Restorative Justice in England and Wales

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In two or three decades, restorative justice has become all over the world a busy field of experimentation, an important domain of empirical and theoretical research and of socio-ethical reflection, as well as a crucial theme in the debates on juvenile justice and criminal justice reform. Very remarkable is the extent to which restorative justice thinking appears to be increasingly influencing the direction of criminal justice policy-making at almost every level: international, governmental (see further), and also subgovernmental within a range of criminal agencies, including the police, probation service and prison service.

In this paper we will try and define the concept (1), explain where it does come from (2), as well as when (3) and how (4) it is implemented in England and Wales.

1. Definition(s)

The term “restorative justice” is a fairly new one and it means different things depending on the country, state and community where such programmes exist. One can think, among others, of restitution, reparation, compensation, reconciliation, atonement, redress, community service, mediation and indemnification. What do they have in common?

The concept is simple. The scales of justice are no longer seen as balancing the harm done by the offender with further harm inflicted on the offender; that only adds to the total amount of harm in the world. Instead, the harm is balanced by offering support to the victim and requiring the offender to make amends, with help of the community if necessary. Stated in this way, the idea appears attractive. At least the response of the state would be ethically acceptable; it would be in line with what is required from citizens – unlike punishment, which uses the principle “Don’t do as I do, do as I tell you” (see further).

One of the most cited definitions is Tony Marshall’s: “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” (Marshall, 1996). But scholars like Gordon Bazemore and Lode Walgrave think that for the advocates of this definition, restorative justice is just a form of diversion. According to them, restorative justice should be much more than this; their goal is a fully fledged restorative alternative. In this view Marshall’s definition appears to them both too broad and too narrow. Too narrow because restorative justice cannot be limited to a process: the primary distinguishing feature of restorative justice is an effort to repair the harm crime causes. That is why they include under this term not only a face-to-face meeting between the parties with a stake in the particular offence, but also a wide variety of services provided for victims, whether or not an offender is involved or even known to the system or the community. Too broad because this definition does not at all refer to repairing harm, and thus provides no specific boundaries on the kinds of processes included. That is why they suggest another very simple definition: “restorative justice is every action that is primarily oriented towards doing justice by repairing the harm that has been caused by a crime” (G. Bazemore and L. Walgrave,

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1 See, for example, the Draft UN Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (draft 13 April 1999) and the Council of Europe Recommendation of the Committee of Ministers to Members States concerning Mediation in Penal Matters (No R(99)19, 15 September 1999); these two documents make specific recommendations about the principles on which restorative programmes should be based.
We could say that the definition offered by the European Forum for Victim-Offender Mediation and Restorative Justice is in between: “A process for responding to crime, based on reparation, as far as possible, of the harm caused by the crime to the victim, holding the offender accountable, and facilitating communication between them, subject to the consent of both”.

This question of definition might seem of pure academic interest, but I think that it is not the case. It is important to keep in mind that restorative justice is more than a mediation process and that different measures can be restorative or not, depending on the extent to which they are carried out with the intent to repair harm (see further the example of community service in England and Wales). The question could be: what is the intent of a sanction: to incapacitate, to punish, to deter, to rehabilitate or to restore? In this sense, most scholars thought until recently that the restorative justice response must be clearly distinguished from the two main models, which are the punitive and the rehabilitative responses. These two responses have a quite different central purpose:

The retributive response to crime takes place in a societal context of state power, focuses on the offence, inflicts harm, seeks “just deserts”, and ignores the victim. This approach, that democratic societies had thought to have left behind, is enjoying a new resurrection (see the United States of America and its highest incarceration rate in the western developed world).

The rehabilitative response takes place in the societal context of a welfare state, focuses on the offender, treats him, seeks conforming behaviour, but ignores the victim. This approach was the predominant approach during a part of the last century. However, people became very sceptical whether rehabilitation worked or not, and the meta-analysis of Martinson (1974), who concluded that “nothing works” with regard to rehabilitation, marked the end of a rehabilitative approach in the criminal justice of most countries.

Therefore, more retributive approaches were the choice of policy makers who were under a lot of pressure from the public to do something about the supposedly increasing crime rates (although everybody should know by now that this approach does not work either!). They did not listen to Christa Pelikan (1992): “Renouncing the use of force and violence cannot be taught by using force”, neither to Lode Walgrave (1994): “We do not think that revenge, even when it is canalized within a legal framework, is a good basis for a civilized social reaction.”

As explained above, the restorative justice response leaves retribution and rehabilitation behind. It takes place in the societal context of empowering the community, focuses on losses, repairs the damage inflicted, seeks satisfied parties, and places the victim as the central person of the whole process.

But there are now theorists to make the whole of it still a bit more confused. Antony Duff, for example, considers that the punishment paradigm and the restorative paradigm are not incompatible. According to him (2002), the kind of restoration that criminal wrongdoing makes necessary is properly achieved through a process of retributive punishment. Or, to put it the other way around, offenders should suffer retribution, punishment for their crimes, but the essential purpose of such punishment should be to achieve reparation. His slogan is therefore “Restoration through retribution.” I am not sure this can help us a lot.

All I wanted to show is the diversity of this relatively new concept, which is still in evolution. The field is not unanimous and there is controversy about many aspects of restorative justice today. But practitioners and scientific researchers have recently become aware that there are important fundamental principles upon which to more fully develop what some regard as the new justice paradigm.

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2. Where does Restorative Justice come from?

Restorative justice has been the dominant model of criminal justice throughout most of human history for all the peoples of the world. Quite unlike the laws found in today’s societies, the laws of more primitive communities contained monetary evaluations for most offences as compensation to the victim, not as punishment of the criminal (Schafer, 1970). As primitive societies became more stable, they became more property-oriented, and restitution and victim compensation became more developed.

A major change occurred in the ninth century under the Frankish Empire where restitution was replaced by a fine, assessed against offenders by a tribunal, which went to the State rather than to the victim (Gillin, 1935). This change marked the beginning of the State’s monopoly on criminal punishment and by the end of the twelfth century the erosion of restorative justice was complete (Schafer, 1970). Despite this erosion and the diminished role of the victim, the concept of restorative justice has remained alive through the centuries.

Despite the increasing interest in reforming the offender, which was matched by decreasing care for the victim, some legal philosophers and reformers reiterated the importance of restorative justice, restitution and compensation over and over again (Thomas Moore, James Wilson, Cesare Beccaria, Raffaele Garofalo, Jeremy Bentham, Enrico Ferri, ... to name but a few).

Margaret Fry, a British reformer, is partly responsible for the revival of restitution and compensation. Her efforts led to the creation of state victim compensation programmes in the early 1960s in New Zealand and the United Kingdom, which served as models for many other countries. These restitution and victim compensation schemes can be considered as the predecessors of restorative justice.

At this time support for restorative justice started to grow in what appears to be a unique period of convergence between emerging justice philosophies and political, social and cultural movements. As the victim’s movement became stronger and drew attention to the need to deal with the suffering caused by crime, crime victims began to claim an expanded role in the justice process and to demand that the outcome of this process become more focused on reparation (Aertsen and Peters, 1995). Community-oriented policing advocates criticized the ritualistic and often counterproductive approaches of the professional model of law enforcement and advanced more problem-oriented interventions based on partnerships with community groups and citizens. The Norwegian criminologist Nils Christie published his seminal article ‘Conflicts as Property’ in which he introduced the idea of “ownership of conflict”: the relationship between victim and offender was said to involve a personal conflict which had been stolen by the state. The women’s movement gained influence and articulated a feminist critique of patriarchal justice that pleaded for a more caring and reconciling system (Harris, 1990). Strong critical positions were also advanced with regard to individual treatment or social welfare models for juvenile justice, which were reproached for their neglect of legal rights and for their focus on the individual needs of offenders that ignored the multiple needs of crime victims and communities (Walgrave, 1994). At the same time, “just deserts” perspectives were subjected to a growing theoretical critique. (We should note that, as early as 1921, Berrini had written: “The state spends enormous sums of intensive breeding of dangerousness and criminality of offenders and thereafter restores to society offenders more fearful than before”.)

In this climate happened what is generally referred to as the “Mennonite model” of Kitchener in Ontario, and considered as the forerunner of the programmes that bring offenders into face-to-face meetings with their victims to explore interpersonal reconciliation and build a plan for reparation. The story is simple but worth being told. In 1974, after a Saturday night vandalism raid in their small town of Elmira, two young men were apprehended and they
pleaded guilty to twenty-two counts of wilful damage. The probation officer who was assigned to prepare their presentence reports was a member of the Mennonite church. Probably influenced by the strong pacifist tradition of this church, he suggested in his report to the judge that “there could be some therapeutic value in these two young men having to personally face up to the victims of their numerous offences.” To his surprise, the judge agreed; he ordered a one-month remand to allow time for the convicted pair to meet the victims and assess their losses, which they did. One month later, the judge ordered a fine for each, placed them under probation, and included as a term of the probation order that each youth should make restitution to the victims. At the time nobody had the slightest idea that this humble experience would be told and retold as the “Elmira Case” in countless articles, speeches, and conference presentations (see further the influence in Great Britain). The probation officer and his colleagues kept on thinking about this experiment, tried to refine the process and eventually formulated a programme proposal which they presented in 1975 as the Victim/Offender Reconciliation Project (VORP). A few years later, it became the Victim/offender Reconciliation Program.

3. When was it implemented in England and Wales?

A preliminary remark: The UK is not homogenous in its legal system or its criminal justice system. For the most part England and Wales have identical provisions. The legal and criminal justice system in Northern Ireland is similar to England and Wales, but some provisions do not apply or are applied differently. Scotland has a completely different legal and criminal justice system (more similar to other European systems in many ways), in which young people are dealt with by Children’s Panels rather than by courts. We will focus in this paper on the criminal justice system of England and Wales.

A second preliminary remark: the term “restorative justice” was not in common usage among British practitioners and policymakers in the early seventies.” Mediation”, “conflict resolution” and “reparation” were frequently used. We have seen that most people agree today about the idea that restorative justice encompasses a lot of different processes like mediation, family conferencing, victims/offenders group, etc.

The concept of applying restorative justice to the criminal justice process was introduced in Britain in the late seventies by a relatively small number of individuals who had been impressed by the restitution projects in North America. These prime movers were a very small number of individuals who had either visited the United States and Canada and seen similar work in operation there or had read about such work, and, in many cases, had been able to try the idea out informally in the course of their jobs as social workers or probation officers. They were motivated by personal beliefs in tune with the philosophies behind such initiatives and by a sense of frustration with the ability of the justice system to achieve anything positive in relation to crime. The programmes they described (Harding, 1982; Wright, 1977) contained a fundamental element of financial compensation or service in recompense for harm which had been caused. As a result, the concept appealed to supporters of punishment who were attracted by the idea of offenders having to “pay” for what they had done, as well as the advocates of the rehabilitation principle, who recognized in restorative justice (limited to “mediation” at the time) the possibility of helping offenders to grow through a deeper understanding of the effects of their actions.

As an example of this confusion of aims: in 1972 (The Conservatives in power: Edward Heath’s Government) was introduced in England and Wales the Community Service Order, in which the offender is required to do some form of work, usually for a public service or a NGO. It is or should be one among the different restorative measures. But it was introduced with a mixture of rehabilitative (because it builds the self-confidence of offenders), retributive
(because it deprives them of free time) and reparative (because...its main goal) aims. And it crossed the Channel to become a very popular sentence in a lot of other European countries.

The first group to discuss the topic in the UK seems to have been the Bristol Association for the Care and Resettlement of Offenders (BACRO), a local branch of NACRO (National Association for the Care and Resettlement of Offenders). In 1972 they were discussing the possibility of helping offenders to become more aware of the harm they were doing, by introducing them to their victims. Realising that they knew nothing about victims of crime, a pilot project was established in South Bristol to ask victims how they had been affected. This led to the setting up of the first Victim Support Scheme in Bristol in 1974. It was followed by many other similar schemes and the formation of the National Association of Victims Support Schemes (NAVSS, now called Victim Support) in 1979 (Victim Support, 1982). The purpose of Victim Support is to provide emotional support and practical advice to people who have become victims of crime. The service has now been extended to give support to victims (and other witnesses) when they have to attend court.

The NAVSS was approached by many enquirers (from agencies interested in starting mediation or reparation projects) who confused victim-offender mediation with victim support. But from the perspective of the NAVSS, the idea of mediated agreements between victims and offenders was born prematurely from an unusual union between policy-makers and penal reformers concerned primarily with an ailing criminal justice system which was in urgent need of a new direction. The concern for victims which was emerging in the late eighties was, according to them, seized upon as a potential means of diverting cases from the over-stretched courts and offenders from the over-crowded, unmanageable prisons. This can explain why the NAVSS, while never obstructive, remained cautious about the idea for a long time, suspicious that reparation schemes might be “using” victims to benefit offenders primarily. From 1981 meetings were arranged by Victim Support at six-monthly intervals for all those concerned. These informal meetings led to the establishment of the Forum for Initiatives in Reparation and Mediation (FIRM) in 1984. FIRM changed its name to Mediation UK in 1991, which is now the main general umbrella organisation for mediation.

Another important factor is the influence of outsiders like Burt Galaway from Minnesota who undertook a teaching assignment at the University of Birmingham in 1981 and introduced audiences to the Mennonite Victim/Offender Reconciliation Programs (VORP, see above) or like Mark Chupp, the then Director of the VORP in Elkhart, Indiana.

At this time of prison overcrowding and pessimism about traditional sentencing methods coinciding with an awakening of interest in victim-related issues, projects concerned with offender/mediation mediation received particular attention. One such early initiative was run by the Exeter Joint Services Youth Support Team and started in 1979, whereby juveniles who where considered suitable for a caution could be invited to undertake reparation work (Marshall and Walpole, 1985).

We should note a legislative factor: British laws do not allow victims to join civil proceedings to the criminal process to obtain compensation, like in France or Belgium. But Compensation Orders, introduced in the Criminal Justice Act (CJA) 1972, must be given precedence over fines, and courts are able to make a compensation order on its own, without any other sanction, since the CJA 1982. (For full information, we should add that since the CJA 1988, they must now consider ordering offenders to pay compensation and must give reasons if they do not.)

In 1983 the West Midlands probation service obtained a grant to employ Martin Wright (founder-member of Mediation UK) in carrying out a three-month feasibility study in the city of Coventry. Increasing interest also began to be shown nationally in the direction of direct reparation. An All-party Penal Affairs Group of MPs recommended developments in this area in 1984. This same year, the Conservative Home Secretary Leon Brittan announced that
money (200,000 pounds) would be made available during the following year to fund a small number of reparation projects based on mediated agreements to test their effectiveness in the context of criminal justice (“The idea of reparation appeals to me because...nothing is more likely to induce remorse and reduce recidivism among a certain, all too numerous, kind of offender than being brought face to face with the human consequences of crime” (Leon Brittan, 1984): we can not say that he was overwhelmed with a real sense of restorative justice!) There was an explosion of interest throughout the country and far more projects were proposed than could be funded. Four reparation projects (Coventry, Cumbria, Leeds and Wolverhampton) were finally selected for funding in 1985 and researched by the Home Office in 1985-1987 (Marshal and Merry, 1990). Some months after the Home Secretary announced the government sponsorship, the Home Office produced a discussion paper that reflected all the uncertainty and confusion of the time and revealed that government interest (second Thatcher’s Government) in this subject was largely centred on the possibility of an additional court penalty – a “reparation order” – that would provide an alternative disposal for juvenile offenders. This was of little interest to most practitioners within the various embryonic reparation schemes, whose practice was not reparation by offender to victim but, on behalf of the offender, diversion of the offender from prosecution or mitigation of the court’s penalty. As we can notice, there was an almost complete mis-match between the policy question posed by the government and the experiments that it hoped would provide an answer. When the report on the Home Office co-ordination of research on reparation, Crime and Accountability, was eventually published (Marshall & Merry, 1990), the Home Office did not even issue a press release. “Reparation” had disappeared from the political agenda, undermined by the policy confusion. That is why mediation did not appear in the Criminal Justice Act which followed (1991). Personnel changes in the Home Office led to a shift in government interest and Victim Support received greater emphasis at the expense of mediation.

Then came the 1990s (the Conservatives in power: John Major’s Government) which saw renewed moral panic in the UK about youth crime, particularly persistent young offenders (though it has proved difficult to provide statistical evidence to support this (Newburn, 1997)), with the government promising return to tough and effective punishments. The origins of this moral panic lie, as is often the case elsewhere, in the government’s need to distract the electorate from its crisis-ridden economic policy, but it has also been fuelled by media coverage of some deeply unpleasant juvenile crimes, which, despite their atypicality, has prompted a wave of national soul-searching. The effectiveness of the youth justice system and the use of diversion were put into question. This became a significant election issue for the (Tony Blair’s) Labour Party, and it is their reform of the youth system, through two big pieces of legislation (see further), that provided a huge opportunity for the rapid expansion of restorative practice throughout England and Wales.

4. Legislative Changes in regard to Restorative Justice in England and Wales

Until recently there has been no specific legislation to restorative justice in the UK (no more than in many other European countries). Consequently, all criminal justice mediation (or conferencing) has occurred in the “shadow of the law”, driven by local initiative and personalities, rather than because of it. However, this situation of emptiness has changed in relation to the youth justice system. We should note that this is the field where changes usually occur first, in most countries. As announced, since their election in May 1997, the (Tony Blair’s) Labour Party has introduced the Crime and Disorder Act (enacted in 1998), which reforms the organisation of the youth system and introduces a range of new orders, and
the *Youth Justice and Criminal Evidence Act* (enacted in 1999), which introduces a further new order, increasing the range of restorative justice in the UK.

The *Crime and Disorder Act* introduces a specific *Reparation Order*, which enables courts to order young people to undertake practical reparation activities, either directly to victims, or to the community at large. *Action Plan Orders* have also been introduced by this Act: it is a three month order intended to engage a young person in a variety of activities, and/or place them under certain conditions. Reparation is expected to be a significant component of these Orders. Finally the (already existing) Supervision Order has been amended to include an option for reparation as part of the activities undertaken under it. This Act also introduces a two-stage system of reprimand and warning. Any young person guilty of a minor offence will receive a reprimand. A more serious first offence, or a second minor offence will warrant a warning. Any subsequent offences should result in prosecution (What people call: “Three strikes and you’re out”). This is a further stage at which the government wishes reparation to be considered as a principal response.

The *Youth Justice and Criminal Evidence Act* introduces a mandatory sentence, the *Referral Order*, for young offenders appearing in court for the first time who have not committed an offence likely to result in custody. The young person is referred to a Youth Offender Panel which will work out the content of the order. This YOP can include: the offender, his immediate family or carers, other supporters of the offender, the victim(s) and their supporters and three members of the community. The purpose of this meeting is to facilitate a frank discussion about what occurred, how people have been affected, and what needs to occur to make amends, and to prevent any further offending. All this sounds more like Family Group Conferencing, and it has been described by the government as the first introduction of restorative justice into the Court itself.

However, the lack of firm guidance on how restorative processes are to be integrated with the system has led to a few problems. Some of these are considered to be highly problematic, particularly in relation to the need for sensitive and meaningful assessments with victims. A number of issues contribute to this, including the government priority of cutting delays in processing young offenders. The Labour Party made a few promises before winning the general election of 1997, and some of them have their origins in “old” ways of thinking, for example the idea of “being tough” and speeding up the criminal process; this has its merits in the context of conventional justice, but it does not allow time for the victim to decide whether to take part in mediation for example, nor for the mediators to arrange a meeting. This “fast-food” version (“McDonaldization of mediation”, according to M. Umbreit (1999)) seems likely to strip the whole process of its most important restorative elements.

### 5. Conclusion

As we have seen, there are still a lot of discussions between experts and practitioners about what restorative justice is or should be. But all agree about the philosophy underlying it. Even if this is not enough, there are currently great expectations for and a huge interest in the future development of restorative justice. A key challenge will be whether this interest can be maintained. The *Crime and Disorder Act* and the *Youth Justice & Criminal Evidence Act* offer great opportunities for the rapid development of restorative justice throughout the youth justice system. If, notwithstanding the “system resistance”, the restorative justice initiatives are successful in juvenile justice, it can be hoped that expansion of restorative justice will also take place throughout the adult system as well.

The best way to stimulate the application in practice seems to be the wider dissemination of information about restorative justice to the public and the police regarding its potential for reconciliation. Information and training provided for judges and prosecutors are also very
important: in many of the areas piloting the new reparation opportunities of the *Crime and Disorder Act*, implementation issues have arisen as “restorative orders” were implemented from an adversarial and retributive perspective. Studies show also that punitive attitudes are much more prevalent on the part of judges and prosecutors than on the part of the public at large.

However the legislation activity backed by substantial funding does suggest a definite commitment to restorative justice from central government. This is probably the best chance the UK has had for many years to achieve major restorative reforms.

But we should keep in mind that attitudes towards restitution and punishment are subject to social change; it cannot be ruled out that nowadays restitutive ideas might stand less chance than a few years ago. This could be related to the current conservative climate (not depending on the official political color) within society that favors a harsh criminal policy. And we can not say that, on the international level, the current Prime Minister is presently showing any sign of a clear tendency to reconciliation, reparation, mediation whatsoever!
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