

Restorative Justice, Self-interest and Responsible Citizenship 10



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# **Restorative Justice, Self-interest and Responsible Citizenship**

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**Lode Walgrave**



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## Foreword and acknowledgements

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The cover of the book displays a work of art representing Sisyphus, the tragic hero in the old Greek myth. It was made in 1548–49 by the Italian baroque painter Titian. The versions of the myth differ, but it is told that Sisyphus had the *hubris* (the arrogant recklessness) to defy the gods. They punished him by imposing on him an everlasting burden. Sisyphus is doomed to push a huge rock up a steep hill. But each time the top is almost attained, the rock rolls back down the hill, and Sisyphus must start again, a cycle which will last for eternity.

The myth of Sisyphus has fascinated artists and philosophers throughout human history. It is intriguing indeed why Sisyphus continues his ceaseless and pointless task. One possible answer is that he goes on out of fear of death, which would follow if he did not. The desire for life is stronger than the aversion for the meaningless effort. And, as Camus writes in *Le Mythe de Sisyphe* (1942), by being resigned and continuing the task routinely, without thinking, Sisyphus finds peace.

Another answer is, however, that Sisyphus keeps pushing the rock because of hope. If, deep down, he did not keep some hope that he will ever reach the top, he would accept death. It is typical that all artists, from the ancient Polygnotus to the postmodern Luciano Fabro, represent Sisyphus while he is pushing the rock up the hill, and not in the most frustrating phase, looking at the rock rolling down it, after which he has to walk back to pick up once again the endless effort. The key to the myth is the pushing up the hill.

Both dimensions together are symbolic of the human condition. Positively, we all are driven by the intrinsic unquenchable desire to

reach the ideal, while knowing that we never reach it completely. Negatively, we are condemned to keep striving towards the highest possible, because if we did not, deterioration would be unavoidable.

It is a leitmotiv of this book. While trying to combine self-interest with common interest, we know that in the end self-interest always gets the upper hand; scientists continue pursuing objective facts, while they cannot but discover subjectively what is 'out there'; liberals argue for maximal liberties for citizens, but using these liberties unrestrained would lead to catastrophic social relations; philosophers and jurists search for general principles of justice, knowing that justice cannot be but an imperfect human construction, provisional and one-sided. But still, if we did not continue pursuing the ideals, the opposite of the ideal would drown us. If scientists gave up their ideal of objectivity, they would sink into impressionist results with no added value; if rights and liberties were not defended, enslavement would follow; if justice were not pursued, injustice would be the rule.

Restorative justice will be presented as an ideal way of doing justice in an ideal society, while understanding it is a kind of utopia. We need an image of what is at the top of the hill, a utopia, to prevent the human community from dying by cynical selfishness. There is nothing as practical as a good utopia. It is a motivating beacon, a reference to work towards. If some progress is observed, utopia is a source of hope. Without a utopia, there is no hope, and motivation for action and improvement drops.

This book can be considered my tribute to the community of criminologists, and especially to those committed to pursuing scientific understanding of restorative justice and its potential. It was a privilege to meet so many people with great commitment to 'the good', personal integrity and high scientific quality. Reading their publications, meeting them and having discussions with them was inspiring, provoking, questioning, fascinating, stimulating, pleasant, amusing, sometimes even hilarious. It opened up for me prospects of new potentials and hope for a better justice in a better world. These colleagues helped me to develop my utopia and to 'push the rock'.

My special thanks go to Gordon Bazemore, John Blad, John Braithwaite, Paul McCold, Dan Van Ness, Bas van Stokkom and Stefaan Walgrave, colleagues and friends (and one son) who devoted some of their scant free time to read earlier versions of one or two chapters. Even if I did not always do as they suggested, their comments were extremely valuable; they made me reconsider, explain better, or, indeed, modify passages of the book. I also thank my colleague

Willy Clarysse, for the information he provided about the myth of Sisyphus. Patricia Butler was my first language-corrector. Her firm but friendly way of turning my particular English-like language into real English avoided too great a confrontation with my shortcomings in that respect.

Finally, I cannot but thank also my wife, Mieke. For a long time she put up with my absent-mindedness, my hiding away at work, my taking up of time we should have spent together. I promised her that it would be better once this book was finished; I'm not sure that she really believed me. We must see it like Sisyphus: I shall push the rock up to the top of my leisure activities and even laziness, but, unfortunately, the gods may roll the rock back downwards to criminology and restorative justice. What can you do then?

Lode Walgrave  
Leuven

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# Introduction

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It is a commonplace that restorative justice is expanding rapidly. From a phrase hardly known, it has become in a few decades a broad and still 'widening river' (Zehr 2002a: 62) of renovating practices and empirical evaluations, a central issue in theoretical, juridical and socio-ethical debates, and a ubiquitous theme in juvenile justice and criminal justice reforms worldwide. No doubt, the boost has to do with the intrinsic social value of the basic ideas and with the quality of the practices carried out all over the world. Probably, the restorative justice discourse also comes timely, in a period of increasing awareness that the current escalation in punitiveness and social exclusion is driving a downwards spiral of lack of safety, discomfort and discontent. Also academic reflection and research are forces which have contributed considerably to the quality and the dissemination of restorative justice practice and theory.

Yet, despite the wide dissemination, there are many conceptions of what is understood by 'restorative justice'. For some, it is a synonym for a particular practice such as victim-offender mediation (in Europe) or conferencing (in Australia and New Zealand). At the other end of the spectrum, others see it as a wide movement to transform the way people live together. The vagueness or even confusion about the concept is a problem for its social credibility and for research.

Well informed critics on the practical, ethical, theoretical and empirical aspects of restorative justice are indispensable in the development of good practice, balanced theoretical insight and socio-

ethical understanding. They help to clear out, correct, reformulate, reduce and sharpen insights and ambitions. But the lack of clarity in conception has made restorative justice vulnerable to criticisms which are based on a misconception or a too reduced understanding; some criticisms address practices which do not meet reasonable standards of good restorative practice, or even caricatures of restorative justice. It is difficult to respond to such wrong understandings if the response cannot itself rely on a clear conception.

The lack of clarity is also detrimental for research. If the object of the investigation is not well delimited, you cannot investigate it accurately. If there is no transparent differentiation between socio-ethical options and empirical findings, credibility is lost. If the relation between the mainstream punitive apriorism and restorative justice is not understood unambiguously, they cannot be compared adequately. If there is no view on the variety and complexity of possible restorative justice practices, conclusions based on one type of practice cannot address restorative justice as a whole. If there is no clarity about the objectives of restorative justice, its success or failure cannot be assessed.

### **Searching for more clarity in concepts and in the socio-ethical foundations**

The first aim of this book is to find clarity. I am going to try to distil out of the large and diverse restorative justice literature what are in my view the essentials of restorative justice, and what it should be ideally. In doing so, I hope to propose a clearer distinction between (1) the core of restorative justice as a restricted option on doing justice after the occurrence of a crime, (2) the other practices of resolving conflicts and injustices that are inspired by the same participatory and peace-promoting philosophy, (3) the socio-ethical roots which inspire not only the choice for restorative justice but also many other movements and practices, and finally (4) the social-political or ideological movement of which the restorative justice movement can be a part. While these four areas are mutually closely interdependent and inspirational, they are different things. It is crucial to recognise that, in order to better mark out the objects of our discourses and research. A sharper view allows better scrutiny and better advancement.

Distinguishing restorative justice in the strict sense from its socio-ethical grounds is not meant to smooth over these grounds. On

the contrary. A second purpose of this book is precisely to dig up the socio-ethical and ideological layers that inspire the pursuit of restorative justice and other deliberative models of conflict resolution. In my view, the option for restorative justice is not primarily inspired by instrumental reasons (which are important, though), but most of all by socio-ethical intuitions. What brings victims and offenders to agree to meet and to seek together constructive solutions? Why is restorative justice so attractive that many adopt it as a buzzword, even if they have not reflected thoroughly on its content and consequences? Why is restorative justice associated so easily with a social movement which goes far beyond dealing with the aftermath of crime? Again, for reasons of clarity, it is important to disentangle the ethical and the empirical arguments which are all too often mixed up in much of the restorative justice literature.

I will base the exploration of these questions on a kind of introspection. What attracts me in restorative justice? I will explore and make explicit my own socio-ethical intuition and propose it as a separate argument in favour of restorative justice. It is not a neutral argument, but a socially committed one.

Such undertaking holds the risk of yielding a moralising sermon. It might become an exercise in what Pratt has called 'evangelical criminology' (Pratt 2006: 44). If my version of restorative justice were to be locked within the box of beliefs, rejecting external criticism and drifting away from adequate empirical checking, it would be a bad thing. But there is nothing wrong with moral reflection and social commitment by social scientists. I will even argue that it is crucial that social sciences are aware of their social role and play it fully. Purely objective social sciences do not and cannot exist. Hence, the truly scientific attitude is to open not only the 'intra-scientific' methodology for external control, but to explain also the 'extra-scientific' motivations and arguments. While it is crucial to distinguish clearly what we find from what we think and what we hope, all has to be communicated. In that sense, I cannot exclude my 'evangelism', but I can try to keep it under methodological control and make it open for discussion.

Like earlier reforms, the introduction of the restorative justice rationale is a movement depending on commitment and internal motivation, supported by good scientific research. Restorative justice ideas and practices are imperfect, but they add a crucial new dimension: focusing on repairing the harm and suffering caused by the crime rather than on preserving an abstract legal order. Good and committed criminological research can make a crucial difference

in the dissemination and the correct implementation of restorative justice.

### **From juvenile justice to restorative justice in a European continental context**

The clarity I am pursuing and the ethical foundations I will seek cannot but be personal. It is clarity for me and the ethical foundations in which I believe. In some respects, they are considerably deviant from mainstream visions of restorative justice. This deviance is marked by my own history in restorative justice and by my European continental roots.

I came to restorative justice via juvenile justice. Until recently, Belgian juvenile justice was one of the most consistently treatment-oriented systems in the world. Its focus on remediating the needs of the child led to neglect of the traditional legal safeguards. But criticising the treatment orientation in juvenile justice entailed the risk of handing over juvenile offenders back to the traditional punitive response (as, for example, in Feld 1999). And that was not my ideal.

Some local practices in Belgium inspired my vision of a possible alternative. In 1981, I wrote an article in a Dutch journal, 'Confronting youth crime with the law: restraint and reparation, but not punishment'<sup>1</sup> (Walgrave 1981). In my view at that time, judicial intervention should refocus on the criminalised act (and not on the needs of the offender), on what would offer the standard for deducing legal safeguards. But the judicial sanction itself should above all consist of pressure or judicial obligation to carry out reparative actions. It would force the juvenile to confront his responsibility, and thereby be more constructively pedagogical and more useful for all. Intuitively, I took a reparative position without knowing of developments in other countries.

It was only in 1991, at an international workshop on Conflict, Crime and Reconciliation (Messmer and Otto 1992) that I heard for the first time the phrase 'restorative justice'. My earlier intuition fitted into the ideas being shared, and the contours became visible of a broader and deeper concept of doing justice. But I still saw restorative justice primarily as a way to escape the unfruitful rehabilitation–punishment dilemma in juvenile justice and as a possible ground for a constructive judicial response to youth crime which would better answer the legal requirements.

Intensive exchanges with colleagues from all over the world in the International Network for Research on Restorative Justice for

Juveniles gradually made me understand how revolutionarily different it is to be focused on repairing the harm and suffering instead of trying to submit the offender to a 'just' response. The importance of the deliberative process came to the forefront. It took a while for me to understand that restorative justice was not so much about a justice system promoting restoration as about doing justice through restoration.

But I did not completely change my mind. So, for example, I straightforwardly use an outcome-based definition of restorative justice, and see voluntary processes only as (crucial) tools to achieve the maximum possible restoration; I include the possibility of imposing judicial sanctions in view of reparation into my restorative justice concept; I am sceptical towards the – in my view – too naive reliance on community, and look for a particular juridical frame to keep restorative justice adequately within the principles of a constitutional democratic state. These and other deviations from the mainstream will become apparent throughout the book.

Probably, these deviant options are mainly due to my European continental roots. Three particularities may explain why developments in restorative justice have taken a somewhat different shape on the European continent (Willemsens and Walgrave 2007).

### *Common law vs civil law*

Restorative justice promotes the inclusion of the direct stakeholders in the response to the offence, which is a challenge to the traditional state monopoly over the reaction to crime. Changing this is more difficult where this monopoly is strongly centralised and consolidated by legal dispositions, as in European civil law regimes.

On the European continent, the *legality* principle prevails, obligating police, for example, to inform the public prosecutor about all cases. The public prosecutor has only limited power not to refer cases to court if there is sufficient evidence. In common law, the opportunity principle prevails granting all agents in the system – police, prosecuting agencies, judges – the *opportunity* to exercise broad discretionary powers in deciding how to act in the 'public interest' and in imposing measures they feel are most appropriate in response to the crime committed. It may bring common law closer to the reality of public life and the attitudes of the 'community', including, however, risks of populist influences and weaker legal safeguards. Civil law provides stricter legal safeguards, but is also more rigid and sometimes unworldly.

The flexibility of the common law system can play an important role in the development of restorative justice. This is true not only because of the space it allows for running experiments, but also because flexibility is a crucial element in restorative practices themselves. It is therefore easier to carry out mediation or conferencing outside of the justice system, within the 'community' for example, or to include these practices in the judicial procedure, as is the case in 'cautioning'. The outcome of the restorative process is not as strictly weighed against legal checks as would be the case in the civil law regimes.

Hence it is not coincidental that most restorative practices have their origins in common law countries, and that Europeans are more concerned with the legal basis for these practices when they are introduced in their countries. More than most common law countries, those on the European continent have legislated detailed procedural rules to implement restorative schemes. From the beginning, legal concerns with restorative justice have been an essential part of the debates on the European continent.

### *Community vs 'citoyenneté'*

Anglo-Americans very much rely on community to explain how they see restorative justice and other social mechanisms working ideally. Europeans are aware that an informal climate of mutual understanding is crucial, but they find the confidence in community naive or even dangerous.

The differences in approach rest on differences in concepts of the relationship between state and citizens (van Swaaningen 1997). Europeans see the authorities as the holders of the *vox communi*. The state is the formalisation of the community, or the community of communities. Most English speakers feel less represented by the state, which is often seen as a bureaucratic taxing machine, an opponent to freedom, located at an unbridgeable distance from real life. Especially in the USA, the shortage of state institutions for education, medical care and social allowances is often partly compensated for by communities based on religion, territory or ethnicity. This may be why many Americans relate to community as opposed to government or state, and are less sensitive to the exclusionary anomalies of many communities, which shall be described in Chapter 3.

Europeans are sensitive to the state's bureaucratic and formalist excesses, but they mostly see it as a tool to be improved. The state is a safeguard against abuses of power by the most powerful.

*Citoyenneté*, as the French call it – citizenship – is a crucial good, including rights and protections offered by the state, and obligations. Decentralisation does not send matters to the community, as in North America, but to the municipalities (Hastings and Bailleur 2005). Communitarianism often has a pejorative meaning in French society, because it is suspected of promoting the selfish interests of the particular community to the detriment of general citizens' interests. It is not that Europeans love paying taxes; they basically consider it as a contribution to collective life.

This difference may explain why English-speaking scholars see restorative justice more often as an opportunity to extend the reach of community in responding to crime and to push back the interference of formal state power: 'Restorative justice is a form of insurgency because it competes with the state' (Sullivan and Tift 2006a: 5). Europeans are predominantly sceptical towards an – in their eyes – uncritical reliance on informal communities, and are often committed to trying to include restorative practices in a judicial frame while preserving the benefits of informal deliberation.

### *First Nations and other Indigenous people*

Indigenous populations currently have a strong voice in Canada, the United States, Australia and New Zealand. Their traditional practices have energised the debates on criminal justice, and have deeply influenced thinking on and practices of restorative justice.

Unlike other regions of the world, Western Europe has not had a driving and inspiring force toward restorative justice based on the ethnic and cultural diversity of its populations. This is undoubtedly due in part to the rather reduced proportion of non-Western populations. But it certainly also has to do with their status as immigrants. The white population is the 'First Nation' in Europe. White Western society and culture has its territorial roots on the European continent, and that positions ethnic and cultural minorities as 'visitors'. According to the mainstream opinion, those visitors must simply 'integrate' into Western culture, meaning that they must accept Western values and institutions. Muslim or African traditions do not really penetrate European social institutions. They are accepted only in the margins, insofar as they do not challenge the Western model of society. This is also the case for criminal justice.

Furthermore, the centralised civil law system is not flexible enough to be influenced to the same extent as the common law system in Anglo-Saxon countries.



## Structure of the book

In Chapter 1, 'Focusing on restorative justice', I explain my own view on restorative justice. It is argued why I opt for a 'restricted definition', addressing only the dealing with criminalisable matters, and not all other practices in schools, welfare work, neighbourhoods, etc. Contrary to most restorative justice writers, I opt for a restricted and outcome-based definition of restorative justice as 'an option for doing justice after the occurrence of an offence that is primarily oriented towards repairing the individual, relational and social harm caused by that offence'. The most important restorative schemes are presented with some comments. The restricted essentialist definition allows for a maximalist option on how to deal with the aftermath of crime. While voluntary dialogue among the stakeholders is promoted where possible, judicially imposed sanctions are also accepted in the restorative justice concept if they are primarily intended to contribute as much as possible to reparation. This acceptance raises questions about the difference between reparative obligations and criminal punishment.

Chapter 2, 'Restorative justice and criminal punishment', argues why restorative justice is clearly distinguished from punishment. The most important difference is that a – possibly painful – obligation to repair is not equal to an intentional infliction of pain. The apriorism that crime must be responded to by an intentional infliction of pain is detrimental for instrumental reasons. I also argue that such apriorism is highly problematic from a socio-ethical standpoint. The need for censuring criminal behaviour and for restoring a kind of moral balance after the occurrence of a crime is recognised. To punitive retributivism, restorative justice is opposed as a model of inversed constructive retributivism.

Chapter 3 is entitled 'Common self-interest: seeking socio-ethical grounds for restorative justice'. The very fact that restoration is given priority over punishment is an expression of a different socio-ethical position. After a review of some ethical approaches to restorative justice, I opt for an 'ethic of social life', advancing common self-interest as the crucial concept. It is self-interest, because I promote community life, not because I am an unworldly idealist, but because I hope to get benefits from being a member of a good community. It is, however, more than self-interest, because we all integrate our self-interest in a project of common self-interest, being to increase the quality of social life. Social life guided by such a project promotes the ethical attitudes respect, solidarity and active responsibility as the