

INTRODUCTION

An exploratory journey towards a consequential restorative justice

Since the 1970s, the Belgian youth justice system was criticised for being too one-sidedly protective, which appeared to be ineffective and to neglect legal safeguards for children, juveniles and their families. But returning to a predominantly punitive response was not an option. In the search for an alternative, I intuitively explored a possible pathway that was, in fact, close to a reparative approach (Walgrave, 1981).

In 1991, for the first time I heard the phrase ‘restorative justice’, at an international seminar in Il Ciocco (Tuscany) (Messmer & Otto, 1992). It opened to me the trunk road to an alternative for both the rehabilitative and the punitive approaches to youth offending (Walgrave, 1992). Maybe the youth justice system could be reoriented towards doing justice primarily through restoration or reparation,¹ including in its coercive interventions. Restorative justice, as I understood it then, was a justice system focused on reparation and restoration, just as rehabilitative justice was a justice system oriented towards rehabilitation of the offender, or penal justice was a system responding to offending by punishment.

At the seminar in Il Ciocco, I was not fully aware that my native English-speaking co-participants understood ‘justice’ mainly in its moral dimension. For them, restorative justice meant that the stakeholders are given the opportunity to seek the satisfaction that justice is done, through direct and respectful dialogue about the harm and suffering caused and about how it can be repaired. While both the systemic justice intervention and the sense of justice can coincide (De Mesmaecker, 2011), they are not the same. The Dutch language (my native tongue) uses different words. Justice as the system is called *gerecht*, while justice as fairness is called *gerechtigheid* or *rechtvaardigheid*.

My initial view of restorative justice in its institutional dimension was thus based on a narrow understanding of the English word ‘justice’. But the realisation of my mistakenly narrowing this concept was no reason to abandon my systemic view. After all, if the option of doing justice through restoration deserves a principled priority, there is no reason to relinquish this priority when an offence is very serious or when one of the stakeholders refuses to cooperate in a restorative dialogue. Therefore, the coercive judicial interventions should also pursue reparation as much as possible.

1 As a non-native speaker, the nuances in the significance of ‘restoration’ versus ‘reparation’ are sometimes difficult to understand. I use ‘reparation’ as a partial, often material restitution or compensation of what is damaged in the past, while ‘restoration’ is understood in a more holistic, more relational meaning, oriented to the future.

Another pathway towards my maximalist view of restorative justice is probably linked to my European continental roots, as described in the first selected text in this volume.

Text 1

Walgrave, L. (2004). Restorative justice in comparison. In J. Winterdyk & C. Liqun (eds.), *Lessons from international/comparative criminology/criminal justice* (pp. 125-137). Willowdale: De Sitter.

This book chapter describes my pathway towards and through restorative justice, until 2004. It also explains my position as a continental European scholar from where I was introduced to restorative justice and started my own inquiry. Compared with the dominant Anglo-Saxon approach, three particularities characterise the European continental viewpoint. (1) Civil law regimes on the European continent allow less space for discretion and experimenting with restorative processes. (2) Most scholars on the European continent are less confident in a ‘community’ as the niche of restorative justice settlements. (3) The impact of indigenous traditions on the development of restorative justice practices does not exist on the European continent. Together, right from the beginning, these particularities made me sensitive to the juridical contextualisation of restorative justice.

1 FROM YOUTH JUSTICE TO RESTORATIVE YOUTH JUSTICE

The gateway through which I entered the restorative justice discourse was my commitment to youth justice. The contours of an institutional view of restorative youth justice gradually took shape during the preparation of a book titled *Restorative juvenile justice. Repairing the harm of youth crime* that I co-authored with Gordon Bazemore² (Bazemore & Walgrave, 1999). In the introduction, we wrote

the future of a restorative juvenile justice depends on it becoming a fully-fledged, systemic alternative ... Systemic reform based on restorative justice implies that there can be a restorative response to any crime ... Restorative intervention will therefore not be limited to one type of offender, one type of victim or community, one programme or part of the system, or one system objective or function (e.g. sanctioning or public safety) (Bazemore & Walgrave, 1999: 5).

² Gordon deceased on 6 June 2021, when I was finishing this volume. He was an outstanding scholar and an unforgettable, very fine friend (Walgrave, 2021).

We called it ‘a “maximalist” agenda for restorative juvenile justice’ (Bazemore & Walgrave, 1999: 7). We defined restorative justice as ‘... every action that is primarily oriented towards doing justice by repairing the harm that has been caused by a crime’ (Bazemore & Walgrave, 1999: 48).

Following thirteen chapters written by several authors, including John Braithwaite, Ray Corrado, Barry Feld, Mara Schiff, Klaus Sessar, Mark Umbreit, Dan Van Ness and Elmar Weitekamp, we conclude in the final chapter that

Rather than divert cases from the system, reformers might instead seek to divert the system itself from its current retributive and/or treatment focus. The fully-fledged, systemic alternative to both the retributive and the social welfare responses to crime ... should offer as many legal safeguards as the traditional criminal justice system. But it should be socially more constructive, provide more standing and support for crime victims, and offer (at a minimum) no fewer opportunities for offender reintegration and rehabilitation than systems grounded in individual treatment assumptions (Bazemore & Walgrave, 1999: 363-364).

The joint endeavour with Gordon Bazemore for *Restorative juvenile justice* was the occasion for the first International Conference on Restorative Justice for Juveniles. Potentialities, Risks and Problems for Research, held in Leuven 12-14 May 1997. It was organised by the *International Network for Research on Restorative Justice for Juveniles*. The opening address is included in the current volume:

Text 2

Walgrave, L. (1998). What is at stake in restorative justice for juveniles? In L. Walgrave (ed.), *Restorative justice for juveniles: potentialities, risks and problems* (pp. 11-16). Leuven: Leuven University Press.

The short allocation presents the option for restorative justice in its maximalist version and sketches a programme for research. In fact, it now appears to have oriented my adventurous journey through restorative justice land. Whereas the conference was officially focused on implementing restorative justice for juveniles, this text and many other contributions to this international conference reflected on restorative justice in general. Later, the organising Network became the *International Network for Research on Restorative Justice*, dropping the ‘for Juveniles’.

In 2004, a chapter in Michael Tonry’s series *Crime and justice. A review of research* allowed me to take stock of my endeavour to transform youth justice into a predominantly restoration-oriented justice system.

Text 3

Walgrave, L. (2004). Restoration in youth justice. In M. Tonry & A. Doob (eds.). *Youth crime and youth justice. Comparative and cross national-perspectives* (pp. 543-597). Chicago: University of Chicago Press. Vol. 31 of 'Crime and Justice. A Review of Research'.

This chapter resumes the reasons why I turned to restorative justice in this field. It explores the potentials of restorative justice to better respond to four topics of criticism that are commonly addressed at the traditional rehabilitation-oriented youth justice systems: (1) its poor effectiveness, (2) the inaccurate legal safeguards, (3) the lack of credibility in the response to serious youth crime, and (4) the neglect of victims' needs and interests. After a short survey of the way restorative practices were being implemented in the existing youth justice systems, the conclusion is that the pathway of restorative justice deserves further exploration in the attempt to reach a more balanced youth justice system, beneficial for the victims, rehabilitative for offenders and constructive for social life. A rather provocative idea concludes the chapter: if the justice system is guided by a priority to repair harm caused by an offence instead of focusing on the intervention against the offender, there might be no principled reason left to keep a special youth justice system separate from the system for adult offenders.

2 RESTORATIVE JUSTICE AND COERCION/PUNISHMENT

Soon after *Restorative juvenile justice* (Bazemore & Walgrave, 1999) was published, several restorative justice proponents criticised our maximalist option. Most scholars indeed identified (and still identify) restorative justice with voluntary cooperative dialogue among the main stakeholders. The *Contemporary Justice Review* devoted a special issue to this debate. It opened with an extensive critical text by Paul McCold (2000). Instead of the maximalist view, McCold defends a 'diversionist perspective' and a process-based definition of restorative justice. He refutes the idea that community and society may be direct stakeholders in the settlement of the aftermath of crime, and he rejects the concept of court-imposed restorative sanctions. Gordon Bazemore and I replied separately, and John Braithwaite, Carolyn Boyes-Watson, Virginia Mackey and Hal Pepinsky offered comments. My reply is published in this volume.

Text 4

Walgrave, L. (2000). How pure can a maximalist approach to restorative justice remain? Or can a purist model of restorative justice become maximalist? *Contemporary Justice Review*, 3(4), 415-432.

The article marks the clear distinction between two basic approaches to restorative justice. The ‘diversionist’ or ‘purist’ approach, proposed by Paul McCold, focuses on the process as the key characteristic of restorative justice. The ‘maximalist’ vision, presented by Gordon Bazemore and me, considers the aim of reparation or restoration as the most important characteristic of restorative justice. The basic argument in my reply is that the purist position is too easy. It is unworldly and will fail to address most of the cases currently presented to the criminal justice system. The most difficult issues arise when voluntary dialogue between victim and offender cannot be achieved. Restorative justice advocates must be prepared to ‘make their hands dirty’ and reflect on how also coercive judicial interventions can be curved in a reparative direction.

Paul McCold rejected the maximalist view of restorative justice because, in his view, accepting judicial coercion would equal accepting punishment in restorative justice. I was confronted with an inversed view in 2001, when I spent a few months at the Australian National University (Canberra) as part of John Braithwaite’s team. Kathleen Daly was there as well, and she approvingly referred to the work of Anthony Duff, who saw restorative justice not as an alternative to punishment, but as an alternative punishment (Daly, 2000; Duff, 1992). Contrary to McCold, the idea that restorative justice would be like punishment was now being endorsed. Including restorative justice into the criminal justice system, which is what a maximalist approach to restorative justice opted for, was at hand but the ‘price to pay’ was accepting that restorative responses are basically also punishments.

That did not concur with my intuition. I felt it as a confusion of concepts and tried to unravel the distinctions between restorative justice, coercion and punishment.

Text 5

Walgrave, L. (2003). Imposing restoration instead of inflicting pain: reflections on the judicial reaction to crime. In A. von Hirsch, J. Roberts, A. Bottoms, K. Roach & M. Schiff (eds.), *Restorative justice and criminal justice. Competing or reconcilable paradigms?* (pp. 61-78). Oxford/Portland: Hart.

This 2003 book chapter is my first systematic attempt to deepen the concept of coercion in restorative justice and to distinguish it from punitive coercion. Punishment is a tool, while restoration is a goal. From an ethical standpoint, intentional infliction of pain is not the same as awareness of painfulness. Threatening infliction of pain is an obstacle in the communication with an offender. Especially the differences in ethical foundations and in the communicative potentials are underlined. Inspired by the republican theory of criminal justice (Braithwaite & Pettit, 1990), the text also explores how the ethical foundations of restorative justice may inspire a particular relation to the rule of law.

In 2003, the tenth Aquinas Conference of the International Society of Criminology was held in Leuven, entitled *Punishment, restorative justice and the morality of law* (Claes,

Foqué & Peters, 2005). It offered me the opportunity to further challenge the views of Anthony Duff.

Text 6

Walgrave, L. (2005). Retributivism and the quality of social life: a reply to Duff. In E. Claes, R. Foqué & T. Peters (eds.), *Punishment, restorative justice and the morality of law* (pp. 145-155). Antwerpen: Intersentia.

As a true retributivist, Anthony Duff advances that the wrong committed by a crime must be responded to with an intentional infliction of pain. In his view, painfulness may constitute a powerful communication to the offender, which may provoke repentance followed by willingness to repair or restore. I objected to this view because wrongs cannot be separated from harm caused. It is the harm caused to social life that permits authorities to intervene coercively in our private lives. The proposed sequence ‘censure – recognition of wrongfulness – painful repentance – restoration’ appeared unrealistic. The threat of painful treatment itself makes open and constructive communication with the offender more improbable.

A few months after the Aquinas conference, I was invited to answer a precise question in a collection, *Critical issues in restorative justice* (Zehr & Toews, 2004): ‘Has restorative justice appropriately responded to retribution theory and impulses?’ My conclusion was that restorative justice can be seen as a kind of inverted retributivism (Walgrave, 2004). In its restorative encounters as well as in its possible obligations to repair, restorative justice and punishment share three fundamental dimensions in retribution: the censuring of the unlawful behaviour, the indication of the responsibility of the offender, and the intention to restore a moral balance. But restorative justice fulfils these three dimensions in an inverted, more socially constructive way.

From now on, my writings will uncouple retribution from punishment and speak of punitive retribution versus restorative retribution. This distinction has so far not penetrated mainstream literature yet, which still mostly uses retribution and punishment as synonyms.

The concept of a constructive retribution, attempting to re-attribute, to return to the victims what has been damaged or destroyed by the crime, is a cornerstone in the next text.

Text 7

Walgrave, L. (2006). Integrating criminal justice and restorative justice. In G. Johnstone & D. Van Ness (eds.), *Handbook of restorative justice* (pp. 559-579). Cullompton: Willan Publishing.

A maximalist view of restorative justice, including the possible use of coercion, leads to the conceptualisation of a restorative criminal justice system. It explores how possible coercion may coexist with the priority for voluntary dialogues among the main stakeholders and how judicial coercion could serve reparation to the greatest extent possible. Four questions are asked: (1) How to include the public dimension of the offence in restorative justice responses? (2) How to deal restoratively with non-cooperative offenders? (3) Is punishment necessary? and (4) How to ensure that restorative decisions are just?

As I became an emeritus professor, I had to spend less time on teaching, meetings and administrative obligations and had more time for reading and extensively writing out the views I had developed on and around restorative justice. This resulted in a book (Walgrave, 2008). *Restorative justice, self-interest and responsible citizenship* represents the culmination of my view of restorative justice at that time. The outcome-based definition grounding the conceptualisation in the book expands on the one developed together with Gordon Bazemore. It considers restorative justice 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). The book proposes a restorative justice apriorism that opposed the punitive apriorism; accepts the need for judicial coercion to impose reparative sanctions if deliberated outcomes cannot be achieved; accepts that, while the reach of restorative justice is wide, it has limits; develops a more sophisticated concept of the relation between restorative justice and the law; explores the social-ethical grounds of restorative justice and proposes a paradoxical concept of common self-interest as a guidance; examines the expansion of the restorative justice philosophy into other areas; and reflects on the implications of restorative justice for criminology and for a more participative democracy.

This book can be considered as a platform from which I have deepened my theoretical reflections on restorative justice, especially in its normative and social-ethical dimensions.

Text 8

Walgrave, L. (2013). From civilising punishment to civilising criminal justice: from punishment to restoration. In D. Cornwell, J. Blad & M. Wright (eds.), *Civilising criminal justice. An international restorative agenda for penal reform* (pp. 347-377). Hook: Waterside Press.

The title of the volume, *Civilising criminal justice*, can be understood both as integrating criminal justice matters into the civil Code and as making criminal justice more civilised. This text argues why it is not a good idea to turn criminal justice into a system of private law and thus looks at how criminal justice can be made more civilised. According to Elias, the civilisation process is basically a gradual restriction of the use of violence in the community by concentrating it in the hands of the authorities. But civilisation is not a