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Discursive representations of restorative justice in international policies

Abstract

The European Directive 2012/29/EU, the Council of Europe Recommendation CM/Rec(2018)8), and the recently launched updated United Nations Handbook (2020) testify to the increasing policy recognition of restorative justice at international level. And yet, despite the vast and burgeoning literature on restorative justice, limited research and critical analysis has been conducted on policies, and even less on international policies and instruments. As a result, we know little about how restorative justice is framed within policy and how such framings could contribute toward the development of this field in practice. Addressing this gap, this article seeks to understand the ways in which restorative justice is construed within international policies and their conditions of possibility, using a ‘policy-as-discourse’ analytical approach. The article also draws implications for the study of the relationships between

restorative justice policy and practice and for future research on the institutionalisation of this 'new' frontier of penalty, internationally.

Keywords

Restorative justice, discourse analysis, policy analysis, international policy

Introduction

During the last decade, the policy recognition of restorative justice at international level has grown significantly. The Directive of the European Parliament and the Council 2012/29/EU (Victims' Directive), the new Council of Europe (CoE) Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters, and the recently (re)launched United Nation (UN) Handbook on Restorative Justice Programmes (2020) testify to the increasing recognition and regulation of restorative justice, internationally. And yet, despite the vast and burgeoning literature on restorative justice, limited analysis has been conducted on international policies regulating this field (Maglione, 2017b). Namely, there is a dearth of theoretically-informed knowledge on how supranational bodies (CoE, EU, UN) represent and shape restorative justice and how this may contribute toward driving the development of this field.

The existing literature addressing international policies on restorative justice (see Smith, 2005; L'Hullier, 2007; Pelikan, 2003; Willemsens, 2008; Lauwaert, 2013; Kerner, 2013; Gavrielides, 2015, 2017; Marder 2018; Aertsen, 2017, 2019) adopts an 'operational-technical' approach (Weimer and Vining, 1999), i.e. looks mainly at policy's implementation, how to improve policy desired outcomes and their possible impact. Differently from this available literature, this article explores critically the ways in which the CoE, the UN and the EU construe restorative justice within policy, focussing on their explicit visions of and implicit assumptions around restorative justice, by using a 'policy-as-discourse' analytical approach (Bacchi, 2000, 2009).

After an overview of the context and research literature on restorative justice within policy and a methodological introduction, this article unpacks international policy on restorative justice, looking at how such policy constitutes distinctive problems and solutions, uncovering the silences and assumptions behind such constructions, identifying their conditions of possibility and possible effects (Bacchi, 2009). Additionally, the article highlights the main issues related to the policy framings of restorative justice providing an outline of a *different* restorative justice. Some concluding remarks are also offered.

Literature review: restorative justice within policy

The existing analyses of international policies on restorative justice, while constituting a diverse body of works, have nevertheless been characterised by a similar way of approaching policy as ‘a matter of fact’. This means that policies are thought of as instruments aiming at producing a change on something that is preliminary categorised by policy-makers as a problem. Operational approaches to policy analysis are therefore premised on the idea that policy interventions identify and solve ‘social problems’ which pre-exist to the process of policy creation (Bacchi, 2009: x) and that the identification of such ‘problems’ is a political issue (and therefore external and irrelevant to policy analysis). As a result, these works have assessed whether international policies are aligned with the research evidence and practice standards in the field (Willemsens, 2008), traced and evaluated institutional policy formations and policy changes (Smith, 2005; Lauwaert, 2013; Kerner, 2013; Marder, 2018; Aertsen, 2019), assessed the impact of international policies on national legislations and practices (L’Hullier, 2007; Pelikan, 2003, 2004; Aertsen, 2017), argued about the necessity of theoretical clarity in policy formation (Lemley, 2001), or criticised policies for their paradoxical or standardising effects (Gavrielides, 2015, 2017). It appears, then, that there is a lack of critical engagement with how international policies generate the reality they are meant to regulate and the taken-for-granted assumptions upon which such a process rests.

Among the works mentioned above, only Smith's (2005) analysis on restorative justice policy formation at the level of the UN, seems to endorse a constructivist approach to policy, building upon Blumer's (1971) idea of 'problem creation'. Smith (2005) reconstructed historically the way restorative justice was forged into the UN agenda, identifying the responsible actors and the relevant events in this process but neglecting the political rationales embedded in the UN policies on restorative justice, limiting therefore the critical purchase of this work.

More recently, an interesting body of works has started analysing policy with a view to uncover their assumptions and their representations of restorative justice. Namely, a special issue of *Restorative Justice: An International Journal* (2017) tried to assess the suitability of the EU legislative framework on restorative justice for delivering a transformative approach to criminal justice, while drawing lessons for the conceptualisation and application of restorative justice internationally (see Pavlich and Thorlakson, 2017). Lippens (2017) has explored the EU Victims' Directive's implicit assumptions and vision about victims of crime whilst ascribing the foundations of this vision to a 'sovereign victim culture' that spurred the development of control societies. Salm and Coelho (2017) have analysed the discursive framings of two declarations—the Ibero-American Restorative Juvenile Justice Declaration and the Leuven Declaration of Restorative Approach to Juvenile Crime—referring to Pavlich's notion of 'imitator paradox' (Pavlich, 2005), arguing that those declarations simultaneously aspire to

visions of restorative justice that are distinct from criminal justice, and yet hold on to a discourse that reflects basic allegiances to founding concepts of the latter. Focusing on the United Kingdom, the work of Maglione (2020a, 2020b, 2019a, 2017a, 2017b, 2017c) has consistently applied a Foucauldian critique to restorative justice policies, by identifying ‘authoritative discourses’ and political governmentalities reconstructing representations of victims, offenders and communities, and shedding light on taken-for-granted assumptions of restorative justice.

This article, although sharing a critical criminological stance with this recent strand of literature, focuses originally on a comparative analysis of EU, UN and CoE policy on restorative justice using a ‘policy-as-discourse’ approach. This assumes that policies do not give answers to problems that are awaiting to be addressed, but that they instead *create*, that is, frame, shape and constitute problems (Bacchi, 2009: x). Yet, this perspective does not imply that policy is a mere exercise in ‘manipulation’ or ‘misrepresentation’ (Bacchi, 2009:1). Instead, it shifts interest from ‘problems’ to ‘problematizations’, highlighting policy’s implicit political meanings and governmental function in producing discursively a certain reality to be then regulated. According to Bacchi (2009: xi) ‘the way issues are problematised - how they are thought about as ‘problems’- are central to governing processes.’ In effect, she adds, ‘we are governed through problematisations rather than through policies’ (Bacchi, 2009: xi). Bacchi’s approach provides ‘an open-ended mode of critical practice, enabling rigorous and

trenchant appraisal of policy agendas—especially those that seem axiomatic or patently obvious’ (Bletas and Beasley, 2012: 2). It de-familiarises policy by reconstructing the implicit assumptions which underlie policy representations, addressing what is taken for granted or what/who may be silenced in policy creation, as well as the possible effects of these processes. Bacchi’s perspective encourages an examination of how those policy constructions are produced, disseminated and defended (cf. Laurie and Maglione, 2020).

We have chosen this analytical approach since it combines a systematic scrutiny of policy texts with a theoretically-informed critical engagement with the ways in which policy generates the reality it purports to regulate. The significance of this approach lies in its capacity to unearth what is taken for granted within policy (and therefore tacitly “handed over” to practitioners, academics, and advocates) whilst inserting these implicit and apparently neutral policy representations within their political, social and cultural context. In fact, the number of policy documents on restorative justice has been significantly growing worldwide, and there is a need to appraise such a phenomenon critically, without taking for granted its positive effects on the growth of restorative justice (Poama, 2015). This could have emancipatory effects particularly on practitioners and advocates who enthusiastically hail the incorporation of restorative justice into policy as something desirable and/or necessary. At the same time, and more broadly, this approach is significant since it challenges the problem-solving paradigm

that dominates both the policy analysis landscape and much of restorative justice (empirical) theory by shifting the focus to problem-questioning (Bacchi, 2009).

Methodology: Policy-as-discourse

The first step in applying Bacchi's perspective is to generate a policy corpus. For the purpose of this article, we focussed on the most recent policy produced by CoE, UN, and EU on restorative justice, namely the Directive 2012/29/EU, the new CoE Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters, and the recently launched UN Handbook on Restorative Justice Programmes (2020). In order to give historical depth to our analysis we also snowballed to less recent policy explicitly recalled by the documents mentioned above to include the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2000), the UN Handbook on Restorative Justice Programmes (2006) and the the CoE Recommendation R(99)19 concerning Mediation in Penal Matters. Although the focus remained on the first set of documents, the second set helped identify and make sense of certain shifts in the CoE, UN, and EU's representations of restorative justice, providing a more nuanced and historically-sensitive picture of the issues at stake.

After completing this stage, we coded the policy dataset manually into three meta-themes –'problems,' 'solutions', 'silences'- following Bacchi's analytical strategy.

‘Problems’ refers to how policy conceptualises certain issues as matters unwelcome or harmful and needing to be dealt with and neutralised; ‘solutions’ refers to the discrete actions or processes intended by policy as the answers to such problems (and to some extent already implied in how those problems are framed); ‘silences’ indicates how policy excludes and leaves as unproblematised other possible understandings of what restorative justice is or is not, how it works and with which purposes (Bacchi and Goodwin, 2016). The second part of the paper is dedicated to discussing policy on restorative justice, unearthing and contextualising the background knowledge which informs policy problems, solutions and silences, by tracing their conditions of possibility and possible effects. The final section focuses on challenging policy representations, proposing different, critical ways of representing restorative justice.

Before proceeding, we wish to highlight two main limitations. First, we acknowledge that policy documents are written by different actors, for different audiences and with different goals, and we do not want to suggest therefore that these policies are structurally and functionally equivalent. Additionally, the aim of the paper is not a comparison between policies of different international institutions, or a progress assessment between different policies of the same institution, but an analysis of overarching policy representations and therefore a degree of generalisation is inevitable. Secondly, a gap exists between how policies are implemented and their declared goals. This article does not address this gap because it is not research on ‘how restorative

justice works' but an investigation of how policy construes restorative justice. Empirical explorations are needed to bridge that gap, but that is not the focus or intent of this article. Finally, attempts to generate knowledge about 'what policy makers *really* meant to do' or to identify biases or gaps between what is promised and what is delivered do not fit with the epistemological orientation of this approach (Bacchi, 2009: xix).

Restorative justice representations in international policies

'Problems'

Within international policy, restorative justice is construed as a response to one main 'problem': criminal justice's failure in satisfying a range of specific *needs*. Such needs do not relate to structural failures such as criminal justice's systemic racial or sexual discrimination but to individual (micro-social) lacks of discrete legal or psychological support within criminal proceedings, experienced by 'victims' and partly by 'offenders' and 'communities'. This policy construction is rather opposite to the claims of progressive and critical strands of restorative justice theory (e.g. Gavrielides, 2014) which have argued that if restorative justice does not address macro-social needs as well (e.g. issues of race, power and gender) it will soon face demise.

The Directive 2012/29/EU (recital 46) states that ‘Such [restorative justice] services should therefore have as a primary consideration the interests and needs of the victim’ and similarly the Recommendation CM/Rec(2018)8 stresses in the preliminary remarks that restorative justice is a ‘method through which [...] parties’ needs and interests can be identified and satisfied in a balanced, just and collaborative manner’ (p. 1). This emphasis on satisfying stakeholders’ needs characterises also the UN policy. The 2006 UN Handbook establishes that ‘Restorative justice is a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders’. This echoes the position expressed in the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2000) that a ‘restorative outcome’ aims ‘at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender’ (art. 1.3).

It is possible to disentangle the range of needs mentioned above by reducing them to three main categories. The first need is that for *an enhanced participation* of crime stakeholders, and particularly the ‘victim’, in addressing and repairing the harm caused by crime. The CoE Recommendation R(99)19, recognises ‘the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimisation, to communicate with the offender and to obtain apology and reparation’ (p. 5) whilst the CoE Recommendation CM/Rec(2018)8 highlights the active participation in criminal proceedings of victims, offenders and others affected by the crime (II.3). Similarly, in

the Directive 2012/29/EU the article 12, specifically dedicated to restorative justice, is placed under the chapter 3 title ‘Participation in criminal proceeding’. In the same vein, the 2006 UN Handbook states that ‘Participation of the parties is an essential part of the process that emphasises relationship building’ (p. 6) whilst the 2020 UN Handbook describes the ‘active participation through dialogue’ (p. 4) a key restorative objective.

The second need is the *offender’s need to take active responsibility toward the victim*. The importance of enabling the offender to repair or redress the harm done and encouraging the offender’s sense of responsibility is explicitly stressed in recital 5 of Recommendation R(99)19 and the recital 9 of the Recommendation CM/Rec(2018)8. The 2006 UN Handbook refers to restorative justice as ‘An approach which encourages an offender to gain insight into the causes and effects of his or her behaviour and take responsibility in a meaningful way’ (p. 8) for ‘the consequences of their action’ (p. 9) and that ‘(c) that offenders can and should accept responsibility for their action’(p. 8). Responsibility here is both a ‘process value’ and an ‘objective’, that is, both a principle which is supposed to drive the restorative process and one of the ultimate aims to be pursued by such a process. Similarly, the 2020 UN Handbook describes the ‘acknowledgement of responsibility’ as a key restorative outcome (p. 4) linked to ‘Accountability’ as a key value guiding restorative justice (p. 6). ‘Encouraging responsibility’ here is explicitly contrasted with criminal justice practice: ‘Unlike criminal proceedings focused on determining and assessing legal guilt, a restorative

justice process moves from acknowledging responsibility for the harm done to focusing on how the harm can be repaired and further harm avoided in the future' (p. 7) (cf. Maglione, 2017c).

The *communities' need to participate in responding to crime* is also recurrently stressed within international policy. Both CoE recommendations describe restorative justice as a 'more constructive and less repressive' practice which 'may increase awareness of the important role of the individual and communities' (CM/Rec(2018)8, p. 1) as a response to crime. Along the same lines, the 2006 UN Handbook describes restorative justice practices (namely circle sentencing) as implementing 'constructive ways to respond to conflict in their community' (p. 23) whilst the 2020 iteration highlights that 'Positive solutions can be generated by such communal dialogues' (p. 30).

'Solutions'

Framing restorative justice as a response to 'victims', 'offenders' and 'communities' micro-social needs, unfulfilled by criminal justice, entails an understanding of restorative justice as a 'fix' that provides 'solutions' for (some of the) criminal justice's failures. Restorative justice as a 'fix' is articulated in policy in three ways: 1) as an increasingly bureaucratised (i.e. standardised and professionalised) approach to people's

needs; 2) shaped by the criminal justice's cultural and operational parameters; 3) and providing preset 'product-services'.

Restorative justice as a bureaucratic instrument. International policy promotes bureaucratisation, in the form of *professionalisation* and *standardisation* of restorative justice practice, as an taken-for-granted desirable step for the development of this field.

The strengthening of training requirements for facilitators is an example of this tendency. CoE policy recalls, somehow inconsistently, both the importance of ensuring that restorative justice is 'flexible' (R(99)19, recital 2; CM/Rec(2018)8, recital 4) and 'autonomous' (R(99)19, art. 20; CM/Rec(2018)8, art. 20) and the increased control over every step of the restorative process (CM/Rec(2018)8, recital 11 & art. 21). The provisions enshrined in the Recommendation CM/Rec(2018)8 reinforce the state supervision on the selection, training, support, and assessment of facilitators. Articles 36 to 45 include detailed requirements for facilitators, their managers and trainer providers, all aimed at supervising the role of the facilitator, originally seen, within restorative justice literature, as a non-expert voluntary figure belonging to the local community (see Pavlich, 2005). Additionally, standards of competence and ethical rules, and procedures for the selection, training, support and assessment of facilitators, are also promoted (CM/Rec(2018)8, art. 36). As for the Directive 2012/29/EU, this requires *ad hoc* 'specialist training where [facilitators'] work focuses on victims with specific needs and

specific psychological training' (recital 61). Here it should be noted that this focus on professionalisation is mainly a recent phenomenon. In fact, the R(99)19 only recommended that 'mediators should be able to demonstrate sound judgment and interpersonal skills' (art. 22) as well as 'initial training' (art. 24).

The development of 'standards' for the expansion of restorative justice is possibly the main aim pursued by the Recommendation CM/Rec(2018)8. This document openly declares to promote 'standards for the use of restorative justice in the context of the criminal procedure, and seeks to safeguard participants' rights and maximise the effectiveness of the process in meeting participants' needs' (Appendix 1.1). The 2020 UN Handbook in chapters 5, 7 and 8 minutely analyses the requirements for the successful operation of restorative justice programmes (pp. 49-66), how to establish and implement restorative justice programmes (pp. 81-102) as well as the programme oversight, monitoring and evaluation (pp. 103-110). Similarly, the 2006 UN Handbook describes thoroughly how to effectively implement restorative justice through standard steps, in three separate chapters (4, 6 and 7). Specific steps are the development of *ad hoc* legislation, securing criminal justice professionals' buy-in, careful planning and monitoring of the implementation process as well as involving community stakeholders (p. 39).

Both in the case of professionalisation and standardisation, it shines through policy the progressive distancing of restorative justice from its practice-led

community-based and informal roots (Pavlich 1996) and a strengthening of a managerialising approach which focuses on the bureaucratisation of the operations and control of the practitioners.

Restorative justice as a criminal justice option. International policy imposes a number of constraints on restorative justice, largely informed by some of the rationales underpinning criminal justice, in order to ‘facilitate’ the realisation of restorative justice ‘solutions’.

The first (apparently obvious) limitation is the fact that a *discrete definition* of restorative justice is recurrently provided by policy. Although there are some variations in terms of the definitions’ content, it is taken-for-granted that a whole, practice-based, historically complex justice framework could (and should) be defined, that is, literally bordered¹ by discrete (mainly) ‘process-oriented’ qualifications. It becomes also clear that the definitions of restorative justice in international policies are rooted in, and therefore are unable to properly break, from the legal process of abstracting and generalising social reality in order to control it, implicit in criminal justice policy. Furthermore, definitions involve (political) choices that impose limitations on our understanding and vision of justice. The Recommendation CM/Rec(2018)8 defines broadly restorative justice as ‘any process which enables those harmed by crime, and

¹ In Latin *definire* means to set a limit or border.

those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, through the help of a trained and impartial third party' (art. 3). The Directive 2012/29/EU, implicitly recalling the Recommendation R(99)19, defines restorative justice as 'any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party' (art. 2.d).

The definitions given by the UN policy are more granular. The 2006 UN Handbook distinguishes between 'restorative justice' as 'a way of responding to criminal behaviour' (p. 6), 'restorative process' as 'any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator' (p. 7) and 'restorative justice programme' as 'any programme that uses restorative processes and seeks to achieve restorative outcomes' (p. 7). The 2020 UN Handbook instead uses a broad-ranging definition of restorative justice as 'an approach that offers offenders, victims and the community an alternative pathway to justice' (p. 4) and then highlights the diversity of available understandings of this approach, shifting from a discrete definition to a catalogue of recurrent 'elements': a focus on the harm; voluntary participation; preparation of the parties and facilitation of the process by trained restorative

practitioners; dialogue between the parties; focus on acknowledgement of responsibility by the perpetrator and a commitment to reparation; support to the victim and to the perpetrator (p. 4).

The second major constraint is the imposition of distinctive (criminal justice informed) ‘safeguards’. Such an emphasis on measures to be taken to protect stakeholders (mainly the victim) from the harms possibly engendered by restorative justice practices, seems to entail a specific understanding of victims as necessarily vulnerable and in need of protection. This conceptualisation reflects the ‘ideal victims’ of criminal justice (Maglione, 2017a). The Directive 2012/29/EU establishes that restorative justice services ‘require safeguards to prevent secondary and repeat victimisation, intimidation and retaliation. Such services should therefore have as a primary consideration the interests and needs of the victim, repairing the harm done to the victim and avoiding further harm’ (recital 46). The Recommendation CM/Rec(2018)8 asserts that restorative justice ‘seeks to safeguard participants’ rights’ (Appendix art. 1.1) including with ‘Procedural safeguards’ (Appendix 4.23). The 2006 UN Handbook states that ‘The implementation of restorative justice programmes, as a complement to the criminal justice system, [is] accompanied by the development of safeguards for participants’. Similarly, the 2020 UN Handbook defines ‘safeguarding of victims and offenders’ rights’ as a key object for restorative justice. In both cases UN policy recalls the Paragraph 12 of the UN Basic Principles on the Use of Restorative

Justice Programmes in Criminal Matters (2000) which contains a reminder that legislative action may also be necessary, depending on the legal context, in order to set some standards and provide some mandatory legal safeguards for parties in a restorative justice process.

Restorative justice as a product-service. Finally, policy has, over the years, increasingly represented the restorative justice ‘solutions’ as a ‘product-services’, aptly constrained within and by criminal justice parameters. This means that restorative justice is represented within policy as a transaction between a provider (facilitator) and the crime stakeholders (‘victim’, ‘offender’, community’), regulated by an external authority (the state/criminal justice system). The emphasis on restorative justice ‘services’, ‘processes’, ‘practices’ or ‘programs’ with specific outcomes, generated according to certain procedures, is the main expression of this policy representation.

The Directive 2012/29/EU consistently identifies restorative justice with ‘restorative justice services’ (recitals 9, 21, 46, article 1). The 2006 and 2020 UN Handbooks are actually named ‘Handbook on Restorative justice programmes’ and their focus is very much on programme implementation. The Recommendation CM/Rec(2018)8 defines ‘Restorative justice services’ as ‘anybody which delivers restorative justice. These can be specialised restorative justice agencies, as well as

judicial authorities, criminal justice agencies and other competent authorities' (Appendix 2.9).

This restorative 'product-service' has some specific qualities. First of all, it is 'transferable', that is, restorative 'services', 'processes' or 'programs' can be used within the criminal justice process, whenever and wherever, as a method of improving/enriching current criminal justice provision. In fact, international policy promotes the use of restorative justice services/processes/programs 'at any stage' of the criminal justice process (CM/Rec(2018)8 Appendix 2.6; 2006 UN Handbook, p. 13; 2020 UN Handbook, p. 41). This provision reinforces the vision that restorative justice is not meant to threaten the state's monopoly of justice, but to complement whenever necessary.

Moreover, this 'product-service' is 'flexible', that is, it can be applied to solve a variety of issues, not only those legally defined as 'crimes'. From this angle can be read the Recommendation CM/Rec(2018)8 declaration that 'Restorative principles and approaches may be also used within the criminal justice system, but outside of the criminal procedure [e.g.] where there is a conflict between citizens and police officers, between prisoners and prison officers, between prisoners...' (art. 60).

Finally, the restorative 'product-service' makes possible the creation of consumeristic relationships between providers (facilitators), stakeholders ('victim', 'offender', community'), and the state/criminal justice system. This entails the key role

played in policy by activities of control, accountability and measurement of effectiveness/satisfaction of restorative justice ‘product-services’, reflecting what happens in any criminal justice organisation. The Recommendation CM/Rec(2018)8 refers to ‘participant satisfaction’ (p. 1) as one of the reasons which justify the further implementation of restorative justice, also defined as a ‘problem-solving process’ (p. 1). Additionally, it states that ‘Restorative justice services should regularly monitor the work of their facilitators to ensure that standards are being adhered to and that practices are being delivered safely and effectively’ (Appendix 6.38). Similarly, the 2020 UN Handbook cites as a benefit of restorative justice the fact that it is ‘more satisfying than the conventional criminal justice system’ (p. 9) whilst the 2006 UN Handbook specifically refers to ‘the perceptions of participants and their satisfaction with their experience of the process’ as one of the key objects of ‘programme monitoring and evaluation’ (p. 81).

Silences

Restorative justice within international policy is shaped selectively, that is, by foregrounding/emphasising certain issues whilst excluding/silencing other possible ‘problems’ and ‘solutions’.

International policy appears for example to silence the possibility of restorative justice for victimless crimes, that is, it is shaped as a ‘product-service’ to satisfy flesh-and-bones vulnerable victims and (although partly) communities and offenders. Policy frames the relationships between victims and offenders as dichotomic, that is, as oppositions between parties individually responsible for their actions. The Directive 2012/29/EU is permeated by this embodied understanding of victims, emphasising the necessity to respect their ‘interests and needs’ (recital 46; cf. CM/Rec(2018)8, p.1), whilst stating the primary importance for restorative justice services of considering victims’ ‘physical, sexual, or psychological integrity’ (recital 46). This entails the correlative definition of power relations, between victims and offenders, as essentially oppressive, unbalanced and binary, but also depending on their will/choice, and therefore amenable to resolution/transformation. Restorative settings aim at countervailing supposed power imbalances between parties, ‘promoting social harmony’ (2006 UN Handbook, p. 7; CM/Rec(2018)8, p. 2), bringing transformation and reparation. However, power relations are re-established by the very dualistic way policy frames victims and offenders, before, during and after the encounter (Maglione, 2019b). In cases of drug use, for instance, the victim and the offender often coincide, and the neat, dichotomous opposition between victim and offender put forth by policy simply does not work. Similarly, in cases of environmental crimes, the victim is not an

embodied individual but the ecosystem itself. It is unclear how this type of crime would be addressed following the international policy on restorative justice.

Policy also silences a radical understanding of the ‘community’, that is, the potential of restorative dialogues to be conflict-transformation arenas wherein to critique criminalisation. Policy frames ‘communities’ as ideal and pro-social ‘spaces’ which stage the moral performance integral to creating a better criminal justice. The Recommendation CM/Rec(2018)8, explicitly describes ‘communities’ as key in ‘encouraging more constructive criminal justice responses’ (p.1) whilst the 2020 UN Handbook describes restorative justice as aiming at ‘Reaffirming community values’ (p.7). The idea of communities as arenas wherein to recognise structurally deprived groups and individuals as actors whose agency is mutilated or limited by political, social and economic processes, and as a condition of their behaviours, is simply excluded. ‘Community’ instead means people other than ‘victims’ and ‘offenders’ involved to either support or control direct stakeholders.

The idea that restorative encounters could be about transforming social conflicts and not merely taking steps after the acknowledgement of a crime is also excluded. Restorative justice is shaped as a *sui generis* penal mechanism (see Directive 2012/29/EU, article 12c), which simply accepts criminalisation, ‘responsibilises’ the offender and ‘satisfies’ the victim. Mobilising restorative justice for purposes of social,

cultural, or political transformation, contesting the very conditions that make crime or criminalisation possible, is therefore foreshadowed by policy.

These examples shed light on the fact that restorative justice within international policy is shaped as an individualistic-penal approach whose goal is not the questioning, transformation, ‘shrinking’ or abolition of the criminal justice system, but to enrich the criminal justice ‘toolbox’ by offering a product-service to satisfy a range of needs framed as requiring a ‘solution’. Instead of a more politically oriented ‘norm-clarification’ function of conflict participation, restorative processes are imagined and designed to be ‘problem-solving’ activities within the criminal justice system. Restorative justice improves the existing system, and its potential to be a challenge against it is simply silenced.

Discussing policy

Underlying assumptions

The policy representations outlined above are underpinned by a number of assumptions, that is, implicit premises, uncritically accepted as true and certain by policy-makers.

Firstly, the idea of bureaucratisation is implicitly driven by the belief that this way of ‘organising’ restorative justice is merely instrumental to achieve the catalogue of

restorative goals indicated in policy. This means/end relationship is simply taken-for-granted. The possibility that the means preempts the ends, i.e. it alters the latter qualitatively is excluded (Maglione, 2020c). However, empirical research on the implementation of restorative justice, particularly for young people, minorities, and indigenous communities, has uncovered the implicitly violent character of standardising and professionalising restorative justice (see Crawford and Newburn, 2003; Tauri, 2009; Blagg, 2017). As Erbe (2004: 289) states there seems to be a general ‘belief that professionals are in a better position to make decisions for those who are directly impacted by social events in their own lives’. The literature has also highlighted that the increasing standardisation and bureaucratisation (Johnstone, 2012) drives restorative justice away from the core values of informality, flexibility and community-based alternatives of dealing with crime that characterised the original movement as an opposer to the adversarial legal system (Pavlich, 2005).

Secondly, it is assumed that restorative ‘product-services’ are simply meant to integrate criminal justice, that is, to support its functioning by ‘fixing’ some of the issues which criminal justice instruments are unable to address. The idea of challenging punishment or increasing depenalisation and decriminalisation, as alternative conceptualisations of the ‘problems’ to be addressed by restorative justice, are simply incompatible with the policy representations of restorative justice as a criminal justice ‘fix’.

A third assumption, related to the former, is the acceptance of a pre-set package of roles integral to the criminal justice system, and namely the concepts of ‘victim’ and ‘offender’. This kind of vocabulary is deeply rooted in pre-conceptions of the traditional criminal justice and the identity of the participants in the restorative justice meeting is fundamentally ‘not up for negotiation’ (Shapland *et al.*, 2006: 509). For instance, the provision that victim and offender have to agree on the basic facts of the case prior their engagement into a restorative process is an exemplification that the roles of the participants cannot be explored during that process (Christie, 1977), but are already decided prior to it. Additionally, the dichotomy victim/offender leaves no room for (social, personal, cultural) overlaps between those two positions. The idea of a subject who is at the same time harmed but also harming, does not seem compatible with the idea of restorative justice underpinning the policy analysed above. Instead, restorative justice as represented by policy revolves around idealised images of crime stakeholders mirroring criminal justice actors (Christie, 1986): a disempowered and vulnerable ‘victim’ who needs any sort of safeguard and a powerful offender neatly separated from their victim (Maglione, 2017a).

A certain concept of ‘crime’ also is pre-assumed by policy. Crime is an individual pathology which needs to be neutralised, or at most an interpersonal rupture which can be repaired. The idea of harms or conflicts rooted in social inequality or

social injustice is completely overwritten by the simplifying criminal justice label of ‘crime’.

Finally, regarding the ‘product-service’ understanding of restorative justice, this implicitly assumes that the restorative ethos is relevant, i.e. worth of policy regulation, only if instantiated in discrete procedures which generate specific, measurable outcomes.

Conditions of possibility

How did these policy representations (and their underlying assumptions) of restorative justice come about? Different historical, cultural and political underpinnings have informed different visions of restorative justice. Tracing back the initial developments of restorative justice in the European landscape can help reconstructing some of the plausible conditions of possibility for the policy representations outlined above. Due to limits of space, only two conditions will be briefly explored here, due to their possibly direct relevance to illuminate our empirical analysis.

In settler colonial countries like the United States, Canada, Australia, and New Zealand, the development of restorative justice was tightly, though not unproblematically, related to local, indigenous and aboriginal traditions (such as the Native American, Hawaiian, Canadian First Nation and Maori cultures). This translated

into a diverse range of restorative justice practices being used there, such as conferencing and peacemaking, healing, and sentencing circles. In Europe, instead, victim-offender mediation soon became the primary restorative justice practice through the establishment of several pilot projects taking place during the 1980s-1990s. These projects were underpinned by a diverse range of cultural motives.

Radical-progressive penological thinkers, namely abolitionist, ‘informalist’ or ‘penal minimalist’ authors (Christie, 1977; Hulsman 1986; Bianchi, 1986, 1994; Hanak *et al.* 1989) influenced the pioneering appearance of pilot projects in Austria, Norway and Finland in the early 1980s (Willemsens, 2008; Dünkel *et al.*, 2015). The idea that the criminal justice system is an inadequate system for resolving (criminal) conflicts originates back then. One of the original aims of the restorative justice movement, drawn from Christie’s *Conflicts as Property* (1977), was challenging the role of the state, which, as Christie suggested, was an illegitimate party in handling constructively people’s disputes. Based on this premise, restorative justice appears thus as a radical alternative to the criminal justice system, and not just another improved scheme for solving the problems of the criminal justice system or an attempt to justify state punishment from a more “humane” perspective (Koen, 2013).

However, it was the aim of reducing incarceration rates which fundamentally contributed toward the development of restorative justice in the field of juvenile justice, whilst percolating through the adults’ criminal justice system in relation only to

low-level offending (Pelikan, 2004). Therefore the idea of restorative justice as a partly alternative way of doing justice was merely centered on responding to juvenile delinquency and providing a more educational approach to justice.

The ‘return of the victim’ (Garland, 2001), and namely the expansion of victims’ rights, the development of research on crime victims and the political exploitation of ‘ideal victims’ to generate electoral consensus, has also played a role in Europe (Dünkel et al., 2015). Namely, the deficiencies of the traditional criminal justice system in coping with the needs of victims have strongly influenced the appearance of restorative justice in the adult criminal justice system. Interestingly enough, differently from Black feminist strands of abolitionism (Davis, 2003; Wilson Gilmore, 2007; Alexander, 2010) that focused largely on ending incarceration, this strand of critique also came from the European abolitionists (Hulsman, 1991; Christie, 1977). They argued that the criminal justice system and the juridical process transform victims to merely a witness of the justice system, and that victims often feel ignored, neglected, or even abused by the justice process, a phenomenon labelled as ‘secondary victimisation’. Also due to the cultural and political climate characterising Europe since the 1980s, restorative justice ended up capturing the imagination of policy makers and supporting a portrait of criminal justice as the fight of the victim, supported by the state, against the offender (Blad, 2015). Precisely, the strengthening of the role and rights of victims is one of the

main drivers that this article has identified in the development of international standards in the CoE, EU and UN, especially the EU.

Overall, it can be suggested that the early developments of restorative justice in Europe were mainly driven by an ‘internal’ criminal justice driver, that is, reducing youth incarceration which neutralised (co-opted) the radical criminological ideas which inspired the pre-history of restorative justice in the community (Pavlich, 2018). This led to a model of restorative justice as a diversionary response to minor (youth) offending, which, combined with the prioritisation of the victims’ needs, has possibly influenced the policy representations of restorative justice. At the heart of this model lies a set of paradoxes: the early focus on youth offending needs clashes against the recent victim’s centrality whilst victimological motives are hardly compatible with radical abolitionist elements. In other words, restorative justice policies in Europe have been since the beginning aimed at complementing the criminal justice system, or at modestly challenging it by ‘appropriating’ low-level offending (see Pelikan, 2004).

Possible effects

The main, possible effect of restorative justice as a policy ‘fix’ rather than an opposing or critical paradigm of justice, is the reinforcement of the criminal justice institutions and more broadly of the state. This means that not only the state monopoly of power of

dealing with social conflicts remains intact, but also that the integration of restorative justice practices within the traditional system further expands state control over its citizens.

By packaging restorative justice as a ‘product-service’ integrated in every stage/level of the criminal justice system, policy overcodes, recuperates and co-opts the critical dynamics characterising restorative justice as a threat to old institutions (Foss and Pali, 2018). As a consequence, restorative justice ends up being used by criminal justice agencies to serve their interests: control, governing and reproduction of state power. As argued by Foss and Pali (2018), using Deleuze’s (2006) terminology, certain ‘rhizomatic’ dynamics of restorative justice (for example flexibility and horizontality) have been incorporated by such institutions in their governing tasks, but in ways that totally supplement and do not conflict with the ‘arboreal’ state dynamics (rigidity, authority, monopoly and hierarchy). When the rhizomatic powers are posited under the state’s control, state power will be expanded.

Another unintentional effect of a fix and ‘product-service’ restorative justice is limiting the future developments of restorative justice to law enforcement practices (rather than e.g. law-making restorative processes). What do the restorative encounters tell us about crime and criminalisation? Which strategies should we pursue to reduce, challenge or redistribute criminalisation? What do restorative encounters tell us about social justice and its relation to the criminal justice system? What do they tell us about

criminal justice legacies of colonisation and realities of indigenous populations living in settler colonial countries? Policies, by not assigning restorative justice an important function at the intersection between law-making and law-enforcement, limit restorative justice's potential. In fact, restorative justice within policy ends up fulfilling a minor function (which takes place after all the important decisions regarding crime and punishment have been made): solving some relational problems between victims and offenders supposedly characterising low-level crimes in order to avoid worse consequences (prosecution, sentencing, etc.).

Challenging policy

Critique

How to question, disrupt or replace the framings of restorative justice analysed above? Can restorative justice stand as an alternative paradigm of justice? And if so, how? Restorative justice in international policy is governed through a partial paradox (cf. Pavlich, 2005). In fact, restorative justice is reliant upon the criminal justice system for its discursive legitimacy, therefore, turning into an 'imitator' of that which was once meant to challenge but only from the radical-progressive penological perspectives discussed above. As Pavlich and Thorlakson (2017) highlight, restorative justice's early aspirations were to work through different lenses, paradigms, and approaches when

addressing conflict and harm, resisting the bureaucratic, alienating, and adversarial focus of criminalising institutions (see also Strang and Braithwaite, 2001; Zehr and Toews, 2004; Zehr, 2015; Pavlich, 2018). However, as Pavlich (2018: 464) writes, instead of grappling with the complexities posed by plural and often competing visions of justice, so-called maximalist versions of restorative justice were translated into programmes, generating compromises and accommodations which ended up homogenising restorative justice within the language and forms of criminal justice system (see also Grey and Lauderdale, 2007; Christie, 2013, 2015; Wood and Suzuki, 2016; Suzuki and Wood, 2017). In other words ‘the aspirations to promote a distinct moral and practical alternative to criminal justice [was] undermined by the manner in which restorative justice position[ed] itself as supplementary and ultimately subordinate to state justice empires’ (Pavlich, 2005: 21).

This critique echoes Aertsen, Daems and Robert’s (2006) claim that the institutionalisation and standardisation of restorative justice undermine its transformative potential due to the conflicting values underpinning criminal justice and restorative justice (cf. Poama, 2015). In the same vein Johnstone (2011, 2012) has argued that the process of institutionalising restorative justice drives the professionalisation of practices, leading in turn to centralisation, uniformity, and lack of creativity. Mapping conceptual faultlines and power battles within the restorative justice movement, Gavrielides (2008) has rang the alarm that all too often the complexity and

ambiguity of restorative justice is addressed instead with sterile and single-layered approaches, ‘definitions’ being one such example.

This process resonates with Mathiesen’s (1974) claim that any movement which aims to challenge or obstruct the criminal justice system is deemed to subsist either ‘defined in’ (absorbed) or ‘defined out’ (marginalised). Some (see Marder, 2018; Aertsen, 2019) may deem it appropriate to extend all opportunities to expand restorative ideas into the criminal justice systems, whereas others (see Gavrielides, 2015) will worry about a ‘Mephistopheles-like pact that trades the transformative, community-enabling, legacy of restorative justice for expanding its current forms in the service of criminal justice trends’ (cf. Pavlich and Thorlakson, 2017: 351; Foss and Pali, 2018). Gavrielides (2015) has argued firmly for a repositioning of restorative justice in Europe by moving away from the mainstreaming, regulation, and state control of restorative justice towards innovation and bottom-up structures of community, unregulated, unregistered, and localised projects. Similarly, Braithwaite (2002: 563) has called the managerial version of restorative justice the ‘anathema of the bottom-up democratic ethos’ of the social movement version of it.

Ways forward

In order to challenge the atrophied policy versions of restorative justice, it is necessary to apply a hermeneutics of suspicion and remain permanently vigilant to the

dangers posed by all engagements with power relations. In fact, according to Pavlich (2018), the ‘imitator paradox’ is not an indication of a failure of restorative justice promises but of intrinsic dangers that characterise all power relations. To tame these dangers it is necessary pursuing what Mathiesen calls ‘the unfinished’, that is an ‘idea of permanent critique’ (see Pali and Pelikan, 2014) of criminal justice, and working politically to build an ‘informal justice counterpublics’ (Woolford and Ratner, 2010) which needs to oscillate between engagement with and withdrawal from the justice complex. It would also necessitate a ‘critical vigilance’ as a way of actively seeking out and naming dangerous potentials – even if unintended- within unfolding and emerging power configurations which are produced in encounters between powers and counter-powers (Pavlich 2018: 465). This would also imply, in spite of policy-makers’ intentions, that restorative justice continues to remain an essentially contested concept (see Gallie, 1962).

From a more pragmatic perspective, Blad (2015) has argued that time has come for the restorative justice movement to develop a wider political agenda with regard to criminal justice policies. He calls for the creation of a new representative body, an International Society for Restorative Justice which would aim at developing a coherent frame of reference for restorative policies with regard to all aspects of criminal policy. Such a Society could and should be focusing on policy and political questions with regard to the criminal justice system, amongst which questions about contemporary

patterns of criminalisation. Is, for example, asks Blad (2015), criminal law addressing the most important wrongs? Which acts could and should be decriminalised and which should, to the contrary, be criminalised? Equally important are questions related to the selective and destructive punishment and mass incarceration. Such a political orientation would also enable restorative justice to grapple with its own legacy and responsibility in becoming increasingly a successful industry in a globalised crime-control market (Tauri, 2017).

Conclusions

Emerging as a critique of punishment and of bureaucratic and professionalised forms of state control and criminal justice, restorative justice initially aimed to reform the criminal justice system by partly decentralising conflict management from the state to civil parties without the interference of professional state bureaucrats (Foss and Pali, 2018). Nevertheless, as development of international policies testify, restorative justice has become in the last decades an increasingly accepted way of dealing with crime and conflict across countries and legislations and its goals have become closely aligned with those of state power, including its bureaucratic and professional drives and interests.

In this article we explored the ways in which international policies represent and shape restorative justice and drive the development of this field. Using

‘policy-as-discourse’ analysis we looked in particular at the ways in which the CoE, the UN and the EU have construed distinctive problems and solutions, uncovering the silences and assumptions behind such constructions, identifying their conditions of possibility and their effects, and critiquing policy for the restorative justice governmentalities that they promote.

We argued that within international policy, restorative justice is construed as a response to one main ‘problem’: criminal justice’s failure in satisfying a range of specific needs for ‘victims’, ‘offenders’ and ‘communities’. This entails an understanding of restorative justice as a ‘fix’ for these failures, which is articulated in policy in three ways: 1) as an increasingly bureaucratised, standardised and professionalised approach to people’s needs; 2) shaped by the criminal justice’s cultural and operational parameters; 3) and providing preset ‘product-services’. We argued that restorative justice within international policy is shaped selectively, by foregrounding certain issues whilst excluding other possible ‘problems’ and ‘solutions’. The effects of these problematisations have been: a strengthening of a managerialising approach which focuses on the standardisation of the process, the bureaucratisation of the operations and the professionalisation of practitioners; a shaping of restorative justice as an individualistic-penal mechanism whose goal is to enrich the criminal justice ‘toolbox’ and therefore reinforce the criminal justice institutions and the state and limiting its own potential to a marginal restoration laundry function.

In the final pages of this article, we have highlighted how international policies on restorative justice neutralise any radical critique of criminal justice, preempting questions around the ideas of challenging punishment, increasing depenalisation and decriminalisation, as alternative ‘problematizations’ to be addressed by restorative justice. These findings should prompt the restorative justice movement to reflect more critically on the long-term effects of handing over to the Leviathan an originally community-based, informal and radical justice practice.

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