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Restorative justice and criminal justice reform: forms, issues and counter-strategies

G. Maglione

Abstract

Restorative justice is a growing field of theory and practice. Once a marginal phenomenon, with very limited traction among criminal justice reformers, today restorative justice is widely studied, globally practiced and increasingly present in the media and political discourse. A crucial step in the recent development of restorative justice is the proliferation of state policy on this subject. This incipient 'institutional turn', entails a significant qualitative transformation of restorative justice, born as a range of crafty instruments emerged organically at the periphery of formal criminal justice systems, and originally designed as alternatives to formal criminal justice practices. In this chapter, I reflect on the re-codification of restorative justice as a criminal justice reform, focussing on the challenges related to this transformation, providing some conceptual tools to make sense of this phenomenon. I start from a few preliminary considerations on what restorative justice is. Then, I examine the relationships between restorative justice and criminal justice reform, highlighting some issues related to the use of restorative justice as an instrument to enhance criminal justice systems. In the conclusions, I sketch out a possible way forward for the restorative justice movement, toward a radical reimagination of restorative justice.

Keywords: Restorative justice; penal policy; criminal justice reform; social movement; institutionalisation

Introduction

Criminal justice scholars have hailed restorative justice (RJ) as one of 'the most significant developments in criminal justice and criminological practice and thinking' (Crawford & Newburn, 2003: 19) over the last 30 years, globally. Once a marginal phenomenon, with very limited traction among penal reformers, today RJ is widely studied and practiced whilst featuring increasingly in the media and political discourse. A crucial step in the mainstreaming of RJ has been the recent, global proliferation of state policy on this subject. This 'institutional turn' (Poama, 2015) entails a significant qualitative transformation of RJ, born as a range of crafty practices bloomed organically at the periphery of criminal justice systems, and originally designed as informal alternatives to criminal justice processes (Daly, 2013). In this chapter, I reflect on the re-codification of RJ as an instrument of criminal justice reform, focussing mainly on the challenges related to this phenomenon. I start from a few preliminary considerations on what RJ is, outlining a multi-dimensional working definition of RJ. Then, I examine the relationships between RJ and criminal justice reform, highlighting some of the main issues related to the incorporation of RJ into criminal and penal policy. In the conclusions, I sketch out a possible way forward for the RJ movement, presenting a critical approach to those issues, toward a radical reimagination of RJ.

What is restorative justice?

Within the criminological literature, there has been much discussion on the very concept of 'restorative justice', on its definitional fuzziness, and even contested nature. In lieu of searches for dictionary-like definitions, I propose here to look at how the expression 'restorative justice'

has been used historically, by whom and with which purposes and effects. From this exercise it is possible to draw a muti-dimensional understanding of 'what RJ is'.

Restorative justice as a social movement

In the early 1970s in North America and Europe, a range of scholars, practitioners and organizations began to advocate for changing the common perception of crime and punishment (Zehr, 2002). These people, who retrospectively could be defined as the RJ movement's forerunners (Diani, 1992), started various experiments with alternative (later on rebranded as 'restorative') ways of dealing with both offenders and victims. A few of them began to disseminate these practices whilst trying to draw more general concepts, to explain and justify what they were doing, how and why. Victim-offender mediation, restorative circles and conferences, in fact, emerged organically at the margins of criminal justice systems, often led by practitioners' inventiveness as rather crafty and bottom-up interventions. The RJ movement's constitutive task was to rationalise theoretically and refine practically these early practices, shaping, in a piecemeal fashion, an approach to crimes focused on their interpersonal dimension, on dialogue and reparation. The RJ movement grew out of the slow spreading of those practices, the solidification of their explanatory and normative dimensions, and the growing traction on penal reformers, becoming, from the twenty-first century, a global entity with increasing popularity. This 'rationalisation' hinged on a few recurrent explanatory claims.

The first was a relatively one-sided idea that those 'new' practices were a response to Western contemporary criminal justice systems' shortcomings (or even failures). As one of the forefathers of the RJ movement, Howard Zehr, claimed 'We know that the system we call "criminal justice" does not work. […] We have known that for many years, and have tried many reforms, and they have not worked either' (1985: 1–2). Integral to such an argument was the specific claim of enfranchising crime victims through RJ, that is, putting them at the center of the criminal justice stage (Shapland, Wilmore & Duff, 1985: 2). RJ practices, in fact, were presented as instruments to give victims voice and help the offender to repair the damage

caused to the actual victim, whilst enabling some form of communication with potentially healing effects. As Zehr (2002: 15) stated 'the theory and practice of restorative justice have emerged from and been profoundly shaped by an effort to take [the] needs of victims seriously'. A further constitutive claim was that the 'community' should be recognized as a fundamental stakeholder in dealing with crime and its aftermath. Drawing on Nils Christie's classical work on 'Conflicts as property' (1977), early RJ advocates argued that that the community has a stake in an offence apart from the victim's and that a larger social network might also be a harmed party. These claims were further bolstered by the use that the movement's forerunners made of traditional/indigenous dialogue-based justice practices. The claim was that RJ was anchored in such ancient ways of dealing with people's conflicts (e.g. Navajo or Māori justice practices), and that the RJ was just re-discovering such traditional approaches (Umbreit et al., 2005; Weitekamp, 1999). This argument reached the status of a 'myth' (Sylvester, 2003) in the RJ literature to the point that another well-known forefather of RJ, John Braithwaite (1999: 2), declared that 'restorative justice has been the dominant model of criminal justice throughout most of human history for all of the world's peoples'.

Restorative justice as a set of values

These claims were animated by some rather specific values, which since then, by gradually solidifying, have defined the movement's fundamental normative identity.

'Justice stakeholding' was presented by the RJ movement as a basic element of this 'new' approach to crimes. The idea of participation and deliberation by lay people in criminal justice has deep historical roots. However, the RJ movement has re-shaped this idea in ways that only partially overlap with that well known theme. One of the most distinctive aspects of RJ is that this form of justice enables the active participation of the relevant stakeholders (i.e. 'victim', 'community' and 'offender') in the process of handling the consequences of a crime. The premise of this view is a relational understanding of humans (Johnstone & Van Ness, 2007: 17), their 'natural' interconnectedness which can be hindered by destructive and

antisocial behaviours. RJ interventions aim, then, at restoring such interconnectedness, transforming actions which threaten or weaken interpersonal relationships.

Harm-orientation is another core value. It is widely shared within the movement that what matters is the consequence of a crime on the people involved, that is, the harm caused. RJ practices are meant to address responsively social harms caused through unique interactions between two or more individuals (Woolford, 2009: 29). Even though the focus is mainly placed on the consequences of a crime, it does exist a radical stream within RJ theory (following Hulsman (1986)) which denies the very validity of the concept of 'crime' in order to make interventions more socially informed and thereby more organic (Sullivan & Tifft, 2001). By challenging the concept of 'crime', and by speaking of 'problematic events', 'conflicts' and their ensuing 'harms' instead, these scholars have claimed that it is possible to produce an alternative to the fundamentally violent social control model of crime-and-punishment.

Strictly linked to the previous is the principle of 'personal reparation'. RJ seeks to address the harm caused by the offender to the victim and the community, promoting material and/or symbolic acts of reparation.The harm here is not only the material loss or damage but also (and characteristically) the psychological/symbolic harm. This expression refers to the offender's breach of relationships and trust with the victim, by creating a sense of fear and lack of safety. Apology or community work are considered typical symbolic reparations since they are supposedly apt to mend the relational bond between parties damaged by the crime. Furthermore, from the offender's side, the active participation in the RJ process, the expression of remorse, listening and responding to the victim, are all activities integral to symbolic harm repair (Braithwaite, 1999; Walgrave, 2003; Wright, 1996).

Another basic value is the bottom-up, communitarian nature of RJ (Johnstone, 2011; Van Ness & Strong, 2015). This means usually that RJ practices rely less on experts-driven central bureaucracies and more on decentralised and self-organised networks often led by less-qualified practitioners. This value is epitomised by Christie's pioneering work (1977) which argued that crimes are social conflicts stolen/reframed by professional (legal experts)

and structural (social systems) thieves, and that we should limit experts' monopoly in dealing with social conflicts.

A final, widely shared principle is 'consensus-orientation'. RJ practices are all designed as voluntary encounters, that is, stakeholders should not be coerced to partake in a RJ process. Additionally, the outcome of RJ processes should also be consensually reached by parties. This is a significant difference with respect to criminal justice practices whereby consent is a marginal factor in the functioning of the system. The consensual nature is also related to the active participation of victims, offenders and community in order to manage the conflict that ties them together, as a condition to achieve empowerment and healing. The restorative encounter is regarded as a time and space where the different issues at stake can be identified, discussed and addressed, restoring the emotional, social, symbolic and material relationships among the conflict stakeholders, with a specific emphasis on the victim's needs (Strang & Sherman, 2003; Zehr, 1990). This view includes, then, the necessity of a meeting, the development of a narrative which enables the participants to express and address emotion; a moment of mutual understanding; and an agreement which seals the convergence of the interests of victim and offender by giving them the ability to guide the outcome (Van Ness and Strong, 2015).

Restorative justice as a set of practices

The RJ movement built itself around the advocacy for a range of interventions into the lives of those affected by 'criminal' harms, from which it drew organically the principles outlined above. This means that victim-offender encounters, conferencing and circles[1] pre-dated the emergence of the RJ movement. Yet, such practices became integral to RJ only when they

[1] At the same time, RJ principles and practices have started to be applied and used in other contexts. One significant growth area of 'restorative practices' is in schools. Another area where the movement has made inroads is in conceptualising and delivering justice in post-conflict societies.

got theoretically appropriated by that social movement, whilst the advocacy for such practices and principles generated, circularly, the RJ movement's collective identity.

The first victim-offender mediation began as an experiment in Kitchener, Ontario in the early 1970's (Peachey, 1989) as a one-shot probation-based alternative for young people involved in a minor offence, inspired by the idea that victim-offender meetings could be helpful to both parties. This experiment evolved into organized victim-offender encounters in Canada and then in the US. From there it has spread throughout the United States and Europe. Operationally, victim-offender mediation involves a voluntary meeting between the victim (the person harmed) and the offender (the person who has harmed) facilitated by a trained mediator. Both parties are given the opportunity to express their views and feelings regarding what happened, why it happened and its consequences. The meeting is also focussed on deciding how the offender will repair the harm caused. The mediator's role is to facilitate the interaction between parties who have a primary decision-making authority. With them only, in fact, rests the power to decide how to address the harm and its consequences. Victim-offender mediation has been evaluated extensively, particularly in the US. Evidence from meta-analytic studies suggests that this restorative practice has a significant impact on reducing recidivism, and produces high rates of satisfaction among victims and offenders (Umbreit, Coates & Voss, 2004).

Restorative circles are mainly the result of the adaptation (heralded by the RJ movement since the 1980s) of Native American practices of conflict resolution to Western criminal justice systems. The main example of restorative circles are the sentencing circles which started in the early 1990s in Canada and the US as native community-sensitive criminal justice practices. Circles consist of a consensus-based encounter between the victim, the offender and the community, all called to decide together how to address the consequences of a crime. 'Community' here may refer to an array of participants ranging from criminal justice practitioners to anyone in the community concerned about the crime. The facilitated dialogue during a circle aims to identify the underlying factors which led to the offence involving the relevant stakeholders. Each circle is led by a 'keeper', who facilitates the communication

process to develop a strategy for addressing the 'criminal' harm (e.g. apology, restitution, or community service). Usually, once an offender has applied for a sentencing circle, and this has been deemed as suitable, a number of preliminary individual encounters with either the victim or the offenders are held. The final stage is the sentencing circle which determines the response expected of the offender, although it may also contain commitments by the other stakeholders involved. In addition, some follow-up circles of support will be held, to check the progress of the action plan. Restorative circles have been sparsely studied and the evidence on this practice remains relatively limited. In the US, Coates, Umbreit and Vos (2010) found that circles are 'an effective approach to involve community members in the process of holding local offenders accountable for repairing the harm they caused, to assist crime victims, and to foster a greater sense of connectedness among all those affected by crime within the community' (2010: 265). In the specific case of restorative circles involving sex offenders, in Minnesota, researchers found that this practice provided significant amounts of emotional support to offenders, compared to other post-release programs (Bohmert, Duwe and Hipple, 2018).

Restorative conferencing emerged in New Zealand as a cultural appropriation of the whanau conference of the Māori, an extended community-based encounter to deal with wrongdoing, which gives primary decision-making authority to the family of the young offender, with the input of the victim and other community support groups. Similar initiatives have been established in a number of localities in the UK, US and Canada since the 1990s. Conferencing programmes combine elements of victim-offender mediation programmes, in that they involve the victim and offender in an extended conversation about the crime and its consequences, and of circles, in that they require the participation of the victim's and offender's social networks (families, community support groups, police, social workers). Usually, this process is informed by the 'reintegrative shame' theory elaborated by Braithwaite (1989). The focus, in fact, is on the consensual identification of actions to strengthen the moral bond between the offender and the community moving away from any form of offender's stigmatisation. Conferencing is not used to determine guilt, and at any time during the process the offender

may choose to withdraw from the conference and proceed to court for a traditional determination of guilt or innocence. Both parties have a chance to express their views and feelings about the events and circumstances surrounding the crime and to discuss reparation, thereafter presenting an offer to the victim and others in attendance. Research done in the UK by Shapland and colleagues, found that conferencing generates high levels of satisfaction among both victims and offenders, reduces recidivism and also presents very limited costs (Shapland, Robinson & Sorsby, 2011). Similarly, in Australia evaluative research converges in reporting 'that offenders, their victims and supporters have positive experiences [of conferences]; they perceive conference processes as fair and are largely satisfied with outcomes' (Hayes, 2005: 83).

Restorative justice and criminal justice reform

Over the last twenty years, the RJ movement has been undergoing an unprecedented transformation, slowly shifting from the margins of criminal justice systems to the mainstream. One of the expressions of this phenomenon is the increasing incorporation of RJ practices into state policy frameworks, a trend supported by large sections of the RJ movement (e.g. Walgrave, 2000). The main reason behind this support is operational: policy supposedly ensures the wide and deep development of RJ, in terms of implementation, funding and capacity (Poama, 2015). However, these operational concerns hardly chime with some of the values historically driving the RJ movement. The issue at this point is to reflect on the forms and issues of this reformist-institutional direction taken by the movement. I will focus here on a few examples of RJ embedded in policy, from the Western world, characterised by different policy time-frames (long lasting –Australia, England and Wales, Germany– and more recent –France, Scotland, Colorado) and representative of relatively different social, cultural and political contexts (cf. Aertsen, Daems & Robert, 2006). My contention is that, although the following examples are clearly not representative of the multiple nuances of the worldwide

regulation of RJ, they do provide some evidence of certain cross-national aspects which characterise the incorporation of RJ into (Western) policy.

Forms

A sui generis sanction

RJ enshrined in legislation is usually shaped as a sui generis sanction, a penal mechanism to administer the consequences of a crime whose individual responsibility has been often unambiguously pre-decided. These 'restorative sanctions' are frequently characterised by a contractual element, that is, by some form of consent required to the offender to undertake self-reponsibilising actions toward the victim. The 'Referral Order' and 'Youth Offender Panels', introduced in England and Wales by the Youth Justice and Criminal Evidence Act 1999 (1999: §8), are a paradigmatic example of these sanctions. Such orders require the offender's consent to a contract ('Youth Offender Contract') with a restorative content (restitution to the victim but also community work etc.), to be drafted through a multi-agency panel (Youth Offender Panels) and completed within a pre-established timeframe. Similar to the Anglo-Welsh youth conference, is the new Norwegian 'Youth Monitoring and Follow-up' measure (The Mediation Service Act 2014: §1), a restorative sanction for young people requiring the young person's consent (along with their relevant guardian's). This measure contains specific activity requirements (restitution, reparation to the victim etc.) to be fulfilled by the young person. The activities are identified during a 'conference' (The Mediation Service Act 2014: §1) and organised as a 'plan' which will be implemented by a multi-agency team. Perhaps, the most well-known example of such consensual restorative sanctions, is the Australian youth (sometimes referred to as family) conference. Legislation varies across Australian states, but youth conferences' structure remains overall similar: bringing stakeholders together to decide an action plan to be implemented by the offender (see Crimes (Restorative Justice) Act 2004). What makes these instruments 'sanctions' is the fact that breaching the contract usually equates with resuming prosecution or the infliction of a

sentence. This looming punitive element is visible in Australian youth conferences legislation which establishes that offenders who do not comply with the outcomes of a conference may return to the conventional criminal justice system, although in some jurisdictions, there is some discretion as to how matters involving offenders who do not comply with their agreement may be dealt with, including a caution or no further action (Joudo Larsen, 2014). In France, the Law 2014-896 (enforcing the EU Directive 29/12 on Victims' Rights), fully recognising the possibility of RJ, establishes that offenders who do not comply with the restorative agreement will be put in prison for the length of the remaining term of the sentence suspended by the RJ measure. Similarly, in Germany, the legislator providing in 1990 the early legal framework for RJ (Păroşanu, 2013), explicitly conceptualised victim-offender mediation as a formal 'educational sanction' (Juvenile Justice Act 1990: §10.7) by which the judge may instruct the juvenile to attempt to achieve a settlement with the injured person.

Endorsement of criminalisation

Another recurrent aspect characterising RJ programmes as represented by policy is that they normally require the offender's admission of responsibility or guilty plea as a condition to enter a scheme, often and characteristically, accompanied by the expression of remorse. This is a form of endorsement of criminalisation processes led by law enforcement agencies and a paradigmatic example of RJ being 'defined in' (Mathiesen, 2015) criminal justice parameters of what is good/right and bad/wrong. In England and Wales the Criminal Justice Act 2003 establishes that RJ may be used to help determine the conditions to be attached to a 'Conditional Caution' (2003: §22) or can be a condition of the caution itself. A conditional caution requires the admission of responsibility for the offence whilst the failure to comply may result in the person being prosecuted for the offence. In Scotland there is an explicit requirement that the admission of responsibility is accompanied by 'expressions of genuine remorse for their actions' (2017: A1.2). Similarly, Australian youth conferencing requires that offenders are pre-screened, in order to check the acceptance of responsibility and level of remorse. In Colorado, the US state with the most comprehensive legislation on RJ, the

minimum requirement for entering a RJ scheme, is the acceptance of responsibility and expression of remorse. This is clearly established in the revised criminal code (§18-1.3-501(1.5)(a)) whereby it is said that the defendant can enter RJ scheme only if he/she 'accepts responsibility for and expresses remorse for his or her actions and is willing to repair the harm'. Here, invoking remorse plays the role of a moral pedagogical process which expresses symbolically the offender's allegiance to the state. In this way, remorse allows RJ to achieve a goal that otherwise would not be attended to: the bridging of moral and political community, individual and social realms through an interpersonal moralising process. Remorse is the point of suture between moral and psychological realms, individual and social dimensions, past actions and future commitments.

Professional practices

The incorporation of RJ into policy has often been accompanied by the professionalisation and standardisation of restorative practitioners. This involves the creation of a new professional group which specialises in dealing with crime in a "restorative way" and/or at the creation of professional bodies overseeing the provision of restorative services (e.g. RJ Councils in England). Restorative practitioners are new experts with control both over the participants' relations during the restorative encounter, and, following it, over the execution of the agreement reached during the encounter. This is the case if the Anglo-Welsh facilitators who set up and run 'Youth Offender Panels' (Youth Justice and Criminal Evidence Act 1999: §8) or the Norwegian 'Youth coordinator' (The Mediation Service Act 2014: §3) who makes direct decisions affecting the young person's freedom, such as prohibit the use of 'alcohol or other intoxicating or narcotic substances' (The Mediation Service Act 2014: §28). Similarly, in Germany, victim-offender mediation is usually carried out by professional mediators (Păroşanu, 2013). Such professional practitioners have rather specific powers toward the participants to RJ encounters (and particularly the offender), sometimes characterised by a striking degree of invasiveness, significantly different from the early narrative of RJ practitioners as mere facilitators of communication (Zehr, 1990; 2002). As Christie sharply

noticed (2015: 111), with respect to the new restorative measures for youth offenders in Norway, '[t]he coordinator becomes a judge, a social worker and a police person in one role. There is not much room left for lay people, the former core members of the [RJ] boards'.

Ancillary justice

RJ is mainly legislated as a measure for youth offenders, or as a stand-alone penal option managed by external professionals to whom "low tariff" crimes are referred (Crawford & Newburn, 2003). This potentially opens up the co-optation of RJ services for a range of cases which would/could not be dealt with by state agencies due to their "minor" nature of low serious crime (Cohen, 1985). In France the Law 2014-896 states that RJ could be offered only to offenders who have committed a crime whose statutory punishment is not more than five years of prison. Similarly, the new Norwegian restorative sanction is available only to young people who have not committed serious or repeated crimes. Additionally, where there is no formal restriction concerning the nature of the offence, like for victim-offender mediation in Germany, usually minor and medium severity cases are selected for case referrals (Păroşanu, 2013). In Colorado it is explicitly stated that defendants convicted of serious crimes (i.e. unlawful sexual behavior, domestic violence, stalking, or violation of a protection order) are not suitable offenders for RJ (§18-1.3-204). These choices frame RJ as a form of minor justice ancillary to criminal justice, a penal mechanism for minor offences and anti-social behaviours affecting "ordinary citizens" in the form of respectable victims and immature (youth) offenders. This is not obvious since there is evidence that RJ practices can be used to address complex conflicts ranging from domestic violence to terrorism (e.g. Liebmann and Wootton, 2010; Varona, 2014).

Coercion and surveillance

Furthermore, the legal regulation of RJ often entails some coercive surveilling practices. Restorative sanctions, in fact, lend themselves to police, judges or facilitators' pressure especially on youth first-time offenders, working as forms of low level responsibilisation

(Crawford & Newburn, 2003). The Anglo-Welsh Crime and Courts Act 2013, which regulates pre-sentencing RJ (schedule 16.2), states that the court can defer sentence in order to have regard to the offender's conduct after conviction, and within this context it can impose a 'Restorative Justice Requirement' which works as a conduct condition to be considered when sentencing the offender. In the same vein, still in England and Wales, the Offender Rehabilitation Act 2014 introduces a form of post-sentencing RJ (§15.3.8), establishing that within the 'Rehabilitation Activity Requirement' could be inserted also a restorative requirement. In both cases, the restorative sanction decided by criminal justice professionals, and administered by RJ facilitators, entails a significant restriction of freedom for offenders who are kept under a form of low-threshold, moralising surveillance which focuses on the implementation of the restorative element. In the case of the Anglo-Welsh 'Reparation Order for youth offenders' (Crime & Disorder Act 1998, §67), this form of surveillance is explicitly framed as 'supervision' which will follow the youth offender before or after a court prescribes a non-custodial sentence, without the offender's consent. In case of breach, the court may impose more restrictive consequences. As seen above, the new Norwegian 'Youth Monitoring and Follow-up' measure is substantiated by activity requirements (The Mediation Service Act 2014: §1) which are implemented through a specific monitoring and follow-up multi-agency work. This can include restrictive interventions like alcohol tests exactly like Australia youth conferences' plans which may include a drug and alcohol treatment where this has been identified as an influence on their offending behaviour. In Germany, mediation can also be applied as the independent sanction of a disciplinary measure in form of restitution (Juvenile Justice Act 1990: §15.1) which may include unremunerated work as an educational or disciplinary measure. Similarly, the French legislation mentioned above, actualises the idea of RJ as a low-threshold and informal punishment backed up by the possibility of being referred back to the standard track of prosecution-adjudication-sentencing-punishment in case of non-compliance.

Idealised stakeholders

Lastly, policy seems to shape RJ around highly idealised images of 'victims', 'offenders' and 'communities', often overlapping with the criminal justice ideal actors (Christie, 1986). The victim appears as a disempowered individual, ontologically distinguished from the offender, erasing any (social, personal, cultural) overlap between them. The idea of a victim/offender, i.e. a subject who is at the same time harmed but also harming, does not seem compatible with the 'ideal victim' of RJ policy (Maglione, 2016). Victims' needs are to participate and be heard as the Anglo-Welsh Crime and Courts Act 2013 (schedule 16.2) or Colorado's law (§18-1-901) explicitly establish. The offender is neither "bad" nor "deprived" or "wicked", but consistently represented in policy as immature, an individual unable to realise the impact of their actions, but at the same time engaged in 'earning his redemption' (Bazemore, 1998), through symbolic and/or material actions. This is particularly evident from policy-makers insistence on youth RJ as a kind of model for RJ in general, that is, from their emphasis on the responsibilising effects of RJ as if people who (supposedly) offend always lack some form of awareness of the consequences of their actions. The Anglo-Welsh, French and Norwegian provisions on supervision express this point. This moral(istic) process refers to the active work toward reintegration and maturation in order to fulfil the victim's needs. Additionally, like for the victim, the offender is a flesh-and-blood individual (not corporation or a state) and ontologically separated from the victim. The community, when included in policy as a stakeholder, is routinely conceptualised as an array of conventional criminal justice actors (police, courts, probation officers) integrated by those rather specific RJ practitioners, and sometimes by victims and offenders' families. This policy representation appears as rather parasitic to the state. In fact, this community merely integrates and supports the functioning of state justice (instead of e.g. challenging or even replacing it), whilst the state in turn backs up this 'professional' community, by funding RJ interventions, or establishing relays between RJ actors and traditional legal institutions (judges, parole officers etc.).

Issues

What are the implications of such institutional-reformist renderings of RJ? I will focus on the most problematic issues connected to the translation of RJ into policy as emerging from the brief, foregoing overview.

Re-definition and co-optation

The language used to regulate RJ is a peculiar combination between the 'conventional' criminal justice language and a rather specific 'restorative' jargon. Crime is conceptualized as an individual pathology which needs to be neutralised. RJ sanctions aspire to 'cure' this pathology, maximising the offender's responsibility, whilst neglecting the unbalanced power relations which contribute toward the definition of behaviours as crimes. The ideal representations of the 'victim' and 'offender' also reproduce some well-known and deep-rooted commonsensical understandings of these actors in "conventional" criminal justice. The "obvious" power imbalance between them (the offender is powerful, the victim is disempowered), the taken-for-granted ontological diversity between offending and victimisation, the personal differences between these two crime stakeholders, as well as the implicit moral asymmetry between the victim and offender, compose a picture which emphasises differences and neglects the empirical nuances which often characterise actual individuals caught up in the criminal justice net. Additionally, the widespread representations across policy and legal regulations ignore the constructive effects of being labelled as a 'victim' and an 'offender'. These labels are neither morally neutral, nor epistemically objective or socially unproblematic (Christie, 1986). On the contrary, they project onto people specific features, interests, needs and goals, with powerful effects (Van Dijk, 2009).

Regarding the community, policy consistently defines this as a collection of professionals who play a supporting role with respect to the key stakeholders (i.e. 'victims', 'offenders' and criminal justice representatives). This is particularly the case of youth offender panels in England and Wales and of the new Norwegian youth conference. These meetings involve the youth offender's 'professional network' and possibly (but not necessarily) the victim and their network. In this way, the 'communitarian' elements are apparently saved, insofar as the

relevant specialist micro-communities are engaged. However, to reduce the 'community' in RJ to the sheer presence of social workers and police officers is problematic, since it leaves little room for any form of active social stakeholding advocated by the RJ movement.

Reification

When policy-makers construe RJ as a discrete 'sanction', which can be used within different contexts for a range of petty crimes, they reduce RJ to a discrete thing (Honneth, 2008). Penal policy transforms informal practices (like the early RJ practices) into a sequence of codified steps which lead from micro-disorders to (supposed) social order. This operation is what renders RJ 'regulable'. Anglo-Welsh, Norwegian and French regulations all ultimately result in prescriptive catalogues of strict definitions, conditions, requirements and consequences for providing/undertaking RJ. RJ becomes a technical device, a means to achieve victims' satisfaction and reducing reoffending, that is, traditional criminal justice ends, with the proviso that the 'victim' here is only the person categorised by criminal justice as the material/direct victim and not the broad society represented by the state/crown. In this way, RJ loses much of its potential 'otherness', its plural nature of bottom-up approach to human interactions, geared toward addressing their ambivalence and sometimes outright destructiveness (Maglione, 2018).

The supposedly 'value-free rule-bound neutrality' of 'transparent' (Graeber, 2015: 183–185) policy regulations promises to render predictable what is regulated, becoming the condition for translating messy social processes into discrete sets of mechanical operations. However, this promise soon turns into bureaucratisation of practitioners' work, constraining their actions and stifling their creativity through regulations. This situation is exacerbated by the fact that policy is a self-augmenting organism which generates its own demand, making itself necessary even when it does not deliver on its promises of predictability and mechanisation. Policy generates more policy, relentlessly (Graeber, 2015). Then, even when policy is largely unapplied, it nevertheless creates the very condition for appealing to the rule-book, when for instance conflicts arise on what to do and how. The issue here is that this may not just entail

adding a layer of confusion but a layer of material violence when policy is backed up by the possibility, expressed as someone's right or the duty, to resort to violence. Certainly similar dynamics are possible when there is no policy in place. However, (state) policy violence is particularly invasive, since by definition is legitimate. It is also true that it is possible to challenge such violence using the same legal tools (read violence) which constitute policy violence, perpetuating a cycle of aggression and reaction. Yet, to consider one person's access to legal violence the same as the Leviathan's is naive, since the latter is both player and referee (it creates and enforces policy). Additionally, even when one does not have any ethical issue in resorting to violence, the access to this is often limited by multiple obstacles, of social, economic, racial and gender-based nature.

Obliteration of personal differences

A further point to be made regarding the 'ideal' stakeholders of RJ, concerns their gender and race (Hudson, 1998; Davis, 2019). Apparently, the policy images of 'victim', 'offender' and 'community' in RJ, are colourless and genderless. There is no specific racial or gender-based characterisation of them in policy and legal documents. They are thought of as empty categories, adjusted to groundless normative models of human beings. However, it is possible to infer from those normative images some implicit (and problematic) assumptions which seem to underpin these colourless and genderless actors. The representation of the victim as disempowered and emotional seems to resonate with the deeply biased gendered representations of female victims of violent crimes in mainstream criminology, strongly criticised by feminist approaches (Carlen, 1985). The offender looks consistent with the model of youth male offender, an immature troublemaker instead of, for instance, a socially deprived individual from a BME background, showing how RJ continues to neglect the challenges raised within a race equality context (Gavrielides, 2014). The community, lastly, seems shaped around the idea of a seemingly Eurocentric *gemeinschaft*, a bureaucratised family-like network, ignoring the criminogenic potential of social groups, especially if characterised by tight subcultural ties (Polizzi, 2011), or the subtle coercion of professional networks. These

policy understandings of RJ may also have 'colonising' effects considering that, through policy transfer, RJ programmes are sold as a 'standardised, homogenised commodity' to non-Western communities (Blagg, 2017: 71). Policy on RJ largely seems erasing the cultural, social and political element characterising early RJ practices, through general and abstract norms. Another aspect neglected by policy is the socio-economic dimension of criminalised behaviour. 'Crimes' are not only and always a result of interpersonal violence, but often of 'social structural violence, that is, violence done to people through [...] hierarchical social arrangements' (Sullivan & Tifft, 2001: 43). Policy on RJ confines its attention to developing practices targeting conventionally defined – that is, defined by those who have significant cultural, social, political and economic capital – acts of injustice. RJ policy does not address the social conditions which reproduce harm, inequality and violence. RJ does not include aims such as recasting conflicts and harms as political matters, creating communities and denouncing precarity, along the lines of gender, ethnicity and socio-economic status (Hudson, 1998; Blagg, 2017; Maglione, 2018). *This* RJ fails to account for how the larger social system contributes to what is defined as 'crime' (Pepinsky and Quinney, 1991).

Counter-strategies

A vision

How to counter the issues integral to RJ embedded in policy? Although addressing coherently this question would require a standalone meditation, here I would like to offer some brief reflections which integrate the foregoing critical analysis. My contention is that the RJ movement should give up on the grand plans of mainstreaming RJ through policy incorporation, and instead re-discover some of the radical elements within RJ history. From this angle, RJ should be re-thought as a form of decentralised 'critical justice', a multidimensional approach to social conflicts and harms which involves political engagement,

ethical work and social resistance. RJ should be conceived of as a critique of the pervasive 'penal' mentality. It should denounce the criminal justice's preoccupation with acts more than interactions and personality more than systems. The mentality of 'pain delivery' (Christie, 1981: 19) informing criminal justice, as a supposed antidote to rule-breaking, should be contested as based on a social revenge logic which perpetuates violence. Additionally, such a critique should also expose the policy constructions of RJ as dichotomous and de-contextualised. A critical RJ, instead, would promote localised discussions of transgressions of people's freedoms and RJ processes would be conflict transformation practices, aiming to reduce violence, opening up spaces for reimagining cooperative social relationships (Hoy, 2004) beyond criminal justice institutions, practices and mentalities. Furthermore, restorative encounters should work as spaces to reframe how we think about harms and conflicts. This could be possible if the language of RJ were critically re-examined. 'Victim', 'offender', 'community' and 'crime' are neither morally neutral, nor epistemically objective or socially unproblematic labels (Christie, 1986). On the contrary, they rest on tacit world-views, values and stereotypes, and project onto people specific features, interests, needs and goals, with powerful effects. Such 'penal' labels should be contested as discriminating and restrictive (Christie, 2013), giving participants in RJ encounters the power to define themselves e.g. as people deprived or wealthy, gendered and racialised, etc.. In such encounters, conflicts and harms would become the material for political reflection (Hulsman, 1986). Individuals would be allowed to rethink the relationships questioned or broken by their behaviours, beyond juridical frameworks, and recognise them as related to wider social, economic and political conditions. It is not the consequences of a 'crime' but the criminalisation process that is the object of discussion. In short, a critical RJ would engage 'with the relations that: define specific forms of wrongdoing; enable the conditions from which subjects respond as wrongdoers; frame subjects to be considered as the wronged; and generate and sustain identities for both individuals and communities in context' (Pavlich, 2017: 306–307). Finally, restorative encounters should offer a platform to engage in 'questioning and adjusting of thought and action in relation to notions of human good' (Christie, 2005: 40). This ethical work would be

possible if restorative encounters were experimental space, where individuals could safely participate in the ethical fashioning of themselves. These spaces would allow for activities which aim to intensify our relationship with ourselves and with others. This ethical work, in fact, is not an individual exercise 'but a true social practice [...] an intensification of social relations' (Foucault, 1986: 53). At stake, here, is the creation of new micro-moral codes as a political act, critically resisting the limited range of possibilities available to those involved in social conflicts and harms, imposed by criminal justice as well as by RJ policy.

Some examples

How would such a critical idea of RJ look in practice? It is possible to point to a few actual initiatives which at least partly are animated by values which resonate with the idea sketched out above. The first example are the Zwelethemba Peace Committees, a set of peace-making and peace-building institutions established by local activists in Zwelethemba, a South African township (Shearing & Froestad, 2007). These practices, which explicitly refer to RJ values as their normative background, reject shaming, extend channels for referrals beyond the criminal justice system, do not require admission of guilt, refuse the victim/offender dichotomy and look at conflicts historically and contextually. The Committees provide safe spaces where parties can articulate their experiences, calling into question larger structural issues underpinning conflicts, such as the uneven distribution of resources. They can then pose actual demands to the state or invest their own resources to respond to people's issues (e.g. creating youth support networks, training activities, etc.). A further example is 'RJ for Oakland Youth[2]' (RJOY), founded in 2005, in California. RJOY aims to break the cycle of violence and incarceration for youths of colour, challenging punitive school discipline and juvenile justice policies. This project promotes restorative encounters within schools involving families, groups and systems to repair harm and prevent reoffending. It aims to create links between youth's individual troubles and broader social issues (racial discrimination and the related school-to-

[2] http://rjoyoakland.org/

prison pipeline), calling for institutional shifts towards approaches focussing on reducing racial disparities associated with high rates of incarceration, suspension and expulsion. It provides education, training and technical assistance and collaboratively launches demonstration programmes with schools, juvenile justice and research partners. Finally, 'Mural Arts Philadelphia[3]' (MAP), a public art program aiming to transform public spaces and individual lives through art. One of the initiatives launched by MAP is an apprenticeship program ('The Guild') which seeks to counter the social disconnection caused by the criminal justice system to people formerly incarcerated and young adults on probation. The Guild gives them the opportunity to reconnect with their neighbourhoods and develop job skills, using their creative voice. Through work on creative projects (e.g. mural making, carpentry, and mosaics) participants, guided by artists, transform their neighborhoods and themselves. This initiative is designed to incorporate within local neighborhoods, people who have harmed and who have been harmed, connecting social and individual 'restoration'. It seeks to prevent re-incarceration and further the employment or educational objectives of each participant using art as a catalyst for change, whilst helping to shift social perceptions through these constructive contributions. These projects embody a critical and progressive RJ, at multiple levels. They invest in RJ practices as democratic arenas which politicise conflicts by linking personal challenges with political injustices, using alternative tools (e.g. art) to discuss criminalization whilst stressing the social and cultural character of harms. They do this outside state-led policy frameworks and regulations, producing (inclusive) communities instead of assuming a cohesive community as their (exclusive and excluding) moral backdrop.

Conclusions: whither restorative justice?

Policy-makers' appropriation of practices (like RJ) which have grown organically at the margins of criminal justice systems and which may represent a challenge to criminal justice

[3] https://www.muralarts.org/

values, aims and goals, is all but culturally and politically neutral. Policy-making necessarily entails the imposition of specific values (hierarchy and coercion), aims (social control) and tools (bureaucratic protocols) upon those marginal justice practices which hence get profoundly altered.

In the previous pages, after a preliminary outline of RJ as a multi-dimensional phenomenon, I have singled out some of the forms that the policy appropriation of RJ has taken, in the Western world. I have argued that there are issues integral to transforming RJ practices into a mainstream criminal justice option. The reduction to a *sui generis* sanction which provides an ancillary type of justice for idealised victims, offenders and communities, administered by a new type of professional practitioners, and with subtly coercive effects on parties, strips RJ of its radical potential to provide people harmed and who have harmed with something better than criminal justice.

Although this paper had mainly a descriptive aim, I have concluded by sketching out a few ideas on how to address those issues, also providing some examples from existing practices. RJ processes already 'defined in' criminal justice, should become spaces where facilitators support participants in reflecting upon the process of criminalisation instead of passively endorsing the fixed labels of e.g. 'victim' and 'offender'. Such arenas should furnish material to contest the very institutional framework and underpinning values they are inserted into. This involves discussing commonalities and differences, challenges and constraints, both at individual and societal level, that parties experience in their pursuit of justice when their needs are obliterated or threatened. RJ should not just be a place where 'offenders' give apologies and 'victims' receive space and time to vent their feelings (as policy seems to envision). Instead of this individualising strategy, RJ should allow possibilities for re-imagining forms of cohabitation, in non-violent and dialogical ways, whereby differentials of power – related e.g. to gender, race and socio-economic status – are openly addressed.

The increasing regulation of RJ (and the unhesitant RJ movement's enthusiasm toward this process) is a sign of its incipient institutionalisation. Many of the RJ movement's dreams have slowly dried up, leaving room to hyper-realistic concerns of doing more (often with less). I think

that the future of a RJ which aims to be something better than criminal justice lies with the RJ movement's ability (and willingness) to rediscover its radical dreams in a bid to generate non-violent ways of addressing the (sometimes tragic) ambivalence of human relationships.

References

Aertsen, I., Daems, T. & Robert, L. (Eds.) (2006). *Institutionalizing Restorative Justice.* Collumpton: Willan.

Bazemore, G. (1998). Restorative Justice and Earned Redemption: Communities, Victims and Offender Reintegration. *American Behavioral Scientist,* 41(6), 768–813.

Blagg, H. (2017). Doing restorative justice 'otherwise'. In I. Aertsen & B. Pali (Eds.), C*ritical Restorative Justice* (pp. 61–78). Oxford: Hart.

Bohmert, M.N., Duwe, G. & Hipple, N.K. (2018). Evaluating Restorative Justice Circles of Support and Accountability: Can Social Support Overcome Structural Barriers? *International Journal of Offender Therapy and Comparative Criminology,* 62(3), 739–758.

Braithwaite, J. (1999). Restorative Justice: Assessing Optimistic and Pessimistic Accounts. *Crime & Justice: A Review of Research*, 25(1), 1–127.

Christie, N. (1977). Conflicts as property. *British Journal of Criminology,* 17(1), 1–15.

Christie, N. (1981*). Limits to pain.* Oxford: Robertson.

Christie, N. (1986). The ideal victim. In E. Fattah (Ed.), *From Crime Policy to Victim Policy. Reorienting the Justice System* (pp. 17–30). Basingstoke: Macmillan.

Christie, P. (2005). Education for an Ethical Imagination. *Social Alternatives,* 24(4), 39–44.

Christie N. (2013). Words on Words. *Restorative Justice: An International Journal,* 1(1), 15–19.

Christie, N. (2015). Widening the net. *Restorative Justice: An International Journal*, 3(1), 109–113.

Cohen, S. (1985). *Visions of Social Control: Crime, Punishment and Classification.* Glasgow: Polity Press.

Carlen, P. (1985). *Criminal Women*. Oxford: Polity Press.

Coates, C., Umbreit, M., & Vos, B. (2003). Restorative justice circles: An exploratory study. *Contemporary Justice Review,* 6(3), 265–278.

Crawford, A. & Newburn, T. (2003). *Youth offending and restorative justice: implementing reform in youth justice*. Cullompton: Willan.

Daly, K. (2013). The punishment debate in restorative justice. In J. Simon & R. Sparks (Eds.), *The SAGE Handbook of Punishment and Society* (pp. 356–374). London: Sage.

Davis, F. (2019). *The Little Book of Race and Restorative Justice: Black Lives, Healing, and US Social Transformation.* Intercourse: Good Books.

Diani, M. (1992). The Concept of Social Movement. *The Sociological Review*, 40(1), 1–25.

Foucault, M. (1986). *The History of Sexuality, Volume III, The Care of the Self.* New York: Pantheon.

Gavrielides, T. (2014). Bringing Race Relations Into the Restorative Justice Debate An Alternative and Personalized Vision of "the Other". *Journal of Black Studies,* 45(3), 216–246.

Graeber, D. (2015). T*he Utopia of Rules On Technology, Stupidity, and the Secret Joys of Bureaucracy.* Brooklyn-London: Melville House.

Hayes H. (2005). Assessing Reoffending in Restorative Justice Conferences. *Australian & New Zealand Journal of Criminology*, 38(1), 77–101.

Honneth, A. (2008). *Reification. A New Look At An Old Idea.* Oxford: Oxford University Press.

Hoy, D. (2004). *Critical Resistance: From Poststructuralism to Post-Critique.* Cambridge and London: MIT Press.

Hudson, B. (1998). Restorative Justice: The Challenge of Sexual and Racial Violence. *Journal of Law and Society*, 25(2), 237–256.

Hulsman, L. (1986). Critical Criminology and the Concept of Crime. *Contemporary Crises,* 10(3–4), 63–80.

Johnstone, G. (2011). *Restorative Justice: Ideas, values, debates,* 2nd ed.. London: Routledge.

Johnstone, G. & Van Ness, D. (Eds.) (2007). *Handbook of Restorative Justice.* London: Willan.

Joudo Larsen, J. (2014). *Restorative justice in the Australian criminal justice system.* https://www.aic.gov.au/sites/default/files/2020-05/rpp127.pdf Accessed 21 December 2020.

Liebmann, M. & Wootton, L. (2008). *Restorative Justice and Domestic Violence/abuse.* London: Home Office.

Maglione, G. (2016). Embodied Victims. An archaeology of the 'ideal victim' of restorative justice. *Criminology & Criminal Justice,* 17(4), 401–417.

Maglione, G. (2018). Pushing the theoretical boundaries of restorative justice: Non-sovereign justice in radical political and social theories. In T. Gavrielides (Ed.), *Routledge International Handbook of Restorative Justice* (pp. 21–31). London: Routledge.

Mathiesen, T. (2015). *The Politics of Abolition Revisited.* London and New York: Routledge.

Păroşanu, A. (2013). Restorative justice in Germany. http://3e-rj-model.web.auth.gr/files/national_reports/Germany.pdf. Accessed 21 November 2020.

Pavlich, G. (2017). Promised communities, unrestored justice. In I. Aertsen & B. Pali (Eds.), *Critical Restorative Justice* (pp. 297–313). Oxford: Hart.

Peachey, D. (1989). Kitchener Experiment. In M. Wright & B. Galaway (Eds.), *Mediation and Criminal Justice: Victims, Offenders and Community* (pp. 14–26). London: SAGE.

Poama, A. (2015). Restorative Justice: The Institutional Turn. *Raisons politiques*, 59(3), 7–16.

Polizzi, D. (2011). Heidegger, restorative justice and desistance: a phenomenological perspective. In J. Hardie-Bick & R. Lippens (Eds.), *Crime, governance and existential predicaments* (pp. 129–155). Basingstoke: Palgrave.

Shapland, J., Robinson, G. & Sorsby, A. (2011). *Restorative Justice in Practice.* London: Routledge.

Shapland, J., Wilmore, J. & Duff, P. (1985). *Victims in the Criminal Justice System*. Aldershot: Gower.

Shearing, C. & Froestad, J. (2007). Beyond restorative justice - Zwelethemba, a future-focused model using local capacity conflict resolution. In R. Mackay, C. Pelikan & M. Wright (Eds.), *Images of Restorative Justice Theory* (pp. 16–34). Frankfurt: Verlag für Polizeiwissenschaft.

Strang, H. & Sherman, L.W. (2003). Repairing the Harm: Victims and Restorative Justice. *Utah Law Review*, 1, 15–42.

Sullivan, D. & Tifft, L. (2001). *Restorative justice: healing the foundations of our everyday lives.* Monsey: Willow Tree Press.

Sylvester, D. J. (2003). Myth in Restorative Justice History. *Utah Law Review*, 1, 471–522.

Umbreir, M., Coates, R.B. & Vos, B. (2004). Victim offender mediation: three decades of practice and research. *Conflict Resolution Quarterly,* 22(1-2), 279–303.

Umbreit, M., Vos, B., Coates, R.B. & Lightfoot, E. (2005). Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls. *Marquette Law Review*, 89(2), 251–304.

Van Dijk, J. (2009). Free the Victim: A Critique of the Western Conception of Victimhood. *International Review of Victimology,* 16(1), 1–33.

Van Ness, D. & Strong, H.K. (2015). *Restoring justice*, 5th (Ed.). Cincinnati: Anderson.

Varona, G. (2014). Who sets the limits in restorative justice and why? Comparative implications learnt from restorative encounters with terrorism victims in the Basque country. *Oñati Socio-legal Series,* 4(3), 550–572.

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*, 1(4), 415–432.

Walgrave, L. (Ed.) (2003). *Repositioning Restorative Justice.* Cullompton: Willan.

Weitekamp, E.G.M. (1999). The history of restorative justice. In G. Bazemore & L. Walgrave, (Eds.), *Restorative juvenile justice: Repairing the harm of youth crime* (pp. 75–102). Monsey: Criminal Justice Press.

Wright, M. (1996). *Justice for Victims and Offenders.* Winchester: Waterside Press.

Woolford, A. (2009). *The politics of restorative justice: A critical introduction.* Black Point: Fernwood Publishing.

Zehr, H. (1985). *Retributive Justice, Restorative Justice. New Perspectives on Crime and Justice.* Akron: Mennonite Central Committee Office of Criminal Justice.

Zehr, H. (1990). *Changing lenses: a new focus for crime and justice.* Scottsdale: Herald Press.

Zehr, H. (2002). *The Little Book of Restorative Justice.* Intercourse: Good Books.

Policy

Australia

Crimes (Restorative Justice) Act 2004

Colorado

Colorado Revised Statutes. Criminal Code

England and Wales

Crime and Disorder Act 1998

Youth Justice and Criminal Evidence Act 1999

Criminal Justice Act 2003

Crime and Courts Act 2013

Offender Rehabilitation Act 2014

France

Law n° 2014-896 on the individualisation of punishment and strengthening the effectiveness of penal sanctions

Germany

Juvenile Justice Act 1990

Norway

The Mediation Service Act' 1991-03-15-3 (now 2014-06-20-49)

Scotland

Scottish Government Guidance for the Delivery of Restorative justice 2017

EU

Directive 2012/29/EU Establishing minimum standards on the rights, support and protection of victims of crime ('EU Directive 29/12 on Victims' Rights').