary, I write from my own "lens", and that is shaped by who I am [...]. This biography and these (as well as other) interests necessarily shape my voice and vision. [...]

So what follows is my "take" on restorative justice; it must be tested against the voices of others.

Who we are? What is our history, our positioning? Our Lens!

We are psychologists and psychotherapists. Our work takes place in the University of Sassari (Italy) and in the context of professions within prisons, courts, schools, social services, etc. We work with public institutions and non-profit social enterprise. Our discipline is psychology and law, in a frame that leads back to social and community psychology and clinical psychology skills. Therefore, in our study, research and professional action, our focus is never on the individual but instead on the individuals in their social context: people and community.

Social constructionism is our paradigm. We utilise positive psychology and its main constructs: optimism, hope, resilience, perceived self-efficacy, collective efficacy and courage. Each of these variables, according to numerous recent researches, has proven to affect the levels of personal and social well-being of people; therefore, intervening on even one of these constructs can increase the chances that people experience better quality of life and improve their social relationships.

This is our perspective on the transformative conception of restorative justice:

This is the broadest perspective of all: it not only embraces restorative processes and steps to repair the harm, but it also focuses attention on structural and individual injustice. It does the former by identifying and attempting to resolve underlying causes of crime (poverty, idleness, etc.). However, it also challenges individuals to apply restorative justice principles to the way they relate to those around them and to their environment. This can generate a kind of internal spiritual transformation even as it calls for external societal transformation. (UNODC, 2006, p. 104).

Theoretical framework

Since Restorative justice is a paradigmatic perspective, a way of understanding the social dynamics, a framework applicable to very different contexts, we used an approach that considers the offense mainly in terms of the damage it causes to people and the subsequent fractures of relationships that occur within a community. Our model focuses not on the penalty and the offender, but on ways to heal the harm (Zehr, 1990) beyond mere financial compensation to the victim. In our framework, we prefer an orientation to the generation/regeneration of social harmony between social partners through a search for consensus, sharing and social peace (Patrizi & Lepri, 2011).

So, if we assume the *community as the unit of analysis* in the restorative vision, the criminal justice system should be considered part of a wider systemic review of the social model, psychological model and relational model of sustainability. This is the centrepiece of the Europe 2020 strategy, which aims to launch a new EU economy that is more intelligent, sustainable and inclusive to achieve the goal of greater social cohesion. This is the main goal of Agenda 2030 to transform our world. Specifically, goal 16 which states: *Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.*

Several studies have shown that community-based programs are more effective in significantly reducing re-offending and societal conflicts, which encour-

ages responsibility and participation by supporting people in the management of conflicts and problems (Cellini, 2009; Petersilia & Turner, 1993; McIvor, 1991; Aos, Miller, & Drake, 2004). In this framework, we are experiencing a model of community that promotes lifestyles and management of conflicts marked by responsibility, peace and well-being: the CoRe (Community of Restorative Relationships) model. The model takes into account the results of previous researches in criminal justice and numerous researches that are still underway, both in the criminal sphere and in other contexts such as schools and neighbourhoods. It is in line with the latest scientific guidelines that support the need to develop intervention systems capable of reducing the conflict within the social dynamics and generating positive dynamics of inclusion and promotion (Fig. 1).



Fig. 1. Our Model. Co.Re.–Community of Restorative Relationships (Patrizi, Lepri, 2014; 2015; Patrizi, Lepri, Lodi, Dighera, 2016)

The *centreline* of the figure 1 illustrates the main change in perspective that inspires the model: the shift from inclusion to well-being. It is *the shift from a re-active to a pro-active mode*. Inclusion is necessary but it is a goal-directed action after the negative effects of marginalisation, social exclusion, imprisonment, etc. Well-being is the vision and the main goal is that it benefits everybody.

Ecological level. Reciprocity, obligations and responsibility are the main concepts. They define this level that we have called ecological, referring to the ecology of responsibility as theorised by Gaetano De Leo (1940–2006), our teacher and founder of the Roman School of Psychology and Law. Ecological responsibility is a concept that is immediately and structurally interactive. It is not content inside our mind or a quality of consciousness and will; it is *co-created* in the relationship between subject, action, institutions and society, and at the same time, it is a pattern that organises the relationships between individuals, actions, rules and community. It is not an entity or a substance but a relational process; a quality emerging in the systems of reciprocity. De Leo (1996) examines the responsibility as a function culturally and socially built to connect: 1) psychological aspects: the self and the social performance of the individual; 2)

interpersonal aspects and regulations to produce consistency and continuity of the expectations at these levels and 3) institutional and social aspects to guide individual performance and collective expectations, maintaining adequate levels of order and predictability.

A focal aspect in this theoretical development is given to the identification of responsibility as a mechanism that governs the processes of social differentiation: in social dynamics, in fact, the responsibility assumes a position directly proportional to the power one possess, the social status, the authority, and inversely proportional to the marginalisation and social exclusion. Responsibility is a basic requirement of subjectivity: not requiring the responsibility of the individual, or only requiring it in part means giving them less power and social relevance.

Social actors are never entirely without responsibility (the ability and capacity to account for their actions): the responsibility can be dysfunctional or has poor quality, but it can never be totally absent. In each case, it is linked to the requests of society that are differentiated and have to do with the systems of reciprocity. For example, in developmental age as a child grows, her/his format of responsibility expands and becomes more complex until it merges with the institutions and society in general. These conditions allow us to describe *responsibility as an on-going process* that builds skills, interactions, roles, systems of expectations and empowering answers. It is an interactive vision that produces a shift of scientific analysis from the *attribution* of responsibility (as well as conceptualised by the classical theories of social psychology and in traditional criminal justice) to its *promotion*. Assigning responsibility to an individual configures the sense of opportunity for personal empowerment in acknowledging the ability to account for their actions and a promotion of responsibility—in a circular view—that is built remains active and changes within interactions. So framed, responsibility is a *generative function* that “does not necessarily precede the action but between responsibility, action and response of the other there is a constructive circularity” (De Leo, 1996, p. 55). The individual capacity to respond to the rules, to the others and to the institutions is closely linked to the demands, the expectations and responses of others. The responsibility is not a specific skill, but it’s a function that circulates between the different subjects and systems and the mutual structure of sets of expectations. Responsibility is inscribed in a framework of the awareness of the effects one’s actions can have, of the regulation of behaviour in consideration of the fact that it has implications and consequences at the extra-individual, collective, social level. It is a quality emerging from the connections between A, B, C, D (Fig. 2) (De Leo, 1996).

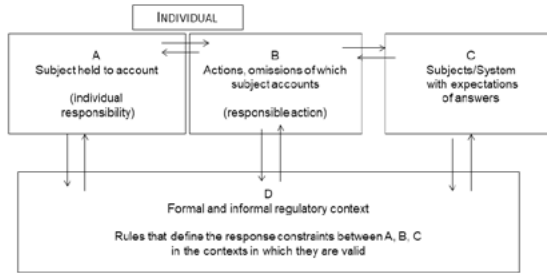


Fig. 2. The ecological model of responsibility. Adapted from De Leo (1996)

The ecological model allows us to identify a promotional perspective of responsibility that involves all stakeholders.

Our actions always have consequences. When detected, they activate social, institutional and regulatory responses. The latter ask the subject to respond in terms of responsibility, related to the social role (and judicial role if the behaviour is configured as a crime). The answers may be incapacitating, as in the case of prison, for example, or expulsion from school: Responsibility is attributed to the subject for the action committed and punishment is given. In a promotional view of responsibility, on the other hand, the subject is asked to respond through an active assumption project of responsibility towards those who have suffered the consequences of his actions (including the community). Active assumption of responsibility means recognising the damage, knowing the consequences for those who have suffered, getting in touch with their experiences, discovering—if adequately supported—the reasons and effects of a person’s own behaviour. This active exercise in responsibility constitutes a social learning of the relationship between oneself, one’s actions, the expectations of others and the regulatory system of social coexistence (Fig. 3).

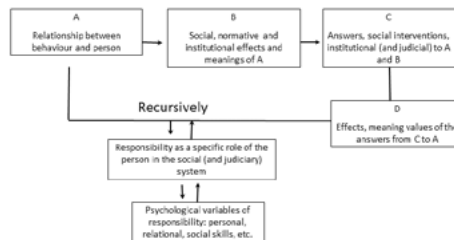


Fig. 3. Cycle of responsibility. Adapted from De Leo (1996, 103)

The connection with restorative justice appears evident with its basic dimensions: responsibility and social support.

We agree with Tim Chapman (2012, p. 71): “Restorative justice is founded on the idea that causing harm to someone creates an obligation to make amends. If that person assumes that responsibility and commits to restorative action, the community should support his or her reintegration”.

Enhance at individual and group level. Human agency is the main concept at this level: the capacity possessed by people to act of their own volition. *Capability*. For Amartya Sen, the quality of life is measured by the fact that people—who live and act in non-abstract social settings but with a historical, geographical and moral order—can freely exercise their *capabilities* to be and to do.

Capability is thus a kind of freedom: the substantive freedom to achieve alternative functioning combinations (or, less formally put, the freedom to achieve various lifestyles). For example, an affluent person who fasts may have the same functioning achievement in terms of eating or nourishment as a destitute person who is forced to starve, but the first person does have a different “capability set” than the second (the first can choose to eat well and is well-nourished in a way the second cannot) (Sen, 1999, p. 75).

Studies of *positive psychology* consider various aspects: a) contextual variables of well-being; b) the interaction between well-being and adaptive processes; c) the practices that are most suitable to sustain people (in their capability to improve their own well-being and to live maximising their own resources and their individual and social functioning) are fundamental resources enabling people to adequately face the challenges of everyday life. The social-cognitive model, described by Lent and Brown, proposes a unifying perspective of well-being in which cognitive, emotional, behavioural, social and personal variables contribute in determining satisfaction both general life and domain-specific. At the individual level, *hope, optimism, courage, resilience, self-efficacy* are fundamental resources so that people can adequately cope with the challenges of everyday life. Equally important is the role of community. To be inclusive, a community must guarantee the full personal, social and relational development of its people. A community must give the people the conditions necessary to facilitate the activation of their resources and to be able to reach the highest quality of life, as indicated by the recent reports on equal and sustainable well-being¹.

In recent decades, the scientific community has acknowledged how the contribution of positive psychology redirected research attention to the growth and development of persons in their environment, aiming to promote skills and attitudes that match the complex reality in which they live (Catalano, Berglund,

¹ <https://www4.istat.it/it/benessere-e-sostenibilita/misure-del-benessere/il-rapporto-istat-sul-bes>

Ryan, Lonczak, & Hawkin, 2004; Nota, Ginevra, & Santilli, 2015). Central constructs in this perspective are: hope (the ability to set goals and identify the strategies needed to achieve them, Snyder, 2000); optimism (the ability to learn from experience and build positive future scenarios, Seligman, 2005); resilience (the ability to engage and persist even in the presence of failures and particularly negative events, Masten & Powell, 2003); courage (continuing to face challenges for equity and social well-being, Snyder, Lopez, & Pedrotti, 2011), including challenging current norms and barriers in pursuit of the greater well-being of the community (Spreitzer & Sonenshein, 2003); perceived self-efficacy (people's beliefs about their capabilities to exercise control over events that affect their lives); collective efficacy (a positive valuation shared by the members of groups/systems, equipped above individual characteristics) (Bandura, 1997). We adopt a positive view of persons and context because we think that restorative practices are the best way to activate positive resources in the people and in their environment (family, friends, work, school, services, community, etc.).

Promote cultural change. This is the level of contamination, of the involvement of people and systems of the community so that the processes activated at the personal level and in different contexts of life can be shared and supported. The challenge and goal of every restorative justice intervention is to translate the questions from the individual situations into community responses.

From Theoretical Grounds to Sustainable Practices

Our restorative justice team's practices involve several major restorative justice projects:

1. The city of Tempio Pausania, where prisoners sentenced for mafia crimes and the local community work on their relationship, despite an initial conflict. It is our most extensive project and an illustrative space will be dedicated below.
2. The city of Mentana (Roma), where projects of social agriculture were initiated to strengthen relationships between parents and young persons in case of minor offenses and to encourage social inclusion.
3. The theatre company Stabile Assai of the Rebibbia prison house in Roma, where theatre performances brought together prisoners and the outside community to promote mutual understanding beyond stereotypes. The authorship of this project is to Antonio Turco. Repeatedly involved in both conferences that often precede or follow the shows, both in the shows, in recent years we have highlighted and supported the restorative principles in the company's work.
4. Cooperative Magliana 80 (Roma), where restorative conferences began

to pacify the relationship between the historical cooperative that deals with drug addicts and the neighbourhood; citizens fear those “drug addicts” and detained in an external penal measure. The project includes: condominium meetings, circle with institutional representatives and associations, circle with community guests, and neighbourhood restorative conferences.

5. Kintsugi Project (Palermo), where we support the Spondé Association connecting people and institutions with restorative conferences in two neighbourhoods (NOCE and ZISA) with the aim of information and change of the cultural framework.
6. A service for victims in Viterbo, where we support the Spondé Association to build a restorative city conference.

We illustrate below our main project, Tempio Pausania, the first Italian restorative city².

In Tempio Pausania, we started from a conflict that has seen a mutually opposing territorial community and that of prisoners. A new prison was built for inmates with life sentences for mafia crimes. The citizens of Tempio immediately feared mafia infiltration in their local community. The prisoners were worried about the great distance from their families. So, in agreement with the direction of the prison and the municipality, we started our pilot experience of a restorative community: *Study and analysis of restorative practices for creating a model of restorative community*. The aim of the action research is to experience restorative practices that can involve the whole community: schools, families, police, courts, municipalities, associations, on the model of the English restorative city of Hull and Leeds.

Since the beginning of the project, we realised seminars and workshops involving the community and professionals (such as journalists and lawyers) was a good means of raising awareness and dissemination of the principles of restorative justice and its practices. Since restorative justice has the immediate potential to combine the needs of rehabilitation and social security through community involvement and conflict management, we tried to build in Tempio Pausania an opportunity to establish a cultural change: trying to involve all communities to create restorative cities; involving the schools in adopting a model of restorative justice and trying to organise all the services and commercial stores to promote a peaceful management view of the everyday life to give back to the community the ability to manage and resolve conflicts (Wright, 2002; 2010). The model of conflict management at the community level allows the development of early education, supporting the use of restorative approaches as educational tools for reciprocity and responsibility in relationships with others.

² <http://giustiziariparativa.comune.tempiopausania.ot.it>

A sense of community is an important part of our restorative practices. It refers to “the perception of similarity with others, a recognised interdependence, a willingness to maintain such this interdependence, offering or making for others what is expected from us the feeling to belong to a totally stable and reliable structure” (Sarason, 1974, p. 174). We try to develop this sense of community, which involves becoming aware of the boundaries that define who is (and is not) part of a community; a sense of emotional connection and security through having significant ties with the people and with a place; personal investment in the community through contributions both tangible and intangible; the quality of the relationship and the sharing of a common history and having a voice in decision-making that increases the sense of influence over how the community is shaped and developed (McMillan, & Chavis, 1986).

The specific aims of the project are: a) building a restorative community model to share within Sardinian context with social and institutional actors; b) identify, disseminate and promote good practices at the local level in relation to restorative justice programs; c) explore the strengths and critical elements in the implementation of a restorative model community; and d) build a network between the agencies involved in order to share experiences and practices aimed at the implementation of the model.

Intervention tools: Restorative Conference. The main instrument to build a sense of community in Tempio Pausania is restorative conferences: a series of meetings in which the different parts of the system come together to identify resources and channels for building a peaceful manner of problem and conflict resolution. The aim is to encourage everyone who is present, in different roles and memberships, to reflect on the meaning and potential of a relational key set community. Restorative conferences give the prisoners and community the opportunity to think about the links between territory and imprisonment. The meeting between prisoner and professionals, institutions, citizens is one of the main steps to building a community based on restorative practices. The aim is to encourage all people participating in the conference, in different roles and memberships, a reflection on the meaning and potential of a relational key set community. During the conference, which is open to the whole community, we have various kinds of participants (judges, volunteers, students, social practitioners, teachers, educators, third sector, the PA administrators, law enforcement, etc.) and we actually have registered about 900 people at 11 restorative conferences. On November 19, 2014, during the International Week of Restorative Justice, a restorative lunch was organised with the participation of a delegation of prisoners (who, for the first time in many years, had the opportunity to sit at a table outside the penitentiary with people who were not prison mates), local authorities, magistrates, lawyers, the mayor of Tempio Pausania

and mayor of Sassari along with various councillors, etc. Each table was marked with the words that emerged from the first restorative conference (the values of the conference, among others: responsibility, respect, trust and reciprocity).

Research instrument: Focus group and questionnaires. To evaluate the results and changes in our community, we used a mixed methodology with qualitative and quantitative instruments. We used a focus group (specific for different areas of community governance: justice, health, safety, education and politics) with the aim to explore social representation on concepts like justice and conflict resolution and to evaluate its changes after the conclusion of the project. The focus groups have also been used to design (until the 31 December 2016) the restorative practices community board. During the first meeting, self-assessment tools were delivered to participants (e.g. perceived support, resilience and hope) to evaluate possible impacts of the action research. The tools are: Social Support Perceived (Zimet *et al.*, 1988); “Life Orientation Test” (Scheier *et al.*, 1994), an evaluation of propensity for optimism; “Hope Scale” (Snyder *et al.*, 1991); “Connor-Davidson Resilience Scale” (Connor & Davidson, 2003); and “Social Self-Efficacy Scale” (Caprara, 2001).

Accomplished results. We can say that the project has encouraged integration processes. A relevant result is represented by a city council held in prison and strongly desired by the mayor and the municipal administration. It is a first stone placed by the “formal community” in prison that highlights that where there first was division, now we have built a sense of sharing, overcoming stereotypical visions of buildings and persons (especially for the prison and prisoners) and facing the previous integration problem with a new point of view. Another point of integration is the strong relationship built between school, university and prison.

But the most qualifying result is a restorative service for the community (citizenship, school and all services). Starting in October 2018, our project has expanded its boundaries and horizons. In fact, it also involved the nearby territory of Tempio Pausania in the *Restorative Service of Psychological Counseling* aimed not only at the first Italian restorative city, but also at 8 neighbouring municipalities. In some of the service’s actions, the detainees in the Nuchis prison house are directly involved in providing their contribution in promoting the well-being of the community.

The objectives are: a) provide listening, welcoming, support, growth, orientation and information; b) offer a specialist listening and counselling service for “social vulnerabilities” with standardised procedures and in line with local services; c) create a network between public and private institutions that can respond to a series of emerging needs related to the risk of social vulnerability and which can be the basis on which to build a new model of social welfare based

on the paradigm of restorative justice; and d) addressing the possible needs of citizens, especially those who are at social risk, such as victims of crime.

The actions of the service were activated following a participatory decision-making process with the various municipal administrations and the services involved.

The service is in charge of:

City restorative conferences: Spreading the conference model of Tempio Pausania to the new territories involved. The conferences take place once a month in the various municipalities targeted by the services.

Restorative workshops in schools: with the aim of promoting education actions to respect, legality, tolerance, non-discrimination and constitutional values through the enhancement of school welfare and hope as well as the well-being and optimism of the students, parents and teachers. The workshops will be conducted according to restorative justice practices to promote orienting towards peaceful management of conflicts and active participation in the construction of community restorative relationships. The main actions running in schools by the service are: a) restorative circles of a group of selected students from the secondary schools in the municipalities involved. The circle, held once a month, has the aim to train facilitator students to disseminate restorative practices; b) implementation of a group of teaching staff, referring to all the schools at all levels of the nine municipalities, trained to support the students in restorative practices.

Support and listening centre for victims of crime: the centre supports victims by accompanying them in a process of recovering their skills and activating the resources offered by the aid network. This action is designed to support the victim during criminal proceedings according to the Directive 2012/29/EU.

The service can achieve other result at the individual and collective levels, such as:

1. Improvement of individual and collective well-being.
2. Contrast and reduction of social vulnerability.
3. Consolidation of new models of local welfare that correspond to a real improvement and management of existing territorial services.
4. Increase in social cohesion.

To achieve these aims, we highlight the importance of listening to all parties to reconstruct the social structures that can be threatened, the damage by actions that constituted a problem, and building a restorative community together. A restorative community is one that is trust-based, established on relationships and on mutual respect; a society definitely based on the well-being of all its parties. A restorative community in Tempio Pausania tries to solve problems cohesively and does not designate others to manage its own problems. Instead,

it bears the responsibility of managing these problems in a more peaceful and positive way for everyone.

One of the main objectives of our work is to establish the cultural conditions to promote the development of services at local level based on the theoretical framework of Restorative Justice. This article is the narrative of an experience of action research and cultural change in different local communities. It highlights the possibility to inspire the communities (politicians, social services, education and judicial systems) to include the Restorative Justice paradigm in providing services for people and promoting restorative practices in all levels of society.

Our restorative focus is on the interaction between people, community and its institutions; *relationships!*

Bibliography

Aos, S., Miller, M., & Drake, E. (2006). *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rate*, Olympia: Washington State Institute for Public Policy, Document No. 06-10-1201.

Bandura A. (1997). *Self-efficacy*. New York: *Freeman and Company*.

Caprara, G.V. (2001). *La valutazione dell'autoefficacia*. Trento: Centro Studi Erickson.

Catalano, R.F., Berglund, M.L., Ryan, J.M., Lonczak, H.S., & Hawkins, J.D. (2004). Positive Youth Development in the United States: Research Findings on Evaluations of Positive Youth Development Programs. *Annals Of The American Academy Of Political And Social Science*, 59, 98-124.

Cellini, G. (2009). Alternative al carcere: la Intensive Probation e un esempio di trattamento intensivo efficace. *Rassegna Italiana di Criminologia*, 1, 37-56.

Chapman, T. (2012). Facilitating Restorative Conferences in Northern Ireland. In E. Zinsstag & I. Vanfraechem (Eds.). *Conferencing and Restorative Justice: Challenges, Developments and Debates* (pp. 65-82). Oxford: *Oxford University Press*.

Connor, K.M., & Davidson, J.R. (2003). Development of a new resilience scale: The Connor-Davidson Resilience Scale (CD-RISC). *Depression and Anxiety*, 18, 76-82.

De Leo, G. (1985). Responsabilità: definizioni e applicazioni nel campo della giustizia minorile. In G.L. Ponti (a cura di). *Giovani, responsabilità e giustizia*. Milano: Giuffrè.

De Leo, G. (1996). *Psicologia della responsabilità*. Bari: Laterza.

Lent R.W., & Brown S.D. Social Cognitive Career Theory and Subjective Well-Being in the Context of Work. *Journal of Career Assessment*, 2008, n. 16, pp. 6-21

Masten, A.S., & Powell, J.L. (2003). A resilience framework for research, policy, and practice. In S. S. Luthar (Ed.), *Resilience and vulnerability: Adaptation in the context of childhood adversities* (pp. 1-25). New York: Cambridge University Press.

McIvor, G. (1991). Social Work Intervention in Community Service. *British Journal of Social Work*, 21, 591-610.

McMillan, D.W., & Chavis, D.M. (1986). Sense of community: A definition and theory. *Journal of Community Psychology*, 14, 6-23.

Miers, D., & Aertsen, I. (Eds.) (2012). *Regulating Restorative Justice. A comparative study of legislative provision in European countries*. Frankfurt am Main: Verlag für Polizeiwissenschaft.

Nota, L., Ginevra, M.C., & Santilli, S. (2015). Life design and prevention. In L. Nota, J. Rossier, L. Nota, & J. Rossier (Eds.), *Handbook of life design: From practice to theory and from theory to practice* (pp. 183-199). Boston: Hogrefe Publishing.

Patrizi, P., & Lepri, G.L. (2011). Le prospettive della giustizia riparativa. In P. Patrizi, *Psicologia della devianza e della criminalità. Teorie e modelli di intervento* (pp. 83-96). Roma: Carocci.

Patrizi, P., Lepri, G.L., Lodi, E., & Dighera B. (2016). Comunità territoriali riparative e relazionali: dall'inclusione al benessere. *Minorigiustizia*, 1: 81-92.

Petersilia, J., & Turner, S. (1993). *Evaluating Intensive Supervision Probation/Parole: Results of a Nationwide Experiment*. Washington, DC: Department of Justice, National Institute of Justice.

Putnam, R.D. (1993). What Makes Democracy Work? *National Civic Review* [Internet], 101-107.

Sarason, S.B. (1974). *The psychological sense of community: Prospects for a community psychology*. San Francisco: Jossey-Bass. (Out of print. See *American Psychology and Schools*).

Scheier, M.F., Carver, C.S., & Bridges, M.W. (1994). Distinguishing optimism from neuroticism (and trait anxiety, self-mastery, and self-esteem): A reevaluation of the Life Orientation Test. *Journal Of Personality And Social Psychology*, 67, 1063-1078.

Seligman, M. (2005). *Imparare l'ottimismo. Come cambiare la vita cambiando il pensiero*. Firenze: Giunti.

Sen, A. (1993). Capability and Well-being. In M. Nussbaum & A. Sen (Eds.) *The Quality of Life* (pp. 30-53). Oxford: Clarendon Press.

Sen, A. (1999). *Development as freedom*. New York: Oxford University Press.

Snyder C.R. (2000). *Handbook of Hope: Theory, Measures & Applications*, San Diego: Academic Press.

Snyder, C.R., Harris, C., Anderson, J.R., Holleran, S.A., Irving, L.M., Sigmon, S.T., Harney, P. et al. (1991). *The will and the ways: Development and validation*

of an individual differences measure of hope. *Journal of Personality and Social Psychology*, 60, 570-858.

Snyder, C.R., Lopez, S.J., & Pedrotti, J.T. (2011). *Positive Psychology The Scientific and Practical Explorations of Human Strengths*. Thousand Oaks: Sage.

Spreitzer, G.M., & Sonenshein, S. (2003). Positive deviance and extraordinary organizing. In K. Cameron, J. Dutton & R. Quinn (Eds.), *Positive Organizational Scholarship* (pp. 207-224). San Francisco: Berrett-Koehler.

UNODC - United Nations Office on Drugs and Crime (2006), *Handbook of restorative justice*: https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf.

Wright, M. (2002). In che modo la giustizia riparativa è riparativa? *Rassegna Penitenziaria e Criminologica*, 3, 153-178.

Wright, M. (2010). *Towards a Restorative society: A problem-solving Response to harm*. London: MakeJustice Work.

Zehr, H. (1990). *Changing Lenses: A New Focus on Crime and Justice*, Scottsdale: Herald Press.

Zehr, H., & Gohar A. (2003), *The Little Book of Restorative Justice*, Uni-Graphics Peshawar, <https://www.unicef.org/tdad/littlebookrjpakaf.pdf>.

Zimet, G.D., Dahlem, N.W., Zimet, S.G., & Farley, G.K. (1988). The Multidimensional Scale of Perceived Social Support. *Journal of Personality Assessment*, 52, 30-41.

*Imagining a Restorative Approach to Individual Reintegration in the
Context of (de)Radicalization*

ANA PEREIRA

Leuven Institute of Criminology, KU Leuven

In the world we live today, with every new terrorist attack linked to Islamic radicalisation, we observe more responses in the media, feed by fear, that seem to cement day by day the ‘*us versus them*’ mentality. Within such a framework it is difficult to imagine successful reintegration rituals for former radicalised individuals. However, applying a restorative lens, we think this is not only possible but extremely needed considering that most of the classified radicalised individuals will one day be released from prison and from their successful reintegration into the community will depend the continuity of their desistance journey (Rome Memorandum on Good Practices for the Rehabilitation and Reintegration of Violent Extremist Offenders, 2012). In this context, we conducted a theoretical, imaginative, exercise about the possible contribution that tools focused on restoration can give to the reintegration process of former radicalised individuals upon release from imprisonment. As Maruna (2011:5) wrote ‘*(a)lthough overlooked in criminal justice (where our attention is typically on front-door practices of arrest, conviction, and sentencing), ‘endings’ can be a rich area to explore*’. This imaginative exercise was grounded on the contributions from three main fields of criminological literature: (de)radicalisation, desistance of crime and restorative justice.

1. *The process of individual radicalisation*

In the international literature and guidelines it is relatively consensual to find radicalisation conceptualised as a gradual dynamic process (Borum, 2003; Moghaddam, 2005; Horgan, 2009; Vidino, 2011; Porter & Kebbell, 2011; Helfstein, 2012; CoE 2016 Guidelines for prison and probation services regarding radicalisation and violent extremism). Porter and Kebbell (2011: 213) define radicalisation as *'the process by which individuals (or groups) change their beliefs, adopt an extremist viewpoint and advocate (or practice) violence to achieve their goals'*

A number of theoretical explaining models of individual radicalisation (considering both cognitive and behavioural components) have been developed in the last few years. Some authors have focused on why radicalisation occurs while others have focused their efforts on the explanation of how radicalisation occurs. Regarding the question why, Feddes (2017: 49) identifies three main needs consistently found at the root of the radicalisation journey: lack of a positive identity, lack of a sense of meaning in life and lack of perceptions of fairness regarding the societal treatment of the individual and/or the community he/she belongs to. Based on this set of needs the author presents different typologies of radicalising individuals: identity seekers, significance seekers and justice seekers. Identity seekers struggle with feelings of insecurity, isolation and disempowerment and strive for a sense of belonging to something meaningful (Feddes, 2017: 49). In these cases, Marshall (2007: 383) argues that extremist groups become *'so attractive to young men because they offer a sense of identity, power and self-respect to those who feel disempowered by their circumstances and disconnected from others.'* According to De Bie (2016:32) "brotherhood" is a highly valued asset offered by the jihadist extremists groups that allows the radicalising individuals to experience that sense of belonging and companionship. Porter and Kebbell (2011) studied 21 individuals condemned under anti-terrorism laws in Australia and concluded that for a significant number of these individuals the main driver to violent extremism was the access to a collective identity. In connection, significance seekers struggle to find their mission and purpose in life (Feddes, 2017: 49; Doosje & Van Eerten, 2017). In a sample of 183 Dutch participants, Van der Veen (2016 cit in Miller & Chauhan, 2017: 36) identified the need for status as one of the main triggers of the process of individual radicalisation.

Justice seekers are characterised by feelings of procedural injustice, perceptions of being unfairly and unequally treated in comparison to others. These perceptions of humiliation are in turn associated with feelings of anger and frustration over powerlessness (Feddes, 2017: 49). For example, as Muslim communities are targeted by counter-radicalisation measures and put under increased surveillance in the context of the "War on Terror", Muslims increasingly

experience feelings of humiliation, stigmatisation and alienation from society (Hafez & Mullins, 2015:963; Thomas, 2017: 119, 129). It is relevant to notice that both Moghaddam's (2005) Staircase to Terrorism metaphor and Borum's (2003) Four Stage Model to a Terrorist Mindset directly link the process of individual radicalisation to this need. However, these models are more focused on the description of the different phases the individual undergoes during his/her radicalisation journey. According to Borum's (2003:7-8) explaining model, in the beginning of the radicalisation process the individual identifies him/herself as the victim of a harm which in the second stage is perceived as an injustice. Next, in the third stage, blame for the injustice suffered is assigned to a target group. In the fourth and final stage of the model, the target group is dehumanised and framed as "the evil", which facilitates the use of violence against the members of that group (Borum, 2003; Miller & Chauhan, 2017). In the same vein, Moghaddam's (2005: 165-166) staircase to terrorism is composed by five floors. The "foundational ground floor" is occupied, according to the author, by vast populations of hundreds of millions of people, who perceive themselves as suffering deprivations and an unfair and unjust treatment. Although these feelings are experienced by many only a few every year move to the upper floors, following a path that may lead to radicalisation. The reason why only a group of individuals follows the path leading to radicalisation seems to be connected with the existence of fundamental relationships of interdependency between the root causes involved in the process of individual radicalisation, for example between identity problems, lack of purpose in life, isolation, feelings of alienation and unfair treatment from society (Hafez & Mullins, 2015:970). In the first floor, called "Perceived options to fight unfair treatment", individuals who assign blame to "others" for their perceived grievances can move on to the second floor where they '*develop a readiness to physically displace aggression*'. In the third floor, the extremist group becomes the "home" of otherwise significantly isolated individuals who, at this stage, adopt the group's ideology and commit to their moral views. In the fourth floor, the moral frame of in-group versus out-group, or "us versus them" is strengthened. Individuals who continue progressing in the staircase and reach the fifth floor are, then, fully prepared and motivated to commit terrorist acts (Moghaddam, 2005: 165-166).

Considering the set of needs identified by research at the root of the process of individual radicalisation it becomes pertinent to question the weight of ideology for the spread of violent extremism. As Hafez and Mullins (2015:967) acknowledge ideology seems to serve several important functions in radicalisation: to encourage the construction of a rebellious identity against the existing order, to justify and legitimatise the use of violence against target groups. In particular, as the authors point many of the religiously radicalised individ-

uals in the West support their actions based on common Islamist ideological themes, ‘including a belief that Western societies are morally bankrupt; the West is engaged in a war against Muslims; ...and that jihad and martyrdom are indeed legitimate means by which Muslims defend their faith’ (Hafez & Mullins, 2015: 967). However, very much in line with the predictions of the Good Lives Model (GLM) (Ward, Fox, & Garber, 2014) research seems to suggest that violent extremism may not simply be an ideological imperative but may be used by individuals - that perceive it as the only means at their disposal - as a utilitarian strategy oriented towards satisfying the primary human goods of a positive identity, sense of belonging, purpose in life and acquisition of status. In the words of Helfstein (2012:6, 69) ‘an emphasis on its underlying ideological doctrine may have masked a simple factor’: ‘the spread of extremism may be just as much a function of self-interest as ideological fervor.’ In a similar vein, Hafez and Mullins (2015: 966) argue that ideology is not always at the centre of the radicalisation process. For practice in the de-radicalisation context this conclusion may have important consequences: following the rationale of the GLM, it means that successful desistance might be accomplished if the individuals find stable pro-social ways in society to satisfy those primary needs at the root of the problem.

1.1. The prison context, de-radicalisation, and the restorative re-entry approach

De Bie (2016) studied a sample of 209 radicalised individuals involved in 14 jihadist networks in the Netherlands between 2000 and 2013. His study offers a view of the hostile versus enabling environments in which radicalisation can occur. Regarding the hostile environment, De Bie (2016:32) describes how the radicalising individuals’ communities of care, formed mainly by their family and friends, often ‘criticised them and threatened with counter-measures to change their attitudes and behaviours’. At the same time, these communities of care tried to help them filling the perceived gap in their lives by looking for new jobs or introducing possible romantic partners. De Bie (2016: 32) describes how these communities of care often tried to keep the recruiters away by threatening them with violence, and, facing their powerlessness to stop the involvement of the radicalising individual with extremists ended up reporting the situation to the police or intelligence agency. As a result, ‘the situation often escalated to an actual breach between the militant and his or her family’ (De Bie, 2016:32).

In Porter and Kebbell’s (2011) study the majority of radicalised individuals were married, employed and a significant number had children. The authors concluded that at the outset of their radicalisation path these individuals had attachments to family and to their local Muslim communities but not to the larger society. In this context, identity difficulties emerged because belonging

to the Muslim community offered access to the Muslim collective identity but also increased the perception of difference regarding the rest of society, thereby decreasing the likelihood of developing a national identity. As De Bie (2016) observed, in Porter and Keibell's (2011) sample the individual's pro-social bonds with family, and with their local Muslim communities, weakened as radicalisation intensified and isolation increased. The authors conclude that '*isolation does appear to have facilitated radicalisation in the Australian sample*' (Porter & Keibell, 2011: 226).

With regard to enabling environments, a relatively accepted conclusion in de-radicalisation literature is the particular vulnerability of prison populations to radicalisation due to the presence of jihadist ideology inside prisons and the recruitment potential of activists in this context (Vidino, 2001; Hafez & Mullins, 2015; Héra, Fellegi & Szegö, 2018). De Bie (2016: 38) concluded that prosecutions and condemnations by the criminal justice system had sometimes the counter-intended effect of facilitating the process of individual radicalisation and the continuous involvement over time in jihadi networks. In the same vein, in an opinion article published in the Belgian newspaper *De Standaard* of May 31, 2018, Pieter De Witte (Researcher KU Leuven; Prison Chaplain) reflected that frequently one of the main negative consequences of imprisonment is that individuals get frustrated with the perceived unfair treatment by the criminal justice system and, ultimately, by society. As explained above these feelings of procedural injustice are identified by the literature as one of the root causes that may trigger the radicalisation process. In addition, Maruna and Ramsden (2004:135) have observed that the "*loss of identity*" and weaken of pro-social bonds, also identified as root causes of individual radicalisation, are listed among of the first consequences of imprisonment. Thus, in this vulnerable context, as it is explicitly acknowledged by the Prison Management Recommendations to Counter and Address Prison Radicalisation (2015), the '*recruiters may be able to tap into the prisoner's anger, frustration and sense of injustice about being incarcerated*' and the process of frame alignment with the group's extremist ideology may occur (De Bie, 2016: 23).

Nevertheless, despite the inhospitable character of the prison environment, Walgrave (2015) suggests the use of restorative focused tools in the prison de-radicalisation context. De-radicalisation is a concept that deserves in itself a few words. De-radicalisation programmes represent a form of tertiary prevention in the context of radicalisation and in the prison environment are frequently conceptualised as exit programmes (Gielen, 2017). Horgan (2009:153) defines the process of de-radicalisation as '*the social and psychological process whereby an individual's commitment to, and involvement in, violent radicalisation is reduced to the extent that they are no longer at risk of involvement and engagement*

in violent activity'. Effectively, de-radicalisation is conceptualised as the process of change and reconstruction of the de-radicalising individual's pro-social identity. This process goes beyond disengagement which only represents the absence of violent behaviour, not necessarily cognitive change regarding extremist beliefs (Koehler, 2017: 64).

The relevance of restorative focused tools in the de-radicalisation context becomes clearer when we consider both the results of recent evaluative efforts regarding the existing de-radicalisation programmes and significant findings from desistance of crime research. Firstly, a survey of existing de-radicalisation programmes conducted by the Institute for Strategic Dialogue, based on thirteen case studies, concluded that the most effective programmes were voluntary, tailor made, targeted individual and social needs, and involved the participation of family, relevant social networks and former extremists (Schmid, 2013: 48). As we will explore in the following sections, restorative focused tools can present all of these important elements of effective de-radicalisation initiatives.

Secondly, as it has been identified regarding the process of individual radicalisation, according to Paternoster and Bushway (2009) the feelings of isolation, lack of belonging and legitimate identity are recurrent root causes identified by offenders in general in their life stories. But Paternoster and Bushway (2009: 1117, 1132-1133) also argue that where such needs exist, the key to understand long term desistance of crime is the relationship between the reconstruction of one's identity and the process of desistance from crime. In connection, changes in identity require the support of a realigned pro-social network, meaning, in the de-radicalisation context, that the environment in which the former radicalised individual is welcomed following the isolation of prison is of the essence. But individualistic interventions or treatments do not solve problems of connectedness (Bazemore, 1998: 790). Maruna and LeBel's analysis is particularly relevant in this context. Indeed, Maruna and LeBel (2003: 97) defend a "strengths-based" paradigm or restorative re-entry approach as a new lens to re-imagine successful reintegration into the local community. In this model, the individual's strengths (not only the risks or deficits he/she presents) are assessed, targeted and the work he/she develops based on the use of those strengths should help him/her (re)build a pro-social identity (Burnett & Maruna, 2006:84). In direct connection, restorative focused tools should also help the individual restore or rebuild previous pro-social relationships damaged by his/her actions (Bazemore, 1998: 787), thereby contributing to the realignment of a pro-social network willing to support him/her upon re-entry into the community.

2. Restorative focused tools in de-radicalisation programmes

In the following sections two restorative focused tools are explored: support circles to re-entry and mentoring. It is important to notice that these tools should not be exclusively pertinent for the re-entry process of former radicalised individuals but that in this case may prove to be especially useful. Thus, we discuss why these tools might be relevant in the final segment of a de-radicalisation programme, when former radicalised individuals prepare their release from prison and they return to their community.

2.1. The Huikahi restorative circles: A relevant example for the de-radicalisation context

Support circles to re-entry are held with the aim of *'let the person know that he/she is supported, that there are people who care for him/her'* but also *'to give the support persons and community a better understanding of what the person in need of healing gone through'* (Ehret et al., 2013: 31). For the purposes of the present chapter we shall focus on the analysis of a particular type of support circle that has been developed in Hawai'i. We highlight that the Huikahi restorative circle is only an example of a support circle to re-entry that could be analysed in the de-radicalisation context. However, exploring in detail this particular model of support circle has the advantage of shedding light on the compatibility between the specific recommendations found in de-radicalisation literature, main findings of desistance of crime literature and this concrete restorative focused tool.

The Huikahi restorative circle project began in 2005 at the Waiawa Correctional Facility (Walker, 2009; Porter, 2007). A Huikahi restorative circle is described by Walker (2016) as a completely voluntary group dialogue process for imprisoned individuals, their communities of care (frequently their family) and prison staff. Information about the existence of the support circle is made available to the imprisoned individuals who then are responsible for reaching out and ask for a circle to be held for them. It is important to stress that this is not a fully restorative justice process in the sense that it does not include the participation of the victim of the crime, but it is a practice focused on the ex-offender's rehabilitation with a restorative focus. As it will become clearer in the following lines, this practice follows the fundamental restorative values of inclusion, participation, voice and accountability (Lauwaert & Aertsen, 2016) at the same time that rehabilitation concerns are prioritised. In the words of Doak and O'Mahony (2018) it is about the ex-offender taking empowerment over his life through accountability. Using such a tool in the de-radicalisation context means that to individuals who feel isolated we offer inclusion, to individuals who feel alienated from the community and society we offer participation and

support, for individuals who feel unfairly and unequally treated we offer a voice and for individuals who feel their lives are lost and devoid of any positive meaning we offer empowerment, and at best, some sense of direction and meaning through accountability to the community.

The Huikahi restorative circle starts with a strengths-based round. The keeper invites the ex-offender for whom the circle is held to share with the rest of the participants his/her achievements since he/she entered prison. In the final segment of a de-radicalisation programme in prison, the individual could also share the challenges and obstacles he/she overcome and his/her achievements and accomplishments since the beginning of the programme. In the following moment, the keeper invites the other participants to identify strengths in the individual (Walker, 2010:87). This approach may seem counter-intuitive in a de-radicalisation context but, in fact, it is quite in line with the recommendations from the International Centre for Counter-Terrorism (2012:14-15) and the Rome Memorandum on Good Practices for the Rehabilitation and Reintegration of Violent Extremist Offenders (2012).

Next, the keeper facilitates the transition to the reconciliation stage of the circle. Globally, the reconciliation phase of the Huikahi restorative circle invites the ex-offender to reflect upon and actively assume responsibility for the harm his/her actions have caused to his/her family, his/her victims and the larger community and society. Firstly, the keeper asks the ex-offender '*Who was harmed by your past behavior?*' and following the ex-offender's response the keeper asks him '*How were they harmed?*' (Walker, 2010: 87). Then, the keeper asks '*Back when you did those things what were you thinking?*' and '*And what do you think now about what you did back then?*' This segment of the circle may have a crucial impact in the process of construction of a redemption script and positive social identity because it represents a golden opportunity for the former radicalised individual to share his/her transformation with significant others, hear him/herself telling that story and observing the reactions around him/her may help him/her '*strengthen and reaffirm (his/her) commitment to better behavior*' (Walker, 2010: 87; Maruna, 2016; Petrich, 2016).

Since in the Huikahi restorative circle the victims of the ex-offender's crime are not present, in the following moment each member of the ex-offender's community of care present is invited to share how his/her past actions have affected them and, in the following round, what the ex-offender can do to repair the harm he/she has caused (Walker, 2016). In the conceptualisation of this support circle, this is considered a crucial step to restore significant pro-social bonds between the ex-offender and his/her family (Walker, 2010: 88; Dhimi, Mantle & Fox, 2009:435).

The United Nations Office on Drugs and Crime (UNODC) (2016:124) acknowledges that *'relationships can be a primary vehicle for disengagement from violent extremism'* and in consequence it is considered important to *'help violent extremist prisoners maintain, or re-establish, contact with their family during their time in custody and particularly in the stages prior to release'*. The Rome Memorandum on Good Practices for the Rehabilitation and Reintegration of Violent Extremist Offenders (2012) also defends that this type of measure would *'help the family understand and be sympathetic to what the inmate is going through and be more readily able to provide a supportive environment for the inmate once he or she is released'*. This set of recommendations is also in line with significant findings in desistance of crime literature (e.g. Calverley & Farrall, 2011:89; Farmer, McAlinden & Maruna, 2015:331). Thus, the Huikahi restorative circle seems to successfully operationalise an important strategy identified both in de-radicalisation literature and in desistance of crime literature, namely, the involvement *'of family and peers, both as a support group'* and *'as a group towards which the repentant has responsibility, as a father, son, husband, friend'* (Schmid, 2013: 44; Horgan & Braddock, 2010).

In the following moment, the keeper directs the discussion to the harm suffered by the victims and their need for reparation. The ex-offender, with the help of all the participants in the circle, reflects about what can be a suitable reparation to the harm he/she caused and the conclusions of the reconciliation phase of the circle are included in a final plan for reconciliation (Walker, 2010: 88). However, when it is considered in the victims' best interest that they should not be contacted the reparation of the harm is addressed through the commitment to be *'a productive member of the community'* in the future (Walker, 2010:88). In the following section, it is explored how this disposition can be put into practice in the de-radicalisation context through the second restorative focused tool proposed in this chapter.

The final stage of the Huikahi restorative circle aims to facilitate the preparation of a detailed transition plan for the ex-offender preparing to leave prison (Walker, Sakai & Brady, 2006; Walker, 2009). Thus, this stage of the support circle is exclusively focused on *how* the ex-offenders' basic needs such as housing and employment may be met (Walker, 2016). The ex-offender identifies his goals and he plans in collaboration with all the other circle participants *how* to live a good life in the community (Walker, 2010:88). Again, this approach is in perfect line with the recommendations provided by the Rome Memorandum on Good Practices for the Rehabilitation and Reintegration of Violent Extremist Offenders (2012) and the UNODC (2016) regarding the preventive effects of satisfying basic needs such as employment and housing in the reintegration journey of former radicalised individuals.

2.2. Mentoring in the context of de-radicalisation efforts: the restorative power of the wounded healer

In harmony with the strengths-based or restorative model of ex-offender re-entry defended by Maruna and LeBel (2003), and applied by the Huikahi restorative circle (Walker, 2010, 2016), Ehret et al. (2013: 182) argue that the plan resulting from the circle should ideally ‘*make use of positive traits or skills of the accused for making amends*’. Considering that an individual for whom a support circle to re-entry has been held can later be a support person for other ex-offenders, we move our attention to the second restorative focused tool proposed in this chapter: the mentoring activity as part of the de-radicalisation journey of the individual and, simultaneously, the restorative contribution of *wounded healers* for the de-radicalisation process of other individuals, their community and larger society.

Shadd Maruna (2014) explored the concept of *wounded healer* and its importance for restorative justice. Following Maruna’s (2014:20) line of thought the intervention of former offenders as mentors of other ex-offenders less far along in the process of desistance are examples of flexible practices of ex-offender rehabilitation that present a restorative focus. Once again this analysis concerning offending behaviour in general matches the particular recommendations found in de-radicalisation literature (Horgan & Braddock (2010: 274). According to the CoE 2016 guidelines for prison and probation services regarding radicalisation and violent extremism ‘*former violent extremists who have renounced violence may serve as legitimate actors for the rehabilitation of probationers or prisoners*’. In the same vein, the Rome Memorandum on Good Practices for the Rehabilitation and Reintegration of Violent Extremist Offenders (2012) argues that ‘*reformed extremists, particularly those who have been through the rehabilitation process themselves, may be influential with inmates participating in these programs. The testimonials of former terrorists can be dramatic evidence of the benefits of change*’.

Following Burnett and Maruna’s (2006:98) line of thought ‘*the ‘strengths potentials’ of assuming the role of wounded healer, acting as a mentor of de-radicalising individuals, would be ‘for identity reconstruction, removal of stigma and full restoration into citizenship.*’ Regarding identity reconstruction, for the individual for whom the support circle to re-entry is held listening to the life story shared by a wounded healer, having the chance to share his/her own life story, and receive positive feedback from the wounded healer and other significant people present in the circle maybe a fundamental step in the process of creating a redemption script and reconstruct his/her identity based on it (Maruna & Ramsden, 2004:140; Lebel, 2007:4). In a later stage, assuming the role of wounded healer, participating in circles held for other individuals and acting as

a mentor for them gives the former radicalised person the chance to continually share his/her redemption tale. Following O'Reilly's (1997, p.123 cit in Maruna & Ramsden, 2004:140) line of thought these actions should feed in the former radicalised person '*a sense of purpose, a sense of... belonging to something, and a sense of direction*'. As a result, in the words of Bazemore and Boba (2007:38) '*helping others may become a way of ensuring one's own transformation and identity as a person who "makes good" by doing good*'.

Furthermore, assuming the role of wounded healer, as a mentor of other individuals in the de-radicalisation process, could contribute to the removal of stigma and restoration into citizenship (Burnett & Maruna, 2006:98). This is extremely significant given that the process of radicalisation seems to be first connected, in part, to feelings of injustice and alienation from society (Borum, 2003; Moghaddam, 2005; Marshall, 2007; Feddes, 2017). In this context, the mentoring activities of the former radicalised individual may signal to the community that his/her path of redemption, indeed his/her journey to belonging (Zehr, 2002), is not simply a burden to the community and larger society but he/she is him/herself participating in crucial peacemaking efforts in the community.

At the same time, the messages received from the community about the new self would also influence the process of identity reconstruction of the former radicalised individual around the redemption script. Indeed, Burnett and Maruna (2006:95) argue that receiving approval and praise from pro-social members of the community regarding their efforts as wounded healers '*helps to reinforce commitment to an alternative course of life and to vindicate ex-offenders in their belief that they have permanently moved on from previous illegal activity*'.

Finally, Dwyer and Maruna (2011: 293-294) provide some empirical evidence regarding the pertinence of using a restorative focused tool such as the mentoring activity of wounded healers in the particular context of de-radicalisation. Based on the analysis of 35 semi-structured interviews with Northern Ireland politically motivated former prisoners, the authors found that these individuals, many of which formerly convicted for terror-related offences, '*repeatedly echoed the theme of wanting to "give something back" and make a contribution to their communities and the wider society*', as it was explicitly referred by one of their interviewees: '*It's about giving back to the community and using their experiences in a positive way in the community*'. In particular, Dwyer & Maruna (2011: 300- 302) observed that '*self-help groups have been viewed as an important and crucial facility to integrate former prisoners into the community as "useful citizens"*' (Dwyer & Maruna, 2011: 300). Based on their study the authors concluded that it was through the adoption of this new self-identity – that of wounded healer - that many of these men (re)gained a sense of purpose and meaning in

their lives.

2.3. Designing a support circle to re-entry with wounded healers in the context of de-radicalisation efforts

As Ehret et al. (2013:431) state circles are an extremely flexible tool, a characteristic that seems to make this restorative practice particularly suitable to very complex and severe cases. In the context of de-radicalisation initiatives, we conclude that the Huikahi restorative circle may provide an inspiration for the design of a support circle to re-entry specifically tailored to the specificities posed by radicalisation. In that sense, using the example of the overall structure of the Huikahi restorative circle and its strengths-based approach, we consider that it may be relevant to mesh these not only with some structural elements of traditional peacemaking circles, but also with the participation of wounded healers and the extended and close support of community members in the style of the COSA Circles of Support and Accountability (Hannem, 2011). In the next few paragraphs we advance some explorative suggestions in this sense.

A first aspect regarding which a combination of the Huikahi restorative circle structure and the traditional peacemaking circle structure may be relevant concerns the participants in the circle. In the first circle process, the participants include the offender in prison, his/her community of care, especially his/her family and loved ones, and the prison staff accompanying the offender. The latter may also include local community members who personally feel committed to strengthening community and crime prevention (Fellegi & Szegö, 2013:23). Now, as Maruna (2011:17-18) argues, *'reintegration is something that happens between the returning prisoner and the wider community'* and, therefore, following the author's reasoning, the macro community should take part in reintegration rituals. But who is this community, whose participation is necessary in the reintegration ritual of former radicalised individuals? In cases such as the sample depicted by Porter and Kebbell (2011), in which radicalised individuals started by struggling with problems combining a Muslim identity with the development of a national identity, being attached to the local Muslim community but not to the wider society, what members of the community would be relevant to invite into the circle? The exact answer to this question would have to be established in each concrete case, but one common idea would be that in the circumstances described above it would be important to invite both Muslim and non-Muslim participants, in order to challenge some the perceived inter-group difference and promote the identification of common ground between all the participants around their shared humanity. Moreover, experiencing positive relations with non-Muslim people in the circle could help the former radicalised individuals to develop wider social bonds, important for their reintegration not only in

the context of their Muslim communities but also in wider society. Also, the inclusion of professionals from social support services may be relevant to help build in collaboration with the offender and the rest of the circle participants the re-entry plan, identifying concrete strategies to give answer to needs such as housing or employment. This option also seems to be in line with Marshall (2007), Chowdhury Fink & El-Said (2011) and Schmid (2013) conclusions that de-radicalisation initiatives should include the local community.

Furthermore, we consider that the inclusion of a “check-in round” for all the participants and a building trust phase in the beginning of a support circle to re-entry held in the context of de-radicalisation would be relevant. These structural elements of traditional peacemaking circles seem to be of crucial importance for the “equalising effect” of the circle and for the identification of common ground between all the participants (Pranis, 2014; Stuart & Pranis, 2006:127), elements of incredible importance considering the identity problems and feelings of unfair and unequal treatment, discrimination and marginalisation partly at the root of the process of individual radicalisation according to research (Feddes, 2017: 49; (Hafez & Mullins, 2015:963; Thomas, 2017: 119, 129; Borum, 2003; Moghaddam, 2005). Prepared the field, the former radicalised individual could, then, be invited to share important achievements and the participants could, in the following moment, be invited to identify strengths in the former radicalised individual. Following this round, the reconciliation phase of the circle could start in similar terms to the exemplar structure of the Huikahi restorative circle.

Following Rossner’s (2011) line of thought, such a circle of support to re-entry could provide for both, the former radicalised individual for whom the circle is held and the wounded healer, powerful emotional energy, consisting of positive feelings such as confidence, enthusiasm, and pride. In turn, this emotional energy should help both former radicalised individuals keep their motivation high, believing that all their efforts to overcome challenges and obstacles along the way are worthy and that a new good life is, indeed, possible. However, as Rossner (2011:181) explains ‘(t)he problem with emotional energy is that without further positive interaction rituals it is likely to decay’. Regarding this particular point, we believe that the transition plan formulated during the circle can work as a crucial symbol, helping the individual move forward, providing him/her with a positive direction, from which he/she can draw motivation when in need for it, and concrete strategies to start building a new life. In combination, the intervention of *wounded healers* may be an important source of continuous support, helping the individual face the challenges and obstacles in his/her path and keep his/her motivation and hope in a better future. But at best, the community members participating in the initial circle of support to re-entry

could also accompany the continued efforts of both the wounded healer and the former radicalised individual receiving his/her help. This would allow both former radicalised individuals to receive on-going validation for their efforts and progresses from the community, and would also mean that the wounded healer could count with a support network to discuss concerns about the progress of the former radicalised individual he/she is helping. To the community, this extended support could mean the chance to witness the contribution the wounded healer gives to peacemaking efforts in a very practical way and the progress of the former radicalised individual being helped, which in turn should increase the community's feelings of safety and empowerment. Indeed, this practice could contribute to the restoration of the community and society. But how could this be accomplished? A possible inspiration could be extracted from the evidence-based Canadian circles of support to re-entry known as COSA Circles of Support and Accountability (Hannem, 2011; Wilson, McWhinnie & Wilson, 2008; Wilson, Cortoni & McWhinnie, 2009; Bates, Williams, Wilson & Wilson, 2014; Wilson, Picheca & Prinzo, 2007; Wilson, Picheca & Prinzo, 2005).

Effectively, unlike the Huikahi restorative circle's conceptualisation as a one off time event, the COSA Circles of Support and Accountability were from the start conceptualised as a prolonged intervention in an ex-offender's life that should be maintained until the individual is considered functional within the local community. In a little more detail, the COSA circles of support and accountability were created to support the re-entry process of recently released high risk-sex offenders. As Wilson, Picheca and Prinzo (2007: 290) describe a *'typical release of a 'high-risk' sexual offender goes something like this: offender released ... media frenzy... community panic... offender driven out of said community or into hiding.'* Considering the de-radicalisation context, a similar type of public reaction upon the release of former radicalised individuals would not seem to us to farfetched. In this case, no matter how positive the initial circle of support to re-entry might have been in preparing the former radicalised person for release from prison, the individual's process of reintegration in the local community could be seriously undermined.

In this kind of adverse environment, during the first 60 to 90 days of the COSA circle, one primary volunteer meets with the core member once a day and a full circle is organised once a week (Wilson, Cortoni & McWhinnie, 2009:415). In the de-radicalisation context, this methodology could inspire the conceptualisation of the wounded healer as the primary volunteer, who could meet daily with the former radicalised individual receiving help, thereby providing an intensive dose of social support during a particular vulnerable period of adjustment for the recently released person and, many times, for the community of care that receives him/her. In turn, the organisation of weekly circles

would provide the platform for community members to accompany the efforts and progresses not only of the former radicalised individual recently released from prison but also of the wounded healer helping him/her and, therefore, would allow the repetition of the reintegration rituals so important to continually infuse new emotional energy in both of them and help them cement their new pro-social identities.

In addition, the COSA methodology may prove inspirational in cases in which the person in process of de-radicalisation would only retain in the community a support network of radicalised individuals or would not have any family members or significant others willing to be involved in his/her reintegration process. In these cases, the roles of both the wounded healer, as a primary volunteer meeting the former radicalised individual every day, and the community members, meeting the individual on a weekly basis in a circle, could be crucial to counteract feelings of rejection and isolation and/or the appeal to (re) join extremist groups. The weekly circles could continue until it is considered that the person is ready to move on with his/her life without such an intense involvement of this support network. At that point, the former radicalised individual could decide to take the role of wounded healer, helping, as a mentor, others less far along in their de-radicalisation journeys. Coming full circle, the adoption of the role of wounded healer at this stage should help cement the reconstruction of a positive identity around the redemption script and signal to the community, and larger society, their value as special servers, thereby creating the conditions for the community, and larger society, to publicly recognise their re-established trust in them. In turn, this public validation should also help them cement their new pro-social identity and finally experience the sense of fully belonging to the community and larger society.

3. Conclusion

Schmid (2013: 49) identifies dialogue, reconciliation and reintegration as some of the main objectives enunciated by existing de-radicalisation programmes. The two tools explored throughout this chapter - support circles to re-entry and the mentoring activity of wounded healers - are guided by cornerstone restorative values of respect for human dignity, active responsibility and solidarity (Walgrave, 2008; Chapman & Törzs, 2018). Thus, we believe they hold the potential to help genuine dialogue, reconciliation and reintegration to become a real possibility in the complex context of de-radicalisation. The design of a support circle to re-entry based, for example, on the Huikahi restorative circle, in the final segment of a de-radicalisation programme could help the former radicalised individuals preparing the release from prison to *find ways to*

reconcile with themselves and others harmed by their behavior; and to create plans to meet their needs for achieving a positive life' (Brady & Walker, 2008: 4).

Nevertheless, after this first support circle to re-entry life will carry on for these individuals and the obstacles and challenges they faced before will not have magically disappeared. The organisation of support circles in the community, inspired by the methodology of the COSA Circles of Support and Accountability, and the involvement of duly trained members of the community, could provide the means to repeat on a weekly basis and for an extended period of time a reintegration ritual from which both former radicalised individuals may draw important energy and motivation to continue their reintegration journey. In turn, the organisation of these support circles would also mean that both the wounded healer offering his/her service to society as a mentor and the former radicalised individual for whom the circle is held would be accountable to the circle and, to a certain extent, would be under the informal monitoring of the community. As a consequence this type of circle may hold significant potential but also a certain level of risk: as it was identified by Hannem (2011) it is fundamental that the community members participating in the circles effectively adhere to the restorative values underlying this tool in order to avoid the risk of conversion into a community strategy aimed only at increasing informal social control.

At last, as William Faulkner (1996) once famously said '*the past is never dead, it is not even past*'. But a once shameful story can be reedited and reworked into a redemption script in which past mistakes can become seeds of knowledge for helping others in the present and future, thereby providing a sense of meaning and purpose in life. Supporting another individual in the process of de-radicalisation, as a *wounded healer*, can mean actively take the responsibility for the writing of a new chapter in that tale of transformation, redemption and, ultimately, triumph.

Bibliography

Bates, A., Williams, D., Wilson, C., & Wilson, R. (2014). Circles South East: The first 10 years 2002-2012. *International Journal of Offender Therapy and Comparative Criminology*, 58(7), 861-885.

Bazemore, G. (1998). Restorative Justice and Earned Redemption: Communities, victims, and offender reintegration. *American Behavioral Scientist*, 41, 768-813.

Bazemore, G., & Boba, R. (2007). "Doing Good" to "Make Good": Community Theory for practice in a restorative justice civic engagement re-entry model. *Journal of Offender Rehabilitation*, 46(1/2), 25-56.

Borum, R. (2003). Understanding the terrorist mind-set. *FBI Law Enforcement Bulletin*, 72(7), 7-10

Brady, K. & Walker, L. (2008). Restorative Justice is a Mandated Component of Hawai'i's Reentry System. *Justice Connections*, 6, pp. 3-4, 11,16.

Burnett, R., & Maruna, S. (2006). The kindness of prisoners: Strengths-based resettlement in theory and in action. *Criminology and Criminal Justice*, 6(1), 83-106.

Calverley, A., & Farrall, S. (2011). The sensual dynamics of processes of personal reform: Desistance from crime and the role of emotions. In S. Karstedt, I. Loader & H. Strang (eds.), *Emotions, Crime and Justice* (pp. 81-100). London: Hart Publishing.

Chapman, T. & Törzs, E. (eds.). (2018). *Connecting People to Restore Just Relations: Practice Guide on Values and Standards for restorative justice practices*. Leuven: European Forum for Restorative Justice.

Chowdhury Fink, N. & El-Said, H. (2011). *Transforming Terrorists: Examining International Efforts to Address Violent Extremism*. New York: International Peace Institute.

Claes, B., & Shapland, J. (2016). Desistance from crime and restorative justice. *Restorative Justice*, 4(3), 302-322.

Council of Europe. (2016). Guidelines for prison and probation services regarding radicalisation and violent extremism.

De Bie, J. L. (2016). Involvement Mechanisms of Jihadist Networks. *Perspectives on Terrorism*, 10(5), 22-41.

Doak, J. & O'Mahony, D. (2018). Restorative intersections with the Criminal Justice System. *Book of abstracts of the 10th International Conference of the European Forum for Restorative Justice: Expanding the restorative imagination: Restorative justice between realities and visions in Europe and beyond*, Tirana, 14 June 2018.

Doosje, B. & Van Eerten, J. J. (2017). 'Counter-narratives' against violent extremism. In Lore Colaert (ed.), *'De-radicalisation', Scientific insights for Policy* (pp. 83-100). Brussels: Flemish Peace Institute.

Dhami, M., Mantle, G., & Fox, D. (2009). Restorative Justice in prisons. *Contemporary Justice Review*, 12(4), 433-448.

Dwyer, C., & Maruna, S. (2011). The role of self-help efforts in the reintegration of 'politically motivated' former prisoners: implications from the Northern Irish experience. *Crime, Law and Social Change*, 55(4), 293-309.

Ehret, B., Dhondt, D., Fellegi, B. & Szegö, D. (2013). *Developing Peacemaking Circles in a European Context*. Final Research Report of the Project: JLS/2010/JPEN/AG/1609. Criminal Justice Programme, European Commission.

Farmer, M., McAlinden, A., & Maruna, S. (2015). Understanding desistance

from sexual offending: A thematic review of research findings. *Probation Journal*, 62(4), 320-335.

Faulkner, W. (1996). *Requiem for a Nun*. London: Vintage Books.

Feddes, A. (2017). Risk assessment in integral security policy. In Lore Colaert (ed.), *'De-radicalisation', Scientific insights for Policy* (pp. 47- 61). Brussels: Flemish Peace Institute.

Fellegi, B. & Szegö, D. (2013). *Handbook for facilitating peacemaking circles*. P-T Muhely.

Gielen, A. (2017). Evaluating countering violent extremism. In Lore Colaert (ed.), *'De-radicalisation', Scientific insights for Policy* (pp. 101- 118). Brussels: Flemish Peace Institute.

Global Counterterrorism Forum. (2012). Rome Memorandum on Good Practices for the Rehabilitation and Reintegration of Violent Extremist Offenders.

Hafez, M., & Mullins, C. (2015). The Radicalisation Puzzle: A Theoretical Synthesis of Empirical Approaches to Homegrown Extremism. *Studies in Conflict & Terrorism*, 38(11), 958-975.

Hannem, S. (2011). Experiences in reconciling risk management and restorative justice: How Circles of Support and Accountability work restoratively in the risk society. *International Journal of Offender Therapy and Comparative Criminology*, 57(3), 269-288.

Helfstein, S. (2012). *Edges of Radicalisation: Ideas, Individuals and Networks in Violent Extremism*. West Point, New York: U.S. Military Academy, Combating Terrorism Center.

Héra, G., Fellegi, B., & Szegö, D. (2018). Questions from the top vs needs in the field? RJ and the way of preventing radicalisation in prisons. *Book of abstracts of the 10th International Conference of the European Forum for Restorative Justice: Expanding the restorative imagination: Restorative justice between realities and visions in Europe and beyond*, Tirana, 15 June 2018.

Horgan, J. (2009). *Walking Away From Terrorism: Accounts of Disengagement from Radical and Extremist Movements*. London: Routledge.

Horgan, J. & Braddock, K. (2010). Rehabilitating the Terrorists? Challenges in Assessing the Effectiveness of De-radicalisation Programs. *Terrorism and Political Violence*, 22, 267-291.

International Centre for Counter-Terrorism (2012). *Roundtable Expert Meeting & Conference on Rehabilitation and Reintegration of Violent Extremist Offenders. Core Principles & Good Practices*, Background Paper. Available online at <http://www.icct.nl/download/file/ICCT-Background-Paper-Rehab-Core-Principles-Good-Practices.pdf>.

International Institute for Justice and the Rule of Law. (2015). *Prison Management Recommendations to Counter and Address Prison Radicalisation*.

Koehler, D. (2017). A typology of ‘De-radicalisation’ programmes. In Lore Colaert (ed.), *‘De-radicalisation’, Scientific insights for Policy* (pp. pp. 63- 81). Brussels: Flemish Peace Institute.

Lauwaert, K., & Aertsen, I. (2016). With a little help from a friend: desistance through victim-offender mediation in Belgium. *Restorative Justice*, 4(3), 345-368.

Lebel, T. (2007). An examination of the impact of formerly incarcerated persons helping others. *Journal of Offender Rehabilitation*, 46 (1/2), 1-24.

Marshall, C. (2007). Terrorism, religious violence and restorative justice. In G. Johnstone & D. Van Ness (eds.), *Handbook of Restorative Justice* (pp. 372-394). Cullompton, Devon: Willan Publishing.

Maruna, S. (2016). Desistance and restorative justice: it’s now or never. *Restorative Justice*, 4(3), 289-301.

Maruna, S. (2014). The role of wounded healing in restorative justice: an appreciation of Albert Eglash. *Restorative Justice*, 2(1), 9-23.

Maruna, S. (2011). Reentry as a rite of passage. *Punishment & Society*, 13(1), 3-28.

Maruna, S., & LeBel, T. (2003). Welcome Home? Examining the “Reentry Court” concept from a strength-based perspective. *Western Criminology Review*, 4(2), 91-107.

Maruna, S., & Ramsden, D. (2004). Living to tell the tale: Redemption narratives, shame management, and offender rehabilitation. In A. Lieblich, D. P. McAdams & J. Josselson (eds.), *Healing Plots: The Narrative Basis of Psychotherapy* (pp. 129–151). Washington, DC: American Psychological Association.

Miller, C., & Chauhan, L. (2017). Radical beliefs and violent behaviour. In Lore Colaert (ed.), *‘De-radicalisation’, Scientific insights for Policy* (pp. 23-45). Brussels: Flemish Peace Institute.

Moghaddam, F. (2005). A staircase to Terrorism: A Psychological Exploration. *American Psychologist*, 60(2), 161-169.

Paternoster, R., & Bushway, S. (2009). Desistance and the feared self: Toward an identity theory of criminal desistance. *Journal of Criminal Law and Criminology*, 99(4), 1103-1156.

Petrich, D. (2016). Theorising desistance-promotion in circle processes: the role of community in identity transformation. *Restorative Justice*, 4(3), 388-409.

Porter, A. (2007). *Restorative programs help Hawai’i inmates reconnect with community*. [14.10.2016, International Institute for Restorative Practices: E-Forum].

Porter, L. & Kebell, M. (2011). Radicalisation in Australia: Examining Australia’s Convicted Terrorists. *Psychiatry, Psychology and Law*, 18(2), 212-231.

Pranis, K. (2014). *Circle Keeper’s Handbook*. Glenview Elementary School, Oakland, CA: Edutopia.org.

Rossner, M. (2011). Reintegrative ritual: Restorative Justice and Micro-Sociology. In S. Karstedt, I. Loader & H. Strang (eds.), *Emotions, Crime and Justice* (pp. 169-192). London: Hart Publishing.

Schmid, A. P. (2013). *Radicalisation, de-radicalisation, counter-radicalisation: a conceptual discussion and literature review* (ICCT Research Paper). The Hague: International Center for Counter-terrorism.

Stuart, B. & Pranis, K. (2006). Peacemaking circles: reflections on principal features and primary outcomes. In D. Sullivan & L. Tift (eds.), *Handbook of Restorative Justice: A Global Perspective* (pp.121-133). New York: Routledge.

Thomas, P. (2017). The perception of counter-radicalisation by young people. In Lore Colaert (ed.), *'De-radicalisation', Scientific insights for Policy* (pp. 119-135). Brussels: Flemish Peace Institute.

United Nations Office on Drugs and Crime (UNODC). (2016). *Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalisation to Violence in Prisons*. New York: United Nations.

Walgrave, L. (2015). Domestic Terrorism: a challenge for restorative justice. *Restorative Justice: An International Journal*, 3(2), 282-290.

Walgrave, L. (2008). *Restorative justice, Self-interest and responsible citizenship*. Cullompton: Willan Publishing.

Walker, L. (2016). Reentry circles for imprisoned people and their loved ones. Research Seminar for the Restorative Justice and Victimology Research Line of KU Leuven Institute of Criminology, 08 June, 2016.

Walker, L. (2010). Huikahi Restorative Circles: Group Process for Self-Directed Reentry Planning and Family Healing. *European Journal of Probation*, 2(2), 76-95.

Walker, L. (2009). Modified restorative circles: a reintegration group planning process that promotes desistance. *Contemporary Justice Review*, 12(4), 419-431.

Walker, L., Sakai, T., & Brady, K. (2006). Restorative Circles: A Reentry Planning Process for Hawaii Inmates. *Federal Probation*, 70(1), 65-73.

Ward, T., Fox, K., Garber, M. (2014). Restorative Justice, offender rehabilitation and desistance. *Restorative Justice: An International Journal*, 2(1), 24-42.

Wilson, R., Cortoni, F., & McWhinnie., A. (2009). Circles of Support and Accountability: A Canadian national replication of outcome findings. *Sexual Abuse: A Journal of Research and Treatment*, 21(4), 412-430.

Wilson, R., McWhinnie, A., & Wilson, C. (2008). Circle of Support and Accountability: An international partnership in reducing sexual offender recidivism. *Prison Service Journal*, 178, 26-36.

Wilson, R., Picheca, J., & Prinzo, M. (2007). Evaluating the effectiveness of professionally-facilitated volunteerism in the community-based management

of high risk sexual offenders: Part One – Effects on Participants and Stakeholders. *The Howard Journal*, 46(3), 289-302.

Wilson, R., Picheca, J., & Prinzo, M. (2005). *Circles of Support & Accountability: An Evaluation of the Pilot Project in South Central Ontario*. Research Report 2005 N° R-168, Correctional Service of Canada.

Vidino, L. (2011). *Radicalisation, Linkage, and Diversity: Current Trends in Terrorism in Europe*. Santa Mónica: RAND Corporation (National Defense Research Institute).

Zehr, H. (2002). Journey to belonging. In E. Weitekamp & H. J. Kerner (eds.), *Restorative Justice: Theoretical foundations* (pp. 21-31). Cullompton, Devon: Willan Publishing.

Restorative Justice and social conflicts: a focus on the issue of hate incidents

ELENA MILITELLO

University of Insubria

1. Introduction

The United Nations Secretary General, Mr. António Guterres, eloquently inaugurated 2019 stating: “We hear troubling, hateful echoes of eras long past. Poisonous views are penetrating political debates and polluting the mainstream. Let’s never forget the lessons of the 1930s. Hate speech and hate crimes are direct threats to human rights, to sustainable development and to peace and security” (Guterres, 2019).

Every day, as we turn on our phones, chances are that we will be reminded that hatred against targeted groups is spreading out with a speed and violence that had been deemed abandoned after the horrors of the World Wars.

Crowds of people (Canetti, 1962) in contemporary societies have no restraint in communicating through stereotypes and insults, and those insults tend to follow patterns and address vulnerable groups, women, LGBT, racial or religious minorities, with a particularly worrisome rampant xenophobia.

We might be tempted to obtain mental comfort through the common and reassuring thought that this is fault of contemporary pastimes like scrolling through social media.

However, reading newspapers we have not only the scathing sensation that this pervasiveness of hatred is even less hidden, but also that the border be-

tween expressing hate and committing violent acts is feeble and can easily fade away with minimum prompting.

All it takes to escalate from hate speech to hate “incidents” is a small step: that is when it becomes of concern to the State, which should protect all citizens and people on its territory.¹

This perception may expand from social media and newspapers to public places, means of transportation, schools, workplaces, businesses.

Different countries experience this wave of intolerance in different ways, but it cannot be said anymore that there are safe spaces. Some countries, like the United States, have witnessed a historical diversity and also hate incidents in a constant way (Alexander, 2010); others, like Italy - historically a country of emigration - and other European countries, are only recently starting to cope with diversity and discrimination (Valbruzzi, 2018).

2. From social conflicts to hate incidents

The current societal dynamics in contemporary Western societies are embedded with distrust and exclusion, “often characterized by anger, suspicion and heightened intolerance” (Woolford, 2009).

Several kinds of conflicts ordinarily run through a contemporary society: interpersonal conflicts, class conflicts, generational conflicts, and racial conflicts among others.² Some of those are group conflicts, and some are intercultural. The concept of conflict, indeed, appears embedded with any human society with limited resources: they can be managed through cooperation or conflict.³

This is natural, we live in a “relational universe”, as humans never live alone: we are individuals living in networks of affiliations with others; we are interdependent (Van Ness, 2012).

The current generation is experiencing deteriorating social relations (Craig, 2003), the economic crisis and its fallback on occupation; the rise in the development pace of technologies that make human work less necessary while decreasing in-person communications; the increased mobility rate, both in the sense of migrations from third-world countries to developed countries and among developed nations. All of these are weakening community and family ties. This paves the way to acute waves of intolerance, and to an intensification of “nor-

¹ Across Western countries, the number of hate incidents is mounting; e.g. Lach, 2018; Tondo and Giuffrida, 2018.

² The term “conflict” must be kept different from the term “dispute”, identifying cases where specific people are fighting the reconstruction of specific events and not more generalized (Moore, 2004).

³ Scholarship on social conflict or interest-group theories is extremely vast and dates back to Karl Marx: for references, e.g. Treviño, 2008, Ferrari, 2010.

mal” conflicts with the risk of explosion.

They are all factors, among many others, contributing to a growing sense of social unrest and to the reliance on one’s group (Van de Vyver, Travaglini, Vasiljevic and Abrams, 2015), with the risk that the social contract and the rule of law might be easily forgotten.

People who express hatred, either face-to-face or online, are in some way hurt, disappointed, fearful, skeptical, or tricked by the political discourse: there is conflict, and this may generate hatred (Dunbar, 1999; Dunbar, Quinones and Crevecoeur, 2005).

Victims are really hurt by hatred, even just online (Citron, 2014), and even as indirect or vicarious victims (Paterson, Brown and Walters, 2018). They are often not properly heard or understood by the criminal justice system. They suffer greater psychological stress, and often post-traumatic stress disorder, than victims of similarly egregious non-bias-motivated violence (Craig, 2003).

One of the cross-border, recurring issues of Western societies in the last decade has been a comeback, in the public discourse and on the public scene, of discrimination, especially race-based discrimination. This led to a debate on the punishment of hate speech incidents, which have sometimes been defended as a consequence of free speech, granted by any modern Constitution, although not without limitations.

3. From hate incidents to hate crime

A blatant sign of this severe intensification of social conflicts is the public manifestation of hatred against specific categories of people, crossing the line between free speech and discriminatory or racist speech, when it does not degenerate to mere violence. This has found a kind of validation by the rise in polls and elections of anti-system parties which do not attempt to hide their dissent with liberal policies and often use the populations’ fears as a communication technique to lead public discourse (Craig, 2003).

Within the term “hate incidents” there could be episodes of hate speech, either online or face-to-face, slurs or insults, or attacks to property, for example vandalism or graffiti, or even acts of violence against persons (Ainsworth and Bryan, 2016). Often, as already noted, these are group incidents, with multiple perpetrators (Craig, 2003), similar to bullying.

In cases where those behaviors also happen to constitute the basic conduct for an existing crime, then we face a “hate crime” or “hate-motivated crime” (OSCE ODIHR, 2019). That, depending on the national criminal system, can either constitute an autonomous crime in itself or entail an enhancement or aggravating circumstance if the motive behind the crime is discriminatory. We

thus define hate crime as a subset (*species*) of the more general category (*genus*) of hate incidents.

Hate crimes challenge our instinctual idea of criminals as troubled people or from difficult backgrounds and show our neighbor as someone capable of hating: it is a failure of the whole educational system.⁴ The more hate is publicly widespread, the more it is normalized and tolerated.

3.1. Hate speech as a crime

Hate speech by itself does not necessarily represent a crime. It can be debated whether it is bad in itself and it has even been argued that it should be responded to with tolerance (Johansen, 2018).

Much depends on statutory or case law interpretations given in each sovereign State. In general, a common trait among Western countries is that free speech can only be protected insofar as it does not become an incitement to the commission of a crime or a threat of violence.

Nevertheless, it should not be overlooked that hate speech, even when it is only online, brings its victims on the verge of exclusion and isolation, and often has significant psychological repercussions (Shackford-Bradley, 2018).

Different systems respond to hate speech in different ways, depending on the context and constitutional framework. While in the United States the constitutional protection awarded to speech by the First Amendment embraces a wide set of conducts without many limitations, in Europe the focus has been on the balance between free speech and other fundamental rights.

In some countries, using discriminatory expressions in the context of the commission of another crime is considered an aggravating circumstance.⁵ In others, only enhancements to facts already constituting crimes are relevant, and for a hate incident to become a crime it is necessary that some element of violence be present.⁶ Specific expressions of hate, like the denial of the atrocities of the *Shoah*, may constitute an autonomous crime (Fronza, 2018; Scotto Rosato, 2016).

⁴ For a portrait of typical perpetrators: Craig, 2003 (pp. 124-127).

⁵ An example is Italy, where a new section of the Penal Code has been recently introduced, named "Crimes against equality" (*delitti contro l'uguaglianza*): there, the crime of propaganda and solicitation to commit a crime motivated by racial, ethnic, and religious discrimination ("*propaganda e istigazione a delinquere per motivi di discriminazione razziale etnica e religiosa*") (art. 604 bis) and the aggravating circumstance of discriminatory motives ("*per finalità di discriminazione o di odio etnico, nazionale, razziale religioso, ovvero al fine di agevolare l'attività di organizzazioni, associazioni, movimenti o gruppi che hanno tra i loro scopi le medesime finalità*") (art. 604 ter) - which already existed - have been relocated: Bernardi, 2018; on the crimes themselves, see Spena, 2017.

⁶ As in the United States: Ainsworth and Bryan, 2016.

4. International sources of law on hate speech

In the decades since the end of the Second World War, an international consensus grew around the idea of rejecting hate expressions, and of providing criminal sanctions to those committing hate-motivated crimes.

At the international level, a strong stance against racism was taken first by the Council of Europe. In the European Convention on Human Rights and Fundamental Liberties, Article 14 is dedicated to “Anti-Discrimination”. There it is enshrined that the rights set forth in the Convention must be protected “*without discrimination on any ground*” (Council of Europe, 1950).

Later, it approved a recommendation on hate speech, with a set of principles to be followed by all Member States (Council of Europe, 1997); in a protocol to the Cybercrime Convention, acts of a racist and xenophobic nature committed through computer systems were criminalized (Council of Europe, 2003); a special European Commission against Racism and Intolerance (ECRI) has been created, with the task of developing General Policy Recommendations (GPR) directed at the governments of all member States (Council of Europe, 2002).

In the United Nations the first declaration of a right against being discriminated against was introduced specifically for racism: the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (United Nations, 1966a; Ghana, 2012). It was soon expanded to other contexts, as the 1966 International Covenant on Civil and Political Rights (ICCPR), which prohibits not only discrimination but also any advocacy thereof (United Nations, 1966b). The UN Human Rights Council has also recently added a specific office on discrimination, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.⁷

Another important subject in the fight against hatred is the intergovernmental Organization for Security and Co-operation in Europe (OSCE). Its Office for Democratic Institutions and Human Rights (ODIHR) (OSCE, 1992) publishes statistical data on hate crime (OSCE ODIHR, 2018); has issued guides to prosecutors (OSCE ODIHR, 2014) and NGOs (OSCE ODIHR, 2009); led projects on police training (OSCE ODIHR, 2012); and created a High Commissioner on National Minorities (OSCE, 1992).⁸

At the supranational level in Europe, the European Union also holds dear the issue of countering discrimination and hate. Art. 21 of the Charter of Fundamental Rights of the EU (known as Nice Charter) solemnly bans discrimination “based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership

⁷ The office, currently held by Ms. E. Tendayi Achiume of Zambia, was originally created in 1993 and its latest mandate renewal was issued in 2017: Human Rights Council, 2017.

⁸ The office, currently held by Mr. Lamberto Zannier of Italy, was established in 1992.

of a national minority, property, birth, disability, age or sexual orientation” (European Union, 2001). The EU has also issued a directive on discrimination (EU Council, 2000) and a framework decision on the criminalization of hate speech (EU Council, 2008). In addition, a recent recommendation on hate crime online has been approved (EU Commission, 2018), as well as soft laws or codes of conduct on the duties of social networks and other Internet Service Providers in countering hate speech (EU Commission, 2019).

Even the EU Directive on Victims specifies that, in case of hate crimes, the circumstance that the case involves a hate crime needs be taken in special consideration.⁹

5. The normal answers to hate incidents in Western societies

When establishing what should follow after a hate incident has occurred, the options left open to public institutions are various, but they are also limited by being part of international and supranational organizations.

Despite the mandatory reactions stated in criminal law, public authorities can remain in practice indifferent. A political condemnation normally follows, but nowadays it cannot be taken for granted, as the level of quarreling is high. Moreover, part of the communication techniques some populist politicians rely on involves identification and nationalism. The deepest changes occur through education and policy campaigns. The reaction can be, even partially, externalized to the private sector, through disciplinary sanctions, provided that it happens in a regulated context, like a school or a workplace. There can be administrative sanctions or, often made mandatory by the international sources of law, criminal prosecutions.

One should wonder whether punishing hate speech with criminal sanctions is the better option, considering all interests that may be relevant: the rights of the victims, the freedom of expression of the offender, and the interests of communities and society.

A thought should go to the functions of the criminal sanction and to what purposes it serves (Beccaria, 1764). Even this issue greatly varies depending on national systems and their constitutional framework.¹⁰

If one aims at societal change, a parallel can be drawn between believing in

⁹ Premise n. 57 recognizes that “Victims of (...) hate crime (...) tend to experience a high rate of secondary and repeat victimization, of intimidation and of retaliation”. Therefore, art. 22, para. 3, includes victims of hate crimes among those to whom particular attention should be paid when determining specific protection needs (European Union, 2012).

¹⁰ In the United States priority is still given to retribution, while in most European countries the primary aim is rehabilitation of the criminal. For example, art. 27 of the Italian Constitution explicitly states that the punishment must aim to the reeducation of the convicted.

education and in rehabilitation.

Additionally, the concept that, in a democratic legal system, criminal law should be a tool of last resort (*extrema/ultima ratio*) should be respected: the area of criminally relevant should not be extended more than strictly necessary and should be reduced to the minimum (Jareborg, 2005).

A further problem of a response merely through prosecutions may be that groups advocating hate and racist ideas might feel galvanized by the persecution and further affirm their righteousness through an expansive interpretation of freedom of speech.

6. Restorative justice as an alternative that may improve the way society deals with hatred

The prevention of hate-motivated crimes and the reduction of escalations from insults to violence may be pursued through actions at the borders or outside of criminal justice, at previous stages of the civil coexistence, and specifically through restorative justice.¹¹

In recent years, and especially in the United Kingdom, the intersection between hate crimes and restorative justice is being explored increasingly more.¹² In the meanwhile, a new debate on the role of cultural differences in restorative justice approaches is being developed (Pali and Aertsen, 2018; Blevins, 2006).

In previous scholarship on restorative justice, hate crimes had often been included among the categories hardly compatible with restorative justice itself, just like serious crimes or child abuse (Gavrielides, 2016). This does not indicate, however, that they have been excluded by the potential scope of restorative justice, but merely that peculiar precautions need be taken when facing those controversial issues with a restorative mindset. That is why at the present moment there is an ongoing debate on the possibility of inclusion of hate crimes among those dealt with restoratively (Anstead, 2017).

The foundation of restorative justice has always been the striving towards a resolution of conflicts different than punishment. In a restorative justice system, the wrongdoings of the offenders are not denied or forgotten; on the contrary, they are faced directly and there is disapproval. However, the way to deal with conflicts focuses on the encounter between the victim and the perpetrator, normally with a mediator and/or in the presence of their communities, and not on a decision by a public authority thrust upon the subjects of the conflict. Instead

¹¹ Among many others: Aertsen and Pali, 2017; Gavrielides, 2015a; 2016a; Gavrielides and Artinopoulou, 2013; Woolford, 2009; Wright, 2008, Zehr, 1990.

¹² Mainly through the pivotal works of Professor Walters and Professor Gavrielides: Gavrielides, 2008, 2010, 2011, 2012, 2014, 2015b, 2016b; Walters, 2014, 2015.

of focusing on a retributive punishment, the such a system aims to respond to victims' needs, and to reintegrate offenders into their community while acting in a special-deterrence way that leads to lower recidivism rates, working in favor of the improvement of societies where the public trust in authorities is decreasing (Gavrielides, 2017).

The fundamental features of restorative justice should be kept in mind, requiring that wrongdoers own their responsibilities and make amends, through honest conversations or actions. At the same time, the instinctual and inner resistance to the restorative method by victims, or in general those who suffer from a wrongdoing should be taken into account. The underlying idea, in any case, would be to anticipate the resolution of discrimination-related conflicts to their embryonal stage, before they explode into more serious acts that would require the intervention of criminal law tools.

A case-by-case determination on the part of the facilitator and the subjects involved should lead to a choice among the different restorative practices (Moore, 2014): victim-offender mediation, including talks with surrogate victims;¹³ family group conferencing or healing circles; circle times, at regular intervals (Hopkins, 2004). It is likely the structure of a public healing circle would best suit most instances of hate incidents, as it allows for the participation of the whole communities of offenders and victims.

A restorative mindset could also be applied to other social situations and contexts of everyday life, where the coexistence of different individuals and groups might trigger conflicts and discrimination incidents. This could intervene at a prior stage than the commission of a crime.

In fact, restorative justice, in its roots and in its depth, entails a shift of paradigm in all aspects of life, and can expand into a theory of restorative living.

The idea of *restorative living* implies expanding the scope of application of the main theories of restorative justice to any other context of living. It was derived directly from the fundamental values of the movement: respect, responsibility, relationship (Zehr, 1990).

Restorative justice cannot live isolated in the criminal justice system and out of history: it becomes truly meaningful only if it brings about a profound change of perspective, with effects on families, communities, schools, and peaceful coexistence among people (Zehr, 2009; Sullivan and Tift, 2004).

A restorative approach might be applied, in particular, to any situation where an individual is confronted with potential alternative choices that will form their behavior and affect how they will react to the obstacles in life. The

¹³ For example, former racists who are willing to meet with victims; as in the case of Mr. Christian Picciolini, a former U.S. skinhead that started public talks on white supremacy and is now the director of the documentary called "Breaking Hate". Davies, 2018.

idea that in every conflict we are presented with in our everyday lives we can choose to react more positively than our instincts would suggest is a restorative one.

With special regard to the issues of hate-motivated conflicts, restorative justice can sustain and repair the trust dynamics among citizens and increase social inclusion by changing the narrative and providing a venue for dialogue and encounter.

7. Potential benefits and risks of the implementation of restorative practices in hate incidents

There are promising outcomes of using restorative justice as a response to hate crimes (Walters, 2014).

First, it promotes empathy and mutual understanding, in contexts where the lack of knowledge on other's cultures and experiences leads to the fear of the other. Empathy, in accordance with its etymological roots,¹⁴ should allow to meet with the other and "encounter the face of the other" (Lévinas, 1987).

In the end, the way all restorative conferences work is based on the acknowledgement of the common humanity, despite different cultural backgrounds (Moore, 2004).

As to the protection of victims of hatred, restorative justice would address the harm caused to the insulted person and invert the victimization process, giving a voice and a storytelling power to the victim, not only of the incident but also of her feeling and identity. To amend the processes of repeated and secondary victimization, it will be important to involve the support system of both the victim and the offender.

In cases of online hatred, a face-to-face meeting with a restorative approach will help move people beyond the keyboard and address the dehumanization provoked by the digital world.

More importantly, it may help prevent escalations and potential future worse harm (Braithwaite, 2002).

Finally, another positive outcome of the diversion from the ordinary criminal justice system is the comparatively easier procedures and the lower costs compared to keeping convicted people in jail (Albrecht, 2010).

On the other hand, the many risks behind the use of restorative justice for conflicts that are not individual should not be concealed (Walters, 2014).

Some of them are general risks of restorative practices; others are hate-re-

¹⁴ The word "empathy" derives from the ancient Greek *en* (inside) + *páchein* (to suffer, to feel): it originally means to feel within someone else, to be in their shoes. Mannozi and Lodigiani, 2017 (p. 126).

lated.

As to the general risks, there is the non-foreseeability of the length of each process, depending on the single participants and their readiness; the initial costs to hire experts and design mediation systems; the difficulties in obtaining scientific measurements of efficiency; confidentiality; above all, voluntariness: it should be guaranteed on both sides, but there is a risk that if there is an alternative to the criminal prosecution, or a potential reduction of the sanction, offenders might feel pressured to try the restorative way only to escape the criminal system without voluntariness.

There is also a theoretical problem in using restorative justice to ascertain responsibility. The criminal trial has a fact-finding function, *i.e.* ascertaining the truth, also in front of the community. It is important to check in advance whether the offender is willing to accept responsibility and renounce her right to a robust inquiry process, with all of the procedural safeguards granted in a criminal trial, as the presumption of innocence and the right to remain silent, with the burden of proof on the public prosecutor (Fletcher, 1998). The accused persons should be assured that none of the information revealed in the restorative process may be used against them in case of unsuccessful mediation and reenactment of the criminal trial (Hopkins, 2004).

Another fear expressed in legal scholarship is the abandoning of the modern essence of criminal law as *Tatstrafrecht*, *i.e.* criminal law based on facts (Braithwaite, 2012), to author-centered. However, that seems to not be at odds with restorative justice, where the focus is not only on the offender.

The development of alternative criminal justice is also highly political, and dependent on political will. In societies captured by populist feelings that call for increasingly high repression, restorative justice is often accused of naivety or do-goodism, if not even brainwashing or indoctrination. We should wonder whether the current governments appreciate the repression of hate speech or actively fuel it as an electoral tool (Acorn, 2018).

As to the specific risks and side effects of hate incidents, it should first be noted that social psychologists have found that there is a group psychology of social identity fueling malign antipathy, or even hate, against those who are perceived as different. Groups thrive by pitching themselves against others. There are empirical data collected by social psychologists proving our instinctual sensations on growing inequality in protecting one's group (the ingroup, or that to which we perceive to belong) and excluding outgroups (people who are different), even from basic human representation, let alone human rights. The assumption of these researchers seem to be that outgroups are likely to be offenders. Victims might not perceive a shared social identity with the victim. Those offenders could be left out of any possibility of restorative justice,

based on voluntary participation. Therefore, restorative justice can in practice be reserved for offenders belonging to the majority, and unavailable for offenders perceived as outgroups (Van de Vyver, Travaglino, Vasiljevic and Abrams, 2015). However, in hate crimes it is the minority - the outgroup - that is normally the victim, and these empirical results could prevent those victims from getting any acknowledgement, possibly leading to fewer prosecutions, secondary victimization, growing social exclusion, marginalization, and, in extreme cases, radicalization. People who hate, offend, and discriminate are not likely to participate in a talk with victims; instead there is a risk of radicalization of positions due to self-exculpatory strategies and to heated politics. Victims too can be reluctant to meet their offenders: they can fear repeated victimization, reprisals, intimidations; they may renounce to reporting any incident, especially if they are illegal aliens, vulnerable to deportation and immigration law.

The worst risk is probably that of ineffective facilitation, that is issues with the expert: they can be insufficiently trained and therefore unfit to hold the meeting between victim and perpetrator. The facilitator often lacks cultural awareness, coming from a different background as the victim (Jenkins, 2004). Moreover, interpretations of concepts such as justice, guilt, shame, reconciliation and forgiveness, as well as the grade of significance of these, differ according to different cultural backgrounds of disputants (Albrecht, 2008; Törzs, 2014) and their communication styles (Albrecht, 2010). The facilitator also has to manage the delicate role of supporters in hate crimes. Often the offender comes from a community that thinks alike and shares the same hatred. They cannot be left alone to choose supporters but should be helped in identifying them so that secondary or repeated victimization be avoided, and a meaningful dialogue can arise (Walters, 2014). In general, the facilitator should be extremely careful in leading the discussion to avoid reinforcing the imbalances of power existing in the society and respecting the vulnerability of victims.

Despite the potential pitfalls highlighted, the positive benefits of the use of restorative justice in cases of hate incidents seemingly outweigh the risks (Walters, 2014). All appropriate measures to ensure voluntariness and structure procedural safeguards to minimize those risks are to be taken, firstly by investing in specific cultural trainings to experts. Restorative justice as a response to hate incidents should be supported by the legal system.

8. Potential settings for implementation of restorative justice

Several possible implementation contexts for restorative justice in cases of hate incidents can be identified, depending on whether a crime has been committed and whether a criminal trial has taken (post-trial phase) or will take

(pre-trial phase) place.

Among the most common environments for restorative justice is the probation phase, after a court of law has determined that a crime has been perpetrated and which sanction is to be applied. The successful participation in restorative justice meetings might take place during the application of the sanction and could be positively assessed as a factor in probation and parole hearings.

Many other options might be developed before or in alternative to the criminal trial for less serious cases. Restorative practices might provide the opportunity for a meeting, an “encounter” between parties in conflict. This could prevent the commission of crimes, or even, in systems where the criminal option is discretionary and not mandatory, divert the criminal trial, avoiding unnecessary costs and additional pain, as well as the long timeline of the criminal justice system. The ideal focus should be on prevention and introducing restorative justice and restorative living in several contexts. In many of them, the hatred behind the discriminatory acts could be analyzed and overcome before the level of the offence becomes so high as to constitute a crime - or even when a crime according to the national system has been committed but its seriousness is limited.

Rooted in the common law tradition, one of these potential contexts, still within criminal justice, has been gradually developed: police training. Men and women belonging to police forces are the nearest public institution to communities. Problematically, the way to deal with victims and offenders in cases of hate crimes is seldom part of their training. Their intervention, which could be a way to address conflicts and improve community cooperation, results in misunderstandings and at times increased or repeated victimization. And this still leaves out the worrisome cases where hatred is hidden in public institutions and results in institutionalized discrimination and victimization.¹⁵ In cases where police forces receive the victims’ complaints, they should be able to present available restorative justice services in that phase.¹⁶

Another context where the implementation of restorative justice practices seems more favorable and compatible is that of schools (and university campuses). In the context of schools, many restorative justice experiments have already been carried out, although not in an organic way (Dominus, 2016).

Incidents of hate are widespread among children and teenagers, especially now that they are often equipped with technologies allowing them to hide their identities when insulting. Far too often these practices are dismissed as bullying

¹⁵ The OSCE ODIHR has already organized several projects to this aim: see *supra*, para. 4.

¹⁶ The choice of the European Union Directive on Victims was to impose on Member States a duty to “ensure that victims are offered the following information, without unnecessary delay, from their first contact with a competent authority in order to enable them to access the rights set out in this Directive: (...) (j) the available restorative justice services”. Art. 4, para. 1, letter j (European Union, 2012).

and childish behavior, without addressing the roots and consequences on the formation of young citizens (Michael, 2015; Kaldis and Abramiuk, 2016).

Without aiming to draw a full picture of such a complex context, in contemporary schools we resort far too often to practices of exclusion of the “dangerous”. The goal should be to “keep students in school and out of the criminal justice system” (Hopkins, 2004), but exclusionary and zero-tolerance discipline policies have created a sort of “school-to-prison pipeline” (Alexander, 2010). That has been mainly discussed in the United States, but it also deserves a discussion in deprived urban areas in our European countries, where dropout rates are unexpectedly high.

The experience of teen courts to solve issues arising among students without necessarily resolving to disciplinary boards (Vassallo, 2005) can be included in the wide set of restorative processes used in schools (Smith, 2012; Davis, 2014; Cardoza, 2018; Shackford-Bradley, 2018). Mediation involving teachers and parents can also be offered in case of worrisome behaviors of a student, which may be beneficial to express everyone’s concerns (Hopkins, 2004).

Analogously, similar experiments should be conducted in universities, like those conducted on some campuses in the United States.

Previously, the training and willingness of principals and teachers should be assessed, educational paths should be designed, and professional roles that include competences in restorative justice should be inserted in schools.

In another context, a restorative perspective could be beneficial to workplaces (Eisenberg, 2016), especially in public institutions and medium- or big-level companies. There, the number of employees and the less personal relationships between employees and management could endanger the harmony and provoke episodes of institutionalized racism or discrimination against women or minority employees. An example of integration within the community could be that of schools as workplace, using restorative approaches in schools to mediate conflicts between staff.

Wherever possible, any possibility to cooperate with administrative anti-discrimination bodies in government should be seized. In the European Union, every country¹⁷ should have created an office to deal with discrimination, also in the private sector. This was mandated by the Equal Treatment Council Directive (EU Council, 2000). The directive includes: appropriate conciliation procedures among the possible enforcement actions (Article 7); provisions aiming to counteract victimization (Article 9); and provisions to promote social dialogue (Article 11).

More generally, restorative justice could be introduced in municipalities and

¹⁷ In Italy, for example, it is the National Offices Against Racial Discrimination (*Ufficio Nazionale Antidiscriminazioni Razziali – UNAR*), founded in 2003 (<http://www.unar.it/>).

local communities, where the first signs of intolerance become apparent. A traditional idea could be that to leave those conflicts to be solved by a mediation body or city assembly. However, that would presuppose an active and open citizenship, which is the opposite of current tendencies. Civic activism, as well as the care of public and dialogue spaces, appears of lesser importance than egotistical interests. It is likely that only people close to offenders and victims - their closest “supporters” - would agree to participate in restorative practices held in traditional decision-making institutions.

New, alternative spaces for the prevention of hatred are to be imagined. As an idea, community circles to discuss ongoing conflicts could be hosted in places where the community still meets today: cafés, libraries and bookshops, gardens, social and cultural clubs - all spaces belonging to the urban environment and typical venues for grassroots initiatives.¹⁸

Finally, possible spaces for restorative living may be open in other social venues, as social media, which unleash torrents of hatred. It should be noted that nowadays on most social media there is a system to adjudicate bans of single users or pages that violate the platform’s code of conducts.¹⁹ Against the example of mainstream social media like Facebook or Twitter, there are new and less known social media that oppose any kind of check on free speech (Marantz, 2018; Basu, 2018).

As mentioned above, in the European Union, public authorities have recommended tackling illegal and hateful content (EU Commission, 2018; EU Commission, 2019). However, they have also preferred to enter into an agreement with the main social media platforms, so that they would adhere to a voluntary code of conduct (EU Commission, 2017), instead of issuing binding legislation (Stupp, 2018).

Leaving it all to the social media platforms to respond to hate, there is no clear and coherent standard determining what is removed as hate speech. It is different in every country and on different platforms. Moreover, even when they are correctly issued, often bans do not work: users can create new usernames, or when their suspension ends they are back and even more aggressive. A potential use of restorative justice could be promoted in the EU codes of conduct, fashioned as a diversion from an impending ban, with modern technologies that would allow participants to overcome the absence of a face-to-face talk, while still allowing perpetrators to meet with victims.

¹⁸ For a concrete example, occurred in the Wien *Frauencafé*, Pelikan and Ragazzi, 2018 (pp. 174-176).

¹⁹ Twitter’s *Hateful Conduct Policy* is available online (<https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>), as are Facebook’s *hate speech* standards (https://www.facebook.com/communitystandards/hate_speech).

9. Looking ahead: the role of education

In an uncountable number of instances, when it comes to the moment of punishment after a wrongdoing has been committed the behavior of the offender has already been irredeemably shaped. The amount of change that can be brought after a criminal judgment is issued is not comparable to the education that can be formed throughout a lifetime. Although restorative justice may be used in responding to hate crimes, the more general solution that should be pursued is education to develop openness and to respect.

The possible education spaces could be in schools, before incidents occur, through the teaching of empathy (Kaldis and Abramiuk, 2016). It can then expand through the schools to the greater community: involving parents to teach them those skills (Hopkins, 2004); working in community centers; and advocating for mutual respect and a heightened willingness to listen. This could be obtained within a consistent theory of “living restoratively”, of openness to others.

This openness is especially needed in contemporary societies, experiencing frequent episodes of discrimination, potentially leading up to hate crimes, if not to violence.

Although practicalities might make it challenging, we need to continue developing the vision of “a more caring and safe society” (Zehr, 1990), while remaining grounded in reality and objectivity.

Bibliography

Acorn, A. (2018). Healing the Will to Annihilate: Can Restorative Justice Restore After Hate-Crime. *Internet Journal of Restorative Justice, Special Issue Restorative Justice & Complex Cases*.

Aertsen, I., Pali, B., eds. (2017). *Critical restorative justice*. Oxford: Hart.

Ainsworth, S., Bryan, N. (2016). Hate Crime Regulation and Challenges. *Georgetown Journal of Gender and the Law*, 17, pp. 303-323.

Albrecht B. (2010) Multicultural Challenges for Restorative Justice: Mediators’ Experiences from Norway and Finland. *Journal of Scandinavian Studies in Criminology and Crime Prevention*, 11 (1), pp. 3-24.

Albrecht, B. (2008). The Cultural Dimension of Restorative Justice: The Case of Immigrants Refugees in Norway and Finland. In Centre for Peace Studies (CPS), *Restoring peace and justice. Exploring methodological and theoretical challenges*. University of Tromsø, Norway: CPS Working Papers, p. 68.

Alexander, M. (2010). *The new Jim Crow: Mass incarceration in the age of color blindness*. New York: New Press.

Anstead, A. (2017). Is restorative justice a solution to the growing problem

of hate crime? *Human Rights and Discrimination - Bright Blue* [online]. Available at: <https://humanrights.brightblue.org.uk/blog-1/2017/4/13/is-restorative-justice-a-solution-to-the-growing-problem-of-hate-crime> [Accessed 11 Mar. 2019].

Basu, Z. (2018). Social network Gab under scrutiny in wake of Pittsburgh shooting. *Axios* [online]. Available at: <https://www.axios.com/social-network-gab-under-scrutiny-in-wake-of-pittsburgh-shooting-fcef4772-15f2-4b97-a000-14cf5e5187bc.html> [Accessed 11 Mar. 2019].

Beccaria, C. (1764) *Dei delitti e delle pene*, 1° ed., English transl. (1872) *An Essay on Crimes and Punishments*. Albany: W.C. Little & Co.

Bernardi, S. (2018). Il nuovo principio della ‘riserva di codice’ e le modifiche al codice penale: scheda illustrativa. *Rivista Trimestrale di Diritto Penale Contemporaneo* [online], 4, pp. 127-133. Available at: <https://www.penalecontemporaneo.it/d/5967-il-nuovo-principio-della-riserva-di-codice-e-le-modifiche-al-codice-penale-scheda-illustrativa> [Accessed 11 Mar. 2019].

Blevins, M. F. (2006). Restorative justice, slavery, and the American soul, a policy-oriented intercultural human rights approach to the question of reparations. *Thurgood Marshall Law Review*, 31, pp. 253-322.

Braithwaite, J. (2002). Linking Crime Prevention to Restorative Justice. In J. Perry, ed., *Restorative Justice: Repairing Communities Through Restorative Justice*. Lanham, Md.: American Correctional Association.

Braithwaite, J. (2012). Rights and restoration. In T. Gavrielides, ed., *Rights & restoration within youth justice*. Whitby: de Sitter, p. 3.

Canetti, E. (1962). *Crowds and power*. London: Victor Gollancz Ltd.

Cardoza, K. (2018). The Challenges of ‘Raising Kings’: A Return to Ron Brown College Prep. *Education Week* [online]. Available at: https://blogs.edweek.org/edweek/rulesforengagement/2018/11/the_challenges_of_raising_kings_a_return_to_ron_brown_college_prep.html [Accessed 11 Mar. 2019].

Citron D. K. (2014). *Hate crimes in cyberspace*. Cambridge: Harvard University Press.

Council of Europe (1950). *Convention for the Protection of Human Rights and Fundamental Freedoms*. ETS No. 5, Rome, 4 November 1950, Art. 14.

Council of Europe (1997). *Recommendation No. R (97) 20 of the Committee of Ministers to member states on “hate speech”*, adopted on 30 October 1997.

Council of Europe (2003). *Additional Protocol to the Convention on Cyber-crime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*, ETS No. 189, Strasbourg, 28 January 2003.

Council of Europe (2002), *Resolution Res(2002)8 of the Committee of Ministers on the statute of the European Commission against Racism and Intolerance*, 799th meeting, 13 June 2002.

Craig, K. M. (2003). Examining Hate-Motivated Aggression: A Review of the Social Psychological Literature on Hate Crimes as a Distinct Form of Aggression. In B. Perry, ed., *Hate and bias crime. A reader*, 1st ed. London: Taylor and Francis, pp. 119-120.

Davies D. (2018). A Former Neo-Nazi Explains Why Hate Drew Him In – And How He Got Out. *NPR* [online]. Available at: <https://www.npr.org/2018/01/18/578745514/a-former-neo-nazi-explains-why-hate-drew-him-in-and-how-he-got-out> [Accessed 11 Mar. 2019].

Davis, F. (2014), Discipline With Dignity: Oakland Classrooms Try Healing Instead of Punishment. *Yes Magazine* [online]. Available at: <https://www.yes-magazine.org/issues/education-uprising/where-dignity-is-part-of-the-school-day> [Accessed 11 Mar. 2019].

Dominus, S. (2016). An Effective but Exhausting Alternative to High-School Suspensions. *The New York Times*, [online]. Available at: <https://www.nytimes.com/2016/09/11/magazine/an-effective-ut-exhausting-alternative-to-high-school-suspensions.html> [Accessed 11 Mar. 2019].

Dunbar, E. (1999). Defending the Indefensible: A Critique and Analysis of Psycholegal Defense Arguments of Hate Crime Perpetrators. *Journal of Contemporary Criminal Justice*, 15(1), pp. 64-78.

Dunbar, E., Quinones, J. and Crevecoeur, D.A. (2005). Assessment of Hate Crime Offenders: The Role of Bias Intent in Examining Violence Risk. *Journal of Forensic Psychology Practice*, 5(1), pp. 2-19.

Eisenberg, D. T. (2016). The Restorative Workplace: An Organizational Learning Approach to Discrimination. *Richmond Law Review*, 50, p. 487 ss.

European Union (2001). *Charter of Fundamental Rights*, 2000/C 364/01, Nice, 18 December 2001.

European Union (2012). *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA* [online]. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF> [Accessed 11 Mar. 2019].

EU Commission (2017). *Communication on Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms*, COM(2017) 555 final [online]. Available at:

<https://ec.europa.eu/digital-single-market/en/news/communication-tackling-illegal-content-online-towards-enhanced-responsibility-online-platforms> [Accessed 11 Mar. 2019].

EU Commission (2018). *Recommendation of 1.3.2018 on measures to effectively tackle illegal content online* (C(2018) 1177 final) [online]. Available at:

<https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-measures-effectively-tackle-illegal-content-online> [Accessed 11 Mar. 2019].

EU Commission (2019). *Code of conduct on countering illegal hate speech online of 15 January 2019* [online]. Available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300 [Accessed 11 Mar. 2019].

EU Council (2000). *Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*.

EU Council (2008). *Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law*.

Ferrari, V. (2010). *Prima lezione di sociologia del diritto*. Bari: Laterza.

Fletcher G.P. (1998). *Basic concepts of criminal law*. New York: Oxford University Press, pp. 7-24.

Fronza, E. (2018). *Memory and Punishment. Historical Denialism, Free Speech And The Limits Of Criminal Law*, New York: Springer.

Gavrielides, T. (2008). *Restoring Relationships: Addressing hate crime through restorative justice and multi-agency partnerships*. London: ROTA.

Gavrielides, T. (2010). Restoring relationships: hate crime and restorative justice. In *European best practices of restorative justice in the criminal procedures: Budapest conference 2009*. Hungary: European Union.

Gavrielides, T. (2011). Restorative Practices & Hate Crime: Opening up the debate. *Temida*, 14 (4), pp. 7- 19.

Gavrielides, T. (2012). Contextualising Restorative Justice for Hate Crime. *Journal of Interpersonal Violence*, 27(18), pp. 3624-3643.

Gavrielides, T. (2014). Bringing Race Relations Into the Restorative Justice Debate: An Alternative and Personalized Vision of "the Other". *Journal of Black Studies*, 45, pp. 216-246.

Gavrielides, T., ed. (2015a). *The psychology of restorative justice*. Farnham: Ashgate, 2015.

Gavrielides, T., ed. (2015b). Race equality & the paradox of restorative justice. *Theo Gavrielides* [online]. Available at: <https://www.theogavrielides.com/single-post/2015/08/31/Race-equality-the-paradox-of-restorative-justice> [Accessed 11 Mar. 2019].

Gavrielides, T., ed. (2016a). *Offenders no more: an interdisciplinary restorative justice dialogue*. New York: Nova Publishers.

Gavrielides, T. (2016b). Moving beyond the crime in hate crimes. *Theo Gavrielides* [online]. Available at: <https://www.theogavrielides.com/single-post/2016/08/28/Moving-beyond-the-crime-in-hate-crimes> [Accessed 11 Mar. 2019].

Gavrielides, T. (2017). Restorative Justice: Self-indulgence and the trust

we've lost. *Theo Gavrielides* [online]. Available at: <https://www.theogavrielides.com/single-post/2017/11/19/Restorative-justice-self-indulgence-and-the-trust-weve-lost> [Accessed 11 Mar. 2019].

Gavrielides, T. and Artinopoulou V., eds. (2013). *Reconstructing Restorative Justice Philosophy*. Farnham: Ashgate.

Ghanea, N. (2012). *The Concept of Racist Hate Speech and its Evolution over time. Paper presented at the United Nations Committee on the Elimination of Racial Discrimination's day of thematic discussion on Racist Hate Speech 81st session* [online]. Available at: <https://www.ohchr.org/Documents/HRBodies/CERD/Discussions/RacistHateSpeech/NazilaGhanea.pdf> [Accessed 11 Mar. 2019].

Guterres, A. (2019). *Secretary-General's Press Conference*. [online] Available at: <https://www.un.org/sg/en/content/sg/press-encounter/2019-01-18/secretary-generals-press-conference> [Accessed 11 Mar. 2019].

Hopkins, B. (2004). *Just schools, A whole school approach to restorative justice*. London: Jessica Kingsley Publishing.

Human Rights Council (2017). *Resolution 34/35 on the Mandate of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, approved on 24 March 2017.

Jareborg N. (2005). Criminalization As Last Resort (Ultima Ratio). *Ohio State Journal of Criminal Law*, 2, pp. 521 ff.

Johansen, B. (2018). Tolerance: An appropriate answer to hate?. In T. Brudholm and B. Johansen, eds., *Hate, Politics, Law: Critical Perspectives on Combating Hate*. Oxford: Oxford University Press, pp. 172-191.

Jenkins, M. (2004). How do culture, class and gender affect the practice of restorative justice? (Part 1). In H. Zehr and B. Toews, eds., *Critical issues in restorative justice*. Monsey, NY: Criminal Justice Press, pp. 311-324.

Kaldis, P., & Abramiuk, L. (2016). Preventing school bullying through the use of empathy: let's stop bullying without focusing on offender discipline and treatment. in T. Gavrielides, ed. (2016). *Offenders no more: an interdisciplinary restorative justice dialogue*. New York: Nova Publishers, pp. 231-246.

Lach, E. (2018). The Bombs Addressed to Obama, Clinton, and Soros, and the History of Anti-Soros Hate-Mongering. *The New Yorker* [online]. Available at: <https://www.newyorker.com/news/current/the-bombs-addressed-to-obama-clinton-and-soros-and-the-history-of-soros-mongering> [Accessed 11 Mar. 2019].

Lévinas, E. (1987). *Humanisme de l'autre homme*. Paris: LGF.

Mannozi, G. and Lodigiani, G. A. (2017). *La giustizia riparativa. Formanti, parole e metodi*. Turin: Giappichelli.

Marantz, A. (2018). Reddit and the Struggle to Detoxify the Internet. How do we fix life online without limiting free speech? *The New Yorker* [online]. Available

at: <https://www.newyorker.com/magazine/2018/03/19/reddit-and-the-struggle-to-detoxify-the-internet> [Accessed 11 Mar. 2019].

Michael, L. (2015). Hate crimes against students: recent developments in research, policy and practice. In N. Chakraborti, J. Garland (eds.). *Responding to hate crime: The case for connecting policy and research*. Bristol: Policy Press, pp. 155-168.

Moore, D. B. (2004). Managing Social Conflict. The Evolution of a Practical Theory. *The Journal of Sociology & Social Welfare*, 31(1), p. 82.

OSCE (1992). *Conference for Security and Co-operation in Europe, 1992 Summit*. Helsinki, 9 - 10 July 1992, Art. VI.

OSCE ODIHR (2009). *Preventing and responding to hate crimes: A resource guide for NGOs in the OSCE region* [online], 15 October 2009. Available at: <https://www.osce.org/odihr/39821> [Accessed 11 Mar. 2019].

OSCE ODIHR (2012). *Training Against Hate Crimes for Law Enforcement (TAHCLE): Programme Description* [online], 4 October 2012. Available at: <https://www.osce.org/odihr/tahcle> [Accessed 11 Mar. 2019].

OSCE ODIHR (2014). *Prosecuting Hate Crimes: A Practical Guide* [online], 29 September 2014. Available at: <https://www.osce.org/odihr/prosecutorsguide> [Accessed 11 Mar. 2019].

OSCE ODIHR (2018). 2017 Hate Crime Data [online]. Available at: <http://hatecrime.osce.org/2017-data> [Accessed 11 Mar. 2019].

OSCE ODIHR (2019). What is hate crime [online]. Available at: <http://hate-crime.osce.org/what-hate-crime> [Accessed 11 Mar. 2019].

Pali, B. and Aertsen, I., eds. (2018). *Restoring justice and security in intercultural Europe*. London: Routledge.

Paterson, J., Brown, R. and Walters, M. (2018). The short and longer term impacts of hate crimes experienced directly, indirectly and through the media. *Personality and Social Psychology Bulletin* [online]. Available at: http://sro.sussex.ac.uk/79230/3/_its-home.uscs.susx.ac.uk_home_sc328_Desktop_Papers%20for%20SRO_brown_personality_and_social_psychology_bulletin_sept18%20%281%29.pdf [Accessed 11 Mar. 2019].

Pelikan, C. and Ragazzi, M. (2018). Critical reflections on active participation under new governance models. In B. Pali, I. Aertsen (eds.), *Restoring justice and security in intercultural Europe*. London: Routledge.

Scotto Rosato, A. S. (2016). Osservazioni critiche sul nuovo "reato" di negazionismo. *Rivista Trimestrale di Diritto Penale Contemporaneo* [online], 3, pp. 280-311. Available at: http://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/rosato_3_16.pdf [Accessed 11 Mar. 2019].

Shackford-Bradley J. (2018). How Schools Can Heal after Hate Speech. *Greater Good Magazine* [online]. Available at: <https://greatergood.berkeley.edu/>

article/item/how_schools_can_heal_after_hate_speech#thank-influence [Accessed 11 Mar. 2019].

Smith, J.A. (2012). Can Restorative Justice Keep Schools Safe?. *Greater Good Magazine* [online]. Available at: https://greatergood.berkeley.edu/article/item/can_restorative_justice_keep_schools_safe [Accessed 11 Mar. 2019].

Spena A. (2017). La parola(-)odio. Sovraesposizione, criminalizzazione e interpretazione dello hate speech. *Criminalia*, pp. 577-607.

Stupp C. (2018). Commission backs away from regulating online platforms over hate speech. *Euractiv* [online]. Available at: <https://www.euractiv.com/section/freedom-of-thought/news/social-media-companies-accelerate-removals-of-online-hate-speech-eu-confirms/> [Accessed 11 Mar. 2019].

Sullivan, D. and Tifft, L. (2004). What are the implications of restorative justice for society and our lives? In H. Zehr and B. Toews, eds., *Critical issues in restorative justice*. Monsey, NY: Criminal Justice Press, pp. 387-400.

Tondo, L. and Giuffrida, A. (2018). Warning of 'dangerous acceleration' in attacks on immigrants in Italy. Murders, shootings and assaults coincide with Matteo Salvini's anti-migration drive. *The Guardian* [online]. Available at: https://www.theguardian.com/global/2018/aug/03/warning-of-dangerous-acceleration-in-attacks-on-immigrants-in-italy?CMP=share_btn_link [Accessed 11 Mar. 2019].

Törzs, E. (2014). Restorative Justice Approaches in Intercultural Conflict Settings. Findings of a Survey and Implications for Practice. *Temida*, pp. 87-102.

Treviño, A. J. (2008). *The sociology of law: classical and contemporary perspectives*. London: Transaction Publishers.

United Nations (1966a). *International Convention on the Elimination of All Forms of Racial Discrimination*, UNTS, vol. 660, p. 195, New York, 7 March 1966.

United Nations (1966b). *International Covenant on Civil and Political Rights*, UNTS, vol. 999, p. 171, New York, 16 December 1966, Artt. 26 and 20.

Valbruzzi, M. (2018). L'immigrazione in Italia. Tra realtà, retorica e percezione. *Il Mulino*, 5, pp. 789-795.

Van de Vyver, J., Travaglino, G., Vasiljevic, M. and Abrams, D. (2015). The group and cultural context of restorative justice: A social psychological perspective. In T. Gavrielides T, ed., *The psychology of restorative justice*. Farnham: Ashgate Publishing, pp. 29-48.

Vassallo, A. (2005). Una nuova modalità di definizione alternativa dei procedimenti a carico di imputati minorenni: i teen court programs. *Cassazione penale*, p. 2402 ss.

Van Ness, D. (2012). Living in a Relational and Moral Universe. In T. Gavrielides, ed., *Rights & restoration within youth justice*, Whitby: de Sitter, p 5.

Walters, M. (2014). *Hate crime and restorative justice. Exploring causes, re-*

pairing harms. Oxford: Oxford University Press.

Walters, M. (2015). Restorative approaches to working with hate crime offenders. In N. Chakraborti, J. Garland (eds.). *Responding to hate crime: The case for connecting policy and research*. Bristol: Policy Press, pp. 243-258.

Woolford, A. J. (2009). *The politics of restorative justice. A critical introduction*, Nova Scotia: Fernwood Publishing.

Wright, M. (2008). *Making good: Prisons, Punishment and Beyond*, 2nd ed., Hook: Waterside Press.

Zehr, H. (1990), *Changing lenses*, 3rd ed., Scottdale: Herald Press.

Zehr, H. (2009). 10 ways to live restoratively. *Eastern Mennonite University* [online]. Available at: <https://emu.edu/now/restorative-justice/2009/11/27/10-ways-to-live-restoratively/> [Accessed 11 Mar. 2019].

*Restorative Justice within Italian Criminal Law: Another Step Beyond
Retributive Justice (with Some Contradictions)*

CHIARA PERINI

University of Insubria

1. Question and Thesis.

My reflections concern the role of restorative justice, also known as RJ, within the Italian legal system and, in particular, the relationship between “restorative justice” and “retributive justice” as paradigms of justice.

The question revolves around the alternative between the ability of “restorative justice” to act as a *substitute* for “retributive justice”, so that the two “forms” of justice would coexist side-by-side, a sort of *parallelism of universes*; and - alternatively - the capacity of “restorative justice” to operate within the traditional framework of “retributive justice”, where the issue of *compatibility* between these two models of justice becomes of paramount importance.

On this point, I formulate a thesis articulated on two levels: a level relating to the *functions* pursued by each model of justice; and a level related to the *operational modalities* of each model of justice.

On the first level, my thesis is that *from the functional point of view* (i.e. according to the aims pursued) “restorative justice” tends to be an alternative to “retributive justice” (in a relationship, therefore, tendentially of *parallelism*). On the second level, my thesis is that the spaces currently provided by the Italian penal system for “restorative justice” make the latter to operate within a scheme still influenced by the idea of “retributive justice” (in a relationship, therefore,

of compatibility).

In this sense, it seems paradigmatic that, in many cases, the areas of action for “restorative justice” are defined by the legislator through the reference to the penalties provided for the crime, so as to draw a “inverse proportional relationship” between the possibility of application of “restorative justice” and the “seriousness” of the committed crime.

2. A Brief Overview of the Concept of “Retribution”.

In order to clarify the relationship between “restorative justice” and “retributive justice”, it is appropriate to recall briefly some characteristics of the concept of “retribution” (making use of some necessary simplifications in my perspective).

As well known, in spite of the famous phrase of Seneca (*De Ira*, I, 19: “*nemo prudens punit, quia peccatum est, sed ne peccetur*”), the notion of “retribution” has been used as the keystone of the doctrines that justify punishment on the basis of the *quia peccatum est*, that is, taking into consideration only the committed crime (the “evil”) in a perspective directed to the past. In this way, the first group of theories is opposed to the set of doctrines that justify punishment in the light of the *ne peccetur*, that is, taking into consideration the “positive purpose” that can derive from the punishment in a perspective directed to the future¹.

From the terminological point of view, drawing from the theoretical debate in German language, in relation to the *quia peccatum est* we speak of “absolute theory of punishment” (*absolute Straftheorie*) or “theory of retribution” (*Vergeltungstheorie*); and specularly, in relation to the *ne peccetur*, we speak of “relative theories of punishment” (*relative Straftheorien*) or “theories of purpose” (*Zwecktheorien*), to underline that such latter theories attribute to punishment a *positive* purpose, to be appreciated in a social dimension. Furthermore, in the theoretical debate in English, in relation to the *quia peccatum est*, we speak of “retribution” and, in relation to the *ne peccetur*, of “utilitarian theories of punishment” as evidence of the strong influence of the philosophy of utilitarianism and, in particular, of the Bentham penalty theory, that can be considered a synthesis of the criminal theories facing the future².

¹ See M. Cattaneo, *Pena diritto e dignità umana*, Torino, Giappichelli, 1998, p. 55 ff.

² See the so called “principle of collective utility” shaped by J. Bentham (Introduction to the principles of morality and legislation, 1789, Italian version, Torino, UTET, 1998, p. 90 f.), to which the punishment must also correspond: «By utility principle we mean that principle which approves or disapproves of any action according to the tendency it seems to have to increase or decrease the happiness of the party whose interest is in question; or, which is the same concept in other words, depending on the tendency to promote such happiness or to oppose it. I refer to

It is notable that, on the side of *ne peccetur*, we use in both cases the plural “theories”, since from the beginning there is at least a double perspective along which the preventive purpose of the punishment is looked at: on the one hand, the so called “General prevention”, where the issue of prevention is applied to the whole social system; on the other hand, the so called “Special prevention”, where the view on the effects of prevention is restricted only on the future behaviour of the culprit³.

2.1. “Retribution” in the Sight of Hart’s Dichotomy of “General Justifying Aim” and “Principles of Distribution” of Punishment.

To summarize the essential characteristics of “retributive justice”, I would like to refer to the distinction drawn by Hart between the following levels: on one hand, the “*general justifying aim*” of punishment; on the other hand, the “*principles of distribution*” of punishment, that concern the identification of the person to be punished and the sentencing process⁴.

2.1.1. The “General Justifying Aim” of Punishment in Light of “Retributive Justice”.

With regard to the “*general justifying aim*” of punishment – that is to say the *foundation* (or the *founding reason*) of punishment – “retributive justice” corresponds to an absolute justice, from the Latin *ab-solutus*, with a double meaning: it is “absolute”, in the sense of “complete, perfect”; it is “absolute”, in the sense of “unconditional, unlimited, non-restricted”⁵.

It is therefore understandable why the notion of “retributive/absolute justice” historically refers to theories, which consider punishment as the final moment of a penal law generally oriented by a *theocratic or idealist principle*, placed *outside* of the normative system.

Punishment is *justified as long as* it is the implementation of divine justice in the world of humans (in this respect, it is “*perfect justice*”). In fulfilling divine

any action, and therefore not only every action of a private individual, but also every measure of government. (...) The interest of the community is (...) the sum of the interests of the various members that compose it».

³ See G. Forti, *L'immane concretezza. Metamorfosi del crimine e controllo penale*, Milano, Raffaello Cortina, 2000, p. 116 ff. About the concept of “general prevention”, see also M. Romano – F. Stella (Eds.), *Teoria e prassi della prevenzione generale dei reati*, Bologna, il Mulino, 1980; V. De Francesco, *La prevenzione generale tra normatività ed empiria*, in *Scritti in onore di Alfonso M. Stile*, Napoli, ESI, 2013, p. 15 ff. About the bond between retribution and punishment’s preventive functions, see L. Eusebi, *La pena “in crisi”. Il recente dibattito sulla funzione della pena*, Brescia, Morcelliana, 1989, p. 11 ff.

⁴ See M. Cattaneo, *Pena diritto e dignità umana*, cited above, p. 72 ff., p. 93.

⁵ See G. Forti, *L'immane concretezza*, cited above, p. 113.

justice in the world of humans, punishment has *no limits*, in the sense that it is *not conditioned* by the need to reach *empirically assessable objectives* (so, it is “*unconditional justice*”): as a consequence, it escapes a *verification of effectiveness* (in terms of *consistency to the purpose*) and a dimension - so to speak - of *accountability*.

As known, the “classical” supporters of the retributive concept of punishment are Kant and Hegel⁶. In Kant’s thought, when a crime is committed, the criminal retribution is *necessary in itself* (as it is well expressed by the famous citation about the community living on an island, which before running away all over the world must carry out the death penalty against the last imprisoned murderer, so that everyone gets what he deserved)⁷. In Hegel’s thought, the penalty is *right in itself*, since it concludes the restoration process of the violated legal system according to the dialectic-triadic scheme, in which: the law is the thesis; the crime is the *antithesis* (as “violation of the law” or “denial of the law”); the penalty is the synthesis (as “denial of the crime”, *i.e.* “denial of the denial of the law”)⁸.

2.1.2. “Principles of Distribution” of Punishment according to “Retributive Justice”.

With regard to the penalty “*distribution principles*” “retributive justice” basically refers to the principle of proportionality between crime and punishment.

The “classical concept of criminal retribution” seeks to trace a “necessary implication link between the gravity of the *single* crime and the concrete entity of the *single* sanctioning response, according to a *philosophical* model of proportionality, which presupposes an intrinsic, and therefore predetermined, analogic relationship between the two related dimensions”⁹.

But here “retributive justice” gets into trouble.

On the one hand, “crime and punishment are heterogeneous realities” and therefore, in order to link these entities on a scale of proportionality, it is neces-

⁶ See M. Cattaneo, *Pena diritto e dignità umana*, cited above, p. 57 ff.; L. Eusebi, *La «nuova» retribuzione*, in G. Marinucci – E. Dolcini (Eds.), *Diritto penale in trasformazione*, Milano, Giuffrè, 1985, p. 100 ff.; Id., *Sulla filosofia penale di Kant e di Hegel*, in L. Eusebi (Ed.), *La funzione della pena: il commiato da Kant e da Hegel*, Milano, Giuffrè, 1989, p. 117 ff.

⁷ The extract is quoted in German by M. Cattaneo, *Pena diritto e dignità umana*, cited above, p. 59: “Even if a civil society, with all its members, decided to disband (for example, the people living on an island decided to separate and disperse all over the world), it would be necessary to execute the last murderer who was in prison, because everyone suffers what their behaviour deserves, and so that they do not suffer the guilt of blood over the people who have given up punishing him”.

⁸ See M. Cattaneo, *Pena diritto e dignità umana*, cited above, p. 60. See also the critical analysis of F. Exner, *La funzione di tutela e la funzione retributiva della pena*, in L. Eusebi (Ed.), *La funzione della pena*, cited above, p. 11 ff.

⁹ See L. Eusebi, *La «nuova» retribuzione*, cited above, p. 103.

sary to look for an “external element” - and therefore “arbitrary” with respect to retribution itself - to base the relation on¹⁰.

Furthermore, the search for proportionality presupposes the possibility of reducing complexities such as *crime* and, in particular, *guilt* to mathematical values, which can be ordered on a progressive scale. But such a result could be achieved only by drastically objectifying the penal sentence and consequently giving up individualized punishment choice and enforcement.

Moreover, it is doubtful whether any criminal legislator is able to “offer valid reasons, that is, of a philosophical, moral and not merely historical nature, which explain the relationship between a specific crime and a certain number of years of imprisonment”¹¹.

The principle of proportion between crime and punishment must not be considered as an unconditional guiding principle of the penal system, but rather as a useful “negative” parameter, capable of “indicating which proportion is *not* the right proportion, or which is a macroscopic disproportion”¹².

In this perspective, the principle of proportionality is useful as an inspiring criterion of a “parallel scale” scheme, in which “two dimensions (crimes and penalties) are compared, in a *directly proportional* and one-to-one correspondence”¹³.

Operatively “the link between the measures of two quantities of the first class (constituted by the different degrees of severity of the crimes) is equal to the link between the measures of two corresponding quantities of the second class (constituted by the different entities of the penalties)”¹⁴.

In fact, this model does not contain any indications of the sanction quantification criterion and fulfils the retributive aim by creating a proportional relation between the two dimensions.

3. The Comparison with “Restorative Justice”.

Now, if we try to compile a similar *summary* for “restorative justice”, it seems that there are some significant elements of difference compared to “retributive justice”.

3.1. The “General Justifying Aim” of Punishment and “Restorative Justice”.

¹⁰ See L. Eusebi, La «nuova» retribuzione, cited above, p. 100.

¹¹ See M. Cattaneo, Pena diritto e dignità umana, cited above, p. 102. See also M. Donini, Per una concezione post-riparatoria della pena. Contro la pena come raddoppio del male, in *Rivista italiana di diritto e procedura penale*, 2013, p. 1174 ff.

¹² See M. Cattaneo, Pena diritto e dignità umana, cited above, p. 104.

¹³ See L. Eusebi, La «nuova» retribuzione, cited above, p. 103.

¹⁴ *Ibidem*.

First of all, with regard to the “*general justifying aim*” of punishment – in other words, with regard to the *founding reason* of punishment – “restorative justice” appears much closer to *relative* punishment theories than to the *absolute* theory of retribution.

“Restorative justice” indeed looks at the future rather than at the past.

It can renounce the infliction of the punishment, which therefore is not “obligatory” in itself.

It conceives the response to the crime not as a “denial of the crime”, but *starting from* the “recognition of the crime”: as known, one of the premises of a path of restorative justice is that the crime - as “fact” - is the object of *acceptance* both by the offender and by the victim¹⁵.

Moreover, “restorative justice” is oriented by objectives that can be assessed empirically for the effects they produce on the *level* of the “*world of human beings*”. This can be stated thinking about the endo- and eso-systematic objectives (with respect to the penal system) identified by Mannozi as belonging to “restorative justice”¹⁶: recognition of the victim, reparation of damage in its global dimension, and offender self-responsibility belong to endo-systematic objectives; on the contrary, eso-systematic objectives include community involvement in the reparation process¹⁷, conduct orientation through the strengthening of collective moral standards and containment of social alarm.

Consequently, “restorative justice” (unlike “retributive justice”) is inherently submitted to a verification of effectiveness with regard to these goals.

Thanks to the unavoidable involvement of the community in “restorative justice”, it can be said that *accountability* is coessential to this model of justice. *Accountability* should be understood as responsibility to “stakeholders”, from which punitive power arises (by delegation) and which are involved in the use of punitive power (first, the *victim* and, indeed, the *community*).

3.2. “Principles of Distribution” of Punishment and “Restorative Justice”.

With regard to penalty in the “distribution principles”, the distance between “retributive justice” and “restorative justice” derives from the fact that, as has been observed, the latter is in reality a “*justice without a weight scale*”¹⁸, that is, it develops the response to the crime without being subject to the constraint of

¹⁵ See G. Mannozi – G. A. Lodigiani, *La giustizia riparativa. Formanti, parole e metodi*, Torino, Giappichelli, 2017, p. 158 ff.

¹⁶ See G. Mannozi, *La Giustizia senza spada. Uno studio comparato su giustizia riparativa e mediazione penale*, Milano, Giuffrè, 2003, p. 100 ff.

¹⁷ On this matter see the critical analysis by P. P. Portinaro, *La Giustizia retributiva oltre la pena*, in *Rivista di filosofia*, 2007, n. 2, p. 277.

¹⁸ See U. Curi, *Senza bilancia. La giustizia riparativa forgia una nuova immagine della giustizia*, in G. Mannozi – G. A. Lodigiani (Eds.), *Giustizia riparativa*, Bologna, il Mulino, 2015, p. 41.

it being proportional to the seriousness of the committed action.

To be more precise we should say: without the constraint of an *objective* proportionality relation (between quantities supposed as commensurate). It is clear, in fact, that also for “restorative justice” it is of great interest to find an equilibrium after the crime (as classically represented by the image of the scales of Justice); however the assumption from which “restorative justice” takes its beginnings is not that of “proportion”, but - again to take Curi’s thinking - that of the “disproportion between forces”: the “weight scale” of “restorative justice” should have “*unequal arms*”, so that “the gram can prevail over the kilo”¹⁹ (for example, because the balance after the crime is reached with a non-afflictive response in the strict sense).

4. Provisional Conclusion.

So if we consider the functional orientation (the *first level* of the thesis enunciated at the beginning), “restorative justice” and “retributive justice” are “alternatives” one to the other in many ways: there seems to be a relationship of *functional parallelism* between them, so that it is not possible to satisfy the goals belonging to both at the same time and completely.

5. The Italian Penal System between “Retributive” and “Restorative Justice”.

Let’s move on to the *second level* of the thesis enunciated at the beginning, examining *how* “restorative justice” operates within the Italian penal system, always in comparison with the alternative model represented by “retributive justice”.

5.1. The Influence of Italian Constitution in Marking the Distance from “Retributive Justice”.

Both at the level of the “*general justifying aim*” of punishment, and at the level of “*distribution principles*” of the penalty, the Italian penal system does not embody today a model of “retributive justice”. Some founding principles prevent it, assigning to Italian criminal law differing goals and, consequently, differing punishment “*distribution principles*” than those of “retributive justice”.

The reference is, first of all, to the principle of re-education established as the purpose of punishment by Art. 27 par. 3 of the Italian Constitution²⁰. This

¹⁹ See U. Curi, Senza bilancia, cited above, p. 42.

²⁰ See D. Pulitanò, Sulla pena, fra teoria, principi e politica, in *Rivista italiana di diritto e procedura penale*, 2016, p. 647 ff.

principle states that, in the Italian penal system, the theory of punishment cannot be *absolute* and must be *relative* (in the sense already clarified). The aim, to which the penalty must be oriented and verified in terms of effectiveness, is the “re-education”, understood - in light of the different constitutional principles that contribute to define the Italian Republic as a secular and pluralist “State of law” - as “social reintegration” of the offender (without connotations of “moral emend”): the rehabilitation of the offender is a pedagogical and/or therapeutic *process*, aimed at promoting the attitude to live in observance of the law and social rehabilitation of the guilty person²¹.

Thanks to the jurisprudence of the Italian Constitutional Court, the scope of the rehabilitative finalism of the punishment has assumed a gradually increasing role: while initially it was limited to the enforcement phase only, this principle was subsequently identified as a guiding criterion not only for sentencing, but – before that – for penalty provisions made by the legislator²². This principle is therefore a constraint both for the legislator and for the judge (not only during the trial, but also in the penalty enforcement phase).

From the systematic point of view, the principle of re-education of the offender is related to the principle of guilt (Art. 27 par. 1 Italian Constitution), in the sense that only a sentence that does not exceed the threshold of “guilt corresponding to the committed fact” (so called “guilt for the fact”) is able to re-educate: the reference to the “committed fact” is an obstacle against illiberal models of guilt, such as the “guilt related to offender’s conduct of life” or the “guilt related to offender’s character”.

It is clear that the parameter of the “guilt for the fact” still expresses a proportionality between the committed crime and the sentence. In this limited sense, therefore, the principle of proportion - typical of “retributive justice” - continues to operate also in the Italian penal system. But the aim is different: the system does not want to set up a “retributive compensation for the fact” by means of punishment²³, but to establish the sentence in the most coherent way with respect to the goal of re-education.

This is also confirmed by the dialectic interaction between “guilt” and “prevention”²⁴, that is, between the unsurmountable threshold of “guilt” and prevention - thanks to re-education - of future criminal offenses by the offender

²¹ See A. Pugiotto, *Il volto costituzionale della pena (e i suoi sfregi)*, in *Diritto penale contemporaneo*, 10 June 2014, p. 3 ff.

²² See G. Fiandaca, *Scopi della pena tra commisurazione edittale e commisurazione giudiziale*, in G. Vassalli (Ed.), *Diritto penale e giurisprudenza costituzionale*, ESI, Napoli – Roma, 2006, p. 131 ff.

²³ See L. Eusebi, *La «nuova» retribuzione*, cited above, p. 105.

²⁴ See C. Roxin, *Politica criminale e sistema del diritto penale. Saggi di teoria del reato*, edited by S. Moccia, Napoli, ESI, 2001.

(so-called “*Special-prevention*”). Prevention needs can in fact push down the punishment compared to the threshold of “guilt for the fact”. Therefore, the principle of proportion is established to trace the boundary within which to proceed with the sentence, but the purpose of re-education (*i.e.* of “prevention”) can lead to a “disproportionally reduced” sentence.

5.2. *The Paradoxical Connection between “Retributive Justice” and “Restorative Justice”.*

Although overall the Italian penal system does not correspond to “retributive justice”, traces of this model of justice can be found in it.

Paradigmatic in this sense is the identification of the “seriousness of the crime” as a fundamental criterion for sentencing according to Art. 133 Italian Penal Code. In this reference, we find a legacy of the proportional model of the Enlightenment, inspired by reasons of guarantee for the offender against possible drifts of “punitive terrorism”²⁵.

Taking into account the considerations made with regard to the distance that separates “restorative justice” and “retributive justice” at the functional level, what appears in some respects *contradictory* - if not even *paradoxical* - is that the Italian penal legislator tends to define the intervention spaces of “restorative justice” on the basis of a retributive approach, that is, anchored to the gravity (in abstract or in concrete terms) of the crime committed.

In this regard, we can cite the example of probation for adult offenders, which refers to criminal offences punishable by up to 4 years imprisonment (Art. 168-*bis* Italian Penal Code)²⁶ or – in the penal sector of the Justice of the Peace – the mechanism based on the suspension of trial in order to achieve conciliation between the parties, which refers to criminal offences subject to complaint, usually not very serious (Art. 29 Decree n. 274/2000)²⁷.

Overall, this retributive approach assigns a selected crime category to “restorative justice” in consideration of the *limited severity* of the penalty provided by the legislator. It seems, therefore, that a bias rooted in the retributive justice tradition accompanies the gradual affirmation of restorative justice, and this is that the latter is an *appropriate tool* only to address conflicts generated by minor crimes.

An exception in this scenario is probation for *juvenile offenders*, which is

²⁵ See L. Eusebi, La «nuova» retribuzione, cited above, p. 104.

²⁶ See R. Bartoli, La sospensione del procedimento con messa alla prova: una goccia deflattiva nel mare del sovraffollamento?, in *Diritto penale e processo*, 2014, p. 659 ff.

²⁷ See G. Mannozi, La mediazione nell’ordinamento giuridico italiano: uno sguardo d’insieme, in Id. (Ed.), *Mediazione e diritto penale. Dalla punizione del reo alla composizione con la vittima*, Milano, Giuffrè, 2004, p. 24 ff.

also applicable in case of very serious crimes, punished with the life sentence. But this exception seems to depend on the particular characteristics of the minor as an offender: in light of what is established by international sources, the juvenile criminal law and the related criminal trial pursue, in fact, special purposes, because the offender is a person who needs first to be *educated* (this taking precedence over to be *re-educated*).

That the juvenile area is considered “*special*” by the Italian criminal law is recently confirmed by Art. 1 par. 2 Decree n. 121/2018 on the enforcement of sentences against juvenile offenders, where we find an *explicit* reference to “restorative justice programs” and to “mediation with the victims of crime” as objectives to be encouraged during penalty enforcement²⁸. Such express recognition is still missing, however, with regard to sentence enforcement against adult offenders.

5.2.1. The Paradox Underlying Provisions Based on “Restorative Conducts”.

However, the area in which the greatest contradictions are to be found is that of juridical provisions based on so-called “*condotte riparatorie*”, a term that can be translated in English as “restorative conducts”.

These are rules traditionally present in the Italian penal system, which have been strongly encouraged by the most recent criminal policy, first in the field of the Justice of the Peace and then overall in the criminal law²⁹. In this case too, the latest reforms - in strengthening provisions based on “restorative conducts” - have followed a *retributive* approach in circumscribing the corresponding field of application, which tends to coincide with *crime of limited seriousness*.

On this ground a *misunderstanding* has often been generated: the terminological resemblance has, in fact, sometimes led public opinion to consider “restorative conducts” as an equivalent of “restorative justice”. In reality, “restorative conduct” is understood by the Italian criminal law in a restrictive sense, including: either behaviours whose purpose is the *reintegration* of the *material conditions* of the good injured by the crime, or conducts aimed at compensation for the damage caused by the crime to the victim, understood in a purely monetary sense, namely as an obligation to pay a sum of money in favour of the victim³⁰.

²⁸ See L. Caraceni, Riforma dell’ordinamento penitenziario: le novità in materia di esecuzione delle pene nei confronti dei condannati minorenni, in *Diritto penale contemporaneo*, 16 November 2018, p. 1 ff.; G. Di Paolo, La giustizia riparativa nel procedimento penale minorile, ibi, 16 January 2019, p. 1 ff.

²⁹ See M. Donini, Il delitto riparato. Una disequazione che può trasformare il sistema sanzionatorio, in G. Mannozi – G. A. Lodigiani (Eds.), *Giustizia riparativa*, cited above, p. 142 ff.

³⁰ See M. Romano, Risarcimento del danno da reato, diritto civile, diritto penale, in *Rivista italiana di diritto e procedura penale*, 1993, p. 872 ff.; C. Roxin, Risarcimento del danno e fini della pena,

So, the notion of “reparative conduct” does not include the global concept of damage caused by the crime and to be restored; which on the contrary, “restorative justice” does³¹. Thus, “restorative conducts” may be an element of a wider program of “restorative justice”, but they are not in themselves an equivalent of “restorative justice”.

Rather in some cases (Art. 35 Decree n. 274/2000), the “restorative conduct” responds to a logic closer to “retributive justice” than to “restorative justice”. Here, in fact, the effects connected to the provision of “restorative conduct” by the offender (*i.e.*, the extinction of the crime) occur only if the judge considers that such conduct is “suitable for satisfying the needs of *stigmatization* of the crime”³². In this way it assigns to “restorative conduct” - along the lines of the model of “retributive justice” - a *compensatory* function of the negative value associated with the crime.

In other cases (Art. 162-ter of the Italian Penal Code), the model based on “restorative conducts” is completely inconsistent with “restorative justice”, because the effects connected to the carrying out of “restorative conducts” by the offender (here too, the extinction of the crime) can be executed notwithstanding the refusal expressed by the victim³³.

In the “restorative conducts” area, these – rather than representing a step towards “restorative justice” – are contradictory to “restorative justice” and are strongly influenced by choices that correspond to a “retributive logic”. This is particularly evident if one reflects on the function that provisions based on “restorative conducts” pursue. More or less explicitly, the penal legislator has used these models for reasons of deflation of trials or of deflation of convicts in prison: a function totally unrelated to “restorative justice”.

But even with respect to this function, these rules appear to be inconsistent: the systematic impact of the proliferation of provisions capable of producing reward effects for the offender, when he puts in place “restorative conducts”, is in fact criminal *inflation* and *not deflation*. The Economic Analysis of criminal law³⁴ shows in fact, that in a system already characterized by a relatively low “criminal risk” especially for “profit-oriented crime” (due to the low probability

ibi, 1987, p. 3 ff.

³¹ See G. Mannozi – G. A. Lodigiani, *La giustizia riparativa*, cited above, p. 222 ff.

³² See G. Mannozi, *Giustizia riparativa e diritto penale. Alternatività o complementarità?*, in *Pena, riparazione e riconciliazione. Diritto penale e giustizia riparativa nello scenario del terzo Millennio*, Varese, Insubria University Press, 2007, p. 17 ff.

³³ See C. Perini, *Condotte riparatorie ed estinzione del reato ex art. 162-ter c.p.: deflazione senza Restorative Justice*, in *Diritto penale e processo*, 2017, p. 1274 ff.; *Id.*, *L'estinzione del reato per condotte riparatorie*, in L. Giuliani – R. Orlandi (Eds.), *Indagini preliminari e giudizio di primo grado. Commento alla legge 23 giugno 2017, n. 103*, Torino, Giappichelli, 2018, p. 231 ff.

³⁴ See C. E. Paliero, *L'economia della pena (Un work in progress)*, in *Rivista italiana di diritto e procedura penale*, 2005, p. 1336 ff.

of being sentenced and the lack of seriousness of the provided penalty) these provisions represent an *incentive for the violation of the criminal law*.

Moreover, they are also inconsistent with respect to the typical function of the sentence, namely the rehabilitation of the condemned, which they tend to hinder. This happens in the situations in which they contribute to monetization of criminal responsibility (sometimes, *against the will of the victim*, as in article 162-ter Italian Penal Code). Nevertheless, it happens also in cases in which they allow a conclusion of the criminal process without formal recognition that what happened constitutes in itself a negative value (for example, in case of a sentence declaring the extinction of the crime). In this way, indeed, the “criminal disvalue” does not assume any importance with respect to those who have violated the criminal law and is totally neglected in the prevailing dimension, which is that of “compensation for damages”.

6. Final Remarks.

With respect to the second level of the “thesis” stated at the beginning, it can be concluded that operationally between “reparative justice” and “retributive justice” there is currently a relationship of “compatibility” in the Italian criminal system, which might be defined as *forced compatibility*³⁵. This “cohabitation” causes damage to the secondary model, which - also for historical reasons - is that of “restorative justice”: “restorative justice” is not yet in a position to consistently pursue the objectives that derive from the “justifying general purpose” of this model of justice.

However, an incentive to create a more favourable context for “restorative justice” in the Italian penal system might be found in the very recent Recommendation of the Committee of Ministers of the Council of Europe n. 8/2018, concerning restorative justice in criminal matters, which among other things stated: “Restorative justice should be a generally available service. The type, *seriousness* or geographical location of the offence should not, in themselves, and in the absence of other considerations, preclude restorative justice from being offered to victims and offenders” (§. 18, emphasis added).

³⁵ See F. Palazzo, *Sanzione e riparazione all'interno dell'ordinamento giuridico italiano: de lege lata e de lege ferenda*, in *Politica del diritto*, 2017, p. 361 f.

*Restorative Justice and Probation: Limits and Unexplored Opportunities
– Considerations Based on the Experience of the Rj Center, Autonomous
Region Trentino-Alto Adige / Südtirol*

ELENA MATTEVI

University of Trento

DANIELA ARIETI, KATJA HOLZNER

Rj Center, Autonomous Region Trentino-Alto Adige

1. Restorative Justice and Probation: Critical Analysis of the Italian Legal Framework

1.1. Introduction

In the Italian criminal justice system there are three different models of probation measures².

1. In the juvenile justice system, the Judge can suspend the proceeding before the sentence and place the youngster on probation without being technically convicted of a crime (art. 28 of the Presidential Decree No. 448/1988, “sospensione del processo con messa alla prova”). During the

¹ This paper is the result of the joint efforts of Elena Mattevi, Daniela Arieti and Katja Holzner. The various sections of this paper can be attributed to their authors as follows: Elena Mattevi, section I; Daniela Arieti and Katja Holzner section II.

² See Galati (2015, p. 134); Della Bella (2016, p. 383).

period of suspension, the offender is ordered to follow certain conditions set forth by the Court, under the supervision of the Juvenile Probation Office (social workers). It evaluates the personality of the minor: at the end of a successful probation, the offence is extinguished; if the probation is revoked or unsuccessful, the proceeding is resumed. The seriousness of the crime committed is not a limit. Probation can be tailored to the offender's personal features and background.

2. In the adult criminal justice system, the suspension of the proceeding before the sentence was introduced in 2014 (art. 168-*bis* of Criminal Code), for some types of crimes (punishable by a maximum of 4 years of prison or by fines). The offender can ask the Court to suspend the proceeding and to place him/her on probation. The measure aims towards the social rehabilitation of the accused. The offender cooperates with the Probation Office (authority responsible for supervising). He/she obtains in exchange for his cooperation to avoid a lengthy criminal trial and the risk of conviction (art. 168-*bis* of Criminal Code).
3. During the execution of a prison sentence, the convicted might be placed on probation (art. 47 of the Law No. 354/1975 "Italian Penitentiary Act")³. This measure ("affidamento in prova al servizio sociale") is an alternative sanction: the offender is put under supervision of the Probation Service. When the Court ("surveillance judges") judges that the measure is useful for the social rehabilitation of the offender, it assigns him/her to the Probation Service for a period equal to the length of the custodial sentence to be served. This alternative to detention can be granted to convicted persons who are sentenced to imprisonment for a term not exceeding 4 years, also as a remaining part of a longer sentence (with the no insuperable exception of offenders sentenced for the serious crimes provided for by art. 4-*bis* of the Law No. 345/1975).

In all these contexts it is possible to promote a restorative justice program in criminal matters, but the normative instruments provided by the legislator are different. We don't have a systematic planning of reform⁴.

1.2. The Juvenile Criminal Justice System

In the juvenile field, the legislator (Presidential Decree of 22 September 1988, No. 448, "Juvenile Code of Criminal Procedure") provided some normative instruments to overcome the obstacle represented by the obligation to pursue

³ See Bricola (1977) and Orlandi (2002, p. 1).

⁴ An interesting law proposal (A.G. 29 Draft Legislative Decree) concerning RJ and mediation (for adults) has recently failed due to the negative opinion delivered by the Senate Commission (11 September 2018).

criminal proceedings. This model is extremely “attentive to the needs of minors” more than the “needs of the protection of the community”⁵.

The current law for juveniles, although it does not regulate victim-offender mediation or restorative justice explicitly, provides legal opportunities for victim-offender mediation based on three different provisions: Art. 9; Art. 27⁶ and Art. 28 of the Presidential Decree No. 448/1988. They open up areas of non-punishment or non-prosecution and the juvenile accused may take advantage of these chances if he or she shows a certain willingness to undergo a re-educative (or an educative⁷) project⁸, such as victim-offender mediation.

But it should be emphasized that juvenile victim-offender mediation is not expressly incorporated into the Italian legal system and the decision for a referral to mediation lies within the public prosecutor’s and judge’s discretion.

RJ practices have been developed spontaneously in different phases of the proceeding, as part of the probation duties (activities directed towards dealing with the consequences of the crime through repairing and restoring the relationship with the victim⁹), too.

Art. 28 of the Presidential Decree No. 448/1988 provides the legal basis for juvenile probation, before the final sentence: the judge may suspend the proceeding and postpone the sentencing decision¹⁰.

During the period of suspension, the offender is put under the supervision of the Juvenile Probation Office (social workers). He or she will carry out the activities agreed upon with them for his/her rehabilitation. These activities may involve either educational programmes or voluntary work as well as activities directed towards dealing with consequences of crime through repairing and restoring relationship with the victim.

After the reform of the juvenile justice system, victim-offender mediation has become more and more common as a part of this project.

The judge can refer the case to the victim-offender mediation centres within the probation period, with the aim of ‘conciliation’, ‘reparation’ or ‘mediation’ if it has been stated in the ‘supervision project’ devised by the juvenile social workers¹¹.

It is doubtful whether the consent of the young offender is necessary for the

⁵ Larizza (2005, p. 104).

⁶ See Ciavola (2010, p. 294).

⁷ Larizza (2004, p. 87): “For minors that have committed a crime, a need is put forward, not of “re-education”, as for all of those subjected to criminal sanctions, but of “education” of values, addressing the developing personality”.

⁸ Bouchard (1995, p. 140).

⁹ See Vezzadini (2006, p. 217); Reggio (2010, p. 42); Manna (2006, p. 1010); Donini (2011, p. 953); Picotti (1998, p. 296); Ruggieri (1998, p. 194); Mazzucato (2002, p. 122); Mannozi (2003, p. 254).

¹⁰ See Cesari (2009).

¹¹ Coronas (2008, p.15).

suspension¹². Anyway, its imposition presupposes the criminal responsibility (if not definitively declared) of the offender.

Probation may be available for every crime, including those of greater seriousness: the seriousness of the crime, in fact, cannot exclude in the juvenile an exceptional moment of anomalous development of the person.

The period of time that an individual will serve on probation is initially established by the court, but maximum duration cannot exceed three years for serious crimes or one year in other cases.

At the end of the probation period, the judge must take into account the behaviour of the juvenile and the evolution of his/her personality and he or she could dismiss the case. Otherwise, the trial continues until the judgment.

1.3. The Adult Criminal Justice System

With the law relating to criminal proceedings of the adults before the “justice of the peace” (“*giudice di pace*” - lay judges with jurisdiction in criminal matters, in particular with reference to petty crimes - assaults, property damages, defamation and insults, etc. – and in civil matters), which came into force in the beginning of 2002 (Legislative Decree No. 274/2000), the victim-offender mediation has been for the first time expressly recognized by the law and has been considered as a stand-alone intervention which can lead to an alternative settlement of the process without sentencing.

In the adult criminal justice system, the role of victim-offender mediation in probation (as part of the probation duties) for the first time came to be expressly recognized by the Law No. 67/2014 (as described in the second point above)¹³.

In proceedings for minor criminal offences, the judge could – upon request by defendant (until the beginning of trial) – suspend the proceeding and order probation¹⁴.

The probation order should include community service as well as reparation, restitution or victim offender mediation.

In case of success of probation, the judge may declare the extinction of the offence. Otherwise the proceeding continues.

Mediation programs remain limited during the execution of the sentence, even though art. 47 of the Law No. 345/1975 provides for an obligation imposed on the offender to do his/her best in favour of the victim of crime.

It provides for the guilty party to be remitted to the social services (a probation measure), but subordinates the availability of the measure to the condition that he/she should “take steps so far as possible to benefit the victim of his

¹² See Bouchard (1995, p. 153); Ruggieri (1998, p. 198), and Di Paolo (1992, p. 2866).

¹³ See Cagossi (2015, p. 163); Mattevi (2017, p. 406).

¹⁴ See Bartoli (2014, p. 661); Pavich (2015, pp. 505-517).

crime” (Art. 47, par. 7)¹⁵.

The “surveillance judges” apply this measure.

Through this disposition, the victim-offender mediation can be also applied after a definitive sentence, even though in this case is missing a fundamental element of the restorative justice: the voluntary participation of the offender.

The positive result of the probation period extinguishes the prison sentence¹⁶.

1.4. Some Provisional Conclusions

Does the Italian legal framework impede the full development of restorative justice practices?

There are a lot of “omissions” that do not offer adequate support to the implementation of RJ: victim-offender mediation is recognized by the law, at the adult justice level, but it’s not regulated.

In order to comply with the European and international standards, we need a reform.

Are omissions always an obstacle? Of course, not.

It is very significant that art. 28 of the Presidential Decree 448/1988 and art. 47 of the Law No. 345/1975 are not so different after all. Anyway, in the juvenile justice system – before the sentence – thanks to the sensibility of system practitioners and a more flexible approach to criminal proceedings that favours the minor’s education there has been more widespread experimentation.

The real obstacle is the lack of political will to implement an efficient system of mediation centres and professional practitioners. There is no central control of training, appointment or performance of mediators¹⁷. There are a lot of organizational and financial problems.

Though the situation is difficult, at the same time there are some good experiences, like that of Restorative Justice Centre of the Autonomous Region Trentino-Alto Adige / Südtirol.

2. Restorative Justice and Probation: the experience of the RJ Centre, Autonomous Region Trentino-Alto Adige

2.1. A brief History of the Centre

The Restorative Justice Centre of the Autonomous Region Trentino-Alto

¹⁵ Benedetti, Pisapia (2000, pp. 181-201).

¹⁶ See Mannozi (2004, p. 27).

¹⁷ The assessment should be mitigated mentioning the documentation coming from the “Tavolo 13 – Stati Generali dell’Esecuzione Penale Esterna”, that esplicitate some raccomandation about training, which are important although they haven’t the force of a law disposition.

Adige / Südtirol was created in 2004 as a public service of the local government with the aim to support justice of the peace in the framework of their penal jurisdiction (petty crimes as threats, property damage and similar). The mission of justice of the peace is to favour conciliation between the parties: they can refer the case to an external public or private mediation centre (art. 29 c. 4 of the Legislative Decree No. 274/2000). In 2005 the Restorative Justice Centre started working also within the juvenile justice system thanks to an agreement reached with the Ministry of Justice.

In 2016 the Center developed its activity in order to offer restorative justice programs during the probation for adults. This became possible thanks to the Law n. 67/2014 that offers the opportunity to introduce victim offender mediation or other restorative programs during the probation period.

At the beginning of 2017 the mediation Centre became Restorative Justice Centre, because in these 15 years of activity the number of referrals and projects increased a lot and the vision about restorative justice widely developed: new practices have been implemented and new projects have been created, which attracted interest of community, schools and political entities about peaceful conflict resolution and restorative approach; some years ago a Protocol has been signed with the central police station in order to offer restorative justice practices in social contexts; the Centre has been collaborating since few years with the department of sociology of Trento University in a project about legality and active citizenship; some partnerships have been also established with the ombudsman for prisoners rights, the children's and young persons representative, local authorities and associations.

Today victim offender mediation is still our main activity but in a larger frame and accompanied by different projects in social, scholastic and re-educational areas.

2.2. The Activity of the Centre

There is no single definition of restorative justice. Restorative justice is a broad approach which actively involves the victim, the offender and the community in a dialogue aimed at restitution, reconciliation and restoration of harm caused by crime.

This Centre adopted the definition of the United Nations (2000) which describes a restorative process as “any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party.”¹⁸

¹⁸ United Nation (2000, Annex I).

In Italy, as all over Europe, there is currently a lot of debate about which parties should be involved and how; what means “community” and how it can be involved; which kind of practices are really restorative, and so on.

To orient the work in the practice a very useful instrument is the famous graphic proposed by McCold and Watchel (2003) called “Types and degrees of restorative justice practice”, which identifies the three actors of a restorative process and their needs (victim – reparation, offender -rehabilitation, community - reconciliation) and classifies restorative justice practices as fully restorative, mostly restorative and partly restorative: when criminal justice practices involve only one group of primary stakeholders, as in the case of governmental financial compensation for victims, the process can only be called “partly restorative.” When a process such as victim-offender mediation includes two principal stakeholders but excludes their communities of care, the process is “mostly restorative.” Only when all three sets of primary stakeholders are actively involved, such as in conferences or circles, a process is “fully restorative.”¹⁹

Through this classification it is possible to show better the practices currently in use in the RJ Centre of the Autonomous Region Trentino – Alto Adige:

As you see in the figure, mediators of the RJ Centre consider

- partly restorative: focus groups; Ri.Re; social-centered work;

mostly restorative: victim restitution; victim-offender mediation;

fully restorative: peacemaking circles and a specific project called “#iori-par(t)o”.

Starting from partly restorative programs, since few years mediators of the Centre have been facilitating groups of offenders which are willing to reflect about their crime and situation. This program has been proposed to both adults (Ri.Re.) and minors with different methodologies and timing.

Minors in probation for different crimes have been involved in 4 meetings in which facilitators helped them to express themselves in an emotional way and see the victim, using specific input and activities.

Sentenced adults are involved in 8 meetings with the goal of helping them face their situation (house detention or probation after sentence) and express their emotions, and thinking on their victims and all the people involved in the crime, with particular focus on their families and important relationships.

The mostly restorative activities are the main part of the work since they include victim-offender mediation (VOM). Victim restitutions can be part of the agreement during a VOM or can be the results of an indirect mediation involving also lawyers, mostly in the context of justice of the peace with adults.

¹⁹ See McCold, Wachtel (2003).

Another mostly restorative practice that has been used in a specific situation is the mediation with a surrogate victim: for example this was the case of 4 minors involved in a crime of opposition to public officers. After the theft of a car they drove away ignoring a police roadblock. The pursuit caused an accident after which one of the youngsters was also shot by a policeman. The first contact was with people directly involved that night, to ask if they were willing to speak about what happened and to participate in a meeting. Three of the minors accepted but police officers directly involved didn't want to participate. According to the Captain the proposal was offered also to their colleagues and two of them decided to join the meeting.

A victimless conference has been organised in the case of a victimless crime involving a group of 6 minors, police officers, social workers and an association working in the community.

Fully restorative are few experiences of peace circles that we are willing to implement, and a specific project called #ioripar(t)o that is specifically described in the next paragraph.

As written above, the development and implementation of this public service can be seen through data. In 2017 the Centre received 109 requests of victim offender mediation. These requests concern in most cases minors (53 – 14 of them during the probation period), but they arrive also from justice of the peace (20) and concern even adults on probation (36). These cases involved 312 subjects overall.

Moreover, 20 juvenile and 22 adult offenders have been engaged in other restorative practices.

2.3. Restorative Justice and Probation

As regards specifically “probation” the activity of the Centre deals with both adults and youngsters.

Concerning minors, the total amount of them involved in a RJ program during the probation in 2017 was 34: 4 of them have been involved in a VOM, 4 in a mediation with a surrogate victim, 6 in a victimless conference, 6 in a focus group work and 14 in the specific project #ioripar(t)o about drugs related crimes.

This means a broadening of perspective: in the past the Centre received only referrals about victim offender mediation, but recently they concern also victimless crimes. An example is drug trafficking: in 2017 the Centre organized a restorative justice circle with five offenders on probation, the police and social services working in this field. Another young offender on probation participated at a meeting and carried out an activity with a local association for drug addict families.

The Centre needed a model able to deal with a larger number of youngsters and that's the reason why the mediators realized the project called #ioripar(t)o. This project created a space of dialogue between the youngsters, their families, social services and associations working in this field and last year 14 youngsters took part in this project.

Moreover last year social services asked to realize a group work stimulating awareness and reflection about the crime, facilitating responsibility and a possible restoration, in particular for youngsters that could not experience mediation because of the refusal of the victim. Six minors on probation took place in this group which met six times for two hours.

Concerning adults, in 2015 the Restorative Justice Centre developed its activity thanks to the Law No. 67/2014 in order to offer restorative justice programs during the probation for adult offenders. In 2017 the probation office referred 36 cases concerning 40 offenders on probation and 45 victims. The cases referred concern above all traffic accidents or driving under the influence of alcohol, resistance to an officer and bodily injuries.

In this context VOM is the most used practice. One of the reasons is that often affected people don't feel comfortable in communicating private events and intimate feelings to strangers. Moreover many persons do not understand why the "community" or the larger family should be involved especially if the crime occurred among two people: sometimes they don't want to hurt family again and the mediator needs time to explain that this can be an opportunity also for relatives.

It is important to take into consideration these cultural elements especially when people come from very little villages where these feelings seem to be more and more present.

In this context 40% of the outcomes are positive but we still count a large number of non-feasible cases (57%): a non-feasible case is usually a situation in which a victim, before or after an individual meeting, decides not to take part in a restorative program. Many victims don't like to participate because a lot of time has passed and they don't want to remember what happened: sometimes they say that if the offender didn't feel sorry before, he or she cannot feel sorry after years. In few cases it can also be the offender that does not accept the proposal because he/she doesn't feel responsible for the crime.

The adult context of intervention seems to be much more difficult than the minors' one because the victim feels an utilitarian motivating force by the offender and usually does not believe in his/her honesty.

Another field of intervention that has been implemented since 2014 is the program "Ri.Re." (in Italian Riparare Relazioni means "restore relations") concerning adults on probation after sentence. The purpose is to reinforce emotion-

al intelligence, favour empathy with the victim, build up communication skills and relationships. This program involves groups of 10-12 persons and has been created to give them the opportunity and the space to speak about their situation and their emotions with a focus on victims and their lives, under the belief that taking responsibility can facilitate the restoration of family, personal and social links. Since 2014 about 90 sentenced persons have been participating in this project which usually takes place ones per year in our two cities (Bolzano and Trento).

Moreover a Protocol with the Ombudsman for prisoners' rights will be soon approved with aim of guaranteeing the accessibility to RJ practices also in prison. In the last year and without a formal agreement the Centre has been contacted twice by two persons on probation after sentence and these mediation processes are still open.

2.4. Limits as/and unexplored opportunities

Thanks to the gained experience of these years it has been possible for mediators of the RJ Centre to identify the main limits encountered in the field of probation.

These difficulties are linked to the Italian model of probation and to cultural aspects, but the mediators of the RJ Centre consider them also as a challenge and an opportunity to improve.

- **PARTECIPATION OF THE VICTIM:** the most significant operative limit regards the participation of the victim both in cases concerning minors and adults. As highlighted before, often in these cases a victim feels like a "tool" and perceives restorative justice as a way out for the offender who can escape easily from the process. It is important for the experience of the RJ Centre to communicate it differently: victims should feel supported before than involved in the restorative process;
- **MOTIVATION OF THE OFFENDER:** when the participation to a restorative process is compulsory (because of a probation order for example), the offenders don't take part totally voluntarily. They may be influenced by the outcome of the probation. In the experience of the Centre this seems much more the case in probation for adults. Also the motivation of the adult offender seems to be different: he/she feels to have already repaired doing the community service or giving the restitution or refund to the victim as decided by the Judge, and sometimes he/she doesn't feel to say something else. Often also the victim after the restitution feels that's enough. In this sense Restorative justice comes here a bit "out of time". An opportunity for the future could be the recourse to RJ in a previous moment:

RJ could become an approach through which the offender and the victim together with the probation officer and the community can decide the “probation program” giving it a restorative significance. This requires a different approach to probation as well as a different “time-table”²⁰;

- **TIMING:** Another important aspect of VOM during the probation for adults concerns time: often victims tell that they want not to open old wounds. They often base their consideration on the fact that the offender had a lot of time to apologize and if he/she does it only after a probation order means that it is just useful and not an authentic feeling. Considering this need, the Autonomous Region Trentino – Alto Adige/Südtirol recently agreed a Protocol with the public prosecutors of the Region. The aim of this protocol is, in case of crimes concerning justice of the peace (and not for probation), to forestall VOM at the moment next to denunciation. After a period of field trial, we hope that this protocol will be implemented also for other crimes to give as much people as possible the opportunity to access these practices from the first moment after crime and to choose the best for themselves.

Bibliography

Bartoli, R. (2014) ‘La sospensione del procedimento con messa alla prova: una goccia deflattiva nel mare del sovraffollamento?’, *Dir. pen. proc.*, pp. 661-674.

Benedetti, E., Pisapia, G.V. (2000) ‘Comma 7. La prescrizione a favore della vittima di reato nell’affidamento in prova al servizio sociale’ in Pisapia, G.V. (ed.) *Prassi e teoria della mediazione*. Padova: Cedam, pp. 181-201.

Bouchard, M. (1995) ‘Processo penale minorile’ in *Digesto delle discipline penalistiche*. Torino: UTET, X, pp. 137-156.

Bricola, F. (ed.) (1977) *Il carcere riformato*. Bologna: Il Mulino.

Cesari, C. (2009) ‘Art. 28. Sospensione del processo e messa alla prova’ in Giostra, G. (ed.) *Il processo penale minorile. Commento al D.P.R. 448/1988*. 3rd Edition. Milano: Giuffrè, pp. 341-396.

Coronas, C.C. (2008) ‘Supporting the Implementation of Restorative Justice in the South of Europe (Final Report of AGIS Project JLS/2006/AGIS/147)’ [online]. Available at: <http://www.euforumrj.org>.

Ciavola, A. (2010) *Il contributo della giustizia consensuale e riparativa all’efficienza dei modelli di giurisdizione*. Torino: Giappichelli.

Di Paolo, G. (1992) ‘Riflessioni in tema di probation minorile?’, *Cassazione Penale*, pp. 2866-2874.

²⁰ See Grandi (2017).

Della Bella, A. (2016) 'Un viaggio tra le misure sospensive: i nodi da sciogliere in attesa della promessa riforma del sistema sanzionatorio', *Dir.pen.proc.*, pp. 377-386.

Donini, M. (2011) 'Le logiche del pentimento e del perdono nel sistema penale vigente' In D. Brunelli (ed.) *Studi in onore di Franco Coppi*. Torino: Giappichelli, vol. II, pp. 889-956.

Galati, M.L. (2015) 'La probation nei modelli processuali anglosassoni ed europei' in Galati, M.L., Randazzo, I. (eds.) *La messa alla prova nel processo penale. Le applicazioni pratiche della legge n. 67/2014*. Milano: Giuffrè, pp. 129-142.

Grandi, G. (2017) 'Libero consenso e volontarietà. Aspetti della "partecipazione attiva" ai processi riparativi', *Paradoxa*, XI, n. 4, pp. 91-102.

Larizza, S. (2004) 'I principi costituzionali della giustizia minorile' in Pennisi, A. (ed.) *La giustizia penale minorile: formazione, devianza, diritto e processo*. Milano: Giuffrè, pp. 85-95.

Larizza, S. (2005) *Il diritto penale dei minori*. Padova: Cedam.

Manna, A. (2006) 'La vittima del reato: "à la recherche" di un difficile modello dialogico nel sistema penale' in Dolcini, E., Paliero, C.E. (eds.) *Studi in onore di Giorgio Marinucci*. Milano: Giuffrè, vol. I, pp. 957-1018.

Mannozi, G. (2003) *La giustizia senza spada: uno studio comparato su giustizia riparativa e mediazione penale*. Milano: Giuffrè.

Mannozi, G. (2004) 'La mediazione nell'ordinamento giuridico italiano, uno sguardo d'insieme' in Mannozi, G. (ed.) *Mediazione e diritto penale. Dalla punizione del reo alla composizione con la vittima*. Milano: Giuffrè, pp. 5-45.

Mattevi, E. (2017) *Una giustizia più riparativa. Mediazione e riparazione in materia penale*. Napoli: ESI.

Mazzucato, C. (2002) 'Mediazione e giustizia riparativa in ambito penale. Spunti di riflessioni tratti dall'esperienza e dalle linee guida internazionali' in Picotti, L., Spangher, G. (eds.) *Verso una giustizia penale conciliativa: il volto delineato dalla legge sulla competenza penale del giudice di pace*. Milano: Giuffrè, pp. 85-134.

McCold, P. Wachtel, T. (2003) *In pursuit of paradigm: a theory of restorative justice*. Paper presented at the XIII World Congress of Criminology, Rio de Janeiro.

Orlandi, R. (2002) 'Best Practice in Restorative Justice (Paper presented at the Annual Workshop of the UN Crime Prevention Network, held in Vienna (Austria) in April 2002' [online]. Available at: http://www.unicri.it/documentation_centre/pni/workshops/docs/workshop_2002.php.

Pavich, G. (2015) 'Il punto sulla messa alla prova: problemi attuali e prospettive'. *Riv. Pen.*, pp. 505-517.

Picotti, L. (1998) 'La mediazione penale minorile: spunti per una sintesi' in

Picotti, L. (ed.) *La mediazione nel sistema penale minorile*. Padova: Cedam, pp. 283-312.

Reggio, F. (2010) *Giustizia dialogica*. Milano: Angeli.

Ruggieri, F. (1998) 'Obbligatorietà dell'azione penale e soluzioni alternative nel processo penale minorile' in Picotti, L. (ed.) *La mediazione nel sistema penale minorile*. Padova: Cedam, pp. 191-205.

Vezzadini, S. (2006) *La vittima di reato tra negazione e riconoscimento*. Bologna: Clueb.

United Nations, (2000) 'Basic principles on the use of restorative justice programmes in criminal matters', ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2.

Neurosciences and Restorative Justice

MARIA BEATRICE MAGRO

G. Marconi University of Rome

1. Punishment and the crisis of the prison system

The criminal law, with its emphasis on punishment, is generally assumed to perform a number of functions. Deterrence and incapacitation are the most obvious ones: one way to envisage the criminal law is as an attempt to regulate the behaviour of the offender through deterrence and incapacitation. The punishment is the traditional form of deterrence and incapacitation of the offender's behavior (M. DARLEY – K.M. CARLSMITH – P.H. ROBINSON, 2000).

Public punishment, however, is not the only mode of deterrence. The states may for example impose non-punitive sanctions in order to deter certain forms of behaviour, or restrain a person.

We are very likely to be at a transformative moment in criminal justice. There is great optimism that the United States is making a decisive move away from the harsh punishment policies that characterized the last 30 years inspired by the idea “zero tolerance”. Prison growth has largely stopped, some states are closing prisons, and Congress and most legislatures are enacting policies that reduce prison sentences for drug crimes and other nonviolent offenses. For example, in just a few short years, the state of California has passed a series of senate bills and propositions, most of which are intended to reduce its massive prison population (A.B. BRADLEY, J. BARTOS-CHARIS, E. KUBRIN, 2018).

2. Antisocial/criminal behaviors and epigenetic

Currently, research on antisocial behavior identifies a number of important neural, genetic, and environmental factors. Across these studies, some factors, such as exposure to violence, and community disadvantage, appear to be important predictors of the broad class of antisocial behaviors. But the reaction to those factors is always individual. There are also factors that differentiate subtypes of antisocial behaviors and disorders, such as activation in the amygdala, specific genotypes, and familial interactions. Interactions of specific factors across levels of analysis may help us understand these chronic trajectories of antisocial behavior. But a paucity of theoretical conceptualizations about the integrate across factors or levels of analysis and methodological approaches remains.

Although it is possible that individuals who engage in antisocial behavior are simply at a neural or genetic disadvantage, this perspective fails to consider the importance of the emotions and of the environmental factors and their fluctuations in behavior over time. Thus, antisocial behavior may be best characterized as an outgrowth of adaptations in various factors that develop to survive.

It is common sense that individual differences in personality are strongly influenced by both genetics as well as diverse environmental events and experiences. Heritability estimates come up with about 50% of genetic influences and 50% of the environment (as very rough estimates). It is of importance to further note that genetics and environmental influences cannot be seen as distinct entities, because both interact and shape together what is happening on both molecular and molar levels, in both brain and mind, resulting in individual differences in brain structure and functionality. This gives way to more individual differences in human personality, which are usually studied linguistically. The study of the modulation of what's called epigenome, by including environmental influences, will surely bring new insights also to personality research in the coming years. E.g., see how prosocial personality is linked to different methylation patterns of the gene coding for oxytocin. In short: the epigenome represents the area "directly above" the genetic code—namely how the environment modifies long-term geneexpression patterns in all of our cells, most importantly neurons from the present perspective. It has been shown in many studies that negative emotionality, especially with respect to the personality dimension of Neuroticism represents a risk factor for instigating and promoting affective disorders and antisocial behavior.

Many of the epigenetic mechanisms are still not well understood, but it is generally agreed that bringing the study of the epigenome to personality research (and its phylogenetically old component primal emotions) will be an important step for a better understanding of human personalities—in a sense, a

deeper understanding of who we are. This further strengthens the dictum that we must better envision how both nature and nurture, as interacting partners rather than distinct units, create our various psychological strengths and weaknesses. Understandably, this exciting area of research is now rapidly expanding.

3. Restorative Justice uses the basic biological emotions

Antisocial behavior produces suffering, for the individual, for their family members, for their community, and for society at large. It is important to know the underlying emotional factors because they tell us why that individual continues to engage in these behaviors despite the persistence of suffering.

Furthermore, a focus on factors at multiple levels of analysis highlights potential targets for alleviating that suffering (A.R. Baskin -Sommers, 2006).

Until today all special prevention objectives were focused mainly on social factors of marginalization, on phenomena of adhesion and conformation of sub cultural criminals. The actions undertaken by social services are being concentrated only on the modification of the social and objective factors of marginalization, without considering the emotional- dynamic- relation between offender and victim, and the emotional repercussions that punishment produces on the victims and on the offenders.

However, today this monolithic penal system, centered on a concept of justice that neglects the emotions of the victim and of the offender, which disregards the consequences of the crime, is being reconsidered.

Restorative Justice uses the basic biological emotions and the communicative dimension as an operational logic to intervene in the vicious cycle created by the crime. The basic idea is to reach a symbolic and material repair of damage caused by criminal behaviour and to effectively pursue a reinstatement of the individual offender. It assumes that people are inclined to adapt to social rules, not only because the punishment is a deterrent, but also because of the emotional interaction with other individuals (H. Zehr, 1990).

It is crucial to take in consideration the communicative function of the punishment and its psychological effects on the offender and on the victim (J. Feinberg, 1965; R.A. Duff, 2001; P. Chau, 2017).

4. The justice-related emotions of the victim and the punisher

Consider our characterization of punishment as a reaction to the perception of a wrongdoing or injustice accompanied by feelings of injustice, and followed by the intentional infliction of disvalue on the perceived wrongdoer. When punishment is considered, more holistically, in these terms, it mirrors

important elements of our sense of justice and the emotive basis to which this is often associated.

The perceived injustice does not leave us cold but is rather accompanied by distinctive feelings and action tendencies. These perceptions are in other words intimately connected to our capacity to react emotionally and, in particular, to react with anger and related emotions such as resentment, indignation, outrage or fury, and moral outrage. These are the justice-related emotions. Our concept of punishment and the practices that it animates are phylogenetically and developmentally dependent on the sense of justice and the capacity to experience these emotions. The sensitivity to injustice and the capacity to react emotionally thereupon is necessary to understand the concept of punishment and also the practices of restorative justice (K. Krause-jensen. R.Rodogno, 2015).

5. The Neurolaw

Neuroscience is a branch of the life sciences that addresses the anatomy, physiology, biochemistry, or molecular biology of nerves and nervous tissue within the brain, specifically in relation to behavior and learning. More generally, neuroscience is the study of how processes function within the brain. This area of study increases our understanding of the complexity of the brain and its effects on behavior.

Neuropsychology adds to the picture outlined by neuroscience, as it is concerned with the integration of psychological observations of behavior and the mind with neurological observations of the brain and nervous system. This is because the standard neuroimaging is neither specific nor sensitive enough to detect the damage done to the brain. Basically, neuropsychology objectively analyzes how the mind works in connection with the brain.

Neuroscience and neuropsychology have been introduced into the legal field most notably as neuroscience evidence. Neuroimaging now allows neurologists to analyze the structural and functional aspects of the brain. Structural neuroimaging involves magnetic resonance imaging (MRI) and computed tomography (CT) scans. These images demonstrate the brain's architecture. Similarly, scans such as the electroencephalography (EEG), positron emission-tomography (PET) scans, and functional magnetic resonance imaging (fMRI) display visual images of how the brain works at a particular moment in time. Neuropsychological exams are more than just scans of the brain. A neuropsychological evaluation is a comprehensive, objective assessment of a wide range of cognitive, adaptive, and emotional behaviors that reflect the adequacy or inadequacy of higher brain functions.

In other words, neuropsychological testing measures a person's brain func-

tion compared to the normal population in a variety of different areas, including education, standardized test scores, and work history. Considering all of these factors, a neuropsychologist can then determine a baseline of brain function for a particular individual, generally before a particular event occurs, such as the committing of a crime. For example, after conducting these tests, neuropsychologists are able to better understand and interpret the consequences of childhood neglect and its effects on brain development, particularly when it comes to explaining how those individuals ended up in the criminal justice system. One of the most interesting aspects of neuroscience is that it can show us actual physical changes in response to childhood trauma. Studies demonstrate that there are differences in the volume of an adult's prefrontal cortex depending on whether that individual experienced trauma as child or whether they had a nurturing childhood.

Dubbed "neurolaw," this "neuroscience revolution" has gained the attention of legal thinkers and is poised to be the catalyst for significant changes in not only the criminal justice system but the legal field generally (S. Camporesi – B. Bottalico, 2011).

6. Punishment without free will?

Neuroscientists seem to question fundamental legal concepts rooted in our Western culture. Upstream, the concept of free will is also under discussion.

The impression that we are able to freely choose between different possible courses of action is fundamental to our mental life. However, it has been suggested that this subjective experience of freedom is no more than an illusion and that our actions are initiated by unconscious mental processes long before we become aware of our intention to act. In an empirical experiment, electrical brain activity was recorded while subjects were asked to press a button as soon as they felt the urge to do so. Notably, their conscious decision to press the button was preceded by a few hundred milliseconds by a negative brain potential, the so-called 'readiness potential' that originates from the supplementary motor area, a brain region involved in motor preparation. Because brain activity involved in motor preparation consistently preceded the conscious decision, it has been argued that the brain had already unconsciously made a decision to move even before the subject became aware of it.

It might seem that neuroscience describes a "model of agent" entirely determined by its limbic system. According to this "model" we have no conscious control over neurological processes. Therefore it brings a non-libertarian and deterministic perspective for both the offenders and the victims.

Also, can we think that are we all determined by our limbic system, as slaves

to an inexorable mechanism, or are we free and indeterminate individuals able to control our internal reality and the surrounding world? Is free will an empirical scientific based concept?

These are old age unresolved questions. They touch the foundations of criminal law. Is it possible to imagine a legal system which isn't based on the free will, on the subjective and phenomenological experience of freedom? Is it necessary for the penal system to be evidence based? Many suppose all legal categories should have an empirical- ontological basis.

7. Which are the consequences, if the offender is without free will?

The consequences of this deterministic approach can be catastrophic. People and civil society need the concept of free will and legal responsibility. Without these, the penal punishment is an exclusively symbolic-retributive function. It applies a higher inflicting harm to the offender than the harm done to society, without giving anything back to the victim or the society (K.M. Carlsmith K.M. – J.M. Darley, 2008). If the criminal system is based on a deterministic model of agent, the offender is always a prey of ungovernable passions and impulses, and he can be neutralized or punished only in a symbolic-retributive way, even with a significantly enlarges suffering than he has produced. This Penal system only worries about proportioning the punishment and the suffering, but does not care about the change of the offender's behaviors and about satisfying the victim (L. Zaibert, 2017; D. Parfit, 2011),

8. Which are the consequences, if the victim is without free will?

If the free will doesn't exist, even the behavior of the victim is caused by his limbic system so is their defenselessness, so its like they are a victim, non-active being. Then it would make no sense involving it in the trial, it would make no sense involving them during the punitive treatment phase and in restorative justice practices.

Empirical research about realpsychology of the punishers supports the claim that human beings are generally satisfied only with punishment that delivers something other than retribution. The victim- punisher without free will has only a punitive need of pure retribution: he want to see pain and suffering and nothing else (E. Aharoni – A.J. Fridlund, 2012). His limbic system is determined and fundamentally retributive. The human beings have a 'brutely retributive' moral psychology and they are indifferent for the sake of reprobation or rehabilitation (S. Nichols, 2013).

People have strong retributive impulses, that drive them to want to see of-

fenders punished, even in absence of potentially beneficial consequences. The retributive impulse is basic and non-negotiable. Strikingly, people will opt to inflict costly punishment on offenders even when they themselves are not the victims, but merely witnesses to the unfair behaviour. Researchers refer to this phenomenon as ‘altruistic punishment’.

It would mean that we cannot expect people to support neither optimistic theories of punishment nor restorative justice and practices

9. Free will and neurological plasticity .

Modern empirical neuroscientific research confirm the existence of the free will and offer empirical bases to the optimistic theory of punishment (A. Lavazza, 2019).

Neuroscientists suggest that when the subject’s decision reached awareness it had been influenced by unconscious brain activity for up to 10 s, which also provides a potential cortical origin for unconscious changes preceding risky decisions. They found that the outcome of a decision can be encoded in brain activity of prefrontal and parietal cortex up to 10 s before it enters awareness.

In contrast with most previous studies, the preparatory time period reveals that this prior activity is not an unspecific preparation of a response. Instead, it specifically encodes how a subject is going to decide. Thus, the Supplementar Motor Area is presumably only the ultimate cortical decision stage where the conscious intention is initiated. This delay presumably reflects the operation of a network of high-level control areas that begin to prepare an upcoming decision long before it enters awareness (C. S. Soon, M. Brass, H.J. Heinze, John-Dylan Haynes, 2008).

In modern science we mean by “unconscious” the neurological processes that go on in our brain that are automatic, that are mostly beyond our control and that we don’t know they are happening, that are outside our awareness. But the unconscious mind works a lot and influences our decisions. There are evidences of correlations between the basic unconscious cognitive system (limbic system) and the conscious cognitive system (prefrontal cortex) that constantly communicate and exchange information between them: the conscious action becomes automatic and instinctive, if repeated over time; the automatic and unconscious action can be restrained, overcoming and replaced by an action resulted from greater cognitive effort (Fuhnahaschi, 2017).

Now new reserches describe the human mind as a self evolving complex system connected with the enviroment, that is characterized by plasticity and malleability: it means that it undergoes continuous biological changes as result of external factors (pharmacological therapies, traumatic events, new expe-

riences) and internal factors and that can be modified independently. It was empirically demonstrated that innovation, exercise, training and selective attention can facilitate the growth and reorganization of neural networks of the brain. Experiences cause changes in gene expression and alter the connections of synapses between the nerve cells. The brain can create new synaptic concatenations, it can use neurons already engaged in other circuits, or alternatively, it can enhance those it already has, increasing the density of the synapses and the fibers that connect the cortical centers. The brain, if stimulated from the outside, is able to redefine the original functions and to create new connections in its neural networks, even in spite of the bioelectrical automation, it manages to abandon old connections and create new ones.

This phenomenon is called “repetition suppression” and indicates that the neurological circuit commonly associated with a certain representation of information can be suppressed and replaced with another. This shows that the mind is not just an archive of implicit or explicit memories (i.e. conscious or unconscious) but has a creative power of itself, it is a retrospective system that engages in construction of future possibilities (Schacter – Addis – Szpunar, 2017).

10. Restorative Justice can activate the self control's system and positive emotions.

If the human mind is constantly changing and there are many factors that affect this neurological change, there are strategies that allow crime prevention, and to recover - on a biological level – from the trauma caused by the crime and activate the self control.

The general theory of Crime of Michael R. Gottfredson and Travis Hirschi claim to be able to explain all crime, at all times” (M.R. Gottfredson- T. Hirschi, 1990). The central constructs of this theory are self-control and criminal behavior; low self-control is the most important predictor for delinquent behavior. This theory is a control theory, and it claims to be able to explain a wide range of criminal acts and “analogous” behavior (for example, divorces or accidents) with low self control (J. P. Tangney – R.F. Baumeister- A. L. Boone, 2004; H. Buker, 2011; F.T. Cullen – J.D. Unnever – J. Wright – K. Beaver, 2008).

The control system is influenced by our genetic and neurobiology, but also by environmental factors, like exercise and self reflection.

Restorative justice can activate practice of self control (physical and mental) that produces modifications of neurological synapses and so implementing a model of corrective justice (A. C. Pustilnik, 2015). A perpetrator is completely able to control his actions consciously or unconsciously and he is able to activate a behavioral standard of respect of the criminal law, because a good, constant, positive, executive treatment can produce neurological transformation

and can activate the system unawareness control (C. Suhler – P. Churchland, 2009). The practice of self control is a practice accessible to everybody, it does not require special attitudes and is a physical and mental exercise that produces modifications of neurological synapses. the control system is not only conscious but is also unconscious and it is possible, through accurate methods, to realize the passage from a self conscious control to automatic and unconscious self control.

Hence, Restorative Justice has a solid empirical epistemological basis: it orients the behavior of the offender and provides the victim a sense of justice and satisfaction.

Neuroscientists studied the brains of psychopathic murderers and gauged their responses to pictures of people's emotional expressions. Using MRI's to image their brains, they found a deficit in the amygdala, a region of the brain we believe to be the 'location' of empathy. But the neuroscientists also have hope. They also discovered that new brain cells can develop, even in adult brains. While isolation and stress can suppress the growth of new brain cells, human interaction and relationship stimulate the brain to develop new cells. The brains of offenders are further damaged especially by solitary confinement, and imprisonment when not accompanied by other humanizing, relational activities. This increases suffering and aggression (T. J. Meyers – A. Infante – K. Wright, 2018; A. Poama, 2018).

In Restorative justice programs, victims, if they choose to participate, and perpetrators, meet face to face in safe, structured encounters. The perpetrator is encouraged to take responsibility for their actions. The victim plays an active role in the process. In such a setting, the perpetrator can see, perhaps for the first time, the victim as a real person with thoughts and feelings and a genuine emotional response. It is a form of emotional healing and comparison for all participants of the process and a focus on relationships which is different from remuneration answer to crime that tends to dismiss those who are involved. This stimulates the amygdala, and may be a more effective rehabilitative practice than simple incarceration. Such programs won't work for everyone. But for many, it could be a way to break the frozen sea within. Restorative justice practices work better than retributive justice practices in reducing criminal behavior, because our amygdalas produce more healthy brain cells when we are in constructive relationships with others.

11. The role of the shame in Restorative Justice

Epistemological theory, which provides a basis to Restorative Justice draws from the work of Silvan Tomkins, who in his study of human motivation ex-

plains clearly how and why the RJ, when applied at work, in the family, in schools and in the setting of criminal justice too, has demonstrated an extraordinary healing power.

To understand the basis of empirical epistemological-RJ is crucial to examine the concept of “affect program” processed by Tomkins. What is an affect? It is good to know that an affect is not a sort of mysterious psychological condition, but is a biological event, a regular part of the daily operation of our central nervous system, like a normal knee reflex. The affect is not the result of conscious thought, it is triggered by conditions of stimulation and thus, being out of conscious control, simply happens. This affect is innate, biologically written into the DNA of people, and is not the result of experience or some form of learning. The affect system evolved to solve a problem that threatened our survival. The problem was *stimulus confusion*: we humans lack the ability to be consciously aware of most of the things that go on around and inside of us. We can shift our focus rapidly, but we still can only focus on one thing at a time. Tomkins called this “limited channel of consciousness”. With this limited consciousness and so many stimuli hitting us all at once, how could we sort it out rapidly? Survival demanded our ability to attend immediately to the most significant thing taking place. Tomkins surmised that the affect system evolved as a normal brain function to reduce confusion from overload stimulus. He proposed that in order to become conscious of any stimulus, it must first activate one of the nine affects. Shame-humiliation was the last affect to evolve. Shame-humiliation came after the system had already had the ability to record and make us aware of stimulus conditions in the form of five negative affects (fear, distress, anger, disgust, and dissmell), one neutral affect (surprise), and two positive affects (interest and enjoyment) (P. Ekman – R. Davidson, 1994; P. Ekman -D. Cordaro, 2011). What additional information did the early members of our species need? They did not need more information about the negative affects. The evolutionary demand for a new affect arose because there were times when interest-excitement or enjoyment became blocked, impeded, or interfered by something. Without the innate affect of shame-humiliation, we would not be motivated to take action when we are deprived of interesting and enjoyable things. The innate affect shame-humiliation is identified when the stimulus condition for its triggering is “*impediment to ongoing positive affect*”. As long as we are interested in something or are enjoying it, anything that gets in the way and interferes with it will trigger shame-humiliation. We evolved shame-humiliation as information about the stimulus condition of ongoing positive affect being interrupted when we did not want it to be. This was and is a critical information for us to have.

The idea of shame is central in Restorative Justice. The sense of shame is that

the offender feels for his conduct (not humiliation or embarrassment) and it is given to him the opportunity to do something to repair the damage that was caused. He is given a power that does not exist in reality: to go back (G. Johnstone, 1999; G. Johnstone, 2003; D.W. Van Ness - G. Johnstone, 2007).

In restorative conferences, it could be argued, the public are invited to take part, not in an undisciplined ritual of public humiliation of offenders, but in a restrained and sober practice in which shaming is part of a broader process designed to condemn the wrongful behaviour but to reintegrate the offending person into the community. Participation in such a process is less likely to awaken dark sentiments and irrational urges, more likely to produce a sober and constructive response, in which it is made clear that the offender's behaviour is unacceptable, but where it is done for him in a reasonable way.

Restorative justice has been highlighted as one of the most effective methods to reverse the damage done and restore relationships rather than require retribution for wrongdoing (H. Zehr, 2002; H. Zehr - B. Toews, 2003)

12. Risks of a corrective justice: the cognitive liberty

These areas of scientific development seem to exhibit risks and dangers for cognitive liberty (Merkel - Boer - fegert - galert - hartmann - nuttin - roshal, 2007).

Recent studies on the relations between the structure of the brain (and the nervous system) and human knowledge led to develop techniques for monitoring (and influencing) brain activity, allowing them to affect reasoning, to alter emotions or memory, and to enhance cognition. These powerful new instruments of neuromodulation acting directly on the brain have been developed: potent neuro-pharmaceuticals, deep brain stimulation, transcranial magnetic stimulation, various methods of neurotransplantation, central neural prostheses, and others. In fact corrective Justice doesn't allow this types of technology.

13. The optimistic theory of punishment and the Realpsychologie of the punishers

Among these normative theories, a number stand out as concerned, not just with past wrongdoing, but with future behaviour. And a significant number of these future-oriented theories are, in addition, relatively optimistic about how human beings can be influenced and where they can be persuaded to go. These more optimistic theories generally presuppose that people are sensitive, not just to the push and pull of cost and benefit—not just to the conditioning effects of penalty and reward—but also to the overtures and persuasions of their fellows. Such theories are generally committed to the justification of criminal sanction

in terms of its reprobative and rehabilitative value, rather than as a strictly deterrent measure. And, while some of them even embrace the language of retribution, or delivering ‘just deserts,’ their concern is nonetheless with the purported reprobative/rehabilitative value of such a response, rather than its punitive nature as such (K.M. Carlsmith, 2006; K.M. Carlsmith, 2008). The discussion focused on the work of John Braithwaite and Philip Pettit, in which they make a compelling normative argument for serious and comprehensive reform in our criminal justice system (J. Braithwaite- P. Pettit, 1991).

But we are worried that the theory may seem vulnerable on another major front, in the real world of policy makers, politicians, victims. The neurosciences and the neuropsychology based the effectiveness of such theories. They demonstrated that Human beings (qua offenders) are realistically reformable in accordance with what these theories presuppose. But such theories are realistically implementable so far as they accord with the psychology of human beings (qua punishers). The question is whether ordinary folks have a deep and abiding interest in reforming/reintegrating offenders as opposed to simply punishing them for the wrongs they have done. The assumption is that a normative theory seems satisfying to us only if it provides some justification for our intuitions about the justice, but isn’t satisfying to us if there is some conflict among our intuitions.

Unfortunately for optimists, a empirical work in the behavioural and cognitive sciences has led a numbe of investigators to conclude that human beings have a deeply retributive moral psychology, one that is unlikely to be reshaped or indeed trumped by other normative concerns. In suggesting that our Realpsychologie is fundamentally retributive, theorists may have a weaker or stronger claim in mind. The weaker claim is that people have strong consequence-insensitive retributive impulses—impulses that drive them to want to see offenders punished, even in the absence of potentially beneficial consequences. The stronger claim, by contrast, is that, whatever other justifications for punishment they possibly endorse, satisfying the retributive intuition is basic and non-negotiable, trumping all other justificatory concerns.

14. The satisfaction of punishment is in its capacity to effect some change in the offender’s transgressive attitudes.

However, in a contrasting set of studies, neuroscientists found that punishers do derive satisfaction from punishing offenders, but only when there is specific feedback from the offenders that recognizes and acknowledges the victim’s intent to punish did not include any feedback from the offenders in their study design. The findings are commensurate with philosophical theories of

punishment that stress its communicative—i.e., reprobative—dimension. People seem not only to care about using punishment to communicate a message to offenders; they also care about ensuring that their message has been received. We also think these results help disconfirm the brutally retributive view that people are simply concerned with giving offenders their ‘just deserts’.

These findings have now been replicated in further studies, strongly suggesting that punishing is not satisfying in itself; punishing is only satisfying if it has the right sorts of consequences—i.e., as we argue here, the consequence of reproof and thereby transforming the offender’s attitudes. These results are in line with philosophical views that take punishment to be justified, not in virtue of the ‘intrinsic value’ of reprobation, but in virtue of its expected consequences—i.e., in its capacity to effect some change in the offender’s transgressive attitudes.

Recent empirical studies have shown that victims experience a sense of satisfaction related to punishment only when there is feedback, an emotional return, an effective transformation of the offender. These studies strongly suggest that punishment is not satisfying itself; punishment is only satisfying when it has the consequence of reproof and therefore thereby transforming the offender’s attitudes, since the victim doesn’t feel an emotional need of “altruistic punishment”, insensitive to the change of the offender (F. Funk – V. McGeer – M. Gollwitzer, 2014; V. McGeer - F. Funk , 2017).

Our review of the extant psychological evidence thus strongly militates against the view that we have a brutally retributive Realpsychologie. There is real and persisting evidence across a broad range of studies that people are susceptible, both in theory and in practice, to purely retributive impulses.

The restorative justice confirms the idea of moral and legal responsibility of the offender as moral agent and communicates that he can do something, though symbolically, to reestablish the relationship with the community which he is a part of (M. Wright – B. Galaway , 1989).

This theory of punishment is optimistic because it orients strategically the behavior of the offender to respect the penal law and therefore provides the victim a sense of justice.

15. Restorative Justice leads to a sense of Justice?

Results from recent studies demonstrate that the satisfaction of victims with punishment is influenced by the kind of feedback they receive from offenders after punishment. Results also indicate that victims were most satisfied when offender feedback not only acknowledged the victim’s intent to punish but also indicated a positive moral change in the offender’s attitude toward

wrongdoing. These findings indicate that punishment its self is neither satisfying nor dissatisfying. It is crucial to take its communicative functions and its effects on the offender. Punishing is only satisfying if it has the right sorts of consequences—that is, as we argue here, the consequence of reproofing and thereby transforming the offender’s attitudes.

Only then will the victims and punishers have justice.

Restorative Justice can activate the changes and it bases its foundation on empirical knowledge. A good costant executive treatment can produce neurological change and can activate the system unawareness control. This process is the result of hard work: reflecting on the reasons for violation of the law and on the understanding of the offender’s needs; undertaking the prospective of reducing the likelihood of criminal offenses being committed again - by reorganizing one’s life and mind.

Several well conducted meta-analyses have identified cognitive-behavioral therapy (CBT) as a particularly effective intervention for reducing the recidivism of juvenile and adult offenders. They found that the cognitive-behavioral programs were more effective in reducing recidivism than the behavioral ones, with a recidivism reduction for treated groups of about 30%. In their analysis, representative cognitive-behavioral therapy programs showed recidivism reductions of 20-30% compared to control groups (N.A. Landenberger, W. Mark, 2005).

The criminal trial and the executive treatment of punishment are paths that concern both the victim and the offender and they must be approached emotionally and not separately because the victim is not moved by an emotional need of altruistic punishment tout court, insensitive to the change of the offender. Recent empirical studies have shown that victims experience a sense of satisfaction related to punishment only when there is a feed back, an emotional return, an effective transformation of the offender.

Bibliography

E. Aharoni – A.J. Fridlund (2012), *Punishment Without Reason: Isolating Retribution in Lay Punishment of Criminal Offenders*, in *Psychology, Public Policy, and Law*, vol. 18, pp. 599–625.

A. B. Bradley, J. Bartos-Charis, E. Kubrin (2018), *Can We Downsize Our Prisons and Jails Without Compromising Public Safety? Findings from California’s Prop 47*, in *American Society of Criminology , Criminology & Public Policy* , Volume 17, Issue 3.

A. R. Baskin- Sommers (2006), *Dissecting Antisocial Behavior: The Impact of Neural, Genetic, and Environmental Factors*, in *Clinical Psychological Science* Vol.

4, pp.500– 510.

J. Braithwaite (1989), *Crime, Shame and Reintegration* (Cambridge, Cambridge University Press).

J. Braithwaite- P. Pettit (1991), *Not just desert: a republican Theory of criminal Justice*, in *Mind*, 100, 3, pp. 379-381.

H. Buker (2011), *Formation of self-control. Gottfredson and Hirschi's general theory of crime and beyond. Aggression and Violent Behavior*, n. 16, pp. 265–276.

S. Camporesi – B. Bottalico (2011), *Can we finally 'see' pain? Brain imaging techniques and implication for the law*, in *The Journal of Consciousness Studies*, vol. 18, p.9-10.

F.T. Cullen – J.D. Unnever – J. Wright – K. Beaver (2008), *Parenting and self-control*, in E. Goode, *Out of control: Assessing the general theory of crime*, pp. 61–74. Stanford, Stanford University Press.

V. A. Chalfin – J. McCrary (2017), *Criminal deterrence; a Review of the Literature*, in *Journal of Economic Literature*, 55, p.5 .

P. Chau (2017), *Bennett's Expressive Justification of punishment*, in *Criminal Law and Philosophy*, 11, 661-679.

K.M. Carlsmith (2006), *The roles of retribution and utility in determining punishment*, in *Journal of Experimental Social Psychology*, n. 42, pp. 437–451.

K.M. Carlsmith (2008), *On justifying punishment: The discrepancy between words and actions*, in *Social Justice Research* 21, pp. 119–137.

K.M. Carlsmith – J.M. Darley (2008), *Psychological aspects of retributive justice*, in *Advances in Experimental Social Psychology* 40 (2008), pp. 193– 236.

K.M. Carlsmith – J.M. Darley -P.H. Robinson K (2002), *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, in *Journal of Personality and Social Psychology* 83, pp. 284–299.

K.M. Carlsmith– J.M. Darley (2008), *Psychological Aspects of Retributive Justice*, in M. P. Zanna (eds.), *Advances in Experimental Social Psychology*, 40, pp. 193–236, San Diego, Elsevier.

M. Darley -K.M. Carlsmith - P.H. Robinson (2000), *Incapacitation and just deserts as motives for punishment*, in *Law and Human Behavior* 24, pp. 659-683.

R.A. Duff (2001), *Punishment, Communication, and Community*, New York, Oxford University Press.

P. Ekman – R. Davidson (1994), *The nature of emotion*, New York, Oxford University Press.

P. Ekman -D. Cordaro (2011), *What is meant by calling emotions basic*, in *Emotion Review*, n. 3, pp. 364-370.

J. Feinberg (1965), *The Expressive Function of Punishment*, in *The Monist*, 49 (3), 397–423.

Fuhnahaschi (2017), *Prefrontal Contribution to decision-making under free*

choice conditions, in *Frontiers in neuroscience*, 11, 43.

F. Funk – V. McGeer – M. Gollwitzer (2014), *Get the Message: Punishment is Satisfying if the Transgressor Responds to its Communicative Intent*, in *Personality and Social Psychology Bulletin*, vol. 40 (8), pp. 986–997.

F. Funk (2005), *Beyond retribution: the role of transformative justice motives for people's reactions to wrongdoers*.

M.R. Gottfredson- T. Hirschi (1990), *A general theory of crime*. Stanford, Stanford University Press.

O.R. Goodenough (2004), *Responsibility and Punishment: Whose Mind? A Response*, in *Philosophical Transactions of the Royal Society B. Biological Sciences*, n. 359, pp. 1805–1809.

G. Johnstone, (1998), *Restorative Justice, shame and forgiveness*, in *Liverpool Law Review*, 21, pp. 197-216.

G. Johnstone (2003) , *A Restorative Justice Reader*, Cullompton.

D.W. Van Ness - G. Johnstone (2007)., *Handbook of Restorative Justice*, Cullompton-Portland.

D. Kahneman – D. Schkade – C.R. Sunstein (1998), *Shared outrage and erratic awards: the psychology of punitive damages*, in *Journal of Risk and Uncertainty* 16, pp. 49–86.

K. Krause-Jensen - R. Rodogno (2015), *Criminal Law and the Internal Logic of Punishment*, in *Philosophy and Public Issues (New Series)*, Vol. 5, No. 1, pp. 135-171.

N.A. Landenberg – M.W. Lipsey (2005), *The Positive Effects of Cognitive-Behavioral Programs for Offenders: A Meta-Analysis of Factors Associated with Effective Treatment*, in *Journal of Experimental Criminology*, Vanderbilt Institute for Public Policy Studies.

A. Lavazza, (2019), *Why cognitive sciences do not prove that free will is an epiphenomenon*, in *Frontiers in Psychology*, 10, 326.

V. McGeer - F. Funk (2017), *Are Optimistic Theories of Criminal Justice Psychologically Feasible? The Probative Case of Civic Republicanism*, in *Crim. Law and Philos.*, 11, pp. 523–549.

T. J. Meyers – A. Infante – K. Wright (2018), *Addressing Serious Violent Misconduct in Prison: Examining an Alternative Form of Restrictive Housing*, in *International Journal of Offender Therapy and Comparative Criminology*, pp. 1–24.

Merkel – Boer – fegert – galert – hartmann – nuttin – roshal (2007), *Intervening in the Brain. Changing Psyche and Society*, Berlin – Heidelberg, p. 13.

S. Nichols (2013) *Brute Retributivism*, in T. Nadelhoffer (eds), *The Future of Punishment*, pp. 25–46, Oxford, Oxford University Press.

D. Parfit (2011) , *On What Matters*, Oxford, Oxford University Press.

A. Poama (2018), *Corrective Justice as A Principle of Criminal Law: A Prole-*

gomenon, in *Criminal Law and Philosophy*, 12 (4), pp.605-623.

A. C. Pustilnik (2015), *Imaging Brains, Changing Minds: How Pain Neuroimaging Can Inform the Law*, in *Alabama L. Rev.*, p. 1099.

D.L. Schacter – D.S. Addis – K.K. Szpunar (2017), *Escaping the past: Contributions of the hippocampus to future thinking and imagination*, in D. E. Hannula – M-C Duff (eds), *The Hippocampus from cells to systems*, 439-465, New York, Springer.

AC.S. Soon, M. Brass, H.J. Heinze, J.D. Haynes (2008), *Unconscious determinants of free decisions in the human brain*, in *Nature Neuroscience*, 11, 5, pp. 543-545.

C.L. Suhler – P. Churchland (2009), *Control: conscious and otherwise*, in *Trends Cognitive Science*, 13 (8), pp. 341-347.

J. P. Tangney – R.F. Baumeister- A. L. Boone (2004), *High Self-Control Predicts Good Adjustment, Less Pathology, Better Grades, and Interpersonal Success*, in *Journal of personality*, n. 72, p. 271–324.

M. Wright – B. Galaway (1989), *Mediation and Criminal Justice: Victim, Offender and Community*, Newbury .

H. Zehr (1990), *Changing Lenses: A New Focus for Crime and Justice*, Scottsdale, PA, Herald Press.

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

H. Zehr – B. Toews (2003), *Critical Issues in Restorative Justice*, Cullompton.

L. Zaibert (2017), *On the Matter of Suffering: Derek Parfit and the Possibility of Deserved Punishment*, in *Crim. Law and Philos.*, n. 11, pp.1–18.

Using Restorative Justice in Post-Conflict Societies: The Case of Bosnia-Herzegovina

ADRIANA MICHILLI

University of Padova

Introduction

The impact of a violent conflict is often categorized by rampant lawlessness, the absence of functional state institutions and widespread social disorder. As articulated by Meernick (2005) one of the major features inherited by a post-conflict society following a period of mass-victimization or war is the need for truth, justice, and reconciliation. When the pursuit of such rights are unachieved, relationships between communities at ends during the conflict remain polarized; this phenomenon is perceived to yield damaging consequences for the individual as a victim and collectively impedes overall social betterment. In order to advance society's transition from conflict and into peace, it is the responsibility of the new state to bring such crimes of the former regime to justice. In this post-conflict environment, the safeguarding of fundamental human rights administrated via governing civic structures becomes increasingly critical and simultaneously challenging to ascertain. As a response to this turbulent climate found within society, there are certain juridical and alternative juridical measures that states confronted with such issues of post-conflict rebuilding can elect to employ in order to assist and sometimes even accelerate their nascent nation's transformation into peace, democracy and stability.

For many post-conflict societies, the perception of restorative justice is fa-

vorable; to this end, programs and policies implemented in such communities have been able to assist persons in providing closure and overcoming their wartime trauma. Restorative Justice (RJ) as articulated by Braithwaite (2002), involves the discretion of the victim in meeting with offender to reconstitute property loss, injury or any other type of harm afflicted. The result of such practices garner a sense of re-established dignity and self-empowerment for the victim as well as responsibility and acknowledgement from the offender at a personal level. At the international level, the installment of such programs have also encouraged collective community forgiveness. If executed appropriately to the context in which they are applied, RJ initiatives serve to reduce feelings of adversity, insecurity and injustice while procuring the rise of justice, peace and security within the structures of post-conflict society. Reflections gathered from sociologists, international security analysts, and United Nations jurists alike are cognizant of how structural factors such as: inequality, out-group discrimination faced on a quotidian basis can breed xenophobic attitudes amongst victim and perpetrator communities.

Currently, the state of the art describes that RJ can be highly beneficial in endorsing and encouraging peace, justice and reconciliation; as referenced by Braithwaite (2002), Zehr and Gohar (2003) in post conflict situations. However, there is little discussion as to *how* such RJ mechanisms can be re-instituted in country when initial attempts to do so have failed. The scope of this paper is to fill this literary gap, by providing an assessment which combines theory and practice in order to discern where policy reforms ought to be targeted from a localized perspective. By re-addressing the social phenomenon through this integrative and top-down approach, it is hoped that reconciliation, justice and peace can be achieved via concrete restorative justice mechanisms that are considerate of the unique context(s) within the transitional country in which they are applied to. The main purpose of this study is to consider the existence of Negative Peace in Bosnia-Herzegovina, as articulated by the father of modern peace studies. Galtung, (1969) "Negative peace refers to the absence of violence, when for example a ceasefire is enacted negative peace will ensue...it's negative because something undesirable has stopped happening" (violence and oppression). Positive peace is filled with positive content such as: the restoration of relations, creations of social systems that serve the needs of the whole population and constructive conflict resolution'. At its' core the paper recognizes that in Bosnia-Herzegovina's post-conflict environment, despite a series of imposed transitional justice mechanism positive peace processes have yet to be attained and enjoyed by civic society; in cognition of this social turbulence the paper seeks to understand if restorative justice has and can work in tandem with transitional justice mechanisms in order to develop a garnered approach to positive peacebuilding within the focus country.

The paper is outlined into four main parts: in the first part, a theoretical analysis using Galtung's (1969) Negative v. Positive Peace theory is provided in order to address the reasons *why* discriminatory practices remain prevalent as a result of the conflict in Bosnia-Herzegovina; in the second part, a theory on the utilization of restorative justice as a mechanism for transitional justice is presented, here ideas shared by theorists such as Braithwaite (2002) and other notable scholars in transitional justice (Lambourne, 2009; Pejic, 2001) are intersected in order to illustrate how the design of restorative measures such as truth commissions, public apologies and reparations, can be implemented to overcome many of the ongoing areas of tension faced by communities as a result of the 1990s wars. Following this theoretical framework, a brief conceptual overview is provided with examples of how restorative justice mechanisms are utilized within the peacebuilding processes for post-conflict societies. As the paper moves on, a practical case-study on the social context and application of restorative justice instruments within Bosnia-Herzegovina is provided in order to procure a wholistic depiction of how the state has chosen to manage the contested areas of truth, justice and forgiveness within its' social realms following the war. In the final section of the paper, recommendations and concluding thoughts on the future of integrating restorative justice approaches in models used to secure Bosnia-Herzegovina's transition out of negative and into positive peace process are offered in order to encourage greater civic trust, justice and democracy in this structurally fragile post-conflict society.

Theoretical Framework. Negative v. Positive Peace

Galtung's creation of Negative v. Positive Peace Theory can help us to understand the structural causes regarding the conditions of Bosnia-Herzegovina's post-conflict social status (Galtung, 1969). As articulated by Galtung (1969) although there is an absence of direct violence, anytime there is a conflict or difference of opinion, when you have negative peace it is settled via a regression to violence. Because of this, many post-conflict societies are wrongly labeled into categories of 'peacebuilding' yet were never able to shatter through overcoming the negative peace plagued by forms of discrimination and inequality (Galtung, 1969). In cognition of this atmosphere, Galtung's insights prove valuable for deliberations on the programs need in post-war societies; he cautions that negative peace processes will endure and be perpetuated by generations of post-conflict reform is not instituted appropriately according to the unique needs of the target society. This is largely connected to the implementation of the DPA which left Bosnia-Herzegovina in an up-hill battle in their attempt to transform out of negative and into positive peace (Galtung, 1969; Pasalic-Kreso,

2002; Russo, 2000). Whereby positive peace processes are characterized by integration, optimism and the settling of opposed views in a civic manner; negative peace is marked by fear, inequality, and injustice (Galtung, 1969). A pivotal description of negative peace forces a society to undergo a process of civic and social reflection and profoundly understand which indicators of positive peace are the missing components within the focus country or area (Galtung, 1969). For example, as the father of peace studies, Galtung discusses that a major feature of positive peace is seen societies where there is access to justice and access to equal economic opportunity; this examination and post-conflict evaluation is especially critical to purging social orders of the corrosive indicators that can hamper a community's ascension into the enjoyment of positive peace processes. Galtung defines peace as the 'integration of human society'; suggesting that positive peace is reflected by conditions where diverse persons, communities and families experience low levels of violence and are able to bask in mutually harmonious relationships. As further conceptualized by Adams, empathy and pluralism are two pillars of social peace.

Around 2005, the United Nations (UN) endorsement of positive peace became integrated at an institutional level (Mac Ginty, 2010). At this point, the UN expanded its peacebuilding approach and began to complement its traditional peacekeeping operations by working together with the host country to adopt a series of measures to achieve a well-functioning government, equal distribution of resources and acceptances of the rights of the other (Mac Ginty, 2010). The field of conflict resolution is no stranger to criticism and often times scholarship on this issue has emphasized that there a series of profoundly longitudinal factors and socio-cultural conditions related to a conflict which supersede the immediate ceasefire period which ought to be dealt with monitored through effective programs in the critical years following the war (Mac Ginty, 2010; Pasalic-Kreso, 2002). This approach is precisely explicative of the method in which peacebuilding tends to be championed by international human rights agencies at a superficial level however, the layers of the deep-rooted underlying injustices are not properly investigated and resolved. In the following section of the paper we will see how the peacebuilding framework of Dayton is emblematic of the international community's 'quick fix' to installing immediate human rights oriented legislation and policy without considering the layers of deep inter-ethnic and inter-cultural conflict that lie below the surface of such arrangements.

Restorative Justice as a Mechanism for Transitional Justice

Transitional Justice helps post-conflict societies answer pivotal questions such as how they should rebuild after a past regime's commission of graves

against humanity and violations against international human rights. The field of TJ is also challenged by balancing demands for peace with those of justice and discerning the degree to which such objectives can be concurrently achieved. For example, transitional justice is able to guarantee a response to pertinent questions faced in post-conflict settings such as: Should society institute retributive justice to punish perpetrators? Or does the need for victim's truth supersede traditional venues of criminal justice and call for reconciliation via truth & reconciliation commissions and/or the granting of political amnesty in order for society to move forward? In many global post-conflict scenarios, the discretion to make these decisions is oftentimes concentrated in the hands of the international community; however, it is important for national parliaments and political officials to be well-represented stakeholders in drafting processes. During this stage, TJ theorists emphasize that negotiations should be 'aimed at achieving agreements that are satisfactory enough for all parties concerned, in such a way that they are willing to accept the transition' (Buckley-Zistel et al., 2014).

Of particular importance, are the needs of the community of victims and the protection of their rights in alignment with internationally adopted human principles and legal standards. Balancing stakeholder's voices and materializing victims' rights to access to justice furthers the scope of RJ mechanisms installed in measures such as: truth commission, reparations and individual forgiveness through combined approaches which make strides towards the establishment of a stable peace and national reconciliation (Buckley-Zistel et al., 2014).

One of the major challenges in the effective functionality of TJ and restorative processes is compliance. Obstacles faced by international jurisprudence with this realm of international law ascertain that it is difficult to receive acceptance of a 'justice-formula' which satisfies both the offender and victim community without further catalyzing already existent tensions from the deep-seeded roots of the prior conflict. In these conditions, state sponsored reconciliation which includes social and political viable solutions for truth, peace and justice should attempt to strike a balance between precluding absolute impunity and recognizing the duty of assigning responsibility to offenders who have carried out crimes against humanity (Buckley-Zistel et al., 2014).

Justice which restores cultural, ethnic and religious relationships in post-conflict societies can bring about change because of the victim centric approach. State policies that satisfy victim's needs not only recognizes the victim's suffering, they serve as forms of acknowledgement that garner support for the new government on a collective level, encouraging social harmony. As RJ philosophy incorporates a forward-thinking approach to peacebuilding in post-conflict settings, it organically contests evaluations made upon the offender's guilt and calls for the instrumentalization of measures which make him/her

conscious of the harm he afflicted, admit his responsibility and attempt to repair the harm done. When transitional societies employ restorative measures to justice these are most noticeably seen in: truth commissions, public apologies and financial or material reparations and restitutions. In some post-conflict settings where RJ has been employed, victims preferred the tangible benefits that had a direct impact on their daily lifestyle and expressed that their fundamental rights had been heard and respected in a concrete way in contrast to a courtroom verdict (Braithwaite, 2002).

Restorative Justice mechanisms assure the protection of a persons' fundamental human rights in the procurement of alternative spaces for justice to be accessed when they cannot be procured through traditional methods as a result of the state's limited resource capabilities. Societies undergoing the institutionalization of other TJ processes can benefit from restorative justice processes because of their flexibility and adjustability to the setting they are supposed to manage and resolve. As mentioned in earlier parts of this paper, it key to remember that participation in RJ and the sense of restitution, empowerment, and social support that can follow its activity is always discretionary. In its character of redress and the reconstruction of ruined relationships, RJ does not focus on punishment for crimes but on repairing the harm caused by the crime. Truth telling, and meeting of victims and perpetrators are important in any RJ process, as well as remorse and restitution (Buckley-Zistel et al., 2014).

It is also critical to maintain that some elements of RJ are proven to be less effective than others. Restorative justice typologies are grouped as fully restorative, mostly restorative and partly restorative. For the purposes of this paper it is important to highlight that victim reparation, community reconciliation and offender responsibility are the three main components of restorative patterns. In transitional justice settings, sociologists have argued for the benefits of installing measures which are fully and mostly restorative in nature; among those are: (*fully*) truth and reconciliation commissions, (*mostly*) special victim's hearings, victim's restitution and amnesty hearings. Reparative bonds, compensation of funds, symbolic reparations and the re-writing of history are also common forms of RJ yet they are seen as only partly restorative in their reparative potential.

In transitional justice, one RJ technique used to enhance restoration is through the establishment of Truth Commissions. As expanded upon by Pejic (2001), truth commissions are established to help nations overcome conflict, immense human rights abuses and to aid in society moving forward mentally, legally, politically and culturally. One of the benefits of such commissions are that they investigates the causes of conflict, via mixed-method forms of analysis including witness interviews, fact finding missions (list of victims) and con-

duct historical and ethnographic inquiries. Upon the Commissions closure, the production of a report of recommendations compiled which includes a consultation for the focus country on which reforms should be prioritized given the research conducted. Information aggregated from this Commission is typically made public via hearings, and informational awareness campaigns. Persons involved in these projects find that commissions can expose otherwise clandestine truths, lead to social healing and encourage reconciliation on a collective level. As described in the earlier section of this paper, applying this method of RJ in transitional societies is seen as beneficial to the victim because they are furnished an 'open-forum' for dialogue, in order to express their wartime traumas and feel as though are re-defined as a competent member of a rebuilding and newly transformed society. The use of RJ strategies as a mechanism for accomplishing transitional justice within the structures of transformative societies such as South Africa is accredited as being the pedigree of international best practice models, in its ability to implement commissions which created a safe-space forum of dialogue between victims and perpetrators and opened a space where the healing processes committed by the prior regime could be discussed freely without fear of out-group stigmatization or punishment from law enforcement authorities.

On Specific Examples Regarding the Use of Restorative Justice Measures Applied in Post-Conflict Societies

This section deals with the application of RJ measures in post-conflict societies as it touches upon instruments including: international/national truth commissions, national investigative committees of inquiry and analysis and domestic reparation schemes. It should be clearly demonstrated from this portion of the paper that commissions can recommend for the implementation of mechanisms including reparations, investigative analysis of state archives and other measures promotion truth-telling, acknowledgement and reconciliation in the state's transformation process.

Truth-telling, Truth and Reconciliation Commissions and Acknowledgment

While defining truth can be ambiguous, Parmentier's model of transitional justice on the four types of truths helps to overcome this challenge for post-conflict societies (Buckley-Zistel et al., 2014). He cites forensic or factual truth; personal or narrative truth; social or dialogue truth; and healing or restorative truth (Buckley-Zistel et al., 2014). While all four of these experiences are pertinent to the reparative process for post-conflict societies it is critical for TJ to

be cognizant of which specific truths are wanted by the local community this way inquires, investigations or reconciliation commissions can be best posed to target and address these rights.

Lambourne (2009), indicates that one aspect of truth telling that can be saliently important for persons overcoming a war is the establishment of a 'historical record' whereby a shared, complete and mutually agreeable version of the conflict (it's causes and occurrences of human rights violations that took place) is defined. As mentioned by Lambourne (2009), in Cambodia this meant that restorative justice measures via 'truth seeking' were administrated; for the local community this involved the Documentation Center for Cambodia gathering of evidentiary support (forensic truth) and survivor stories (narrative truth) about the genocide while furnishing a sense of recognition and acknowledgment of the crimes which occurred during the country's Pol Pot era.

In East-Timor, a truth commission body entitled 'The Commission for Reception, Truth and Reconciliation in East-Timor' was mandated; through these powers other truths was sought after. In this context, survivors wanted answers to what happened to their loved ones. For less serious crimes, the local truth and reconciliation commission brought victims and perpetrators together and called for acknowledgement in their sessions in order to build peace through the establishment of forgiveness and reconciliation. Some limitations of this project however was that the unveiling of forensic truth's for many of the grave crimes against humanity were not procured therefore many survivors became widely unsatisfied with the outcomes of such processe (Lambourne, 2009).

Investigative Commissions

The National Commission on the Disappeared (CONADEP) operative in Argentina from December 1983- September 1984 is one of the first representations on the use of restorative justice in transitional and post-conflict societies (United States Institute of Peace, 2011). Although widely underscored by features of hybrid¹ and solely retributive justice is becomes apparent that many of the features of the commission were reparative both in nature and in practice. The scope of the commission was to investigative a seven-year armed struggle between the military dictatorship and their opposition which resulted in the disappearance, torture and death of thousands of victims who were in support of the leftist political agenda following the country's military coup in 1976 (United States Institute of Peace, 2011).

¹ Hybrid Justice: legal practices used in post-conflict and transitioning states. These courts and tribunals feature varying combinations of domestic and international staff, operative law, structure, financing and rules of procedure. (Mac Ginty, 2010)

The commission was able to assist many of the families who requested justice for their relatives on information regarding their disappearance. According to the report, while official documentations of the disappeared were totaled at approximately 9,000 real estimates places these figures at a much higher value as families of the victims were frightened to contact the new regime's judicial bodies (United States Institute of Peace, 2011). Upon the Commission's closure approximal 10,000 to 30,000 persons are disappeared as a result of the internal conflict. Further conclusions produced by the Commission included that torture, secret detention camps, disposal of bodies and lack of information on these practices were intentional strategies enacted by the government to obstruct collaborations amongst survivors. Repressive military practices were also exposed by the commission as having been order via a chain of command ranging from high level officials to low level soldiers. However, the Commission also reported that documents and archives denoting the inner-workings of this hierarchal structure on the commission of crimes and human rights violations were destroyed by then de-facto President Reyanaldo (United States Institute of Peace, 2011).

Reparations

In Peru, the use of reparations as a mechanism of restorative justice is common. Fieldwork onto this topic indicates that survivors do not feel completely fulfilled by the sentencing powers of retributive justice alone and exhibit preference towards restorative approaches to justice by state institutions (Laplante and Theidon, 2007). Monetary and non-monetary forms of reparation schemes have been expressed by the victim community as a method which is seen to encourage tangible change in their daily livelihood conditions. This could be in part due to the fact that Peru has a low record for criminal prosecutions of human rights violations, because of the limitations of the tribunal and state legislative system Peruvians tend to perceive reparations as "the most tangible manifestation of the efforts of the state to remedy the harms that the victim has suffered" (Laplante and Theidon, 2007). Authorship describing the meaning of reparations for Peruvian society explicate the power of economic reparations in offering a symbolic value by signaling the state's assumption of the harm done and suffered as a result of political violence. Victims often underscore in their narratives that this form of justice signifies a degree of accountability for crimes committed by the state sand helps victims in the settling of their grievances against political and state entities in cases where they are not being brought to trial (Laplante and Theidon, 2007).

Case Study: Bosnia-Herzegovina. Sites of Discrimination

In practice, the DPA separated Bosnia-Herzegovina into two entities, one being the Federation of Bosnia-Herzegovina composed of a majority Bosnian Muslim populace and the other being Republika Sprska with a majority of demographics belonging to Serbs (Paslic-Kreso, 2002). In the Federation, governance is divided into ten cantons while in RS there are 7 regions (Pasalic-Kreso, 2002). As written in Dayton (1995), ‘Cantons are solely responsible for developing policies, including declarations for education and implementing cultural policies’. In the Federation, trends indicate that when educational policies are implemented the question of it public education should instruct via segregated or generic national curricula aries annually (Paslic-Kreso; 2002; Russo, 2000, Tolomelli, 2015; Torts, 2009). This is reflective of the exacerbated level of political exploitation of the education system; which research demonstrates is completely devoid of democratic principles; this position is further emphasized by in the following quote: “There is much manipulation of education for political and ideological purposes in Bosnia-Herzegovina today...education is often misused (by) providing students with different interpretations of the same facts... for example, curricula and textbooks may present the start of the war (diversely) as aggression / occupation / or a fight for liberation and national emancipation” (Paslic-Kreso, 2002) This phenomenon occurs because ‘truths’ are missing and the society as a whole has not overcome the traumas of the war; the incentives of entering into dialogue for the youth generation in order to share wartime experiences, reconcile and bring out a unified national identity become especially salient when we analyze the field of post-conflict education in Bosnian society.

Curricula

Segregation of schools being stratified along the lines of ethnicity, language and religion are commonplace. At the beginning of each academic year, there are intensive debates regarded integrated schools and common core curricula (Paslic-Kreso, 2002; Russo, 2000, Tolomelli, 2015; Torts, 2009). The teaching of history also remains a point of discussion. As noted by Emkic (2018), problems in this realm surfaced when displaced returnees came back to their hometown which was occupied by other ethno-religious groups; making them out-numbered and the ‘new minority’. Education was not the sphere where discrimination was experienced however; many families homes were damaged and destroyed and in the years following the war property restitution has not been effectuated nor has equal economic employment in the area of capital and unskilled labor been experienced by the focus minority populations (Emkic, 2018).

In terms of educational curricula, there is a true rejection of a multi-ethnic social fabric whereby minority pupils are granted access to educational instruction and lessons that service the affiliations of the majority students. There are no alternatives to opposing majority curricula, the only option is to not receive an education given these structural conditions many minorities are forced to conform to majority learning instructions and lessons which typically include versions of history bearing offense to their ethnic, cultural and/or religious identity. Nationalist leaders have a heightened degree of discretionary leverage in their power to evade the inclusivity of multi-ethnic curricula; this is readily seen in the educational programs of cities who experienced extreme devastation from the conflict such as: Sarajevo, Tuzla, and Zenica (Emkic, 2018; Paslic-Kreso, 2002). The Dayton Peace Agreement neglected to mention education as a special topic but education was regarded in this international legal charter as a basic human right, which left the implementation of educational reform for the local municipalities to manage. Overall, this omission of education as a 'special item' represents a piecemeal approach to institutional redress within an especially critical social sector in the country's aftermath of war.

Today, in zones where the majority population is Croat, Croat head ministers have been to such extremes as to locking the entrances of children and teachers belonging to Bosnian Muslim minorities there are also episodes where instructors have refused to attend shared buildings with Bosnian Muslims (Emkic, 2018; Paslic-Kreso, 2002). Political leaders become empowered by such occurrences and use such discriminatory practices to harness the indoctrination of Bosnia and Herzegovina mixed youth population. On a practical level, this means that nationalist ideologies dominate the field of education and resolution of problems are biased which strengthen the discourse of ethnic separatism and evade the development and inclusive, tolerant and heterogenic approach to a national new identity which is learned within domestic schools.

Language

Linguistic differences have also become problematic following the war; as the areas closer to the borderlands such as Serbia and Croatia you see the power of such nationalist rhetoric stems from Belgrade or Zagreb rather than Sarajevo (Emkic, 2018; Paslic-Kreso, 2002). Today, there are cases where populations are only offered classes in majority language courses; it is important to note that Serbian follows the Cyrillic alphabet. During the war, Croatian students were taught in Serbian and only afforded the opportunity to have pocket dictionaries in order to aid in the translation of the language of educational instruction to their native language (Emkic, 2018; Paslic-Kreso, 2002; Torts, 2009). This phenom-

enon explicitly violates the basic human right of a child to receive an education in their maternal language (De Luca, 2018). As mentioned above there is still widespread intention to 'cleanse the motherland' by instituting education via the Cyrillic script (Tortsi, 2009). These practices are emblematic of a post-conflict culture's refusal to come to terms with a pluralized post-conflict narrative and post-war national identity increasingly representative of negative as opposed to positive peace which would be manifested by themes of unity, nationhood and uniformity of a people across a territorial state.

The teaching of history

Textbooks also served as 'quick-fixes' when international pressures in the post-conflict atmosphere mainly from the Organization for Security Co-operation Europe required that material which could be regarded by pupils belonging to minority groups as offensive is to be removed from textbooks. Often times the text was simply blackened and replaced with wording that said 'the following material contains passage of which the truth has not been established or that may be offensive or misleading and is currently under review' (Paslic-Kreso, 2002). Because this practice was essentially imported, and pragmatically top-down' the power of the pen was in the hands of the educators; in some cases, the text was removed or blackened but the material was placed in even more obvious classroom location such as the bulletin-board; such behavior manifests a strong volition for contesting a common-core curricula. Sociological authorship on this issue has mentioned that if the implementation of national curricula was guided with equal representation and participation of minorities it is plausible that a complete re-structuring process could have taken place and offered the entrance of democratic citizenship education for Bosnian society.

Inter-religious dialogue and religious pluralism in the classroom setting

The institutionalization of the "Two Schools Under One Roof" post-war educational policy is a quintessential example of the difficulty of achieving religious freedom within the Bosnian school system. Tolomelli (2015) explains that the program of allowing Bosnian and Croat students to attend classes in the same building, but being physically separated and taught completely diverse curricula (with different educators) was seen as temporary solution to be tolerated by the international community. Despite international pressures to absolve its segregated school program, Bosnian Education Ministers have halted progress on the development of inter-religious classes. In 2007, Education Minister Kuna rationalized this decision by stating that: "The two schools under one roof

project will not be suspended because you can't mix apples and pears...apples with apples and pears with pears". (Tolomelli 2015). The prejudicial attitude on the reluctance to institute learning about world religions is further exacerbated in the following quotation "Croatian students attend classes in the morning while Bosnians in the afternoon. The Bosnian textbooks state that 'unlike others', Muslims do not destroy sacred objects and the Croat students learn that Muslims are only an ethnic group and not a religion." (Tolomelli 2015, p. 101).

Trends of minority religious groups having little alternatives to learn about their faith and the faith of others in the company of their peers is not well corroborated in the literature or international reports by quantitative and statistical evidence, underlining that additional research is merited in this realm. As explicated in the current scientific literature courses such as: '*Society, Culture and Religion*' as well as '*Culture of Religion*' involving lectures on inter-religious dialogue, religious tolerance and religious freedom have been implemented in schools in Sarajevo and Tuzla districts however, longitudinal data evaluating their level of societal impact remains unavailable (Tolomelli, 2015). In the following section of the paper we will see how the usage of education and freedom of religion as channels for discrimination can be over-come in the post-conflict period by raising awareness on the benefits for introducing measures advocating for inter-cultural competences and inter-group communication and dialogue at the micro-level of society.

Applying Restorative Justice as a Transitional Justice Mechanism

After the establishment of the ICTY, the international community had concluded that additional efforts were necessary to safeguard peace and reconciliation in the region (Jakala and Jefferey, 2012). As articulated by the International Center for Transitional Justice (2004) the handing down of verdicts to war criminals by the ICTY inflamed the situation on the ground in Bosnian society. When sentences for gross human rights violations, crimes against humanity and genocide were given, relationships amongst ethnic groups and religious communities were seem to gain friction and become increasingly hostile. This atmosphere created by the ICTY seemed to make peace very difficult to attain in Bosnian society. The path to democracy in Bosnian society needed something more profound, personal and collective in order to heal its wounds from the war. It was under these conditions that the rise for the need of RJ measures was ushered into legislative drafting processes. Representatives from the international community believed in the ideology that national incentives for accepting RJ practices would be the immense benefit such policies could provide to the inception of an absolute, undeniable and shared truth.

Truth and Reconciliation Commissions

The need to establish a Truth and Reconciliation Commission (TRC) is at the cornerstone of a state's ascension into the post-war peace process. International human rights organizations such as the UN advocate for the deliverance of justice through these alternative mechanisms because it gives voice to the victims of human rights abuses, while also recognizing the offender's rationality for committing such acts of warfare. According to Gibson (2006) "The truth process is able to apportion blame to all sides and is relatively high in two characteristics: political pluralism, competing centers of power, and commitment to the rule of law with its emphasis on universal standards for judging". As non-judicial inquiries established to determine the facts, root causes and societal consequences of past human rights violations, TRCs can concentrate on providing victims of the most heinous atrocities against humanity a level of empathy, acknowledgement, and recognition of suffering. It is important for a state emerging from conflict such as Bosnia-Herzegovina to have such initiatives because institutional reform processes in the areas of criminal justice can provide victims with a sense of relief, empowerment and help in their transformation of beginning the rebuilding process and recreating trust among their civic counterparts (RECOM, 2017).

From 1997 to 2007 there have been a series of failed attempts to establish a truth commission in Bosnia-Herzegovina. In the first attempt, the United States Institute of Peace was promoting the organization of its presence, in 2001 chats about its establishment began during the conflict itself; at this point the ICTY was largely resistant towards the idea because it feared that the Commission's work would interfere with its retributive jurisprudence. The second attempt in 2005, represented a working partnership between the Bosnian government, the international community, and the ICTY who this time changed its attitude towards the commission and advocated for its establishment. Further attempts in 2007, never made it past the finalization of a draft law. However it should be noted that there were various international, institutional and social pressures blocking the existence of such an initiative yet, its scope and mission were ambitious in terms of truth-telling, for example at its second attempt the commission sought to conduct a profound investigation into the: causes of ethnic distrust and misunderstanding, role of certain groups and perpetrators during the war, as well as recommending measures to countering violence due to these conflicts (Dragovic-Soso, 2016). As described above while truth telling maybe critical for the transformation of post-conflict societies it is increasingly important to understand via which measures truth is desired and to be considerate to the sensitivity of the local population, whereby it is plausible that such projects are not yet wanted by the population and its new government.

The Srebrenica Commission

The Commission for the Investigation of the Events in and around Srebrenica between the 10th and 19th of July 1995 also known as 'The Srebrenica Commission' is a secondary example of the failure to establish absolutist truths about the events occurring during the conflict. While the Commission's Report was able to: 1) locate 32 mass grave sites and, 2) the activities engaged in by Serb perpetrators in their 'round-up' of Bosnian Muslims; they have been reversed in August 2018 by Republika Srpska (RS). This contestation comes after RS had called for the clear establishment of the facts in the country (Dragovic-Soso, 2016).

Reparation Programs

The program of reparations is a feature used in both transitional and restorative justice models as mentioned in the prior sections of this paper. In Bosnia-Herzegovina, one of the major problems with reparation is the restitution of property, for many victims of the war their homes and/or land were seized from the opposing group; upon return to their communities many victims come to understand that they are currently the minority and their human rights to reparation and access to their property are respected by members of the majority community or the municipality once issues are raised to the local courts. Plagued by weak rule of law culture where the enforcement of legislative standards and principles guidance is not applied in society; cases requesting the restitution of seized property tends to sit on the court's docket for years. The specific chamber dealing with such cases, the Human Rights Chamber, which is a specific legislative arm of the national court meant to investigate such violations against persons as a result of the war experienced a massive backlog consequentially double victimization for persons already living on the fringes of society had taken place. Under these tenets, persons are increasingly vulnerable and marginal; not only did the war take away their human rights to property; their ability to fight for these rights via access to justice is equal point of suffering following the conflict (Dragovic-Soso, 2016).

Recommendations

The implementation of restorative justice measures in Bosnia-Herzegovina were prone to failure for the main reasons as indicated by this article's prior case-study analysis: first, the state was politically resistance to such reforms, secondly there was a deep-seeded culture of institutional rivalry between the

international community and locality; for example the level of cooperation between the local commissions investigative powers and that of the international criminal court were never clearly defined; in retrospect, it appeared as if the two were in competition with one another instead of working collaboratively to investigate such truths and events surrounding the war and genocide; this attitude severely hampered the power of local commissions and drastically opposes core RJ philosophy regarding amnesty powers, finally, it is plausible to speculate based upon the socio-political outcomes that such commissions were premature, many were unwilling to relive post-war traumas immediately after the war and many victim associations shared the same response.

There is also corroboration of literary and open source evidence indicating that some drivers of change were consistently interested yet subsequently excluded as stakeholders in decision-making processes as parliamentary and international community attitudes changed overtime; RJ was also not connected to larger resolutions or transitional justice funded projects in the region, furthermore interviews with victim have indicated a vast public opinion on indifferences towards the idea that RJ, reforms procure the potential to produce a 'real' change in their socio-cultural, and economic wellbeing. Given the cognition of the social context in which the transitional state of Bosnia-Herzegovina finds itself, considering the existence of negative peace and potentiality of restorative justice it is indeed by possible that such measures are in fact desired by the community yet the society is unaware of its impactful benefit they can exhibit upon civic life.

In order for future restorative justice projects to be successful it may be critical for them to follow specific ideologies in their interaction with the Bosnian population. Firstly, it is important to have informational awareness and educational campaigns communicating to victims and offenders the 'real' and tangible benefits in engaging in such productive RJ schemes. Secondly, it is recommended that novel initiatives gather prior information on which specific reforms the populace is prioritizing through this approach implemented projects can represent unique and targeted approaches to restorative justice, for example reparations may be increasingly valued for one community whereas the truth and its exposure may be prioritized by another town or village. Finally, it is vital that any reforms, legislation, relevant policies on the usage of RJ be longitudinally monitored and evaluated in order to assure that the quality of such changes are reflective of the needs of the community it serves.

Conclusion

This paper has contributed to wider discussions regarding a restorative approach to transitional justice as it considers how the needs of the post-conflict

societies can be dealt with via alternative spheres and instruments of the traditional criminal justice system in order to enhance both victim and offenders potential for 'restorative living' via peaceful mechanisms. The paper also offers some insight as to the power of restorative justice in working collaboratively as a hybrid form rather than competing with international retributive criminal justice systems such as the International Criminal Court. In order for positive peace to be attained via restorative measures, it is critical that the benefits of such projects in changing victims and offenders social, economic and cultural wellbeing are sensitive to the local context and norms of the society they are assisting. When engaging in restorative practice becomes perceived by the civic society as a valuable tool for the building of a common and shared future together only then can such instruments of justice prove useful for the restoration of wounded intra-personal and collective relationships.

Bibliography

- Braithwaite, J. (2002). *Restorative justice and response regulation*, New York: Oxford University Press USA.
- Dragovic-Soso, J. (2016). History of a Failure: Attempts to create a National Truth and Reconciliation Commission in Bosnia and Herzegovina. *International Journal of Transitional Justice*, 10(1), pp. 292-310.
- Emkic, E. (2018). *Reconciliation and education in Bosnia and Herzegovina*. Cham: Springer.
- Galtung, J. (1969). Violence, Peace and Peace Research. *Journal of Peace Research*, 6(3), pp. 167-191.
- Gibson, J. L. (2006). The Contributions of Truth to Reconciliation: Lessons from South Africa, *Journal Of Conflict Resolution*, 50(3), pp. 409-432.
- International Center for Transitional Justice. (2004). Bosnia and Herzegovina, Available at: www.ictj.org [accessed April 2017].
- Jakala, A. and Jeffrey. M. (2012). Beyond Trial Justice in Former Yugoslavia, *The Geographical Journal*, 1(1), pp. 1-6.
- Lambourne, W. (2009). Transitional Justice and Peacebuilding After Mass Violence, *International Journal of Transitional Justice*, 3(1), pp. 28-48.
- Laplante, L. and Theidon, K. (2007). Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru, *Human Rights Quarterly*, 29(1), pp. 228-250.
- Buckley-Zistel, S., Koloma Beck, T., Braun, C., and Meith, F. (2014). *Transi-*

tional justice theories. Abingdon: Routledge.

Mac Ginty, R. (2010). Hybrid Peace: The Interaction Between Top-Down and Bottom-up Peace,

Security Dialogue, 41(4), pp. 391-412.

Meernik, J. (2005). Justice and Peace? How the International Criminal Tribunal Affects Societal

Peace in Bosnia, *Journal of Peace Research*, 42(3), pp. 271-289.

Pasalic-Kreso, A. (2002). Education in Bosnia and Herzegovina: Minority Inclusion and Majority Rules, the System of Education in BiH as a Paradigm of Political Violence on Education, *Current Issues in Comparative Education*, 2(1), pp. 6-13.

Pejic, J. (2001). The Yugoslav Truth and Reconciliation Commission: A Shaky Start, *Fordham International Law Journal*, 25(1), pp. 1-22.

RECOM. (2017). RECOM, Available at: www.recom.link/ [accessed 15 March 2017].

Russo, C. (2000). Religion and Education in Bosnia: Integration not Segregation? *Brigham Young University Law Journal*, 3(12), pp. 945-966.

The Dayton Peace Accords-Official Constitution of Bosnia and Herzegovina. (1995). Available at: <http://extwprlegs1.fao.org/docs/pdf/bih136068e.pdf> [accessed 15 March 2017].

Tolomelli, A. (2015). Two schools Under One Roof: The Role of Education in the Reconciliation Processes in Bosnia and Herzegovina. *Journal of Theories and Research in Education*, 10(1), pp. 89-107.

Torsti, P. (2009). Segregated Education and Texts: A Challenge to Peace in Bosnia and

Herzegovina. *International Journal on World Peace*, 26(2), pp. 65-82.

United States Institute of Peace. (2011). *Truth Commission: Argentina*, Available at: <https://www.usip.org/publications/1983/12/truth-commission-argentina> [accessed 15 March 2017].

Zehr, H. and Gohar, A. (2003) *The little book of restorative justice*, Intercourse: Good Books.

Restorative Justice Within Legal System of Bosnia and Herzegovina

ENA KAZIĆ¹ AND RIALDA ĆOROVIĆ²

University of Sarajevo

1. A Brief Overview of Restorative Justice Model

The last four decades have been marked by the development of the model of restorative justice that stemmed from the disappointment of the traditional retributive criminal justice system (Dancig-Rosenberg and Gal, 2013, p. 2316). Relations between the offender and the victim in the traditional criminal justice system are predominantly hostile, communication is interrupted, and the interests are opposed, while in restorative judiciary, the process is aimed at establishing a dialogue and restoring disturbed relations. In this way, restorative justice helps the victim not to feel powerless, marginalized, unrecognized, and ignored, and at the same time means respecting the dignity of the offender and eases his reintegration into the community. So, it represents a constructive response to crime that has a strategy not only to prevent crime, but also to respect the dignity and equality of people. The restorative concept does not represent a single idea, but, it is one that combines various ideas, practices and proposals, which represent some kind of alternative conventional view of crime and social

¹ Senior teaching assistant at International University of Sarajevo. Doctor of legal sciences; working on restorative justice, juvenile justice and sexual violence. E-mail: e.kazic12@gmail.com.

² Legal advisor at High Judicial and Prosecutorial Council of Bosnia and Herzegovina. Doctor of legal sciences; working on restorative justice and juvenile justice. E-mail: rialda_87@hotmail.com. ³Both authors got their PhD degree at the Faculty of Law of the University of Sarajevo (respectively in February and March 2018).

responses to it" (Ćopić, 2013, p. 11-12).

The essential question is whether the principles of restorative justice really work in practice and what kind of results they bring. This restorative justice turns to the path from philosophy to empiricism. Empirical research on restorative practices is "mile wide, but only inch deep," Paul McCold wrote once. The assessment of the success of a restorative justice model is not easy, as positive outcomes can be discussed at multiple levels, depending on what is implied as a criterion of success (Miroslavljević, 2010, p. 58). However, it is evident that using the restorative programs achieves generally good results when it comes to the rate of recidivism of the participants in the process (Bergseth and Bouffard, 2007, p. 437).

All institutional sanctions, prison, in particular, are a very expensive way of dealing with offenders (a set of ways to make things worse off worse), for which no country seems to have enough money. We should not lose sight of the fact that punishment by institutional isolation is a two-way process. Almost all prisoners are released and given the conditions of isolation, many of them at the time of release represent a higher risk to society than they were at the time they were sent to prison. „Prison inevitably creates offenders from prisoners. It creates them by the way of life that impose prisoners. Exposed to sufferings, a prisoner becomes constantly angry at everything that surrounds him, he sees ordinary officials in government officials, he does not believe in his own guilt, accuses only the judiciary" (Foucault, 1997, 259).

Many criminologists believe that restorative justice is the answer and solution to the problems mentioned. Based on the principles that are several centuries old, the restorative concept, as one comprehensive model of treatment, offers a completely different way of responding to the crimes committed. By its application, it seeks to replace the existing punitive system of reactive measures and crime control with reparative (restorative) justice. The development of the restorative justice model over the past two to three decades is considered one of the most significant criminal achievements, which has made it an integral part of the criminal justice systems of a large number of countries around the world.

Restorative justice is, above all, a concept rather than a special technique or method for dealing with conflicts, and therefore there is no complete agreement on what its definition should contain. The term „restorative justice”, as stated by some authors, was first used by Albert Eglash in 1977, pointing to three types of criminal justice system: a retributive justice based on the penal system; distributive justice based on the therapeutic treatment of the offender, and restorative justice based on restitution, or compensation of the damage caused by the criminal offense (Gavrielides, 2007, p. 21).

One of the founders of the modern concept of restorative justice, Howard

Zehr, makes an analogy with the camera lens, thus indicating that there is a retributive and restorative lens of observation. Viewed through the prism of retributive justice, the crime is understood as a violation of a certain norm or state violation, which produces guilt on the side of the offender, while justice is designated as blaming and inflicting pain and suffering in a strictly formal procedure that takes place between the state and the offender. Observed, however, through a restorative lens, a crime constitutes a violation of people and interpersonal relationships, which creates an obligation for the person to repair things, while justice involves the involvement of the offender, victim, and the community into a process that should result in the correction of damage, reconciliation, and prevention of criminal offenses (Zehr, 1990). Furthermore, Howard Zehr lays out a skeletal outline of restorative justice, which provides a framework upon which a fuller understanding can be built. According to his outline, „restorative justice requires, at minimum, that we...

- Adress victims' harms and needs
- hold offenders accountable to put right those harms,
- and involve victims, offenders and communities in this process” (Zehr, 2002, p. 23).

Daniel Van Ness and Karen Heetderks-Strong believe that restorative justice takes into consideration the underlying violation of the criminal offense, as well as, the attempt to prevent its re-emergence; it implies full acceptance of responsibility by the offender for his behavior, and strives for reintegration of both the offender and the victim into the community (Ćopić, 2013, p. 29-30). However, it was Tony Marshall who gave the most famous, most widespread, and accepted definition of restorative justice. He understands restorative justice as a procedure in which all parties, or participants in a specific criminal offense, meet, in order to decide together on the resolution of the consequences of the criminal offense and its implications for the future (Clark, 2008, p. 339). Although the definition is far from universal, it serves as a good starting point in understanding this issue.

Nowadays, there are a series of international legal documents that set the standards for including restorative programs into national legal frameworks and suggests the application of restorative justice as a response to crime. In fact, they are paving the way for reforms of modern criminal justice systems.³

³ There are two groups of international legal documents when it comes to restorative justice. The first group consists of a wide range of international documents that are concerned with restorative justice in a broader way, basically suggesting its use in criminal law practice with a view to improving the position of crime victims (e.g. *UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power*(1985), *Recommendation No. R (85) 11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure*, *Council Framework Decision on the standing of victims in criminal proceedings* (2001/220/

Apart from differences in understanding and defining restorative justice, advocates of this concept concede that there is considerable uniformity in terms of the basic principles on which the model of restorative justice is based. Analyzing Bazemore et al. thought and literature dealing with basic ideas, values and problems related to restorative justice, it is noted that, in general, restorative justice is based on four principles:

- The perception of the crime, first of all, as a violation of people and interpersonal relations;
- Correction of damage caused by a criminal offense;
- Creating the conditions that the offender understands and takes responsibility for his work (active responsibility); and
- Reintegration of the offender and the victim (Bazemore and Umbreit, 1998; Bazemore, O'Brien and Carey, 2005).

2. Restorative Justice in the criminal legislation of Bosnia and Herzegovina

The trend of introducing elements of restorative justice into the legal system did not bypass Bosnia and Herzegovina. Starting in 1998, with modifications in our criminal legislation, certain conceptual effects of the model of restorative justice start to emerge. This is a positive step in the process of reforming Bosnia and Herzegovina's legal system⁴ and its harmonization with relevant international standards. However, in our legal system, restorative justice is primarily seen as a form of reacting to the juvenile's criminality and those who have done a relatively minor offense. At least for now, the necessity of employing restorative character mechanisms to address serious adult offenses is neglected. It is quite reasonable to say that restorative justice has been accepted only partially in Bosnia and Herzegovina's legal system. The decision to use restorative mea-

JHA), Recommendation Rec (2006) 8 of the Committee of Ministers to Member States on assistance to Crime Victims, Vienna Declaration on Crime and Justice (2000).

The second group of documents consists of those who directly deal with restorative justice and establish standards and principles for its application in response to criminality (e.g. *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000), Recommendation No. R (99) 19 of the Committee of Ministers to Member States concerning Mediation in Penal Matters* and the *Document of the European Forum on Victims of Victim Assistance in the Mediation Process (2005)*). Nowadays, they are crucial in setting the basis for the reform of criminal justice systems regarding the inclusion of measures, programs and procedures of restorative character.

⁴In terms of the organizational framework of the legal system, taking into account the specific constitutional and territorial organization, there are four legal systems in Bosnia and Herzegovina: the legal system of Bosnia and Herzegovina, the legal systems of the Entities (the Federation of Bosnia and Herzegovina and the Republic of Srpska) and the legal system of the Brčko District of Bosnia and Herzegovina. Consequently, the matter of criminal justice, like wise restorative justice, is regulated in different levels of authority.

sures depends on whether the perpetrators are adults or juveniles.

2.1. Restorative justice for adult offenders

When it comes to *adult offenders*, elements of restorative justice in the criminal legislation of Bosnia and Herzegovina are visible in the following circumstances: when the victim submits a property claim for damages as result of the offense, when requiring community service as an alternative to a prison sentence, and when requiring the offender to fulfill certain obligations as a condition of probation.

2.1.1. Property claim

At the trial stage, the first manifestation of restorative justice is apparent in the possibility for the victim to file a property claim for damages, if her personal or property rights were endangered or damaged by a criminal offense. The property claim shall be discussed at the proposal of an authorized person in the criminal proceedings if it would not significantly delay this procedure.

The proposal for the property claim can be filed no later than the end of the main hearing or the hearing for the pronouncement of a criminal sanction before a court. The person authorized to submit a proposal is obliged to designate his/her request and submit evidence. An authorized person may, until the completion of the main hearing or the hearing for the pronouncement of a criminal sanction, withdrawal from the proposal for the realization of property claim in the criminal procedure and file a claim in a civil proceeding. In case of withdrawal from the proposal, such a proposal can not be submitted again, unless otherwise determined by law.

The property claim can refer to compensation for damages, a return of goods, or an annulment of a particular legal transaction. Elements of restorative justice are reflected in the possibility for the court to propose to the injured party (victim) and the defendant (the accused), a mediation procedure through a third party mediator in accordance with the law, if the court determines mediation is the appropriate means to resolve that particular property claim. The request to refer the dispute to mediation may also be made by the injured party and the defendant, until the completion of the main hearing (Articles 193.-204. Code on Criminal Procedure of Bosnia and Herzegovina)⁵.

The procedure of mediation between the victim and the offender is regulated by the provisions of the Law on Mediation Procedure, the Law on the

⁵Further in text: CCPBH

Transfer of Mediation Activities to the Association of Mediators, and a series of implementing laws. According to the Law on Mediation Procedure, mediation is a process in which a neutral third party (mediator) helps the parties in an effort to reach a mutually acceptable solution to the dispute⁶.

The basic principles of the mediation process, according to aforementioned legal sources, are as follows:

Volunteering - parties voluntarily initiate mediation proceedings and participate in the achievement of a mutually recognized agreement.

Confidentiality – Mediation procedure is a confidential nature. The statements of parties presented in the mediation procedure can not be used as evidence in any other proceedings without the consent of the parties.

Equality of the parties - parties in the mediation process have the same rights.

Neutrality of the mediator - the mediator mediates in a neutral way, without prejudice to the parties and the subject matter of the dispute. Mediators should have a fair and impartial approach and act with good intentions and according to parties' needs and interests. The mediator will not favor any of parties.

Prior to mediation, the Association of Mediators in Bosnia and Herzegovina will provide the parties with a mediation contract and a deposit invoice that the parties have to pay before the commencement of the proceedings. The mediation process is initiated by a written mediation contract signed by the parties in dispute and the mediator. The mediation contract must contain: information on the contracting parties, legal representatives or proxies, the subject of mediation (description of the dispute), a statement on the adoption of the principle of mediation defined by law, the place of mediation maintenance, as well as provisions on the costs of the proceedings, including compensation to the mediator. It is evident that the adopted model is similar to "Commercial Mediation".

The Law on Mediation Procedure prescribes the conditions for dealing with mediation. Thus, a mediator may be a person who meets the general requirements for employment. In addition, according to the Article 31 of the Law on Mediation Procedure, mediators must also meet the following requirements:

- high professional education;
- completed training according to the program of the Association of Mediators in Bosnia and Herzegovina or another program recognized by the Association; and
- enrollment in the Register of Mediators conducted by the Association of Mediators in Bosnia and Herzegovina.

⁶Mediation activities are performed by the Association of Mediators in Bosnia and Herzegovina registered with the Decision of the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina, No: RU/ 44/02 of 05.11.2002.

2.1.2. Work for the common good at liberty

The criminal material legislation of Bosnia and Herzegovina (Article 43. Criminal Code of Bosnia and Herzegovina⁷, Article 44. Criminal Code of Federation of Bosnia and Herzegovina⁸, Article 34. Criminal Code of Republic of Srpska⁹, Article 44. Criminal Code of Brčko District of Bosnia and Herzegovina¹⁰) prescribes another measure with restorative elements when it comes to adult offenders - work for the common good at liberty, a sanction that was incorporated into all criminal laws in Bosnia and Herzegovina in 2003. According to that provision, when the court reviews and imposes a sentence of imprisonment for a term of up to one year, it may at the same time determine that the imposed sentence (with the consent of the accused) be replaced with work for the common good at liberty. Therefore, in our criminal procedural legislation, work for the common good at liberty represents a substitute for a pronounced imprisonment, rather than an independent alternative sanction.

Furthermore, according to the above-mentioned article, work for the common good at liberty shall be determined for the duration of the proportionate sentence of imprisonment of not less than ten to ninety working days. The time limit for the performance of work for the common good at liberty can not be shorter than one month or longer than one year¹¹. In evaluation of the duration of the work for the common good at liberty, as well as the timing of the work, the court will consider the duration of prison sentence to be replaced and the abilities of the offender, given his personal situation and employment.

The allocation to work for the common good at liberty in terms of the type and place of work in the Federation of Bosnia and Herzegovina shall be performed by the cantonal ministry in charge of the affairs of the judiciary according to the place of residence or place of residence of the convicted persons, taking into account his abilities and knowledge. In Republika Srpska, this deployment is carried out by the Ministry of Justice of Republika Srpska, in the Brčko District of Bosnia and Herzegovina, by the Judicial Commission, and at the state level, the Ministry of Justice of Bosnia and Herzegovina.

2.1.3. Conditional sentence

One of the warning measures that are prescribed in the criminal material legislation of Bosnia and Herzegovina within articles 58-65. CCBH, articles 62-

⁷ Further in text: CCBH.

⁸ Further in text: CCFBH.

⁹ Further in text: CCRS.

¹⁰ Further in text: CCBDBH

¹¹ In Republika Srpska that period can not be longer than six months.

68. CCFBH, articles 46-52. CCRS, articles 59-68. CCBDBH – is *conditional sentence* and it contains elements of restorative justice in the broader sense. Namely, in a conditional sentence, the court may, *inter alia*, obligate the convicted to compensate for the damage caused by the criminal offense and order that the offender may not have contact with the victim. With a suspended sentence, the court imposes a criminal sentence but suspends the term of the sentence, which can not be shorter than one or more than five years (the term of probation), as long as the offender does not commit a new criminal offense during the term of probation. When deciding whether to pronounce a suspended sentence, the court shall, having in mind the purpose of the conditional conviction, taking into account the personality of the offender, his earlier life, his conduct after the committed criminal offense, the degree of guilt, and other circumstances under which the criminal offense was committed. A suspended sentence can be pronounced when the offender is punished with imprisonment of up to two years or as little as a fine.

The court shall revoke the conditional sentence and order the execution of the sentence imposed if the convicted person fails to fulfill the obligation(s) during the term of probation, assuming the convicted was not prevented from fulfilling that obligation due to impossibility. In case of impossibility to fulfill the obligation imposed, the court may extend the deadline to fulfill this obligation, or replace it with another appropriate obligation provided for in the relevant criminal legislation, or release the convicted person as if the obligation was fulfilled as imposed.

2.2. Restorative justice for juvenile offenders

In the phase of investigation, the initiation of criminal proceedings against *juveniles*, restorative justice is manifested in the provisions on educational recommendations and police warnings. In the phase of criminal proceedings, restorative justice is manifested in the provisions on educational measures - special obligations and delayed pronouncement of the sentence of juvenile imprisonment. Nevertheless, restorative justice is predominately utilized in deciding upon educational recommendations or police warnings.

2.2.1. Educational recommendations

The objective condition for educational recommendations for the offence a prescribed sanction of either a monetary fine or imprisonment up to five years

in the Republic of Srpska, or up to three years in the Federation of Bosnia and Herzegovina and Brčko District of Bosnia and Herzegovina, and in exceptional circumstances when the seriousness of the offense deems, punishment may be imprisonment for more than five or three years. (Article 24. paragraph 1. Code on protection and dealing with juveniles in criminal procedure in Republic of Srpska, Article 24. paragraph 1. Code on protection and dealing with juveniles in criminal procedure in Brčko District of Bosnia and Herzegovina, Article 24. paragraph 1. Code on protection and dealing with juveniles in criminal procedure in Federation of Bosnia and Herzegovina).

If we proceed from the provisions of a special part of our material criminal legislation, bearing in mind that this condition related to the level of punishment aforementioned, we can conclude that the application educational recommendations is not negligible. For example, educational recommendations can be imposed on a minor who has committed one of the following crimes: unwanted deprivation of life, suicide and suicide assistance, light bodily injuries, serious bodily injuries /certain forms/, participation in the fight, unlawful deprivation of liberty, theft, trafficking in human beings for prostitution, extortion, blackmail, computer sabotage, causing general danger etc.

Bearing in mind the solution of the earlier legislation (which solution still exists in the criminal law at the state level- Article 76. paragraph 1. CCBH), where the application of educational recommendations was reserved only for less serious offenses, the use of educational recommendations was quite big news and caused significant divisions within the professional and scientific public in Bosnia and Herzegovina. There are subjective conditions which require the juvenile to admit to perpetration of the offence and he/she shows an interest to interface with the victim. However, there are additional conditions that do not recognize criminal law at the state level: the confession is given freely and voluntarily; there is sufficient evidence that a minor has committed a criminal offense; the juvenile in writing expresses readiness to reconcile with the injured party; that he or she has written consent to the adoption of educational recommendations, or for a younger juvenile, the parents and guardians have given written consent; and, finally, to give written consent to the injured party when this is required by law (Article 24. paragraph 2. Code on protection and dealing with juveniles in criminal procedure in Republic of Srpska; Article 24. paragraph 2. Code on protection and dealing with juveniles in criminal procedure in Brčko District of Bosnia and Herzegovina; Article 24. paragraph 2. Code on protection and dealing with juveniles in criminal proceedings in Federation of Bosnia and Herzegovina; Article 76. paragraph 3. CCBH).

The new legislation of Republic of Srpska, the Brčko District of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina recognizes six educational recommendations. They are by their nature and content partially dif-

ferent and in that sense can be classified into several groups (Babić et al, 2005, p. 355-356).

The first group includes those recommendations that regulate personal relationships between juveniles and the injured party. These are recommendations: personal appeal to the injured and compensation for the damage suffered. The second group includes recommendations referring to the education and work of minors as recommendations of a treatment nature. This includes: *regular school attendance or regular work attendance and/or volunteering, free of charge, in humanitarian organizations or in matters of social, local, or ecological content*. Finally, the third group consists of educational recommendations of a medical nature aimed at removing or mitigating factors that have generated juvenile delinquency, such as: *treatment in an appropriate health care facility (hospital or outpatient) and inclusion in individual or group treatment of educational, educational, psychological, and other counseling centers*.

Furthermore, the new juvenile criminal law opens up the possibility that each of the six educational recommendations, one or more of them cumulatively, can be pronounced by both the prosecutor and the juvenile judge. When it comes to the state-level juvenile criminal legislation, the jurisdiction to apply certain educational recommendations is divided between the prosecutor or the juvenile judge.

Thus, the competent prosecutor may apply educational recommendations: *personal appeal to the injured, compensation for the damage suffered, regular attendance of the school, and visits to educational, educational, psychological and other counseling centers*, while juvenile judge may apply these educational recommendations: *volunteering at a humanitarian organization or the local community, acceptance of appropriate employment, accommodation in another family, home or institution, and treatment at an appropriate health institution* (Articles 78. paragraph 1. and 2. CCBH). Accordingly, state-level juvenile criminal legislation recognizes educational recommendation that is not in separate juvenile legislation, *the accommodation of another family, home or institution*.

The new juvenile criminal law in the process of pronouncing and executing certain educational recommendations provides mediation. Namely, when applying for educational recommendations: the juvenile must write a personal apology to the injured party and pay damages caused by their criminal actions. Also, in addition to the written consent given by the offending juvenile, written consent is required from the person who has been damaged by criminal offense. In this case, mediation between a minor offender and a victim is performed by an authorized person of a social welfare body, trained to conduct mediation, monitoring, and reporting. If there is no qualified person for mediation, the prosecutor or the judge may determine that the mediation procedure between

the juveniles and the injured party is carried out by the mediation organization. State-level juvenile criminal legislation does not, however, specify the conditions for applying any of the aforementioned educational recommendations.

In the course of its implementation, the specific educational recommendation may be replaced by another recommendation or completely terminated if deemed appropriate (Article 27. of Code on protection and dealing with juveniles in criminal procedure in Republic of Srpska; Article 27. of Code on protection and dealing with juveniles in criminal procedure in Brčko District of Bosnia and Herzegovina; Article 27. Of Code on protection and dealing with juveniles in criminal procedure in Federation of Bosnia and Herzegovina). When the obligation imposed by the educational recommendation is successfully completed, the prosecutor issues an order to withdrawal the motion for preparatory proceedings against the juvenile and the juvenile judge dismisses the action.

If, on the basis of a report by the custody body, it is found that a minor, for no good reason refuses to fulfill the obligation under the the educational recommendation or has misbehaved, the prosecutor issues an order to initiate the preparatory proceedings and the judge schedules a session or the main hearing (Articles 90., 105. and 106. Code on protection and dealing with juveniles in criminal procedure in Republic of Srpska; Articles 90., 105. and 106. Code on protection and dealing with juveniles in criminal procedure in Brčko District of Bosnia and Herzegovina; Articles 90., 105. and 106. Code on protection and dealing with juveniles in criminal procedure in Federation of Bosnia and Herzegovina).

2.2.2. Police warning

Regarding a police warning, it can be given if, objectively, the monetary fine or the term of imprisonment is 3 years or less (respectively up to 1 year in Brčko District of Bosnia and Herzegovina) as prescribed for the criminal offence, and subjectively, if perpetrator willingly plead guilty, there insufficient evidence to prove the perpetrator committed the crime, and finally, the perpetrator has not received a police warning for a past offense. A record of the police warning is kept by the police. This record does not carry the same weight as a criminal record of juvenile convictions does and can not be used in any manner which would harm a juvenile (Articles 22-23. Code on protection and dealing with juveniles in criminal procedure in Republic of Srpska; Articles 22-23. Code on protection and dealing with juveniles in criminal procedure in Brčko District of Bosnia and Herzegovina; Article 23. Code on protection and dealing with juveniles in criminal procedure in Federation of Bosnia and Herzegovina).

A police warning is issued prior to the start of the preparatory procedure.

An authorized police officer with special knowledge in the field of child rights and juvenile delinquency is authorized by the prosecutor's office to issue the order. The prosecutor may, under legal conditions, approve the statement of a police warning. Upon approval from the prosecutor, the authorized police officer shall within three days impose a police warning and inform the minor of the social inadmissibility of the warning, the harmfulness of his behavior, the consequences that such conduct may have on him, the possibility of conducting criminal proceedings, and potential criminal sanctions applicable in case the criminal offense is re-opened due to failure to comply with the warning.

2.2.3. Educational measures - special obligations

They are used in the event that the court considers that such special obligations requires intensified supervision for the successful execution of the educational measure. The purpose of adding the special obligation of intensified supervision to the educational measure is to improve the personal responsibility of the juvenile, to improve his awareness of the need to respect social and legal norms, to assist in the development of a positive attitude to some of the basic values of his community and society, as well as, to eliminated the factors that can lead to recidivism. The court is obliged to take into consideration the circumstances surrounding the juvenile's personality and the offense he committed.

In the new juvenile legislation, the character of autonomous juvenile criminal sanctions that can be pronounced independently have been addressed. Also, although in the new legislation they represent a separate type of educational measure, special measures can continue to be imposed under enhanced surveillance measures (*sui generis* measures). In those cases, the special measures do not expire until the measure of enhanced supervision expires, in other words, they can last longer than when they are termed as an autonomous educational measure.

The court may impose one or more special obligations on a minor if the court considers that appropriate orders or bans will positively affect the juvenile and his behavior. The court may impose these special obligations on the juvenile:

- attend school regularly,
- Sufficient work attendance,
- seek an occupation fit for his abilities and tendencies,
- volunteer at humanitarian organizations or affairs of social, local or ecological content,
- refrain from visiting certain locales or events and avoid the company of

- certain individuals who may be harmful to him,
- subject to the consent of the legal guardian, abide by medical treatment programs to address addiction issues, drugs or otherwise,
- engage in individual or group work at the youth counseling center,
- attend vocational training courses or prepare for and take examinations to determine the appropriate courses,
- engage in certain sports and recreational activities, and
- receive the special consent of the court in order to leave the place of residence or residence.

The new separate legislation on juveniles does not foresee certain special obligations: a request for damages and damages awarded to the injured party, which was provided for in the previous legislation. That is regulated by substantive criminal law at the state level and it is possible to request mediation and thus provide restorative justice. On the other hand, the new juvenile legislation has elements of restorative justice which are evidenced in a provision stipulating that the court must take into consideration the readiness of the juvenile to cooperate into their selection of particular obligations. Likewise, restorativeism is reflected in the ability of a judge to impose a special obligation on the juvenile to volunteer at humanitarian organizations, whereby the purpose of the work or the work that the juvenile provides must be directed primarily at eliminating the harmful consequences of the criminal offense.

The obligations imposed may last for a maximum of one year. Supervision over the execution of special obligations shall be performed by a court, which may request a report and an opinion of the social welfare body. Regulations on the application of special obligations for juvenile perpetrators of criminal offenses have also been issued and were made by the justice minister of the entity for which they pertain, i.e. the Judicial Commission of the Brčko District of Bosnia and Herzegovina (Article 22-23. Code on protection and dealing with juveniles in criminal procedure in Republic of Srpska; Article 22-23. Code on protection and dealing with juveniles in criminal procedure in Brčko District of Bosnia and Herzegovina; Article 23. Code on protection and dealing with juveniles in criminal procedure in Federation of Bosnia and Herzegovina).

2.2.4. Delayed pronouncement of the sentence of juvenile imprisonment

The court may impose a sentence of juvenile imprisonment and at the same time suspend the sentence, when it can be reasonably expected that the potential of serving a sentence of imprisonment will serve as an effective deterrence for the minor to prevent future criminal activity, provided that during the probationary time (which may not be shorter than one year or longer than three

years) the juvenile does not commit a new criminal offense, complies with the imposed imposed with the juvenile imprisonment. Upon the expiration of at least one year of probation, the court may, after obtaining the report of the guardianship authority, issue a final waiver of the sentence. This is predicated on a determination that the minor will not commit any new offenses (Article 54. Code on protection and dealing with juveniles in criminal procedure in Republic of Srpska; Article 54. Code on protection and dealing with juveniles in criminal procedure in Brčko District of Bosnia and Herzegovina; Article 54. Code on protection and dealing with juveniles in criminal procedure in Federation of Bosnia and Herzegovina).

Namely, in the ability of a juvenile judge to impose a special obligation to require a juvenile offender to volunteer at humanitarian organizations or the affairs of social, local or ecological content, are visible elements of restorative justice.

2.3. Practical application of restorative programs in the Canton of Sarajevo from 2006 until the end of 2015.

Besides giving a detailed overview on the restorative regulations in legal system of Bosnia and Herzegovina, the authors will provide an analysis of the practical application of restorative programs (educational recommendations, police warning, and work for the common good at liberty) in Federation of Bosnia and Herzegovina (rather in the Canton of Sarajevo) in period from 2006. until the end of 2015. An analysis of the practical application of the restorative institutes throughout whole country is almost impossible to provide. There are several issues in this regard, namely, there are no specific databases at the statistical institutes, where all relevant indicators can be found. There is no data either at the justice ministries or in the Brčko District Judicial Commission. Some records exist in courts and prosecutors' offices, but these are incomplete and interpreted mostly in annual or semi-annual reports on the work of these institutions, not in an idle database.

Therefore, we sent a request for free access to information (based on the laws on free access to information) to the competent institutions in the Canton of Sarajevo, specifically: Cantonal Prosecutor's Office of Sarajevo Canton, Municipal Court in Sarajevo and Ministry of Internal Affairs of Sarajevo Canton. Below we will present the information based on the data that was provided to us.

2.3.1. Review of the pronouncement of educational recommendations in Cantonal

Prosecutor's Office of Sarajevo Canton from 2006 until the end of 2015

From the table below, it is evident that the Sarajevo Cantonal Prosecutor's Office had 5,463 applications in the period from 2006. until the end of 2015. and it did not pronounce any educational recommendations. During that time period the principle of opportunity to apply such measures was available in 206 cases. Bearing in mind the number of criminal charges, it is unacceptable that the educational recommendations in the observed period are not pronounced in practice.

	Number of criminal charges in work (total)	Number of decisions on non-incitement of criminal procedure (opportunity)	Educational recommendations (prosecutor)	Educational recommendations (judge)
2006	991	-	-	-
2007	828	-	-	-
2008	676	-	-	-
2009	599	-	-	-
2010	486	-	-	-
2011	522	46	-	-
2012	460	112	-	-
2013	391	34	-	-
2014	304	2	no data	-
2015	206	12	0	

2.3.2. Review of the pronouncement of educational recommendations in the Municipal Court of Sarajevo in period from 2006 until the end of 2015

From the act of Municipal Court in Sarajevo it is evident that the Municipal Court of Sarajevo in the observed period did not pronounce any educational recommendations to juvenile offenders.

2.3.3. Review of the pronouncement of police warnings in the Ministry of Internal

Affairs of Sarajevo Canton in 2015

The application of police warnings in Federation of Bosnia and Herzegovina, and therefore in Sarajevo Canton, began with the beginning of 2015. From the act of Ministry of Internal Affairs of Sarajevo Canton it is evident that the police officers of the Ministry of Internal Affairs of the Sarajevo Canton did not pronounce any police warnings for juvenile offenders of criminal offenses in 2015.

2.3.4. Review of the pronouncement of work for the common good at liberty in Municipal Court of Sarajevo in period from 2006. until the end of 2015

From the report submitted, the Municipal Court in Sarajevo in the period from 2006. until the end of 2015. decided to replace the pronounced prison sentence with work for the common good at liberty in only four (4) cases.

3. Conclusion

Reforms of the criminal legislation in Bosnia and Herzegovina started in 1998 and marked the introduction of certain elements of restorative justice into a docile, traditionally retributive criminal justice system. When it comes to resorting to restorative mechanisms in relation to adult perpetrators, the legal solutions are quite “poor”, so we can argue that restorative justice is a better solution. In that sense, it would be useful to use examples of good practice in the future, especially in the neighboring countries that are close to Bosnia and Herzegovina, given the similar legal and historical heritage.

Unfortunately it is undisputed that in practice, restorative mechanisms are not sufficiently applied in the Canton of Sarajevo. This situation can be partly explained by the lack of adequate theoretical grounding, respectively, by not recognizing and insufficiently understanding the essence of the concept of restorative justice. Namely, as Sanja Ćopić points out, the assessment of whether and to what extent a restorative system cannot be carried out cannot be made based only the type or number of restorative character measures or abstract estimates of legal solutions, but require their implementation in practice (Ćopić, 2010, p. 259, 262).

Furthermore, a whole host of steps must be taken in order to improve the existing criminal justice system and to make use of restorative mechanisms in practice. It is necessary recruit additional experts and obtain the necessary equipment for the relevant institutions so that they can perform their role properly, especially in the new juvenile justice system. The new juvenile criminal

legislation specifically lays down the obligation of continuous professional training and upgrading of all persons working in the field of juvenile delinquency and criminal justice. It is also important to implement and target public awareness of the efficiency and benefits of restorative justice through the media (radio, press, television), by organizing public meetings, forums, lectures, round tables, publishing brochures, newsletters, publishing works in professional and scientific journals, publishing educational material, books, manuals, etc., since civil society's involvement is of primary importance for the implementation of restorative measures.

By pointing out the advantages of restorative justice, the advocacy campaign addresses the necessity of its inclusion in the criminal justice system of Bosnia and Herzegovina. It seeks to boost interest in this new criminal law and criminal-political concept. We think it should become a realistic complement to the current criminal justice system. Therefore, we consider that the restorative approach should not be viewed solely as opposed to the classical criminal justice approach, but as far as possible these two approaches should be treated as complementary, as two components of more efficient, more comprehensive, and a more humane form of justice. It will represent a step closer to a society that, as well-known criminologist Martin Wright states, functions with a "response on evil with evil, but to eradicate the evil with good" (Wright, 1996, p. 162).

Bibliography

Babić, Miloš. et al. (2005) *Komentari krivičnih/kaznenih zakona u Bosni i Hercegovini*, Savjet/Vijeće Evrope i Evropska komisija, Sarajevo;

Bazemore, Gordon., O'Brien, Sandra., Carey, Mark. (2005) *The Synergy and Substance of Organisational and Community Change in the Response to Crime and Conflict: The Emergence and Potential of Restorative Justice* (online). Public Organisation Review, Springer Science & Business Media B.V., Dordrecht, vol. 5. - No. 4.;

Bazemore, Gordon., Umbreit, Mark. (1998) *Guide for Implementing the Balanced and Restorative Justice Model*, U.S. Department of Justice, Washington-DC;

Bergseth, Kathleen J., Bouffard, Jeffrey A. (2007) *The Long-Term Impact of Restorative Justice Programming for Juvenile Offenders*, Journal of Criminal Justice, Elsevier, Amsterdam, vol. 35., No. 4.;

Clark, Janine. (2008) *The Three Rs: Retributive Justice, Restorative Justice and Reconciliation*, Contemporary Justice Review, Routledge Taylor & Francis Group, Oxford, vol. 11., No. 4. Available on: <http://www.tandfonline.com/toc/gcjr20/11/4>.;

Code on Criminal Procedure of Bosnia and Herzegovina ("Official Gazette of

Bosnia and Herzegovina”, No: 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13, 65/18);

Code on Criminal Procedure of Federation of Bosnia and Herzegovina (“Official Gazette of Federation of Bosnia and Herzegovina”, No: 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13, 59/14);

Code on Criminal Procedure of Brčko District of Bosnia and Herzegovina (“Official Gazette of Brčko District of Bosnia and Herzegovina”, No: 10/03, 48/04, 6/05, 14/07, 19/07, 21/07, 2/08, 17/09, 9/13);

Code on Criminal Procedure of Republic of Srpska (“Official Gazette of Republic of Srpska”, No: 53/12);

Code on protection and dealing with juveniles in criminal procedure in Republic of Srpska (“Official Gazette of Republic of Srpska”, No:13/10, 61/13) ;

Code on protection and dealing with juveniles in criminal procedure in Brčko District of Bosnia and Herzegovina (“Official Gazette of Brčko District of Bosnia and Herzegovina”, No.: 44/11) .

Code on protection and dealing with juveniles in criminal procedure in Federation of Bosnia and Herzegovina (“Official Gazette of Federation of Bosnia and Herzegovina”, No: 7/14);

Criminal Code of Bosnia and Herzegovina (“Official Gazette of Bosnia and Herzegovina“, No:3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15, 35/18);

Criminal Code of Brčko District of Bosnia and Herzegovina (“Official Gazette of Brčko District of Bosnia and Herzegovina“, No: 10/03, 45/04, 6/05, 21/10, 47/11, 52/11, 33/13);

Criminal Code of Federation of Bosnia and Herzegovina (“Official Gazette of Federation of Bosnia and Herzegovina“, No: 36/06, 37,03 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16, 75/17);

Criminal Code of Republic of Srpska (“Official Gazette of Republic of Srpska“, No: 64/17);

Ćopić, Sanja. (2010) *Restorativna pravda i krivičnopravni sistem* (doktorska disertacija), Pravni fakultet Univerziteta u Nišu, Niš;

Dancig-Rosenberg Hadar., Gal, Tali. (2013) *Restorative Criminal Justice*, Cardozo Law Review, Benjamin N. Cardozo School of Law, New York-NY, vol. 34., No. 6.;

Foucault, Michel. (1997) *Nadzirati i kažnjavati*, Izdavačka knjižarnica Zorana Stojanovića, Novi Sad;

Gavrielides, Theo. (2007) *Restorative Justice Theory and Practice: Addressing the Discrepancy*, Helsinki: European Institute for Crime Prevention and Control;

Law on Mediation Procedure (“Official Gazette of Bosnia and Herzegovina”, No: 37/04);

Law on the Transfer of Mediation Activities to the Association of Mediators (“Official Gazette of Bosnia and Herzegovina”, No: 52/05);

Mirosavljević, Anja. (2010) *Modeli restorativne pravde u svijetu za mlade u sukobu sa zakonom i pregled istraživanja njihove učinkovitosti*, Kriminologija i socijalna integracija, Edukacijsko-rehabilitacijski fakultet Sveučilišta u Zagrebu, vol. 18., No. 1.;

Wright, Martin. (1996) *Justice for Victims and Offenders. A Restorative Response to Crime*, Waterside Press, Winchester;

Zehr, Howard. (1990) *Changing Lenses*, Herald Press, Scottsdale-PA;

Zehr, Howard. (2002) *The Little Book of Restorative Justice (The Little Books of Justice & Peacebuilding)*, Paperback – January 1.

Authors' Bio

Daniela Arieti has a degree in Sociology at University of Trient (2005), a Master's degree in Forensic Sciences at "La Sapienza" University in Rome (2007) and a specific training in penal mediation at faculty of law in Trient (2008). Since 2009 she has been working as Penal Mediator at the Restorative Justice Center of the Region Trentino Alto Adige, in the field of juvenile justice and adults justice (specifically justice of peace and adult probation) and also at a community level.

Rialda Ćorović was born on March 17, 1987, in Sarajevo, Bosnia and Herzegovina. In March 2018 she got her PhD degree at the Faculty of Law of the University of Sarajevo, with the doctoral dissertation entitled "*Restorative Justice in the Criminal Justice System*". She works in the Ministry of Internal Affairs of Canton Sarajevo.

Giovanni Grandi is professor of Moral Philosophy at the University of Padova. He teaches *Theoretical and Historical Grounds of Philosophical Anthropology* and *Conflict Analysis, Forms of Justice and Restorative Practices*. He is the leader of the scientific research team on Restorative Justice at University of Padova and has contributed with several publication to the topic.

Simone Grigoletto is a post-doc researcher in Social Innovation at Area Science Park. He is working on a theoretical expansion of the Restorative Approach beyond the Penal Justice system. His further research interests deal with the major issues in contemporary moral philosophy. Other than Restorative Justice, he is the author of publications on supererogation, moral excellence and moral exemplarism.

Katja Holzner has completed her degree in Politics at the University of Bologna (2005). She, then specialized in Institutions and Politics in Cultures and Human Rights at the University of Padova (2008). Since 2009 she works as a penal mediator at Restorative Justice Center of the Autonomous Region Trentino – Alto Adige /Südtirol. Her primary focus is working with minors and adults, also at a community level.

Ena Kazić is an Assistant Professor at Faculty of Law of International Uni-

versity of Sarajevo, in the scientific area of Criminal Law. Her research addresses topics of sexual violence prevention and restorative justice

Gian Luigi Lepri, psychologist and psychotherapist, methodological coordinator, supervisor of the counseling service for student and coordinator of the Restorative Justice Practices Team (UNISS), member of the Values and Standard working group and Vice-Chair of the Working Group on Restorative Cities of the European Forum of Restorative Justice.

Ernesto Lodi, PhD, psychologist and psychotherapist, researcher on social psychology at University of Sassari, honorary judge at the Juvenile Court of Sassari. He is a member of: Restorative Justice Practices Team (Uniss); EFRJ-European Forum for Restorative Justice; PsicoIus-Roman School of Psychology and Law.

Beatrice Magro is professor of criminal law, as well as the director of the Master in Forensic Sciences at the G. Marconi University of Rome. She is a member of the editorial and scientific committee of specialized magazines. She is the author of numerous publications about the end of life and, recently, the relations between law and neuroscience.

Elena Mattevi Adjunct Professor of Criminal Law at the University of Trento, she is author of numerous publications on restorative justice, probation, immigration and criminal law, prison law and ADR. She is author of the book "Una giustizia più riparativa (ESI, 2017), and co-editor of the book "Giustizia riparativa: responsabilità, partecipazione, riparazione" (Università degli Studi di Trento, 2019).

Adriana Michilli is a second year PhD Fellow at The University of Padua, Human Rights Centre. Her research interests include: securing access to justice in transitional societies, providing redress for victims of gross human rights violations, & institutionalizing democratic reforms in the Western Balkan context.

Elena Militello is a Ph.D. Candidate in Law and Humanities at the University of Insubria in Como, Italy. Her main research interests are comparative criminal procedure, restorative justice, and corporate criminal liability. She has been a Visiting Researcher in Los Angeles, Freiburg and Luxembourg.

Patrizia Patrizi, psychologist and psychotherapist, full professor of Psychology and Law and Restorative Justice Practices (University of Sassari). She is director of the Restorative Justice Practices Team (Uniss), president of PsicoIus, member of the EFRJ board (European Forum for Restorative Justice).

Ana Pereira is a Ph.D researcher in Criminology working in the Research Line on Restorative Justice and Victimology of the Leuven Institute of Criminology (KU Leuven). She holds a Bachelor's and a Master's degree in Criminology from University of Porto (Portugal). Her areas of interest are restorative justice, moral psychology, experimental criminology, desistance of crime and (de)radicalisation.

Chiara Perini, Ph. D., is associate professor in criminal law at the University of Insubria. Within the Law Degree she teaches the courses of Criminal Law, Business and Corporate Criminal Law, Restorative Justice and Victim-offender Mediation. She is member of the Scientific Committee of the Restorative Justice and Mediation Studies Centre (Univ. Insubria).

Lucille Rivin, Senior Director of Curriculum at The Leadership Program, has overseen the development of its Restorative Justice coaching/coordination program in schools. Dedicated to nurturing Restorative Practices in schools and communities, Lucille has presented at RJ conferences internationally.

Howard Zehr is currently the Distinguished Professor of Restorative Justice at Eastern Mennonite University's Center for Justice and Peacebuilding, and co-director of the Zehr Institute for Restorative Justice. Zehr is considered to be a pioneer of the contemporary studies on Restorative Justice and his works have grounded and established a well-know reference for the scientific debate.

With the contribution of: Daniela Arieti, Rialda Ćorović, Giovanni Grandi, Simone Grigoletto, Katja Holzner, Ena Kazić, Gian Luigi Lepri, Ernesto Lodi, Maria Beatrice Magro, Elena Mattevi, Adriana Michilli, Elena Militello, Patrizia Patrizi, Ana Pereira, Chiara Perini, Lucille Rivin, Howard Zehr.

In the last decades, Restorative Justice has represented an emerging new practice to deal with conflict management. This promising approach suggests looking at conflicts from a different perspective, with a specific attention to the needs of the victims. This volume emphasizes possible expansion of the approach to a variety of aspects of the social environment. Specifically, then, the focus will be on the Restorative Approach and Social Innovation. How can we connect these two topics? In what sense Restorative Justice is not simply an innovative practice for the public administration of justice, but also a paradigm for social innovation? How can restorative principles affect our everyday lives and improve the quality of our relationships? Questions like these have guided and characterized the 2018 Restorative Justice International Conference at the University of Padova entitled "Restorative Approach and Social Innovation: From Theoretical Grounds to Sustainable Practices". The present volume collects some of the best contributions from the event and some other works that try to focus on a possible expansion of the reach of the Restorative Approach.

€ 40,00

ISBN 978-88-6938-161-4



9 788869 381614