

Reconciling Models: Balancing Regulation, Standards and Principles of Restorative Justice Practice

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Introduction

Northern Ireland has a more mature debate on standards and principles of restorative justice than any society I know. Certainly you have a much more sophisticated debate than in my home country of Australia. I suspect this is because Northern Ireland has a more politicized contest between state and civil society models of restorative justice than can be found in other places. Such fraught contexts are where there is the greatest risk of justice system catastrophes. But they are also the contexts with the richest prospects for rising to the political challenges with transformative innovations through restorative justice. In my short time in Northern Ireland I have found the restorative justice programs in both the Loyalist and Republican communities inspiring. Partly this is because of the courage and integrity of the community leaders involved and the reflective professionalism of those in the state who are open to restorative justice. I have been struck by the way so many Republican and Loyalist ex-prisoners I met, who agree on very little politically, share remarkably similar restorative justice values. There is hope for your society in this. This conference is itself a manifestation of hope – that Republican and Loyalist community leaders can be sitting in the same discussion circles with one another and with the leadership of the RUC.

Pluralising State Power

Restorative justice is now a global social movement. One of the reasons I find it an attractive social movement to identify with is that it involves a value commitment to combating oppressive state structures of inhuman reliance on prisons. It also involves empowering citizens with responsibility for matters that over the past few centuries came to be viewed as state responsibilities. I have been asked to discuss standards for restorative justice. If restorative justice is about shifting power to the people, surely reimposing the state to set standards for restorative justice shifts the power back to the state.

It may. And there is certainly a worry here, especially in a context like Northern Ireland where all sides have their historical reasons for distrusting moves by the state that might disempower their people. Equally, there are historical reasons for the state to distrust paramilitary elements in civil society who they fear will use control of informal justice to sustain an armed tyranny over local communities. So we need state standards to render the empowerment of restorative justice robust. In Cuban Peoples Courts we saw the oppression of gay and lesbian people; in popular justice throughout the ages we have seen all manner of disempowerment of minorities by majorities, of those without guns by those with guns. State-sanctioned human rights are vital for regulating the tyrannies of informal justice. They are also vital for regulating the tyrannies of the police, of state-sanctioned torture and violence, which in Northern Ireland have been considerable problems.

State standards can enable the deliberative democracy of the people or it can disable it. It all depends on what the standards are and how they are implemented. So

we must get down to detail. But before we do that, it is worth mentioning that part of the genius of restorative justice as a policy idea is that many of its most precious virtues are invulnerable to state power. An example is the way that empowerment works with restorative justice. We can tell how much power a person has by how many people listen to their stories. When the prime minister speaks from his podium many listen; when the pauper on a street corner mutters his stories we walk past. The deadly simple empowering feature of restorative justice here is that it involves listening to the stories of victims and accused offenders, both groups which the criminological literature shows to be disproportionately poor, powerless and young. The empirical evidence from my own country is that women's voices are actually slightly more likely to be heard in restorative justice conferences than men's voices, a very different reality from the voices that are heard in my country in the corridors of state power and judicial power. By the simple fact of listening to their story we give them power. So long as the core listening principle of restorative justice is retained, this kind of empowerment cannot be threatened by state standards.

Dangers in Standards

While it is good that we are now having debates on standards for restorative justice, it is a dangerous debate. I worry about accreditation for mediators that raises the specter of a Western accreditation agency telling an Aboriginal elder that a centuries-old restorative practice does not comply with the accreditation standards. Such accreditation crushes indigenous empowerment. I worry about standards that are so prescriptive that they inhibit restorative justice innovation. We are still learning how to do restorative justice well. I believe that the healing edge programs today involve real advances over those of the 90s and the best programs of the 90s made important advances over those of the 80s. I even worry about regulatory proposals that are highly prescriptive about how we should define what a standard or a principle of restorative justice is, or which matters should be formulated as rights that are guarantees that should never be breached. I am not sure we have learnt enough yet about what happens in restorative processes to be ready for such prescription.

We must be careful in how we regulate restorative justice now so that in another decade we will be able to say again that the healing edge programs are more profoundly restorative than those of today. By the way, those healing edge programs are most likely in my view to come from those contexts, like Northern Ireland, where the challenges confronting restorative justice are greatest. Unthinking enforcement of standards is a new threat to innovating with better ways of doing restorative justice. It is a threat because evaluation research on restorative justice is at such a rudimentary stage that our claims about what is good practice and what is bad practice can rarely be evidence-based. At the same time, there is such a thing as practice masquerading as restorative justice that is outrageously poor – practice that would generate little controversy in this room that it was unconscionable. This is an even greater threat to the future of restorative justice. So we have no option but to do something about it through a prudent standards debate.

We can craft open-textured restorative justice standards that allow a lot of space for cultural difference and innovation while giving us a language for denouncing uncontroversially bad practice. My contribution to the standards debate

today will be a modest one that will not seek to be exhaustive in defining some of the issues standards must address.

The Principle of Non-Domination

Some of you will know that I approach such questions from a civic republican perspective, which I am told in the Northern Ireland context, such views may also be referred to as a civic unionist perspective. This means that a fundamental standard is that restorative processes must seek to avoid domination. We do see a lot of domination in restorative processes, as we do in all spheres of social interaction. But a program is not restorative if it fails to be active in preventing domination. What does this mean in practice? It means that if a stakeholder wants to attend a conference or circle and have a say, they must not be prevented from attending. If they have a stake in the outcome, they must be helped to attend and speak. This does not preclude special support circles for just victims or just offenders; but it does mandate institutional design that gives every stakeholder a meaningful opportunity to speak and be heard. Any attempt by a participant at a conference to silence or dominate another participant must be countered. This does not mean the conference convenor has to intervene. On the contrary, it is better if other stakeholders are given the space to speak up against dominating speech. But if domination persists and the stakeholders are afraid to confront it, then the convenor must confront it. Preferably gently: *"I think some of us would like to hear what Jane has to say in her own words. Jane?"*

Often it is rather late for confronting domination once the restorative process is under way. Power imbalance is a structural phenomenon. It follows that restorative processes must be structured so as to minimise power imbalance. Young offenders must not be led into a situation where they are upbraided by a "roomful of adults". There must be adults who see themselves as having a responsibility to be advocates for the child, adults who will speak up. If this is not accomplished, a conference or circle can always be adjourned and reconvened with effective supporters of the child in the room. Similarly, we cannot tolerate the scenario of a dominating group of family violence offenders and their patriarchal defenders intimidating women and children who are victims into frightened silence. When risks of power imbalance are most acute our standards should expect of us a lot of preparatory work to restore balance both backstage and frontstage during the process. Organised advocacy groups have a particularly important role when power imbalances are most acute. These include women's and children's advocacy groups when family violence is at issue, environmental advocacy groups when crimes against the environment by powerful corporations are at issue.

Of course, holding the threat of a punishment beating, of knee-capping, over the head of a person is an intolerable violation of the principle of non-domination. Common ground among all the restorative justice initiatives in Northern Ireland seems to be to transcend this particular form of domination, though there are competing visions of how to accomplish this. While I am in no position to adjudicate these competing visions, I would like to submit the principle of non-domination and the values that flow from it as a values framework for the debate.

Due process is perhaps the major domain where there have been calls for standards. It seems reasonable that offenders put into restorative justice programs be advised of their right to seek the advice of a lawyer on whether they should participate in the program. Perhaps this would be an empty international standard in poorer nations where lawyers are not in practical terms affordable or available for most criminal defendants. But wealthier nations like this one can afford higher standards on this issue. Arresting police officers who refer cases to restorative justice processes should be required to provide a telephone number of a free legal advice line on whether agreeing to the restorative justice process is prudent.

In no nation does it seem appropriate for defendants to have a right for their lawyer to represent them during a restorative justice process. Part of the point of restorative justice is to transcend adversarial legalism, to empower stakeholders to speak in their own voice rather than through legal mouthpieces who might have an interest in polarising a conflict. A standard that says defendants or victims have a right to have legal counsel present during a restorative justice process seems sound. But a standard that gives legal counsel a right to speak at the conference or circle seems an unwarranted threat from the dominant legal discourse to the integrity of an empowering restorative justice process.

The most important way that the criminal justice system must be constrained against being a source of domination over the lives of citizens is that it must be constrained against ever imposing a punishment beyond the maximum allowed by law for that kind of offence. It is therefore critical that restorative justice never be allowed to undermine this constraint. Restorative justice processes must be prohibited from ever imposing punishments which exceed the maximum punishment the courts would impose for that offence. As someone who believes that restorative justice processes should be about reintegrative shaming and should reject stigmatisation, it seems important to prohibit any degrading or humiliating form of treatment. We had a conference in Canberra where all the stakeholders agreed it was a good idea for a young offender to wear a T-shirt stating "I am a thief". This sort of outcome should be banned.

Another critical, albeit vague, standard is that restorative justice programs must be concerned with the needs and with the empowerment not only of offenders, but also of victims and affected communities. Programs where victims are exploited as props for programs that are oriented only to the rehabilitation of offenders are morally unacceptable. Deals that are win-win for victims and offenders but where certain other members of the community are serious losers, worse losers whose perspective is not even heard, are morally unacceptable.

The right to appeal must be safeguarded. Whenever the criminal law is a basis for imposing sanctions in a restorative justice process, offenders must have a right of appeal against those sanctions to a court of law. That said, not all of the accountability mechanisms of criminal trials seem appropriate to the philosophy of restorative justice. For example, if we are concerned about averting stigmatisation and assuring undominated dialogue, we may not want conferences or circles to be normally open to the public. But if that is our policy, it seems especially important for researchers, critics, journalists, political leaders, judges, colleagues from restorative justice programs in other places, to be able to sit in on conferences or

circles (with the permission of the participants) so there can be informed public debate and exposure of inappropriate practices. Most importantly, it is critical that restorative justice processes can be observed by peer reviewers whose job it is to report on compliance with the kinds of standards I will discuss.

International Standards

In general, UN Human Rights instruments give quite good guidance on the foundational values and rights restorative justice processes ought to observe. The first clause of the Preamble of the Universal Declaration that most states have ratified is:

"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,"

Obviously freedom, justice and peace have a lot of appeal to someone who values republican freedom to frame the pursuit of justice and peacemaking in restorative justice.

In its 30 Articles the Universal Declaration defines a considerable number of slightly more specific values and rights that seem to cover many of the things we look to restore and protect in restorative justice processes. These include a right to protection from having one's property arbitrarily taken (Article 17), a right to life, liberty and security of the person (Article 3), a right to health and medical care (Article 25) and a right to democratic participation (Article 21).

From the restorative justice advocate's point of view, the most interesting Article is 5: *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"*. Of course, all states have interpreted Article 5 in a most permissive and unsatisfactory way from a restorative justice point of view. The challenge for restorative justice advocates is to take the tiny anti-punitive space this Article creates in global human rights discourse and expand its meaning over time so that it increasingly acquires a more restorative interpretation. This is precisely how successful NGO activists have globalised progressive agendas in many other arenas – starting with a platitudinous initial rights and values framework and injecting progressively less conservative and more specific meanings into that framework agreement over time.

We can already move to slightly more specific and transformative aspirations within human rights discourse by moving from the Universal Declaration of 1948 to the less widely ratified International Covenant on Economic, Social and Cultural Rights of 1976 and the International Covenant on Civil and Political Rights of 1966. The former, for example, involves a deeper commitment to "self-determination" and allows in a commitment to emotional well-being under the limited rubric of a right to mental health. The 1989 Second Optional Protocol of the Covenant on Civil and Political Rights includes a commitment of parties to abolish the death penalty, something most restorative justice advocates would regard an essential specific commitment. Equally most restorative justice advocates would agree with all the values and rights in the United Nations Declaration on the Elimination of Violence

Against Women of 1993 and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly in 1985. The latter includes some relevant values not so well traversed in other human rights instruments such as "restoration of the environment" (Article 10), "compassion" (Article 4), "restitution" (various Articles), "redress" (Article 5) and includes specific reference to "restoration of rights" (Article 8) and "Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices" which "should be utilised where appropriate to facilitate conciliation and redress for victims". (Article 7).

A Proposal

So my proposal for a starting framework for a debate on the content of restorative justice standards is as follows.

1. Restorative justice programs should be evaluated according to how effectively they deliver restorative values which include: Respect for the fundamental human rights specified in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Second Optional Protocol, the United Nations Declaration on the Elimination of Violence Against Women and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

2. Restorative values include the following values to be found in the above international human rights agreements:

- Restoration of human dignity
- Restoration of property loss
- Restoration of safety and of injury to the person or health
- Restoration of damaged human relationships
- Restoration of communities
- Restoration of the environment
- Emotional restoration
- Restoration of freedom
- Restoration of compassion or caring
- Restoration of peace
- Restoration of empowerment or self-determination
- Restoration of a sense of duty as a citizen
- Provision of social support to develop human capabilities to the full

Together these values imply parsimony in the use of punishment; together they say there are many positive approaches to regulation that we can consider before we think about our reluctance to resort to punishment. The last value - providing social support to develop human capabilities to the full - is essential as a corrective to the concern that restorative justice may be used to restore an unjust status quo. The key design idea here is that regulatory institutions must be designed so as to nurture developmental institutions. Too often regulatory institutions stultify human capabilities, the design of punitive criminal justice systems being a classic example. As a list of specific restorative values this is unsatisfactorily incomplete, for example

in the non-inclusion of mercy, forgiveness, which are nowhere to be found as values in these UN documents.

Many will find these values vague, lacking specificity of guidance on how decent restorative practices should be run. Yet standards must be broad if we are to avert legalistic regulation of restorative justice which is at odds with the philosophy of restorative justice. What we need is deliberative regulation where we are clear about the values we expect restorative justice to realise. Whether a restorative justice program is up to standard is best settled in a series of regulatory conversations with peers and stakeholders rather than by rote application of a rulebook. That said, certain highly specific standards are so fundamental to justice that they must always be guaranteed – such as a right to appeal.

Yet some conventional rights, such as the right to a speedy trial as specified in the Beijing Rules for Juvenile Justice, can be questioned from a restorative perspective. One thing we have learnt from the victims movement in recent years is that when victims have been badly traumatised by a criminal offence, they often need a lot of time before they are ready to countenance healing. They should be given the right to that time so long as it is not used as an excuse for the arbitrary detention of a defendant who has not been proven guilty.

This is an illustration of why at this point in history we need an international framework agreement on standards for restorative justice that is mainly a set of values for framing quality assurance processes and accountability in our pursuit of continuous improvement in attaining restorative justice values. There is some hope that the Committee of Experts being established in pursuance of the Declaration of Vienna from the UN Congress on the Prevention of Crime and the Treatment of Offenders earlier this year will accomplish precisely that.

Not Waiting for the United Nations

At the local level what we need to think about is how to make the quality assurance processes and accountability work well. We don't have to wait for the United Nations for this. A local restorative justice initiative can take a very broad list of values, such as the ones I have tentatively advanced here, and use them as the starting point for a debate on what standards they want to see accomplished in their program. A few discussion circles with all the stakeholders in the program may be enough to reach a sufficient level of shared sensibility to make quality assurance and accountability work. Not every contested value or right has to be settled and written down. The unsettled ones can be earmarked for special observation in the hope that experiential learning will persuade one side of the debate to change their view or all sides to discover a new synthesis of views.

The drafting of local charters, as commended in the "Blue Book" is consistent with the approach I commend here. So is the approach Greater Shankill Alternatives has developed through its local "Principles of Good Practice". There are a lot of similarities between these principles and those articulated by the Republican community through statements such as the "Standards and Values of Restorative Justice Practice" of Community Restorative Justice Ireland. The latter has some distinctively interesting standards as well, such as "flexibility of approach" and

"evaluation" (and both "confidentiality" and "transparency"). There is also indigenous distinctiveness in the proposal that key elements of the charters "*are slated to appear as large murals at strategic locations, in spaces that have traditionally been reserved for the political iconography that is well known within and outside Northern Ireland*" (Mika and McEvoy 2001 forthcoming). For all the local distinctiveness, both the Republican and Loyalist charters have values that sit comfortably beside the values I have derived from the UN human rights instruments and beside those that the Northern Ireland Office has derived from European human rights instruments.

Once there has been a preliminary discussion of the principles, standards and rights the local program should honour, training is needed for all new restorative justice convenors to deepen the furrows of shared sensibility around them. Training carries a risk of professionalisation. This risk can be to some extent countered by making the training participatory, by giving trainees the power to reframe the curriculum. It need not be long. Three days of training followed by a period when convenors work with an experienced mentor and a follow-up day of reflection on the initial period of practice can turn out excellent convenors. Most people do not make good restorative justice facilitators. But I believe that in any large group of people, say in any 7th grade schoolroom, there will be someone with the ability to be an empowering facilitator of a restorative justice circle with only limited training.

It follows from this view that quality assurance is more important than training. I have sat through more restorative justice training sessions than any sane human being would aspire to and taught many others. As well trained as I am, a good quality assurance program would weed me out as someone whose talents were better suited to other roles. My main deficiencies as a restorative justice conference facilitator are that I am sometimes too intellectually curious about things that are not important to the parties, I am sometimes more emotionally engaged than is best and my personality causes me to have too much dominance in a room; even when I have my mouth shut, my body language is too inured to leadership – communicating encouragement or doubt when all I should be communicating is attentive listening.

Many deficiencies of this kind can be cured by colleagues who sit in on our circles and communicate with us frankly about how we can improve. Other failings may require that we be gently steered into making a contribution somewhere other than in this front-line role. Either way, the crucial remedy is peer review complemented by feedback from participants. The feedback I mean involves the peer reviewer talking to participants after a conference or circle to elicit any concerns they have about the way the facilitator played out their role. It is this process of post-conference regulatory conversations about the conduct of the conference itself that helps clarify how we should give life to the principles, standards and rights that restorative justice must honour. The "regular inspection by the independent criminal justice inspectorate" recommended by the Criminal Justice Review for Northern Ireland could be crafted to fulfil this role.

Conclusion

My suggestion here is to do something like the following before setting up a new restorative justice program:

1. Assemble stakeholders to reflect on a starting set of principles, standards or rights. These starting objectives might be grounded in the values and rights in UN or European human rights instruments.
2. Secure through this local democratic deliberation a set of local commitments to principles and/or standards and/or rights that are widely shared. Secure commitment to continuing regulatory conversations around other principles/standards/rights that stakeholders consider important, but where sensibilities are not shared.
3. Try to resolve the contested principles/standards/rights through reflexive praxis – restorative justice practice that reflects back on its starting assumptions.
4. Avoid didactic training. Make the training sessions, especially role-plays, part of this locally reflexive praxis that continually rebuilds the ship of restorative justice while it sails the local seas.
5. Use peer review not only to counsel against practices that threaten the consensually shared local principles/standards/rights but also to advance our understanding of the contested principles through regulatory deliberation.
6. Aggregate these local regulatory conversations into a national regulatory conversation. If the local regulatory conversations converge on the importance of certain rights that should never be infringed, then the state should stand behind those rights, for example by legislating for them or threatening program funding when they are flouted. But where there is no democratically deliberated consensus, the state should be wary of national standards that threaten local innovation and local cultural difference.

At the end of the day it is better that restorative justice learn from making mistakes than that it make the mistake of refusing to learn. This mistake usually takes the form of believing that standards and rights should be grounded in the rulings of lawyers whose eyes are closed to the reflective practice of justice by the people. Recent experience is ground for optimism that if we regulate flexibly, being mindful of all the local ideas for innovation, better models of restorative justice will blossom, especially in Northern Ireland where the soil for restorative justice has been rendered so fertile by the blood of injustice. I look forward to returning in a decade to a Northern Ireland where the restorative justice programs watered by your tears have blossomed to become the world's leading practice.

Suggested Reading

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