

RESTORATIVE JUVENILE JUSTICE – THE CHALLENGES – THE REWARDS

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Bringing a child into contact with the criminal justice system is an extremely difficult issue. Decisions have to be made that will affect that child's future. The first issue to be decided is whether it is even necessary or wise to bring a child before a justice system. Is there a need for justice designed to cope with wayward children? Is it necessary to establish a separate system of justice for juveniles? In answering such issues we have to first consider who we are dealing with when we talk of children and criminal justice systems. Children living in difficult circumstances are those who would be most likely to eventually drift into more and more serious criminal behaviour. For those children assistance in the form, for example, of education, vocational training, social services, and integration into a valid social system, is necessary. What is not necessary, and what can impact negatively on the developing child, is bringing them into contact with any kind of justice system. Such children then might become those in conflict with the law, and can be children who have committed very minor offences to very grave ones as they have had contact with the justice system, often in its worst form – a closed institution – the well known academy of crime.

In looking at this issue, I feel it necessary to examine changing societal attitudes towards children. Throughout my professional career, attitudes have changed considerably. I recall a time when children from my part of the world had no status whatsoever. They were not to be reckoned with; they were tools used by adults for income support, and an investment for old age insurance. Their births were not planned and they were not cherished family members, but extra mouths to feed and extra pairs of hands to be put to work. Their plans and dreams for their own better future were not discussed with adults and were not taken into account other than for reasons of increased income support or property gains. In cases where such children were caught engaging in criminality, they were suddenly considered to be "mini adults", and even for minor deviancies they would be punished as adults. Sadly, there are still many such children in today's world who are treated in this way.

During the time I was studying, I remember reading the story of a 10 year old boy who lived in the middle ages in Europe. The boy had fought in a war, which was already horrific from my point of view, but it got worse. He was hungry and stole bread, and his punishment for that crime, at the age of 10, was to be hanged. Just as adults were hanged for minor crimes, so was this little boy.

It was only at the beginning of the last century, when huge leaps forward in science and education were made, did it become clear that children were very different from adults and attitudes towards children started to come under review. This was

at a time when governments started to see the value of mandatory basic education. Teachers were among the first to recognize and address the different stages in a child's intellectual development, and as a consequence, the different stages of a child's ability to be held responsible for his or her acts. The idea of juvenile justice was born. In criminal justice systems, the issue of children being held responsible for a crime came under scrutiny and it became clear that a child who had committed a crime should be examined using different standards than those used for examining adult offenders. Different specialized systems of approach to children in conflict with the law emerged. One concept was the so-called "welfare" model. The reasoning for offending conceived under this model was that society was at fault, that a child was influenced by negative factors resulting from a dysfunctional system, and that the child was not yet a fully developed human being and could not understand his or her crime and therefore could not be held responsible for any wrongdoings committed.

Solutions arrived at under this system for the correction of such misbehavior often involved the use of institutions. In an institution, wayward children could be provided with care and education, which obviously was lacking in their home environment, otherwise why else would they have offended? The threat of being sent to such an institution, especially a closed one, for an unspecified period of time, for "as long as it takes" to re-educate the offending child, was a very real one. The State, as the guardian of children, or its representative, the judge, decided what should be the course of action to take, albeit in the best interest of the child in question as understood. Remembering that children were not considered to be fully developed human beings, meant that their views were not sought (and were in fact, completely ignored). The views of the victims of offenders were also ignored, as the welfare system does not deal with victims. Responsibility remained with the society that had produced the environment in which offences had been committed, and a child was not given the opportunity of repairing the damage he/she had caused as he/she bore no guilt for that wrongdoing and victims remained unheard. This system, which continues today in the Latin American tutelary system in some countries, holds that a child cannot be considered responsible for, or given the opportunity to make good the wrongs done, and does not encourage a child to participate in any part of the justice process.

A completely different system, and one that could be described as being almost opposite to the welfare system, was established in most European and common law countries under the name of the "retributive model". This model does not speak about the break down of society, but about the break down in respect for and observance of rules. This system uses punishment as a solution to learning that rule breaking is wrong, in that the offender's punishment should be commiserate with the suffering caused to the victim. In the not too distant past, this principle was known as "an eye for an eye" but has thankfully evolved, in most parts of the world, to a more humane attitude, as offenders are no longer necessarily meted out punishment that is as great in sufferance as that which the victim had endured. The attitude behind the eye for an eye principle went to great extremes, but today,

international law prohibits the use of the death penalty for crimes committed by people younger than 18. The execution of child offenders however still continues in a few countries. International law also prohibits corporal punishment, and that is also a law that is not respected in many parts of the world.

Under the retributive model victims also have no voice and are of no interest other than to measure the degree of punishment of the offender. Their views and wishes go entirely ignored and their role in penal procedures is that of a witness only. The State, and its representative the Judge, decide on a course of action without engaging in discussions with either the victim or the offender as to their needs. The judge alone decides what will happen. Under this system the child is regarded as a “mini adult” and in certain cases even dealt with under criminal systems designed for adults, is labeled an offender, and while being considered as having to take responsibility for whatever offence has been committed, that responsibility may be less than adult full responsibility. The result of this attitude is the stigmatization of child offenders, which is certainly not helpful for their future development. Furthermore, victims are often subjected to reliving trauma through long and cumbersome judicial procedures, and receive no recompense for their suffering.

Neither the welfare nor the retributive system still exist in their pure forms in contemporary justice systems but elements of both are mixed in various degrees. Further, it is now proved that overburdening a child with responsibility and commensurate punishment, as well as under-reacting, or reacting too late to a child’s responsibility for commission of wrongdoings (even a toddler is told to stop behaving badly and to stop immediately by the parents) has long lasting negative impacts on the development of the child.

It has to also be remembered that no matter what type of justice system is in place, the impact of culture, tradition and religion, particularly on juvenile justice systems, is not negligible. For example, if culture dictates that the behavior of a female child has to be exemplary, while the behavior of a boy is not so strictly controlled, then the punishment for wrongdoing, or any penal reaction, for the girl will not be the same as that for the boy. Similarly, in societies where tradition dictates that children must not speak when adults are present, it is difficult for any adult to discover what the best interests of the child might be, particularly in situations where the parents are not in agreement with the plans for the future of the child or the measures recommended by a court. In those societies where religion dictates that there must be repentance and punishment for wrongdoing, alternative measures not contemplating punishment have little chance of being used, to the detriment of both victims and offenders.

A more ancient system of justice made its reappearance at the end of the last century - restorative justice. That ancient system was in use at a time when legal bodies as we know them today did not exist, and people came together under the leadership of a chief, an elder or a wise man to discern solutions to daily problems. Looking at good parenting in the past (now once again becoming the mode) a child

that had done wrong would be brought by the parents to the victim of the offense and apologies would be made and restoration achieved. This very old cultural technique of bringing victim and perpetrator together for the sake of restoring peace in the community in order to allow members of that community to continue to live together was the basis of research undertaken by eminent jurists, such as Zehr and Braithwaite, and evolved into the model of restorative justice. The restorative model gives equal consideration to the victim and the offender. Restorative justice neither speaks about a break down in society, nor about broken rules. It speaks about broken relationships and injured persons. The blame for the commission of wrong is not given to a break down in society or societal rules, or seen as an infringement of the law, but is viewed as being a violation of the respect for people, their lives and their property. Under this system, a child is not punished as such for a wrongdoing, but is included in a procedure designed to heal and restore and the threat of punishment only is largely removed. It is neither the State, nor the judge as the State's representative, that decides what measures should be put in place for the victim or the offender, but through a participatory process, the child offender will be encouraged to take responsibility for what he or she has done and encouraged to fully participate in the process of redemption and amendment.

This approach takes into account the needs of all those affected by the wrong doing and is oriented towards restoring peace between victim and offender, and offender and society, where, after all, the both must reside.

It is not so easy to clearly explain the issue of restorative justice. Perhaps stating what restorative justice is not will help.

- Peter has stolen a mobile phone from his neighbor and has been caught with the stolen property. He may be told to return the property and to offer an apology to the neighbor. Peter thinks he got away with his wrongdoing without too much hassle. While this procedure may be in the interest of the offender, and the victim has stolen property restored and receives an apology, Peter has not understood his misdemeanor and will most likely offend again. This is not restorative justice.
- In a brawl, Alex broke his class mate's nose and the police are called in by the school director. The director believes that the children's behavior is typical for their age and simply wants a police presence to use as a threat. No police action is therefore taken. Such an approach is neither in the interest of the victim nor of the offender. The victim is not compensated and the offender is not shown the error of his ways. This is not restorative justice.
- A judge suggests a family conference but the victim does not want to participate. The facilitator, in attempting to execute the order of the judge, infers that without the victim's participation, no protection or compensation or other measures will be made in the victim's interest. Whatsoever the outcome in this case, it is not restorative, as the victim's participation is forced.

- Both the offender and a victim are in the courtroom where the judge has decided on the measures to be taken in the best interests of both, and the judge issues an order accordingly. The victim and the offender have to accept the order. Again, this action may be in the interest of the judge who thus avoids having to sit through a long procedure or writing judgements. It even might be in the interest of the parties, but it certainly has nothing to do with restorative justice, as neither parties have had a chance to contribute to the outcome and to have their real needs addressed.

So what is restorative justice?

There are several definitions of restorative justice and maybe it can be said that none of them completely define what it is all about but it might be helpful to cite them.

- *“Restorative justice is a process whereby all the parties with a stake in a particular offence, come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”* (UN working Party on Restorative Justice, derived from Tony Marshall).
- *Viewed through a restorative justice lens, “crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender and the community in a search for solutions which promote repair, reconciliation, and reassurance.”* (Zehr, Howard)

These two definitions are certainly not the first attempts to define the limitations of responsibility and ensure that children do not become involved in the juvenile justice system. Article 40 of the CRC states that State Parties seek to promote, whenever appropriate and desirable, measures for dealing with children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. In the preamble to the Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice, the basic principles on the use of restorative justice programmes in criminal matters, as already mentioned in Economic and Social Council resolution 2002/12, annex, are dealt with in great length. General Comment No.10 (2007) of the Committee on the Rights of the Child again mentions that a comprehensive policy in juvenile justice has to provide methods differing from punishment and including alternatives to it, and General Comment No.12 (2009) stresses the conditions for the participation of a child in legal proceedings. The recommendation CM/Rec (2008)11 of the Committee of Ministers to Member States on the European rules for Juvenile Offenders subject to Sanctions or Measures again deals with the same issue, and this is just to mention a few international documents. The United Nations Office on Drugs and Crime has also dealt in a practical way with this new approach by issuing the Handbook on Restorative Justice Programmes, produced with the assistance of the University College of the Fraser Valley (Canada), the Centre for Criminal Law Reform and Criminal Justice Policy, and the School of Criminology, Simon Fraser University (Canada), supported by the International Centre for Criminal Law

Reform and Criminal Justice Policy (Canada), and the Training Manual on Alternative Dispute Resolution and Restorative Justice, produced in collaboration with the National Judicial Institute (Nigeria) and funded by the European Commission.

Now let us return to the definitions above. To what exactly do they draw our attention? The issue at hand that will always be the first consideration and the main and key issue is that victims, offenders and communities and their relationships have to be addressed. Let's speak first of the offenders.

Do offenders see justice in a welfare, tutelary or retributive justice system? In order to answer that, we have to examine whether they have understood and are capable of taking responsibility for what they have done. The only guaranteed way to prevent re-offending – an issue of great importance in all systems – is to first ensure that the offender understand why his actions were wrong, and second, to ensure, to the extent possible, that the offender is capable of taking responsibility for those actions. Only the restorative justice system will permit this to happen. Under which system do offenders have the opportunity to make reparation for damages caused? Which system will encourage them to change their behaviour in their own interest? Which system gives them the opportunity to participate in the justice process and to contribute to seeking the right solution? Which system enables them to address their own needs? Finally, which system tries to assist their families by providing support and assistance? You will come to the conclusion quite quickly that restorative justice systems will answer all of the above requirements and thus assist the offender.

What about the victim? Under which system can victims relate the experience of the offence they have suffered? Take the example, for instance, of a young offender who forcefully robs an old lady of her handbag. The handbag contained the keys to her house, a set of false teeth, her identification papers, and some money. The robber was only interested in the money and threw away the other items. Under which system can the victim relate that her biggest loss was that of her false teeth, without which she was unable to eat; that the loss of the keys for her house caused her great stress as she could not enter her own home until new keys were organized; and finally, that the loss of her identification papers and the process of obtaining new ones caused her a lot of bureaucratic difficulties. The loss of the money was not a big issue. It was however of great concern to her that she was able to ask the offender why he picked her as a victim, what had she done wrong for him to have selected her as his target, and how could she prevent herself from becoming a victim again? All these issues are not taken into consideration in a retributive system where a victim is treated only as a witness, or in a welfare system where the victim has no part in the justice procedure. The restorative approach will first of all give victims a voice, so that they may articulate what kind of compensation or restitution they feel they will need, what kind of injustice they have felt done to their person, what kind of protection they would seek against further violations, what kind of information they want about the offence, the offender, and the judicial process.

Finally, the restorative approach will address any other needs material, psychological or spiritual that the victim might have.

In order to provide the offender with the opportunity of atonement, an opportunity has to be created where offender and victim may meet. Consideration then has to be given to how they meet - would a direct confrontation be appropriate? Or would it be a re-victimization for the victim to confront the offender, particularly if the crime was brutal? Would it only provide an opportunity for the victim to shame the offender if the offender is of a lower social status than the victim? To prevent any such situation, a neutral third person should be present to facilitate a meeting between victim and offender (and their respective families if they consent).

What about the community concerns? Should the outcome of the restorative justice procedure be public in order to assist the community or has the outcome to be weighed against the needs of the victim and the offender? Is the protection of the community as such to be addressed, a consideration that is important for example when the case involves an extremely violent offender? Is there need for restitution to the community if it has been violated by the action of the offender? Is there any symbolic action needed? Has the community to be represented in some way?

Let me tell you the story of a child soldier whose evidence was brought before the Special Court for Sierra Leone. When this boy was 12 years old he was captured by one of the warlords during the 11 year long civil conflict in Sierra Leone. In order to make it impossible for him to ever flee the rebel group into which he was to be integrated, he was forced at gunpoint to hack off both hands of the 12 year old daughter of a neighbor. After the war, NGOs working with the Truth and Reconciliation Commission tried to find a way to solve the problem of the girl victim as well as the boy offender. The father of the girl brought the child to the Special Court for Sierra Leone to give evidence and said that the Court could keep her as she was no longer worthy of being fed as she would not fetch a bride price. Without hands, she would be unable to work for a husband. Social workers dealing with the case tried to find a solution that would satisfy the traditional culture of the village from where the boy and girl came. Both the family of the boy, and the villagers rejected his reintegration into family and village. Village elders were of the opinion that if the boy was not allowed to remain in the village, he would, having learned to live by violence, continue his criminal ways and bring members of a crime gang into the village to commit theft. A further solution they considered was killing the boy, but they did not want to commit murder, particularly not in the presence of internationals from NGOs. Finally, the boy volunteered to marry the handless girl and the village, as well as the two families, consented to this proposal. I was horrified by this solution as, even though it would appear that all concerns had been covered, the poor victim in this case was going to be forced to live for the rest of her life with the same person who had hacked off her hands. I was therefore very astonished to hear the girl say that it did not matter to her who mistreated her – her father or her husband! I was also extremely relieved when the boy said that he knew

now, having been a child soldier, what cruelty really meant and that he would not beat his wife.

In this very sad case, justice was finally done in a restorative way. The needs of the victim and the offender had been addressed, the community accepted them back into the fold and a healing procedure could take place.

Restorative justice is administered through programmes using a process and delivers an outcome which is restorative. By restorative justice programmes, it is meant any programme that uses restorative processes and aims to achieve a restorative outcome. A restorative justice process means any process in which the victim, the offender and any other community members affected by the criminal behaviour, actively participate to find a solution for matters arising from the transgression, sometimes with the help of a fair and impartial third party – and there are many more examples of such processes and some of which will undoubtedly be discussed in the course of the Congress. Finally, a restorative justice outcome means an agreement reached as the result of a restorative process - and this will also be discussed in the course of the Congress.

As the means and the process of restorative justice differs in cases when an adult is the offender and when a child is the offender, those means and processes will have to be adapted to the child's capabilities and needs. In some cases, it may be a good solution for an adult offender to work in the interest of a community. The same solution however, may not be in the best interest of a child. The restorative outcome of working in the interests of a community are lost if the offender is stigmatized as a person who is having to do community work as a form of punishment. However, it may be a completely different outcome if a child works together with other children in the interest of the community in a way that is designed to respect the needs of all these children.

All these definitions may lead you to ask what sorts of cases would be suitable to consider for using restorative justice and, in particular, juvenile restorative justice? In answer, I would purport that it is not the types of cases that are important when making this consideration, as theoretically all kinds of offences could be considered in which an offender violated a person, but the type of persons involved. Maybe we can establish some criteria in this regard.

To say that restorative justice is a cost-saving enterprise, particularly in the “developed” world is incorrect. The methodology and network for using restorative justice mechanisms has to be established and it is not cost neutral. For example, when establishing a victim-offender mediation event, it is necessary to have two rooms – one for the mediation and one for those involved who have to wait. A paid mediator is required, as well as an established network of assistance providers (for security, medical treatment, housing etc.) In some cases the event can last more than just a few hours and assistance for one or more of the parties may become a necessity. However, saving in costs can be the outcome of using restorative justice,

and a further positive consideration is that no stigmatization of the offender will be made under the restorative justice process. Thus the offender will have the opportunity to become a law abiding citizen who is able to contribute to the common well-being of his community. So as the restorative justice process will need resources, I would also argue that petty crime cases are not appropriate for consideration under restorative justice. They are many less cost-intensive and non-punitive alternative measures in the arsenal of juvenile justice measures.

Further, a restorative justice approach may not be advisable when the possibility of the victim being re-traumatized occurs, such as in a rape case. A restorative justice approach would be impossible if the victim does not wish to participate in the process, which is his or her right and has to be respected.

Also a restorative justice mechanism may not be possible to use in cases where one of the parties has considerably more power than the other as such an imbalance might render agreement impossible.

It is the person of the offender that matters for enabling a decision on whether to use a restorative approach in a given case. The offender has to wholeheartedly accept responsibility for the offence committed. If the offender claims innocence, a trial must take place to ascertain innocence or guilt, and the presumption of innocence has to be respected. Furthermore, if it is established that a child has committed an offence against another person but is not ready to admit to having done wrong, or if a child is not capable of taking responsibility for the offence, a restorative justice procedure cannot take place.

In cases where the victim and offender can reach an agreement, but the community is not inclined to accept the outcome, it will be a difficult task for a facilitator, who should be a person who is qualified and well trained, to convince members of the community of the common advantage. Fortunately, such cases occur rarely in the juvenile justice sphere as communities are consistently willing to accept the reparative efforts of a child.

Thus, the practical questions are the following:

Is the offender ready to apologize and to put the wrong right? Is the victim ready to accept an apology and accept the efforts of the offender to repair damage caused? Is the community ready to accept and rehabilitate the offender? Is the community ready to accept the reintegration of the victim? I say this because in many cultures, victims, for example victims of rape, are also considered guilty and are stigmatized. If the correct criteria are met, then one can start the restorative justice procedure, while taking into consideration the possibilities, mental capacities, spiritual development and needs of the offender and the victim alike.

It is not true that restorative justice can be used only as an alternative to the justice system as a diversion programme. Restorative justice, and once again especially

juvenile restorative justice, can be used as an alternative during the whole judicial process, used as a pre-sentence process, as part of the outcome of the sentence, and as an alternative to a sentence.

In the pre-trial phase, restorative procedures can be initiated by the police (if trained) or by a referral of the prosecution. If the procedure is successful, as victim and offender came to an agreement and the offending child fulfilled all obligations, the police can close the case in some jurisdictions, as can the prosecutor in others. The child is thus diverted from a formal judicial procedure. The ultimate goal of justice – to rectify delinquent behavior and hopefully to prevent re-offending – is reached without resorting to the formalities of the justice system.

Even if a case involving a juvenile does go to court, a judge has (or should have) the power to opt for a restorative approach if conditions are met. A judge would then stop the proceedings and refer the case to the appropriate institutions or persons (social workers, mediators, facilitators etc) to initiate restorative justice procedures.

If a trial is already concluded, the juvenile judge has the possibility to make restoration part of the (then lenient) sentence or to pronounce a conditional sentence, the condition for the non-execution of the sentence being a restorative measure achieved. Thus, if considering all the restorative tools available to the justice system, very few child offenders should have to confront sentences involving deprivation of liberty.

Appropriate preparation, facilitation and monitoring for the restorative procedure in the context of juvenile justice will be another issue for discussion and for finding effective ways to deal with offending children. The training of persons that will be involved in the restorative justice process, such as police, facilitators, mediators, social workers, judges etc., will be one more subject to be considered. Many basic questions will have to be answered, for example, how can the offender, if a child, succeed in reparation to the victim in an appropriate way? How can an offender, if a child, succeed in reparation with family members or with members of the community? How can the offender, if a child, work together with family members to ensure that regression into misbehavior does not happen? Are there provisions to be made for solving the underlying problem of the victim and the offender which led to the commission of the criminal offence? Are there provisions to be addressed for solving the problems that have been caused by this offence? Are there future intentions by the child offender to be addressed *vis-à-vis* the victim, the family, the community, but first of all, *vis-à-vis* him or herself? Finally, is there an approach to be taken to transform the youth justice system, the youth care system? Will the approach taken empower and develop all persons involved? Will the approach liberate victim and offender alike? Will the approach assist the offender, the family and the victim to break with traditional, religious, cultural and juridical norms that have roots in discrimination, poverty and poor education?

Much has already been taking into account by modern juvenile justice systems, but much remains to be done. Taking into consideration that juvenile justice has always been at the forefront in developing humane ways of delivering justice, to advocate for different systems of justice for children, be it the abolishment of torture concerning children, be it the option of a conditional sentence for children and the availability of probation services, I am sure that the acceptance of a sound restorative justice system for children worldwide will be another “first” that juvenile justice systems will be proud to achieve.