

WHAT TO DO WITH THESE VICTIMS?

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Abstract

The restorative ideology is about the democratic and active participation of victims, offenders and the communities affected by crime in the reaching of consensual solutions to deal with its consequences. It is a breath of fresh air for a traditional criminal justice system which is recognised by many as being in crisis. The discourse of restorative justice recognizes the balance between victims' and offenders' needs and rights, but in practice many of the existing schemes are mainly geared towards the offenders' needs. The victim support community arrived late to restorative justice and has identified three main ideas concerning victims' involvement in restorative practices: a greater openness and sensitivity to the victim's needs and specificities, an increased knowledge based on in-depth evaluation and research into the participation of victims, and a greater intervention of victim support organisations.

Key words: Restorative Justice; Mediation; Victims; Offenders; Crime; Evaluation

Restorative justice is here to stay. Translated into a number of practices, of which victim-offender mediation is the most common in Europe, restorative justice has asserted itself as a complementary and revitalized approach rather than as a substitute to the traditional criminal justice system. Proof of this is the growing number of pilot-projects and programmes with a restorative aim, its legal framing in some countries, and the increase in number and diversity of its defenders and advocates, from academics to practitioners, from political decision-makers to the ordinary citizens. A cornerstone in the path of progressive mainstreaming is Article 10 of the European Union Council's Framework-Decision on the Standing of Victims in the Criminal Proceedings¹, dated 15th March 2001, which states victim-offender mediation is one of the fundamental rights of victims of crime.

The restorative ideology of democratic and active participation of victims, offenders and the communities affected by crime in reaching consensual solutions to deal with its arising consequences is a breath of fresh air for a traditional criminal justice system which is recognised by many as being in crisis. It is a way to achieve a justice that is closer to the people and places the victim, the offender and the community in the centre of the action,

promoting an active civic participation in mechanisms of conciliation and greater democratic participation of all. The main merit of restorative justice is the promotion of active participation by offenders, victims and communities, the aim of which is their integration and the restoration of human and communitarian relations. Victims are given the opportunity to know the offender, to confront him/her with the impact of the crime and to see his/her reactions and possible regret, to express the arising emotions and to avoid the lengthy duration and re-victimising effect of criminal proceedings. Offenders have the opportunity to take responsibility for their actions, become aware of the impact these have had on the victim, to feel and express regret, and to promote their self-knowledge and rehabilitation in connecting to the victims and to society. Communities participate in an active way that is closer to justice and may contribute towards social integration. Christa Pelikan (2004) perceives restorative justice as “common sense”, not only is it a “normal” and even almost intuitive way to solve conflicts, not out of the ordinary, but it also requires an active involvement of all those involved.

The downsides associated to the traditional criminal justice system are as ‘traditional’ as the criminal justice system itself: the marginal role played by victims in criminal proceedings and their resulting disenfranchisement; the offender-centred approach (of the judicial professionals and the media); the great difficulties in achieving the rehabilitation of the victim as well as the offender and thus the great level of re-incidence; the high costs and the non-satisfaction of generic and specific crime prevention. Restorative justice has a discourse in which the needs and rights of victims of crime are of greater concern but without decreasing the attention paid to the offenders. Ideally, justice is one of communication and participation as opposed to a vertical and disenfranchising one (Van Garssen, 2003), but in practice the question arises whether these concerns with victims are more apparent and instrumental rather than effective and deep?

The emergence of a more democratic and participatory justice can be attributed to the desire to introduce a higher degree of humanity in the retributive responses of the traditional criminal justice system. The mandatory adoption by European member states of measures to achieve the implementation of victim-offender mediation in the respective national justice systems is included in a framework-decision regarding the standing of victims in criminal proceedings. Its inclusion in an EU legal instrument dedicated to the rights of victims of crime was a clear statement that participation in penal mediation is one of the victims’ rights. Both the implementation of mediation in countries where it does not yet exist and its development in countries where it has already been institutionalised, has to take into consideration a greater balance between the rights, expectations, needs and specific interests of both victims and offenders. Only then will there be trustworthy mediation practices and services in criminal proceedings, in which all involved parties have confidence and is considered effectively restorative.

The legitimacy of restorative justice as an alternative to conventional criminal justice depends of the willingness of victims to participate (Williams, 2005). Increasing the victim’s standing does not diminish the offender’s position, but offers a better balance between their rights and interests to ensure truly restorative practices.

According to the comparative study by Miers and Willemsens (2004), many mediation services and other restorative justice practices are mainly geared towards the offenders’ needs. This can partially be explained by the context in which these were developed in pioneering countries, in which organisations working with young offenders played a crucial role. The restorative justice community is often more sensitive to the offender’s situation than that of the victim. There is also the danger that those who are not used to handling the needs and expectations of victims, nor to understanding and supporting them, pressure victims into taking part. One has to respect the victim’s right not to participate as well to participate in mediation, otherwise there is the risk of transforming them inappropriately into instruments to meet the offender’s needs.

Having arrived late to restorative justice, the increased interest and active participation of the victim support community is a determining factor in the success of the restorative justice process, as reflected in the increasingly active participation of national victim support organizations in the activities of the European Forum for Restorative Justice, and the Statement on the Position of the Victim within the Process of Mediation by the European Forum for Victim Services (2004). Besides the recognition of the importance that mediation may have in meeting victims’ interests, this statement has a clear list of some of the fundamental rights of victims of crime which should be recognised within restorative proceedings: receive information on the process, the possible outcomes and the monitoring mechanisms in place to assess the compliance with any reached agreement; information on available support services; granting of the time necessary to reach a free and informed decision about the participation in the mediation process; access to legal advice free of charge before, during and after the mediation process; choice of mediation form (direct or indirect). Greater cooperation by all participants is the path set in the last five years, which includes firstly, a greater openness and sensitivity by the community and restorative justice practices to the needs of victims (namely suitable training focusing on the issues, rights, needs and reactions of victims in the aftermath of crime); secondly, increased knowledge based on in-depth evaluation and research into the participation of victims in restorative justice processes; and thirdly, a greater intervention of victim support organisations in the improvement of restorative justice practices.

The evaluation of victim-offender mediation programmes and projects varies greatly in terms of dimension and depth but usually covers issues such as the number of cases and their outcome according to different crime categories, the profile of participants, the levels of participation and non-participation, length of processes and number of requirements and actions, the content of the agreements and their level of compliance, conformity or lack of conformity between the agreement and the judicial decision, the satisfaction of the different participants’, recidivism, participation of other persons besides the victim and the offender. The most common criticism made of evaluation is that it is excessively focused on economic and utilitarian parameters such as the cost per case, the number of cases per mediator and the results achieved (percentage of agreements and of those complied with, satisfaction of participants). This is a persuasive means to justify the existence and funding of these programmes, as it makes it possible to highlight the decreasing numbers of judicial

proceedings, of prison population and of re-incidence, as well as the increase in restoration and of satisfied victims and offenders. These issues help attract decision makers at a political level, funding sources and judicial operators, convincing them of the merits of mediation. An evaluation based on these parameters is easier and less costly to achieve: it is not very demanding in terms of material and human resources, of number of processes, of entities who send the cases, of types of cases, among others. With a little more work it is also possible to attain data on the percentage of agreements followed through and the degree of satisfaction of the different participants (Brookes, 2000).

The key question is to determine whether or not an evaluation exclusively based on these parameters truly allows the assessment of the restorative level of any given programme. Consider as example the objective criteria of “agreement”. What can one apprehend about whether the restorative purposes of the process have been reached, namely has the true regret felt by the offender or the victim overcome the feelings of fear, anger and anxiety? (Pemberton, 2007). Reaching an agreement, per se, says little or nothing about the true impact the mediation had on its participants. One can go even further and state that an agreement is not a synonym of success neither does the lack of agreement signify that the process has been unsuccessful (Hartmann, 2007). The participants may reach an agreement on material compensation of the party which has suffered damage in order to “solve the problem as quickly as possible”, and not deal with those issues which the restorative justice process ideally strives to cover via communication processes: the sincere admission of responsibility and the wish to repair the caused damages, overcoming negative feelings such as rage, anxiety or fear, and social integration. Alternatively, although not reaching an agreement, the participants may have developed an intense communication process which allowed them to better understand each other, which allowed the victim to understand the offender’s reality and perceive the sincerity of his/her regret and the admission of his/her guilt, as well as allow the offender to fully understand the negative consequences of his/her actions. The effective assessment of the level of restoration requires re-directing the research to more qualitative factors such as the degree to which the offender was remorseful, spontaneously apologized to the victim, understood the impact of the crime on the victim; the degree to which victims understood the offender's situation; and the extent of positive movement between the offender, victim, or their supporters (Daly, 2005 and 2006). However, in order to determine whether or not the restorative process has had an effect in minimising or overcoming the negative effects suffered by the victim it is necessary consider the starting point: different victims experience crime differently and that this may affect the way they participate in the restorative process (Daly, 2006). Thus, it is important to start off by trying to establish the degree of distress shown by the victim after the incident but before his/her participation in the restorative process, take into account reactions such as fear of being alone, sleeplessness or nightmares, general health problems (headaches, physical pain, trouble breathing or walking), worry about the security of your property, general increase in suspicion or distrust, sensitivity to particular sounds or noises, loss of self-confidence, loss of self-esteem or other problems (Daly, 2005). Comparing this information with the that gathered about the victim’s participation in the restorative process, Daly concluded that

victim’s distress was significantly linked to their attitude toward offenders and their interest in finding common ground during the conference: victims who are only lightly touched by a crime orient themselves more readily to restorative behaviours (Daly 2005, 2006). This important conclusion, which has possible implications for the selection of victims to participate in restorative processes, was only reached by undertaking research going beyond the “surface” and penetrating to deeper, and often overlooked, levels of the complexity of the victim and offender meeting face to face.

In summary: in order to understand the level of “restoration” of a given practice or scheme, one should bear in mind qualitative criteria. These can help determine factors such as whether the offender felt sincere regret, if the victim was able to overcome feelings of revenge, fear and low self-esteem, if the social bonds were restored, if there has been a change in the offenders behaviour, among others. These are realities which may be difficult to measure but which require further study in order to, on the one hand, determine with a higher degree of precision the extent and limits of restorative justice, and on the other, to improve the quality of restorative processes.

End Note

1. Framework-Decision on the Standing of Victims in the Criminal Proceedings (2001/220/JHA) published in the Official Journal on 22 March 2001, and which resulted from an initiative by Portugal, during its Presidency of the European Union. Article 10 - Penal Mediation in the Course of Criminal Proceedings: 1. Each member state shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure. 2. Each member state shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account.

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