2. The aims of restorative justice: Some philosophical remarks on the challenges of integrating restorative justice into the criminal justice system. Reconciling the irreconcilable?

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2.1 Introduction

'The restorative justice movement originally began as an effort to rethink the needs which crimes create, as well as the roles implicit in crimes', Howard Zehr, one of the pioneers of the movement, writes in his *Little Book of Restorative Justice*.[11] Throughout the last four or five decades, the proponents of restorative justice have questioned the most fundamental aspects of the way we sanction crime: how should we react to crime? What is the aim of our sanctioning system? What are the needs of the parties involved and how can they be met? The answers given have been radically different from the traditional answers of the criminal law. An alternative to the criminal process has been born.

This alternative is, however, not a specific kind of process called restorative justice. Victim–offender mediation, family group conferencing, community circles, sentencing circles – these are just a few of the types of processes that are called restorative.[12] As Lord Justice Auld remarks in his *Review of the Criminal Courts of England*

11 Howard Zehr, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2002), p. 13.

12 E.g. Shari Tickell and Kate Akester, *Restorative Justice: The Way Ahead* (London: Justice, 2004), p. 21.

and Wales, restorative justice has been described as 'more of a philosophy than a specific model'.[13]

The philosophy that unites these different models – to the extent that there can be said to be one philosophy of restorative justice: the debate about the definition of restorative justice continues[14] – gives an answer to the question of what the aims of our sanctioning system ought to be. It is the content of these aims that I shall explore in the following. I shall do so by comparing the aims of restorative justice with the aims of the criminal law as they are traditionally conceived, thereby attempting to show that restorative justice is based on a different conception of justice from that of the criminal law, in other words, a different understanding of how individual conflicts ought to be solved, both with regard to *who* should decide the outcome, and *what* a just outcome may be like. I shall also discuss whether restorative justice can be said to fulfil the functional purpose of criminal law in a modern society, especially with regard to general deterrence.

The application of restorative justice processes within the criminal justice system is in continuous growth.[15] Many countries plan to expand the use of restorative justice in the coming years. One example is Norway, where restorative justice is already incorporated into the criminal justice system through the Norwegian Mediation Service (*Konfliktrådet*). A government rapport from 2007 states:

> The Justice Department believes that restorative justice should have a central place in the future way of reacting to crime (...) For crimes that have been admitted and where there is a known victim, a process of dialogue and restoration and reconciliation should always be attempted. Such an approach may be viable on all levels and at all times after the crime is committed.[16]

13 Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (London: Stationery Office Books, 2001), p. 387. The review was commissioned by the Lord Chancellor, the Home Secretary and the Attorney-General in December 1999.

14 E.g. Howard Zehr and Barb Toews, *Critical Issues in Restorative Justice* (Monsey, NY: Criminal Justice Press, 2004), pp. 1–60.

15 See, generally, Tickell and Akester, *Restorative Justice*.

16 St.meld. 37 (2007–2008) *Straff som virker* ['Punishment That Works'] – *mindre kriminalitet – tryggere samfunn (Kriminalomsorgsmelding)*, section 12.3.4. In the

In other words: the Justice Department foresees a considerable increase in the use of restorative justice; it desires an even greater integration of restorative justice into the criminal justice system than we have today.[17]

A question then arises: is it possible to integrate restorative justice into the criminal justice system to the extent that the Justice Department plans? Can the two types of processes be reconciled in a way that makes it possible for them to co-exist as two alternative procedures competing for criminal cases? Or do they have such fundamentally different aims that they cannot co-exist without constantly undermining each other? Will for instance the 'case specific' or singular nature of restorative justice processes undermine the rule-of-law principles that constitute the normative basis of the criminal process, such as the principle of legality, the principle of equality before the law and the principle of proportionality between offence and sanction?

A closely related, and more practical, question is *how* it might be possible to organise the integration of restorative justice into the criminal justice system in a way that respects the nature of the two processes, if that is at all possible. For instance, how far can we go in establishing court supervision and control of restorative justice agreements before the autonomy of the mediating parties is jeopardised? And from a criminal justice point of view: how much autonomy is it acceptable to leave to the parties before the process becomes merely a private and not a legal justice process? These and similar questions about the practical integration of restorative justice in the criminal justice system will not, however, be addressed in this paper. The aim here is to clarify some of the philosophical principles that distinguish restorative justice from criminal justice.

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original Norwegian text the wording is: 'Departementet mener at tilbud om restorative justice bør ha en sentral plass i framtidens måte å reagere på lovbrudd på. (...)Ved tilstått lovbrudd med identifiserbart offer skal det alltid om mulig legges opp til dialog med gjenoppretting og forsoning som mål. En slik tilnærming kan være aktuelt på alle nivåer og på alle tidspunkter etter at lovbruddet er blitt begått.'

17 The police or prosecutor may today divert criminal cases to the Norwegian Mediation Service when the cases are deemed suitable for mediation (Straffeprosessloven §71a), typically cases of rather minor crime, and not, for instance, serious violent crime.

The life of the law is not always conducted strictly in accordance with one set of overarching principles. Rules, institutions and sanctions that are based on different theoretical viewpoints may be adapted into the legal system in modified versions and as such co-exist quite well. Accordingly, from a traditional pragmatist or functionalist point of view, the co-existence of restorative justice ideas and traditional criminal law ideas in the same criminal justice system may very well be unproblematic. The uncertainty regarding the possibility of reconciling the philosophical foundations of restorative justice with the rule of law principles of the criminal justice system does not necessarily mean that the two processes are irreconcilable in practice. Nevertheless, the practical integration of restorative justice into the criminal justice system would be well served by a philosophical and principled discussion on the nature and the aims of restorative justice and the criminal justice system. It is through such a discussion that we shall become best equipped to judge whether the attempts to integrate restorative justice into the criminal justice system preserve the necessary characteristics of a restorative justice process, or whether the result is an integrated process that ceases to be restorative.

2.2 The general aims of sanctioning crime

On a very general level restorative justice and the criminal justice process share the same aims. They are both ways of sanctioning wrongful behaviour. The purpose of this sanctioning is twofold: on the one hand there is what we might call the societal function of the sanctioning system, where the aim is to deal with wrongful actions in a way that minimises the conflict level in the society as a whole – in other words, to somehow prevent as much wrongdoing in society as possible. On the other hand there is what we might call the individual function of the sanctioning system, where the aim is to deal with each specific conflict in a way that somehow resolves the conflict and restores a sense of justice among the parties. Naturally, these two aspects are not completely independent of each other: individual cases are not solved in a vacuum, but depend on the institutions and norms of the legal system and the established concepts of justice in society. Likewise, the societal

function is dependent on individual cases being solved satisfactorily – the legitimacy and efficacy of the legal system rest on the confidence people place in it for solving their conflicts. In addition, individual cases may serve as examples, producing a deterrent effect and thereby influencing the conflict level of society directly.[18]

Though the two processes in question share these very general aims, each process is based on an understanding of the content of these aims and how they should be reached that is sometimes fundamentally different from the other. They do not, in other words, share the same normative basis on some key issues. I shall in the following point out some of these differences both on the societal level and on the individual level.

2.3 The societal function of sanctioning crime

2.3.1 Restorative justice and the community

There is considerable doubt whether restorative justice can fulfil the functional purpose of the criminal law in a complex modern society. Restorative justice is often considered a kind of private conflict resolution that is primarily relevant to the immediate parties of the conflict. In Nils Christie's seminal article *Conflicts as Property*, the criminal process is famously portrayed as 'stealing' the conflict from the involved parties.[19] In contrast, restorative justice is seen as a way of ensuring the parties' ownership of their conflict. The state is often excluded from the process, sometimes attributed only the role of mediator, as in the county-level Norwegian Mediation Service (*Konfliktrådet*). This kind of privatisation of the conflict resolution, awarding the parties greater autonomy in the decision-making, can be seen as being at the heart and soul of

18 In criminal law science, the aims of the criminal law are most commonly divided between general deterrence and retribution. Both these aims will be treated in the paper. I have, however, chosen to lead the following discussion along the line of the societal and the individual function of the sanctioning system, as these are more general terms that are relevant to both types of process in question.

19 Nils Christie, 'Conflicts as Property', *The British Journal of Criminology*, 17 (1) 1977, pp. 1–15.

restorative justice.[20] It would, however, be wrong to conclude from this that restorative justice is a private matter and does not include a broader societal perspective. The societal function of the conflict resolution process is important in many restorative justice theories, although society is usually considered on a smaller scale, as the community of the parties.

John Braithwaite is one of many restorative justice theorists who underline the importance of the community in assuring that the agreement reached by the parties is fulfilled. His widely discussed theory of *reintegrative shaming* is a good example of a theory of the purpose of restorative justice that stresses the societal aspect. The restorative justice process, he claims, involves a form of shaming of the offender by the community, and this may have a positive effect when followed by a reintegration of the offender into the community.[21]

RA Duff too stresses the communicative aspect of restorative justice: The characteristic feature of mediation in criminal cases, he claims, is the moral censure that is communicated to the offender for his crime. Mediation in civil cases, on the other hand, does not necessarily involve moral censure or shaming (for instance in a case of two neighbours arguing over water supply). Criminal mediation, like the criminal process, addresses a wrong that has been committed and thus serves the societal purpose of censuring wrongful acts.[22]

Some more radical forms of restorative justice, such as the traditional Native American versions, put an even larger emphasis on the role of the community, not just in the resolution of the conflict, but also in the reason for the emergence of the conflict. In this kind of relationship-oriented form of restorative justice, the offender does not bear the entire responsibility for the offence. The relationships between the offender, the victim and their community must

20 Howard Zehr views the participation of the primary parties in the justice process as one of the 'three pillars of restorative justice'. The other two pillars are (1) the focus on repairing the harm done to the victims and meeting the needs of all parties, and (2) the focus on the offender's obligation toward the victim to repair the harm, *The Little Book of Restorative Justice*, pp. 22–26.

21 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989).

22 RA Duff, Restoration and Retribution, in A. von Hirsch, A. Ashworth & J. Roberts, *Principled Sentencing: Readings on Theory and Policy* (Hart, Oxford: 2009), pp. 178–188.

also be taken into account. One could describe it as a form of collective responsibility for not preventing the conflict, as well as for the resolution of the conflict, yet without denying that the offender has a personal responsibility as well.[23]

Some modern restorative justice theorists, like Howard Zehr, express a similar attitude about the collective responsibility of the community:

> The community bears a responsibility for the welfare of its members and the social conditions and relationships which promote both crime and community peace. The community has responsibilities to support efforts to integrate offenders into the community, to be actively involved in the definitions of offender obligations and to ensure opportunities for offenders to make amends.[24]

2.3.2 General deterrence

The main inadequacy of restorative justice with regard to the societal function of the legal system is the lack of a general deterrence perspective. The outcomes of restorative justice processes can hardly be said to constitute a clear threat of negative sanctions for someone contemplating a crime, mainly because the outcomes are not decided in advance and may vary from relatively extensive restitution schemes to no consequences at all apart from the restorative justice meeting. Hence, it may be claimed that restorative justice does not offer the necessary predictability of sanctions for it to fulfil the deterrent function of the legal system. In addition, the burden of the sanction agreed upon in the restorative justice meeting is often considered to be much lighter than the sanction would have been in a criminal court. Therefore, in the presumed cost–benefit analysis of potential criminals, a threat of restorative justice would weigh less than the threat of punishment, and would presumably lead to more crimes being committed.

23 For more on the Native American type of restorative justice, see, for example, Rupert Ross, (Toronto: Penguin Canada, 1996), and David C. Vogt, *Det kalkulerende individ: straffesystemets filosofiske forutsetning* (University of Bergen, Master's thesis, 2006, pp. 80–89).

24 Zehr, *The Little Book of Restorative Justice*, p. 66.

However, this idealised rational agent model of general deterrence may be criticised. Empirical research shows that the main deterrent effect comes from the fear of being caught, not from the fear of the punishment itself.[25] The greatest fear is of being exposed as the person who committed such an awful act, of being stigmatised as a criminal, of facing the public humiliation of a trial. There is no reason why a restorative justice process cannot be equally frightening, granted the process is public, or at least involves the people the offender cares about.[26] Restorative justice may therefore be able to achieve this main deterrent effect.

But, even though the deterrent effect of fearing exposure is more important than the effect of the threat of punishment, that does not mean that the latter is unimportant, especially facing criminals of the tough sort, who are presumed to be immune to the kind of primary control that restorative justice represents. Some would call it naïve to think that the threat of mediation might deter these habitual criminals. Law professor Johs. Andenæs seems to be of that opinion. He writes in the book *Straffen som problem* ('The Problem of Punishment') that an accountant, a priest, a teacher, a public servant – in other words what we may call 'normal law-abiding citizens' – would rather fear exposure than punishment, when contemplating a crime. But then he goes on to write: 'For a previously punished habitual criminal, or an unemployed youth from a drug-user environment, this would be different'.[27]

Perhaps there is something to this argument: people who already feel alienated from society will not be deterred by the risk of exposure and further alienation. Studies of the criminal group of society show that unmarried men, between 18 and 24 years old, living in cities, with weak ties to family, school, housing and work are over-represented in the criminal statistics. The characteristic trait that unites this group, according to Braithwaite, is weaker than normal social ties to the community.[28]

25 See Jørn Jacobsen, 'Diskusjonen om allmennprevensjonen sin faktiske verknad', *Tidsskrift for strafferett*, 4 (2004), pp. 414–17, for an overview of research on the deterrent effect of punishment.

26 Cf. Braithwaite, *Crime, Shame and Reintegration*.

27 Johs. Andenæs, *Straffen som problem* (Halden: Exil, 1994), pp. 53–54.

28 Braithwaite, *Crime, Shame and Reintegration*, pp. 44–48.

The conclusion that Andenæs draws – that punishment is necessary because primary control is inefficient for this group – is none the less questionable. It is questionable both from a moral perspective – he admits that punishment is primarily aimed at some of the least privileged people in society – and logically – he claims that punishment is a necessary deterrent for those people who happen to be the main recipients of punishment. It is a logical fallacy to claim the people who are in fact punished as examples of people for whom the threat of punishment functions as a deterrent – obviously the threat of punishment did not deter these people, since they committed the crimes and were punished. This is not to say that punishment can never deter this group, but merely that it, unlike the law-abiding group of society, cannot be used in an argument for the deterrent effect of punishment.

Perhaps the conclusion should be that neither the fear of exposure, nor the threat of punishment is enough to deter the most diehard criminals, in which case the restorative justice approach of appealing to the conscience of the offender, for instance by confronting him or her with the victim's suffering, might prove to be a more productive approach. Put differently: if weak social ties are acknowledged as a common factor increasing the risk of criminal behaviour, then it would not be unreasonable to think that a sanction that attempts to address this problem might succeed better than a sanction that further excludes the offender from the community.

Either way, it is a plain fact that restorative justice cannot satisfy the aim of deterring presumed cost–benefit calculating and socially alienated criminals, such as members of the mafia, by posing a threat of severely disadvantageous sanctions. This, I suspect, is one of the main reasons why it is considered unrealistic to think that restorative justice can ever replace the criminal process as the main sanctioning process in modern society. Other functional obligations of the legal system, beyond that of general deterrence, further underline this conclusion: the need for an efficient and predictable system where security seems to be an ever more important goal, where the scope of a crime may go way beyond the local and morally more comprehensible crimes of less complex societies, and where the interests that demand protection may be economic, communal or may concern a person on the other side of the globe.

The societal function of the legal system in a global world cannot be achieved solely by a mediation system that was conceived under considerably less complex circumstances.

That does not mean that restorative justice has no part to play in a modern society. It is certainly possible to imagine restorative processes alongside the criminal process, even to a larger degree than we see in, for example, Norway today. Perhaps the societal function is sufficiently well maintained by the criminal process, so that even a considerable element of restorative justice in the criminal justice system may still be compatible with it. When it comes to the goal of general deterrence, which is mainly achieved through fear of exposure, there certainly seems to be a large degree of flexibility in the choice of sanction, at least as long as the possibility of punishment remains as a distant threat.[29]

2.3.3 Ensuring the state's monopoly of force

Another societal function of the sanctioning system is maintained by the state's ability to provide a response to wrongful behaviour that prevents the public from taking the sanctioning into own hands. This aim of preventing revenge is perhaps the oldest way of justifying the public penal system. The parties involved, as well as the public at large, must feel that justice is being done if they are to accept that the state has a monopoly on enforcing sanctions. Hence, the criminal justice system must not just accomplish the aim of crime prevention; it must also meet a demand for justice.

Is restorative justice capable of meeting such a demand? The seemingly insatiable appetite for harsher punishment expressed in

29 The question of whether restorative justice can take part in a criminal justice system without weakening its deterrent function naturally invokes a more fundamental question regarding the extent to which general deterrence should influence the design of the criminal justice system in general. Some, like Nils Jareborg in *Straffrättsideologiska fragment* (Uppsala: Iustus Förlag, 1992), pp. 136–48, argue that general deterrence is a relevant concern only with regard to criminalisation: and its function in terms of crime prevention, and deny its role in sentencing and execution of the sanction. From such a perspective, restorative justice elements in the process and sentencing would presumably be regarded as unproblematic under such a theory, as long as the criminalisation and threat of punishment is upheld. This is not to suggest that Jareborg and others may not find restorative justice problematic for other reasons than general deterrence.

the media and by most political parties seems to suggest that it may be difficult. It is easy to get the impression that punishing criminals is an essential part of people's sense of justice: no punishment, no justice.

However, as research has shown, the matter is more complicated. The large survey performed by Flemming Balvig in 2006, *Danskernes syn på straff* ('The Danish View on Punishment')[30] suggests that people's view on the justice of punishment greatly depends on the way the question is asked. When asked a general question of their view of punishment, a great majority claimed to be in favour of harsher sentences. But when asked what they considered to be right in a specific case, they were a lot less punitive, and generally less so than the Danish courts. And after being shown a video of a simulated trial, most became even milder in their judgements.[31]

How should we interpret these results? Either people's opinions are generally not well informed and they therefore change their opinion when more information is given (on a specific case) – this suggests that people are in reality less punitive than one might get the impression of from simple surveys and TV talk shows – or it means that the very concept of justice is such that it evades a clear definition that can yield universal answers to what is just. A third possibility is that both of these interpretations may be right.

2.4 Resolving individual cases

We are now already deep into the question of what I have called the individual function of the sanctioning system: dealing with each case in a way that resolves the conflict and restores a sense of justice. I shall now look more closely at how the two processes in

30 Flemming Balvig, *Danskernes syn på straff* (Copenhagen: Advokatsamfundet, 2006).

31 In 2009, Flemming Balvig, Helgi Gunnlaugsson, Kristina Jerre, Leif Petter Olaussen and Henrik Tham conducted a follow-up survey in all the Nordic countries that has largely corroborated the findings of Balvig's 2006 study (the Finnish results have not yet been analysed), see Balvig, Gunnlaugsson, Jerre, Olaussen and Tham, 'Attitudes towards Punishment in the Nordic Countries', *Nordisk Tidsskrift for Kriminalvidenskap*, 97 (3) (2010). Similar results were also found by Thomas Mathiesen, *Tiltak mot ungdomskriminalitet* (Oslo: Universitetsforlaget, 1965).

question attempt to fulfil this function and then return to the issue of how we should interpret Balvig's survey and the possibility for restorative justice to satisfy our demand for justice.

Even passionate utilitarians will concede that the criminal process must aim at creating a just solution to each case. It might not be the primary aim – general deterrence or treatment of offenders might be considered more important – but as Johs. Andenæs[32] and John Rawls,[33] among others, have stressed: punishment must always be deserved by the offender. It would be wrong to consider only the utility of punishing somebody; it would inevitably lead to the acceptance of punishing innocent people or bestowing draconian sentences when the consequences are for the greater good. Punishment must be just, which means that the offender, to use the term of Immanuel Kant, must be 'strafbar' ('punishable').

The way Kant explains it, a person makes himself 'strafbar' by committing a crime and thereby accepting that others have the right to treat him the same way as he treated others. In Kantian terms, all humans have a rational part, what he calls 'homo noumenon', and it is this pure reason in us that 'draw(s) up a penal law against myself as a criminal'.[34] It is, in other words, the universality of reason that makes it rational and right to treat the offender according to the 'rules' that his rational part drew up. Kant goes further and claims that this not only gives us the right to punish criminals, but that we have a duty to do so. However, we do not have to follow Kant in this controversial last part of his argument, if we, like Andenæs and Rawls, set forth other reasons why we should carry out the punishment of somebody. The offender's 'Strafbarkeit' – his deserving of punishment – becomes the minimum criterion that gives us the right to punish him, while crime prevention and other greater goods offer the reasons for actually going through with it. In either case, whether one accepts utilitarian reasons for punishment, or if one, like Kant, accepts only the moral imperative of retribution, punishment must be considered to realise the function of creating justice.

32 Op. cit.

33 John Rawls, 'Two Concepts of Rules', *The Philosophical Review*, 64 (1955).

34 Immanuel Kant, *The Metaphysics of Morals* [1797] (Cambridge University Press, 1996), p. 108.

In the rule of law-tradition, or *Rechtsstaat*-tradition[35], certain criteria must be met for punishment to be just. The debate about these criteria is extensive, and it would take us too far to account for the different positions here.[36] There is, however, broad agreement on three main criteria for just punishment. Firstly, the rules under which one is punished must be known in advance; there must be legal certainty so as to make it possible to make rational choices to uphold the law and avoid punishment. Secondly, there must be equality before the law; similar acts deserve similar reactions, regardless of who committed them. And thirdly, there must be proportionality; the punishment must be balanced with the seriousness of the crime. Within the scale of punishment, more serious crimes should be punished more harshly than less serious crimes. If one or more of these criteria are not met – if one is either convicted without having been given a fair chance to avoid it by being made aware of the criteria for conviction in advance, if the punishment is unfair in the sense that there are no relevant reasons for the unequal treatment, or if the punishment does not stand in a reasonable relation to the offence committed – we would consider the sanction unjust and not in accordance with the rule of law.

How then, does restorative justice relate to these three criteria?

With regard to (1) legal certainty, it is clear that restorative justice does not entirely achieve it. The result of the meeting between the parties is not predetermined in a set of rules, so it is nearly impossible to know the sanction in advance. Neither are the criteria for initiating a restorative justice process certain. A restorative justice meeting can in theory be initiated even when it is unclear whether a crime has actually been committed, whether one of the parties is criminally liable, if they both are, etc. However, when restorative justice is applied in a criminal context, there is usually more certainty. The process is initiated at the request of the police or prosecutor (and in some countries by a judge). It must be clear that the law has been transgressed and that the offender has taken responsibility for the act (though not necessarily legal responsibility) and agrees to be part of the restorative justice meeting.

35 See footnote 2, Chapter 1.

36 For a discussion of the rule of law principles forming the basis of the criminal law, see for instance Jørn Jacobsen, *Fragment til forståing av den rettsstatlege strafferetten* (Bergen: Fagbokforlaget, 2009).

With regard to (2) equality restorative justice agreements vary to a large degree and acts that would be considered similar in the criminal process might result in completely different sanctions in a restorative justice process, depending, for instance, on the victim's willingness to forgive. Restorative justice is therefore not in accordance with the principle of equality. As a note to this, we could add that restorative justice is in this sense similar to the civil part of the legal system – actions that one person might get sued for are left unsanctioned in other instances, because the possible plaintiff for some reason does not want a lawsuit. We do not hear many complaints about the unfairness of that system, something that suggests that the incomparability of restorative justice sanctions may not be as problematic if considered outside of a criminal law context.

With regard to (3) proportionality restorative justice does not include any rules determining the proportionality of the offence and the sanction. The criticism of restorative justice is usually that the sanctions are too mild – the offenders do not get what they deserve. It is true that the sanctions agreed upon – for example making some sort of financial restitution – are from an outsider's perspective often considerably less painful for the offender than the result would have been after a criminal process. The focus is primarily on remedying the harm done to the victim, and it is therefore usually less punitive toward the offender. However, one should not underestimate the emotional toll it takes on the offender having to face the victim and their family and hearing their suffering. Many offenders would probably prefer the seclusion of a prison cell to the confrontation of a restorative justice meeting. The restorative justice process itself, and not just the result of the meeting, should therefore be viewed as an important part of the sanction. None the less, although the differences in the burden of the sanctions between the two types of processes might be slightly smaller than assumed, restorative justice cannot be said to fulfil the criterion of proportionality.[37]

37 Restorative justice sanctions are problematic regardless of whether the criterion of proportionality is viewed as absolute or relative. Kant (*The Metaphysics of Morals*, pp. 105–06), for instance, operates with an absolute criterion of proportionality, where each sanction must be balanced against the specific crime. Jareborg (*Straffrättsideologiska*, p. 148) and other modern criminal law theorists

The conclusion is that restorative justice does not live up to the standard of just sanctioning expressed through these three criteria, legal certainty, equality and proportionality. Restorative justice is in other words in conflict with principles that are central to a traditional understanding of a criminal justice system based on the rule of law, or the democratic *Rechtsstaat*. This may be one of the main reasons why restorative justice processes, in all the countries in which they are applied, have usually been limited to less serious offences.[38] The conflict between the different conceptions of just sanctioning would become all too evident if, let us say, a murderer would come to a financial agreement with the victim's family, and the fulfilment of the agreement were the only sanction he would suffer. The discrepancy between the solutions of the retributive and the restorative forms of justice becomes larger in more serious cases.

2.5 The underlying concepts of justice

Although the two types of processes share the aim of creating justice in individual cases, the content of the aim, as we have seen, is not the same. The concepts of justice that the processes seek to fulfil differ from each other both substantially – with regard to *what* is seen as just, and formally – with regard to *how* justice is determined.

The concept of justice that the criminal process aims at fulfilling is *objective*. It is objective in the sense that it can be expressed in the form of principles such as 'crime ought to be punished' and 'punishment should be proportional to the crime'. These principles are expressed in advance, and the individual cases should deduce their

see proportionality as relative within the scale of punishment, meaning that more blameworthy crimes ought to be punished more severely than less blameworthy crimes, and equally blameworthy acts should be punished equally. The principle of proportionality does not, according to this view, determine the level of repression itself. Even such a criterion of relative proportionality is unattainable for restorative justice, as there is no way of determining that more blameworthy crimes receive more severe sanctions, nor that equally blameworthy crimes are sanctioned correspondingly.

38 There are some examples of restorative justice processes being applied in such serious cases as murder, child abuse and robbery, but then as an addition to, and not a replacement of the criminal process. See Tickell and Akester, *Restorative Justice*, p. 60.

solutions from them so that they exemplify these principles. The concept of justice is thus also *universal*, applicable to all cases unless there are significant reasons for making an exception. The criteria of legal certainty, equality and proportionality all contribute to realising this concept of justice.

The concept of justice that the restorative justice process aims at fulfilling is, on the contrary, not universal. All conflicts are attempted to be resolved in their own, unique way, considering only factors that are directly relevant to the specific case. One does not try to solve a case similarly to other cases that resemble it. What is just in one case may be unjust in another. This is a *singular*, and not a universal concept of justice.

Naturally, the criminal process usually also leaves some room for considerations of factors that are unique to a case. The offender's life situation, for instance, may be given attention when deliberating on the equity of the sanction. Nevertheless, the criminal process takes as its starting point the transgression of a certain prohibition. Otherwise dissimilar events are thus necessarily framed within the context of the crime in question. A certain likeness is abstracted from the cases in order to subsume them under the prohibition, and a certain set of justice criteria are assigned to them, such as the upper and lower limits of punishment for the type of crime. Restorative justice, on the other hand, is not committed to framing the conflict within the context of a certain type of crime, and thus avoids having to relate the justice of the case to the general criteria of justice pertaining to that type of crime.[39]

Restorative justice also does not have an objective concept of justice. The just solution is not based on principles that are established in advance (at least not explicitly). Instead the just solution is simply that which is considered just by the involved parties. I suggest we call this an *inter-subjective* concept of justice, as opposed to an objective one. If the parties come to an agreement that they

39 The extent to which restorative justice processes, when applied in a criminal justice system, should be framed within the categories of the criminal law is a matter of debate. Some theorists, like RA Duff, propose that criminal mediation ought to be conducted "under the aegis of the criminal law" (op. cit., p. 183), including defining the type of crime in question. Others, like Nils Christie, propose a strict separation between the two types of process, leaving the definition of the act in question up to the parties.

consider to be just, then it does not matter whether it is in accordance with the principle of proportionality or other such principles or not – justice is simply what the parties experience as justice in the particular case.

In this experience of justice, the emotions of the parties are an important component; an agreement is just when it feels right for the parties. If the agreement enables the parties to move on, if they leave with a feeling of justice having been done, if the process has helped them to deal with their trauma and concerns for the future – then the objective rationality of the content of the agreement becomes subordinate.

Moral philosophy has traditionally concentrated on clarifying moral concepts, such as the concept of justice. This is the Socratic legacy of Western philosophy: philosophy's main task is to clarify concepts, and this will in turn lead us to act in the right way. As a result, the view of morals in Western philosophy has mainly been that they are a purely cognitive faculty – Kant being the epitome of this position, Aristotle being an important exception. Less emphasis has been laid on empathy, on moral impulse and intuition, on not just knowing intellectually what the right thing to do is, but feeling it and reacting on a moral emotion.

The moral philosophy of Emmanuel Lévinas is an expression of this latter position.[40] For him, morality is something that occurs in the meeting between two people, a meeting of I and the Other. When I meet 'the face of the Other' an infinite responsibility for this unique Other arises in me. It is not a reciprocal responsibility, like in a contract. Morality is not about treating everybody the same. On the contrary, Lévinas' understanding of morality is about treating everybody as other, as unique. It is about acting on the moral experience of the concrete situation, not about reasoning about concepts and principles from which moral action is deduced.

This understanding of morality may better explain the way in which the experience of justice is conceived in restorative justice than the more cognitive and deductive moral reasoning that underlies the concept of justice that the criminal process aims at reaching. More emphasis is laid on the parties' emotions, of restoring their

40 Emmanuel Lévinas, *Totality and Infinity* (Pittsburgh: Duquesne University Press, 1969).

sense of self-respect and feeling of safety, on establishing a feeling of closure and dealing with their emotional pain. Much attention is therefore devoted to ensuring that the process itself is conducted in a way that is conducive to these experiences. If the parties really are to feel that justice has been done, it is imperative that their autonomy is respected in the decision-making. Legal representation and jargon are avoided, less attention is devoted to fact-finding and establishing guilt, the rhetoric aims less at convincing a third party that one party is right and the other party is wrong, and more at finding a common future ground and repairing the relationship between the parties.[41] The restorative justice meeting itself must be viewed as part of the experience of justice-being-done, and not just as a necessary step towards a just result.

These differences should not, however, be exaggerated. Restorative justice is not all about 'listening to your inner feelings' without any logical reasoning, and likewise, the criminal process is not a completely rational enterprise, where feelings are excluded entirely. In fact, this strict separation of feeling and reasoning is itself somewhat philosophically outdated.[42] There is usually an element of the cognitive in the emotional, and the emotional in the cognitive.

The way I interpret Flemming Balvig's survey, it supports the conclusion that these two elements are present to a varying degree in our deliberations on justice. On the most general level, our search for justice is mostly cognitive. We reason from principles such as that of proportionality. As we delve deeper into the concrete moral situation of punishing an offender, our moral intuition becomes more important. Perhaps it is a sense of empathy with the offender that makes the people in Balvig's study less punitive as they get closer to the offender. In any case, the survey has shown that our sense of justice is complex and often incoherent – we display attitudes that contradict each other, depending on the context in which we are asked.

Perhaps then, it would be wise to conclude that although the justice of restorative justice is different from the justice of the criminal justice system, and there are considerable challenges in

41 For a treatment of this 'rhetoric of reconciliation', see Trygve T. Svensson and David C. Vogt, 'Konfliktløsningens retorikk,' *Rhetorica Scandinavica*, 52 (2010).

42 See for instance Antonio Damasio, *Descartes' Error* (London: Vintage Books, 1994).

incorporating the former into the latter, this need not be viewed primarily as a problem. Restorative justice could be welcomed as a supplement to the objective and universal criminal justice, because the complexity of our sense of justice cannot be exhausted by one such concept alone. If we acknowledge that our sense of justice is incoherent – if we acknowledge the impossibility of capturing all that we consider to be just within one universal concept – then the task of creating a completely coherent system of norms may appear less crucial. The prospect of different processes undermining each other within the system may seem less precarious.

As mentioned at the beginning, the life of the law is seldom conducted strictly in accordance with one set of overarching principles. Perhaps we ought to see this as a strength and not a weakness of a justice system that ought to reflect the citizens' sense of justice. It might be a good thing if our focus shifted slightly in favour of putting the solution of the individual conflict first – including applying the best suited form of process – even if it means accepting some differences in how similar cases are treated. Justice, after all, is not just about equal treatment, but about addressing the issues of the specific case, seeking, in the best possible way, to restore a sense of peace for the people involved.

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