# Advancing Restorative Justice as the Ground for Youth Justice

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All over the world, youth justice systems include concerns for rehabilitation and treatment of the offender, more than the criminal justice systems for adults do. Most countries therefore orient punishment for juveniles in a rehabilitative sense; some even exclude punishment entirely.

Currently, these systems are under heavy pressure. In most of the countries, a shift is going on towards more focus on the offence and the responsibilities of the young offender than on the needs for re-education or treatment. The punitive dimension is becoming stronger, to the detriment of concerns for education, treatment or rehabilitation (Doob & Tonry 2004).

This development no doubt is part of the general cultural climate. Abundant good literature is available to document that capitalist globalisation has caused cultural and moral fluidity and socio-economic uncertainty. It creates an existential feeling of insecurity that affects all aspects of life, our relationships, our socio-economic position, our food, our health, the future of our children and even of the globe. According to Bauman, we are living in an area of "liquid modernity" (Bauman 2000) in which nothing is fixed and nothing is predictable. The current social cultural climate is dominated by the obsession with uncertainty, anxiety, unsafety, and risk (see e.g. Beck 1992, Giddens 1998, Bauman 2000). Citizens hide away in fortresses of selfishness and retreat in a postmodern reconstruction of self-serving norms and values. Participation in civil life and solidarity with those in trouble are shrinking drastically (Putnam 2000). The perception of increasing risk is projected on fear for crime and lack of tolerance for what is considered a new "classe dangeureuse" (Stenson 2001). Governments, powerless in tackling the fundamental causes of these obsessions, capitalist globalisation, try to maintain their legitimacy by focusing on crime problems and giving in to penal populism. It creates the illusion of determination and care for public order, which may be electorally rewarding, though counterproductive in fact. Youth justice is part of this penal populist development. "Youth crime is an attractive territory for political opportunism since tough legislation can be enacted with relatively few political and financial costs" (Doob & Tony 2004: 16).

## Welfare oriented juvenile justice under pressure

Besides this general cultural climate, there is more at hand. Youth justice as it is basically conceived in the first half of the 20th century is also subject to specific criticisms that must be taken seriously. They can be clustered under four headings.

*Doubtful effectiveness*

The founders of juvenile justice strongly believed in a human engineering model according to which treatment-oriented courts could help endangered youths become conforming and useful citizens. It inspired a major orientation in criminological research trying to "unravel" juvenile delinquency. Social work, educational programs, and clinical treatments sought to correct the deviant development of youthful offenders (Rothman 1980). In the critical 1960s and 1970s,

however, the awareness emerged that the courts and treatment programmes risked to be biased by social and ideological prejudices to the disadvantage of the poor and ethnic minorities (Platt 1969). Evaluations of treatments did not produce encouraging results (Sechrest, White & Brown 1979). Some studies even pointed to negative results, which were explained mostly through labeling theory.

The overall pessimism about treatment programs has become more nuanced in the past two decades. A "what works" tradition presented a series of meta-evaluations of earlier studies, to identify the characteristics that might be effective in treating offenders. It suggests that under some conditions, some programs work for some offenders (McGuire & Priestley 1995, Lipsey & Wilson 1998). Bonta and his colleagues (2007) list three principles for effective treatment: (1) the intensity of the intervention must be in proportion to the offender's risk of reoffending; (2) the programmes must target the direct criminogenic needs, rather than indirect non-criminogenic needs; (3) the programme must be tailored to the learning style of the individual. Behavioural-cognitive programmes that appeal to the active responsibility of the offender are more effective than other treatment or punitive approaches (McGuire & Priestly 1995). However, reductions in reoffending are always limited, depending on the kind of the intervention, characteristics of the target groups and on many factors beyond the scope of the programmes (Loesel 2007).

It remains difficult, however, to generalize these conclusions. Firstly, the studies measure only quantifiable aspects of the interventions and seldom include context-oriented interventions, such as community building and its influences on social environment. Secondly, the evaluations mostly explore experiments in exceptionally optimal conditions. The step toward routine practices, in general, seriously reduces the gains of the evaluated programs. Finally, the "what works" analyses do not address ethical questions about the acceptability of lengthy and intensive restrictions of liberty, which often seem disproportionate to the modest seriousness of the offences committed, and which are of doubtful effectiveness. The fact that some treatment programs have some effectiveness for specific groups does not mean that the rehabilitation-oriented juvenile justice system as a whole is effective.

The question will be whether restorative justice can develop its own effectiveness criteria, including the interests of victims and communities, while achieving effects on offenders that are not worse than those of existing rehabilitative programs.

*Ineffective legal safeguards*
Under the dominant ideology of child-saving and child-raising, it was believed that legal safeguards could be replaced by clinical diagnoses and the juvenile court judge's adherence to commonsense. The Belgian Child Protection Act (1912) and Youth Protection Act (1965) were among the most consequently welfare oriented systems in the world. A prominent researcher of that time wrote "Does the principle of 'nulla poena, nullum crimen' not loose its meaning in a system which considered itself not repressive, but re-educative and protective?" (Racine 1937: 149). The Director-general of the Belgian office for Youth Protection (Ministry of Justice) wrote: "It is logical not to be obsessed anymore by the circumstances or the coincidences that brought a child to the judge, rather than to the psychiatrist" (Huynen 1967: 185).

Critical criminology and anti-psychiatry, however, exposed cultural and socioeconomic biases in both clinical evidence and commonsense. Juvenile courts appeared to widen the net of social control, which was especially detrimental to the most disadvantaged parts of the population.

Children's rights movements launched the "4 D's:" decriminalization, diversion, due process, and de-institutionalization (Empey 1976). International organizations promoted conventions and advocated basic principles for dealing with children both in general and in court. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) are now widely seen as a crucial guide on how to construct a legally adequate system of juvenile justice. But they still reflect a fundamental ambivalence which apparently cannot be resolved.

Indeed, a basic tension remains inevitable primarily because juvenile justice jurisdictions try to combine what cannot be combined satisfactorily. Basing sentencing upon the needs of the offender rather than on the characteristics of the offence inevitably erases enforceable limits on judicial intervention. The judgement is passed with a view to achieving re-socialising aims in the future and is less, or not at all, based upon available and checkable characteristics of the offence committed.  This "prospectiveness" in the reaction to juvenile crime (Feld 1993) and its extension through "preventionist" ambitions make many youth justice systems "insatiable" (Braithwaite & Pettit 1990): the needs of both treatment and prevention are infinitely large. Traditional legal safeguards are hard to combine with such a system because they are based upon "retrospection," looking back at the offence, as a yardstick for measuring the permissible degree of restriction of freedom.

In order to reaffirm procedural rights for juvenile offenders, some would abolish the separate youth court and subject all offenders, juveniles and adults, to the same punitive criminal justice system, recognizing the offender's youth as no more than a mitigating factor (Feld 1999). Such move, however would risk greater punitiveness. The question for restorative justice will be whether it can provide better legal safeguards without greater punitiveness.

*Too soft responses to serious youth crime*
An authoritative Belgian lawyer once obtained general approval for the proposition that the child "has one right only, being the right to be educated, and one duty only, being the duty to be docile in the hands of his educator" (Dabin 1947: 13). Since then, the image of childhood and adolescence has changed drastically from dependent and vulnerable to autonomous and responsible. This emancipatory view is also applied to youthful offending. Juveniles who commit offences are no longer seen as helpless objects in need of treatment; they are viewed as persons who are accountable for their misbehaviour. This is especially true of patterned and violent youth crime. In the current penal populist climate described in the introduction, some dramatize urban youth crime and create an image of "young predators," dangerous individuals who are uncontrollable threats (Singer 1996), for which the welfare oriented approach is considered to be naïve and counterproductive. The need for risk management is advanced and is inevitably mixed with a retributive "just-deserts" approach. When added to the perceived (partial) failure of the treatment model, the punitive perspective provides arguments for stricter, harsher, and more incapacitating responses to youth crime (Feld 1999, McCord, Spatz Widom & Crowell 2001).

However, a long tradition of research leads to the conclusion that punishment is not socially effective for any goal (Tonry 1995, Sherman 2003, Andrews & Bonta 2003). On the contrary,

"There is widespread agreement over time and space that alterations in sanctioning policies are unlikely substantially to influence crime rates" (Tonry & Farrington 1995: 6). This does not mean that the threat of punishment never has any effect, but it indicates that deterrence has to be looked at in a nuanced way. The general statement that penal law is needed in order to deter (potential) offenders is a doctrine, rather than an empirically sustainable theory. The idea that punishment rehabilitates or individually deters offenders has never been confirmed empirically. Criminal punishments do not morally educate the offender, or do only seldom induce in the offender penance and reform. One of the conclusions of the "what works" research is that "punishment-based programmes … on average lead to a 25% *increase* in reoffending rate as compared with control groups" (McGuire & Priestly 1995:10, my emphasis).

It brought Braithwaite, for example, to disqualify the criminal justice system as "the most dysfunctional of the major institutional accomplishments of the Enlightment" (Braithwaite 2005: 283). Punishment may incapacitate some violent offenders, but the need for incapacitation applies only to a reduced minority of offenders. Penal procedures may offer decent legal safeguards to juveniles, but they may not be the only way to offer such safeguards. The challenge for restorative justice is to find responses issuing clear censuring messages, being firm enough to act credibly in serious crime, and at the same time socially constructive. The latter condition could make restorative justice socio-ethically more desirable than the *a priori* position that crime must be punished, which is ethically deeply problematic (Fatic 1995, Walgrave 2008).

*Neglecting victims' needs and interests*
Victims' movements since the 1970s have heavily criticized the criminal justice system. Criminal procedure is focused on assessing the criminal act and culpability and on defining the penalty. Victims are often (mis)used as witnesses in the criminal investigation process and then left alone with their grievances and losses. Many undergo secondary victimization by the criminal justice system (Dignan 2005). This is also true in youth courts where the rehabilitative view may be detrimental to victims' interests. To protect the young, judges sometimes screen the offender from the victim's anger and claims for restitution or compensation, based upon a concern that these would be too severe and too hard to fulfill.

Currently, the relation between the victim and criminal justice is under reassessment almost everywhere (Goodey 2000). One spin-off is increasing experimentation with victim-offender mediation and conferencing, educative programs with special attention to victimization, and judicial restitution orders. In their limited versions, these experiments remain subordinate to rehabilitation or punishment rationales. These experiments, however, are amongst the most vigorous foundations for the redevelopment of restorative justice.

**Restorative justice**
Restorative justice is rooted in multiple origins, such as victims' movements, communitarianism, and critical criminology (Van Ness & Strong 2002, Walgrave 2008). It now appears as a complex domain covering a wide realm of practices, a challenging subject for legal and normative reflection and debate, and a fruitful field for theorizing and empirical research. Restorative justice also is a social movement and a field of social science experimentation. Adding to the confusion are apparently similar visions that appear under banners such as "transformative justice,"

"relational justice," "community justice," and "peacemaking justice." In this paper, restorative justice is characterized as *"an option for doing justice after the occurrence of an offence that is primarily oriented towards repairing the individual, relational and social harm caused by that offence"* (Walgrave 2008: 21).

*Outcome based definition*

This definition is clearly is outcome-based. Probably most 'restorativists' prefer a process-based definition (Zehr 1990, McCold 2004). Well-conducted restorative processes indeed offer a powerful sequence of social and moral emotions, and genuine communication (Harris et al. 2004), which is an essential pathway to a maximum possible restoration in the victim, chances for reintegration of the offender and assurances of rights and freedoms in society. But identifying restorative justice with such processes only is confusing the means with the aims. Voluntary processes are valued, not because of the process as such, but because of their possible restorative impact on the participants and the reparative outcomes they help to achieve (Johnstone & Van Ness 2007, Walgrave 2008).

Restricting restorative justice to voluntary deliberations would drastically limit its scope and doom it to stay at the margins of the system. The mainstream response to crime would remain punitive. The criminal justice system than acts as the gatekeeper, and probably presents less serious cases only for (semi)voluntary processes, excluding victims of serious crimes who are most in need of restoration. Moreover, such a diversionist position gives up the principled priority to restoration. Many citizens would still be handed over to the traditional system, which is socio-ethically contestable and has detrimental impact.

Therefore, a maximalist vision for restorative justice is presented: when voluntary processes cannot be achieved or are judged to be insufficient, pressure or force must be considered. These coercive interventions also should serve restoration (Wright 1996, Walgrave 2002, Dignan 2002). Possible judicial procedures should be oriented to enforce obligations or sanctions in view of (partial) reparation through, for example, material restitution or compensation to the victim, paying a fine to a victims' fund, or community service. Granted, their restorative impact will be reduced, but restoration is not a black-and-white option. It can be achieved to different degrees (Van Ness 2002, McCold 2000).

*Harm*

A focus on repairing harm and not on what should be done to the offender is the key to understand restorative justice and to distinguish it from both the punitive and the rehabilitative justice responses. That is why it is another paradigm (Zehr 1990, Bazemore & Walgrave 1999). It offers a distinctive "lens," to use Zehr's term, to define the crime problem and how to solve it. Crime is defined by the harm it causes and not by its transgression of a legal order. Responses to crime should not, primarily, punish or rehabilitate the offender but set the conditions for repairing as much as possible the harm caused.

The harm considered for reparation includes all prejudices caused by the crime: the material damage, psychological and relational suffering by the victim, social unrest and community indignation, uncertainty about the legal order and about the authorities' capacities to assure public safety, the social damage the offender causes to himself. The only limitation is that the harm

considered by the restorative process must be caused by the particular offence. Social exclusion, for example, or psychological problems in the offender, may cause the offending, but are not caused by the offence. Their remediation, therefore, is not included as a primary objective of restorative justice, though it is an important secondary objective (Bazemore & Schiff 2005).

Restitution or compensation for the individual victim's losses could be private, to be arranged through the civil law, but crime also has a public side. It is one of the difficult issues in restorative justice theorizing. What makes an offence a collective or a public event? If the authorities did nothing, it would hurt all citizens' trust in their rights to privacy and to property. The concept of "dominion", first introduced by Braithwaite and Pettit (1990), can be used to try to grasp the public aspect of crime in restorative terms (Walgrave 2003, 2008).

*Restoration*
Different processes may lead to restorative outcomes, but not all are equally appropriate.

As mentioned above, the most suitable processes are those that consist of voluntary deliberation between the main stakeholders. Most well known such processes are different forms of victim-offender mediation, various versions of conferencing, several types of circles (McCold 2001). Besides a healing impact on the participants, the formal agreement after such processes may include a wide range of actions such as restitution, compensation, reparation, reconciliation, and apologies. They may be direct or indirect, concrete or symbolic. The degree of the offender's cooperation is crucial. It expresses his/her understanding of the wrong committed and his/her willingness to make up for it. For the victim, it means the restoration of his or her citizenship as a bearer of rights, and possibly also a partial material redress. For the larger community, it contributes to the assurance that the offender will take rights and freedoms seriously in the future.

If voluntary agreements cannot be accomplished, coercive obligations in pursuit of (partial) reparation must be included in the restorative justice model. Restorative sanctions, enforced by judicial procedures seem to leave few or no differences between such sanctions and traditional punishments (McCold 2000). I see, however, essential differences (Walgrave 2008).

First, punishment is a means in the eyes of law enforcement and it is morally neutral. Some political regimes use punishment to enforce morally doubtful laws. Restoration, on the other hand, is a goal for which different means can be chosen. The goal of restoration itself expresses an orientation toward the quality of peaceful social life, which is an intrinsic moral orientation.

Second, "punishing someone consists of visiting a deprivation (hard treatment) on him, because he supposedly has committed a wrong" (von Hirsch 1993: 9). The pain is intentionally inflicted. An obligation to repair may be painful but is not inflicted with the intention to cause suffering; it may be a secondary effect only (Wright 2003). Painfulness in punishment is the primary yardstick, while painfulness in restorative obligations is a secondary consideration only.

Third, this intentional infliction of pain "involves actions that are generally considered to be morally wrong or evil were they not described and justified as punishments" (de Keijser 2000: 7). The justifications in penal theories (von Hirsch 1998) do not convincingly demonstrate the need for systemic punishment. The *a priori* position that crime must be punished is itself dubious from an ethical standpoint. Thorough exploration is thus needed on alternative ways to express blame, to favour repentance, and to promote social peace and order.

Restorative justice is promising. Deliberative processes, if possible, or obligations with a view to reparation, if necessary, are socially more constructive: they do not respond to crime-caused harm by inflicting further harm on the offender, but by aiming at the repair of the harm. Imposing reparation is ethically more acceptable than deliberately inflicting pain (Walgrave 2003).

*Doing justice*

Justice has two meanings here. On the one hand, it refers to a feeling of equity, of being dealt with fairly, according to a moral balance of rights and wrongs, benefits, and burdens. Punitive justice tries to achieve this balance by imposing suffering on the offender that is commensurate with the social harm caused by the crime. In restorative justice, the balance is restored by taking away or compensating the suffering and harm. It aims to achieve "procedural fairness" (Tyler 1990) and "satisfaction" (Van Ness & Schiff 2001) for all parties involved.

Justice also encompasses legality. Restorative justice processes and their outcomes must respect legal safeguards to protect citizens against illegitimate intrusions by fellow citizens and by the state. (Van Ness 1996, Dignan 2002). This is true for both deliberative processes and judicial procedures with a view to impose reparative sanctions.

It is a difficult matter of debate amongst restorative justice proponents. The aim is to find a balanced social and institutional context, which combines maximum space for genuine deliberative conflict resolution with complete legal safeguards. Reflection on how adequate legal safeguards can be developed for restorative justice is still beginning (Braithwaite 2002, Walgrave 2002, 2008, von Hirsch et al. 2003, Lauwaert 2009). It is crucial for the future of restorative justice. I shall come back to that.

*A socio-ethical basis for a maximalist view of restorative justice*

The option for restorative justice can be argued by instrumental reasons, but it is first of all based on socio-ethical grounds (Walgrave 2008).

It rejects the punitive apriorism in mainstream criminal justice. Penal theories do not offer satisfying answers as to why criminal punishment would be an exception to the general ethical rule that deliberately inflicting pain to another human is reprehensible, unless if it serves a higher moral good. But empirical research shows that penal justice does not achieve any of its claims. As a general rule, it appears, on the contrary, to be counterproductive. Punitive apriorism which does not explore thoroughly other possible expressions of public rejection and other ways of promoting social peace in the future is itself a morally wrong position.

More positively, restorative justice recalls the fundamental *raison d'être* of the criminal justice system. Why is it forbidden, for example, to steal or to commit private acts of violence? Because if it were not forbidden, severe victimisations would occur all the time, which would provoke counteractions "to make things even", leading to an escalation in mutual victimisation. Constructive social life would be impossible. Society would be dominated by abuse of power and fear. Hence, what is logically the first concern of the response to crime? It is to repair – as much as possible and in an orderly way – the harm done to the victim and the damage to social life.

Instead of the abstract legal order, the quality of social relations and social life in general are (re)positioned as the fundamental reasons for criminalising certain behaviour. The aim is to restore this quality, and not primarily to enforce public order. To achieve this, restorative justice

relies mainly on cooperative processes among citizens, and not primarily on coercive intervention by the state. The assumption is that, in appropriate conditions, opponents in a conflict are willing to meet each other in mutual understanding and respect, and able to find a constructive solution. The belief is that such response is more reparative for the victim, more reintegrative for the offender and more reassuring for public life.

Both the social ethical arguments to reject punishment as the mainstream response to crime and to strive for a more constructive restoration oriented response, and the empirical assessments that a restorative response actually is a feasible alternative, lead to a view of a maximalist restorative justice (Bazemore & Walgrave 1999). That means that the punitive apriorism would be replaced by a restorative apriorism. The first concern in responding to a crime must be to assess the harm and to help to repair it as much as possible, not to inflict additional pain to the offender.

Concern for the quality of social life, and belief in the potentials of ordinary people to find solutions are not the monopoly of restorative justice. They are central to a much wider social ethical and political agenda, which I have set out elsewhere (Walgrave 2008). It is based on the concept of common self-interest, the view that our self-interest is best served by living in social life of high quality, permeated by mutual respect and driven by solidarity among citizens taking active responsibility. Common self-interest is the glue of social life. Promoting common self-interest is its drive. It is observable in social movements and a multitude of social, political, educational and problem-solving practices focused on enhancing the quality of social life. Restorative justice is part of this social movement.

**Restoring juvenile justice through restorative justice**
Let us now explore whether the criticisms mentioned in the first subsection can be responded to satisfactorily by reconstructing the juvenile justice system on restorative grounds, as described in the second subsection.

*Effectiveness*
The criteria for effect-evaluation in restorative justice are different. They do not primarily focus on the offender, but on the harm caused. Several surveys of evaluation research support optimism (Latimer et al. 2001, McCold 2003, Bonta et al. 2006, Sherman & Strang 2007, Walgrave 2008). Despite methodological shortcomings, the over all conclusions are that restorative justice interventions do work and produce outcomes more satisfying than the outcomes of punitive or purely rehabilitative interventions. They are more satisfying to victims and their communities of care. There is not any evidence that restorative practices would have negative consequences for public safety, on the contrary.

As we are exploring here the restorative justice potentials for juvenile justice, we focus on the impact on the offender. Their willingness to participate in a restorative process is high. For example, Strang et al. list participation rates between 100% and 58% (Strang et al. 2006). Probably many offenders simply hope to come out better that way than if they went to court. As long as it does not lead to secondary victimisation for the victims, one can realistically expect and accept that the offender begins a meeting with some calculation. It is the process during the meeting that makes most offenders to understand what they caused, and increasingly emotionally

involved and less rationally calculating (Harris et al. 2004). Satisfaction rates are very high. Bonta et al. (2006) mention an average expression of satisfaction of 87.7%.

Reoffending has great public interest. The available results are not unequivocal. Bonta et al. (2006) selected 39 studies for meta-analysis. The overall effect was about a 7% lower rate of repeat offending, compared with traditional criminal justice handling of cases. Studies published after 1996 reported greater effects than those published earlier, which was attributed to the higher intrinsic quality of the projects. The schemes outside the criminal sanction system produced up to 10% reduction. Better results were achieved in programmes targeting mostly violent offenders, which is in line with other outcomes reported for violent crimes and serious crimes. This is paradoxical when one observes that conferences are applied mostly to divert rather benign youth offences from court.

Studies confirm that the best predictor of reoffending is not whether there is a conference, but prior life experiences and offending, and the social prospects of the (young) offender (Maxwell et al. 2004). One can indeed imagine that a single intervention may have more influence on a young person who still has intensive bonds to social life than one who has drifted far away from social norms and values. It is probably in the same sense that we must understand why more young offenders desist after conferencing than older ones (Hayes & Daly 2004).

The quality of the conference matters (Maxwell et al. 2004, Hayes & Daly 2003). Less reoffending was observed after family group conferences that were experienced as "fair, forgiving, allowing to make up for what they had done and not stigmatising or excluding them" (Maxwell et al 2004: 214). When the offender expressed remorse and a consensus was reached, conferences were more effective. It is not clear, however, whether remorse is provoked by the quality of the conference, or is part of a compliant attitude of the offender which existed prior to the conference.

If the conference is followed by systematic support or treatment for the offender, the risk of recidivism is much lower (Maxwell et al. 2004). A well conducted conference is an excellent opportunity to start up such support (Daly (2005). "It may be not the role of restorative justice facilitators to deliver treatment programming; yet it would be useful if they would recognize the need for treatment and the type of programming that would assist in reducing offender recidivism, and make the appropriate referrals for treatment" (Bonta et. al 2006: 117).

Several theories have been advanced as to why one can expect that mediation and conferencing may have positive impact on the offenders. The reintegrative shaming theory (Braithwaite 1989) has been integrated into a sequence of several moral emotions (Harris et al. 2004). It has been completed by the procedural justice theory (Tyler 1990), the concept that conferences activate social support in the offender's natural environment (Bazemore & Schiff 2005), or the idea that such processes allow offenders to reconstruct their identity in a positive sense (Maruna 2001). The theory of interaction rituals (Collins, mentioned in Strang et al. 2006) helps to explain the high emotional intensity of such events, with greater impact on the participants. The restorative justice approach also appears to respond rather well to characteristics, indicated by the What Works research tradition as being most effective (Bazemore & Bell 2004). The Good Lives Model (Ward & Maruna 2007) advancing the motivation of the offender himself as the major force in rehabilitation is an excellent basis for explaining the possible positive impact on the offender. Being offered the possibility to make up

for the harm caused and to feel respect for that, may open the window on a more socially integrated future, and thus be a major motivation in the offender's quest for rehabilitation (Walgrave 2008).

*Legal safeguards*
In current youth justice, mediation or conferencing is often carried out to teach something to the offender, using the victim as a kind of "educative tool" in a rehabilitative framework. Community service may be ordered for education, rather than as symbolic reparation. If isolated from their theoretical foundations, such practices are simply additional possibilities within the existing system and they do not guarantee legal safeguards any better than the existing system does.

If thought through consequently, restorative justice has a better potential to respect legal safeguards than does rehabilitative justice. The traditional principles are constructed to preserve two fundamental values: equivalence of all citizens and protection of the citizens against abuse of power by other citizens and by the state. They must also be preserved in restorative justice, but the way they are made concrete in legal principles must be adapted. Restorative justice is indeed based on a different paradigm, inspired by a clearly distinct philosophy. It conceptualises the essentials of crime differently, aims at different goals, involves other key actors, uses dissimilar means, and operates in a different social and juridical context. It is not possible to frame different paradigms with the same criteria, just as it is not possible to play basketball with the rules of football.

Basically, we can consider restorative justice as inversed constructive retributivism. Retribution consists of three elements: the unlawful behaviour is blamed, the responsibility of the offender is indicated, and the moral imbalance is repaired by paying back to the offender the suffering he caused by his offence. Restorative justice in fact shares these components, but in a constructive version.

(1) Restorative justice clearly articulates the limits of social tolerance. It intervenes because a crime has been committed, which is disapproved. Moral emotions such as shame, guilt, remorse and embarrassment, are inherent in restorative processes, and result from the disapproval expressed during the process. Restorative justice thus provides the essential elements of censuring. But there is a difference: Censure in current criminal justice condemns the offender because he has transgressed an article of penal law. Restorative censuring is rooted in social relations. The offender's behaviour is disapproved because it caused harm to another person and to social life (Blad 2004). Restorative censuring refers to the obligation to respect the quality of social life.

(2) As in punitive retributivism, restorative justice raises the responsibility of the offender. But in punitive retributivism, the offender is confronted by the system with his responsibility, and must submit to the punitive consequences imposed on him by that system. This passive responsibility is retrospective; it is imposed because of an act committed in the past. Restorative justice invites (under pressure) the offender to take active responsibility, by participating in the deliberation and making active gestures of reparation (Braithwaite & Roche, 2001). If this active commitment does not succeed, an active effort will be imposed as part of (symbolic) reparation. Active responsibility is raised because of the act committed in the past, but also oriented towards

an action or a situation in the future. Active responsibility, therefore, is both retrospective and prospective.

(3) In punitive retributivism, the balance is restored by paying back to the offender the same amount of suffering he has caused. It is supposed that things are then evened out: both parties suffer equally. In restorative justice, the offender's paying-back role is reversed: he must himself pay back by repairing as much as possible the harm and suffering caused. The balance is now restored, not by doubling the total amount of suffering, but by taking suffering away. Retribution in its genuine meaning is achieved, in a constructive way (Zehr 2002).

This retributive dimension in restorative justice, appealing to active responsibility of the stakeholders, being retrospective and seeking to balance, is the ground to construct restorative justice safeguards. The challenge comes from the key difference: the punitive apriorism vs. the aim at restoration. To attain the restorative goal, ample space must be allowed for informal deliberations including all stakeholders, which is contrary to the strict formalisation in the hands of professionals in the penal system. It is a difficult challenge, which is not impossible. Many examples exist of how restorative processes are currently implemented and located in relation to mainstream criminal justice systems. From a maximalist standpoint, these are transitional stages only, but they inspire theoretical juridical work about new principles more appropriate to frame restorative justice legally.

As thinking on legal safeguards for restorative criminal justice is relatively new, certainly compared to the centuries of tradition for punitive criminal justice, there is not a complete set of principles available as yet. Some tentative proposals have been advanced (as, for example in Braithwaite 2002, Walgrave 2008, Blad 2004). Certain is that lawyers of victims and offenders are the most important guarantees of their clients' legal rights. It is not different in a restorative justice context, but lawyers must reconsider what is in their clients' best interest. They are currently educated as fighters, aiming to win a battle, while they will now have to learn to make peace. If lawyers can open their minds and strategies to what really is the best interest of their clients, they can make a major contribution to a restorative justice system that respects human rights, procedural guarantees and sentencing limits.

All in all, restorative justice holds the potential to develop the legal standards that allow the checks and balances which are needed in a constitutional, democratic state. These potentials are not always realized, but the retributive dimension offers the ground for gauging the justification of the intervention and the reasonableness of the reparative obligations that may be imposed. In a rehabilitative approach, this ground is less available, because it refers less to controllable external criteria such as the seriousness of a crime or of harm, and more to the needs of the offender.

*Responding to serious offending*
Several reasons are advanced in support of the claim that restorative responses are inappropriate for cases of serious youth crime.

Some suppose that those who commit serious crimes respond only to punishment and deterrence. Such idea reflects a naive view of the etiology of crime, as if the seriousness of a crime expresses the offender's social callousness. Earlier mentioned research even shows that positive impact on recidivism is higher for serious offences than for benign delinquency.

Punitive retributivists advance that serious offences must by principle be responded by a proportionate hard treatment. Such offending indeed needs a firm public rejection, possibly including coercion, but it must therefore not be expressed by deliberately inflicting pain. It has been argued earlier already that it is an unethical assumption.

Media, policy-makers and justice professionals, refer to the so-called retributive feelings of the victims to justify punishment in case of serious crimes. This argument appears more to instrumentalise the victim in support of the penal populist rhetorics, than based on real knowledge of what victims want. Research indeed does not document a general call from victims for punishment. As Strang concludes her research, victims want "repair, not revenge" (Strang 2002).

An important reflection is that fewer risks can be taken with those who have committed a serious crime because their possible reoffending could lead to serious re-victimisation. One can indeed not run headlong after restoration, if this gives space for more harm, suffering and social unrest. The principled priority for restoration may need to face up to the need to preserve public security. In a few cases, incapacitation of negatively defiant offenders will limit the potential for reparation (Braithwaite 2002, Walgrave 2008).

All in all, seriousness of crime cannot be an a priori argument to exclude offenders and victims of serious crimes from restorative interventions. On the contrary, the restorative justice paradigm makes the amount of harm and suffering caused by a crime an essential argument in favour of actions with a view to restoration. Victims of serious crimes and communities where these crimes occur probably suffer more hurt than those involved in trivial offences. They are more in need of restoration. Certainly after a serious crime, offenders must be confronted with their responsibility. Restorative justice does this more than the welfare oriented reactions in juvenile justice, and, as argued before, restorative justice does this more constructively than punishment in the traditional criminal justice.

Restorative justice is not a soft option. Traditional procedures make the confrontation indirect, impersonal, and filtered through rituals. Restorative processes are personal, direct, and often emotional. For the offenders, being confronted directly with what they have done and with the disapproval of beloved persons is a deeply moving burden. The offender is brought to feel intensely a mixture of unpleasant emotions like shame, guilt, remorse, embarrassment, and humiliation (Maxwell and Morris 1999, Harris et al. 2004). Agreements often require serious and unpleasant commitments and demanding time investments.

Therefore, restorative justice can respond credibly to serious offending. It is experienced convincingly in New Zealand where all juveniles go through a Family Group Conference. It is contradictory to restorative principles to exclude victims of serious crimes a priori from restorative actions. The only practical limit is the risk of serious reoffending. It is not now known where this limit lies or how it should be implemented. Except New Zealand experience, the experience with systemic restorative responses to youth crime is limited.

*Victims' interests and needs*
At first sight, it seems evident that justice responses inspired by restorative principles meet victims' needs better than traditional criminal justice does. Empirical assessment so far confirms this expectation: in general, victims' satisfaction after participation in restorative encounters is significantly higher than after being involved in criminal procedures. Yet, the position of the

victims in restorative justice practice is less clear than it may seem. Two concerns must be taken seriously.

First, it is feared that victims may be misused in another agenda. Most of restorative justice processes are currently being mandated by the traditional criminal justice system, which is offender oriented. Hence, the processes also undergo a continuous, often inarticulate, pressure to focus on the offender. Genuine respect for the victim's interests and needs may become subordinate. This is especially true in the juvenile justice context, with its strong rehabilitation tradition. Often, mediation or conferencing is seen as a peculiar form of offender treatment, subordinating the victim's view (Acorn 2004). Social pressure may then be exerted on the victim. His story is used as a 'pedagogical means' to motivate the offender for treatment, rather than to understand genuinely the victim's suffering and needs in order to determine appropriate restorative actions. The risk of secondary victimisation is at hand.

Such practices evidently abuse the victim in an offender-perspective. It is contrary to restorative justice principles. They simply cannot be considered as a restorative justice practice. Yet, the pressure to keep an offender focus will remain strong as long as restorative justice practices are included in the traditional justice systems. That is why the maximalist vision on restorative justice is promoted, reorienting criminal justice as a whole towards doing justice primarily through reparation (Walgrave 2008).

The second concern is that a too heavy burden may be loaded on the victims and their rights may be neglected. Restorative justice advocates' emancipatory view to promote stakeholders' commitment actually may have an inverse effect. The opportunity offered to victims to be heard and to play a crucial role in the aftermath of the offence may be felt by them as a moral obligation or even a duty. Contrary to the traditional judicial procedures, restorative justice processes leave the victim/offender positions more open and set the scene for a direct personal communication and confrontation. Not all victims can cope with that. The offence has been traumatizing, and it is feared that the process may cause additional trauma and reiterate the power inequalities that existed already between the victim and the offender before the crime occurred, which could be detrimental for example in family violence (Stubbs 2002).

There is no absolute guarantee to exclude this risk totally. The unavoidable other side of awarding rights and opportunities to victims is the side of burning them with responsibilities. We cannot but hope that victims are willing and able to search for socially constructive solutions to their victimisation and to the social unrest caused by the offence. But the emotional consequences of the event may make that impossible, and that has to be respected. The facilitators must be aware of the victims' feelings and respect possible refusal to participate in a restorative meeting. A maximalist restorative justice system would provide first line support for all victims, which could constitute an additional safeguard for respecting victim's rights and emotions.

But besides of that, the only remaining question is whether victims in general are more at risk in restorative justice than in other responses to crime. Based on what we know so far, we can answer it by a clear "no, on the contrary". The research reported in the earlier mentioned surveys advances victims' satisfaction as one of the most stable findings.

**A look to the future**

The current tendency to confront juveniles more than in a predominantly welfare oriented juvenile justice system with their responsibility for what they have done and to safeguard their civil rights more accurately, is a good development. It is however threatened by an unfortunate association with more repressive views, following the wake of penal populism. Therefore the appeal for more responsibility and better rights must be kept on track of a positive, constructive pathway. Restorative justice can offer a compass to orient the juvenile justice reforms in this direction. It offers benefits such that it can address the criticisms, already mentioned, of the predominately rehabilitative juvenile justice system. Restorative justice is more effective, even for reintegrating offenders. Its clear normative approach and its retrospective aspects provide stronger criteria for developing legal safeguards. The appeal to the offender's personal responsibility seems more adequate for responding to serious crime, and victims are better off with restorative responses than with rehabilitative or punitive ones. Moreover, restorative justice seems not to provoke destructive consequences for public safety.

In my view, future juvenile justice developments will go towards a three tracks model.

- For the majority of children and adolescents the restorative apriorism will be implemented. They are considered able to take responsibility and are invited (albeit under pressure) to cooperate in voluntary restorative processes or subjected to judicial sanctions with a reparative component.

- Children and adolescents who, because of their age or mental incapacity, are considered to have only slight levels of responsibility, will be referred to welfare institutions operating outside the judicial system but possibly under judicial supervision.

- Adolescents who are considered serious offenders and at risk for serious re-offending, will receive sanctions with a mixed rationale of incapacitation and punishment.

But even in the last two tracks, attention to victims' suffering and harm will remain crucial, together with the question as to how to involve the offender in partially reparative actions.

This paper has developed the arguments as to why the first restorative track should be developed maximally and the last track should remain reduced to the strictest minimum.

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