Restorative Justice as a Response to Atrocity: Profound or Merely Pragmatic?

https://www.e-ir.info/2020/08/25/restorative-justice-as-a-response-to-atrocity-profound-or-merely-pragmatic/

GRACE YEO, AUG 25 2020

The growing prominence of restorative justice as a response to atrocity in recent decades has unmistakeably led to discussion surrounding the justifications for its adoption, specifically between the elements of pragmatism and genuine normative appeal. This essay seeks to posit that the pragmatism and profundity of restorative justice are not mutually exclusive; rather, they are mutually reliant as modes of justification and framing of restorative justice practices. This debate surfaces a broader tension between the *ideals* of restorative justice (that underpin its profundity), and the *implementation* of restorative practices into political process, which must be acknowledged. For purposes of clarity, this essay adopts the following working definition of restorative justice: "a process to involve, to the extent possible, those who have a stake in the specific offence to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible" (Zehr, 2002: 40).

In order to explore these assertions, this essay proceeds with the following conjectures: first, restorative justice may be more cost effective than retributive justice; second, the political constraints of transitional justice often render restorative practices practical or even necessary; third, the case for the profundity of restorative justice as a model of justice in its own right; fourth, a distinction must be made between the idealsof restorative justice and how they translate into restorative practices.

The Cost Effectiveness of Restorative Justice

Arguments purporting the pragmaticism of restorative justice are founded, first and foremost, on the broader claim that restorative justice practices are more cost effective than retributive justice practices. Restorative justice "averts maximally expensive options" such as incarceration and maintaining the criminal judicial system, and may hence provide an economical alternative response to crime than the conventional punitive model (Braithwaite, 1999: 71). In the context of mass atrocity, these considerations are definitively amplified due to: (i) the scale or extent of the atrocity – the astonishing number of victims and perpetrators to be potentially tried; and (ii) the quality of the crimes committed – that of the severest kind, such as murder and rape. Accordingly, the sheer cost and lengthiness of the ensuing legal prosecution necessitated under the punitive justice model may, more often than not, render retributive justice a categorically unfeasible or unrealistic response to atrocity. This is particularly critical in post-conflict scenarios, whereby an excessively protracted justice process may *prevent* national reconciliation and risk exacerbating the very social grievances that fuelled the violence in the first place.

This has perhaps been most evident in early post-genocide Rwanda: the overwhelming number and concentration of deaths as well as the widespread participation of the civilian population in the genocide thoroughly crippled Rwanda's already decimated domestic criminal justice system. Between 500,000 and 1 million people had been brutally murdered from April to July 1994 (Clark, 2010); more significantly, the atrocity was a "populist genocide" of an unprecedented magnitude (Daly, 2002: 361) in that majority of killings were executed directly by hundreds of thousands of ordinary Rwandan citizens (Drumbl, 2000). Rwanda's overcrowded prisons were struggling to hold some 125,000 *genocidaires* awaiting trial, which would have taken over two centuries to prosecute (Wielenga and Harris, 2011). The post-conflict government hence turned to the local restorative tradition of *gacaca* (Kinyarwandan for grass), a community-based method of conflict resolution, to accelerate the justice process – to 'clear the prisons'

– and speed reconciliation between Hutu and Tutsi (Fisher, 1999). The modern *gacaca* community courts have since tried over 1.2 million genocide-related cases since 2005 (Human Rights Watch, 2011). As such, Mamdani (1996: 22, emphasis added) contends that "justice *delayed* is justice *denied*": justice processes must be pragmatically feasible in order to be at all relevant. In sum, punitive justice practices may not be practically executable on the *scale* precisely demanded by the horrors of the atrocity itself.

The Political Constraints of Transitional Justice Contexts

Restorative principles and practices have been appropriated and implemented in addressing past atrocity *only because* retributive justice, the de facto response to atrocity following the precedent of the 1946 Nuremberg trials, was politically impossible or impractical. This has been especially applicable in transitional justice contexts, whereby the outgoing political regime in most cases retains considerable military, economic and/or judicial power, and is hence able to dictate – or at the very least influence – the parameters of the political transition to (more) democratic governance, not least any future attempts to address its past atrocities (Kiss, 2000: 70). Under these circumstances, the new political order is required to navigate the "precarious politics" of "balancing the political demands of an outgoing authoritarian order against the moral demands… for truth, justice, accountability and reparation" (Moon, 2012: 188). As such, the reality remains that restorative justice has been adopted in numerous transitional justice contexts simply out of political necessity or as "the next best thing" – when the preferred option of retributive justice was obstructed by the old regime (Wilson, 2001: 544).

The example of South Africa's Truth and Reconciliation Commission (TRC), one of the most famous adoptions of restorative justice in transitional justice, is particularly significant. Berat and Shain (1995: 189) argue that the hard-nosed political bargain behind the TRC "[had] more to do with delicate political crafting, however incongruent with the principles of justice, than with moral idealism". Despite vociferously opposed the dispensing of a general amnesty for much of the negotiation process, the anti-apartheid African National Congress (ANC) eventually acquiesced to the amnesty provisions after the security forces directly threatened to disrupt the 1994 general elections. Chairman of the TRC Desmond Tutu eventually concurred that Nuremberg-style trials had been "clearly an impossible option" due to the "military stalemate" between the ANC and the incumbent government (Tutu, 1998: 5). To this end, the TRC's oft-touted "*language* of restorative justice and societal reconciliation was mere window-dressing" for what had principally been a necessary political compromise to preserve the stability of the political transition (Wilson, 2001: 535, emphasis added). Gade (2013) also highlights that the term 'restorative justice' did not feature heavily in the TRC's background legal documents or public hearings, further confirming that the TRC was only *retrospectively* dressed and presented in restorative terms.

Further consider the aftermath of Argentina's 'Dirty War', following the collapse of military junta rule in 1983. Moon (2012: 192) observes that two subsequent civilian regimes of Raúl Alfonsín (1983–1989) and Carlos Menem (1989–1999), under "importunate [threat] from the military", implemented restorative practices such as amnesty laws, pardons, and reparations that thoroughly *limited* the prosecution of the junta's past atrocities. The Alfonsín administration initially attempted to investigate and prosecute the Dirty War abuses, revoking the self-amnesty law previously instituted by military and commencing criminal proceedings against the junta leaders in 1985. However, after facing violent backlash from the military, Alfonsín bowed to political expediency and mandated two placatory 'amnesty laws', the 'Full Stop' (1986) and 'Due Obedience' (1987) laws, halting the prosecutions altogether (Human Rights Watch, 2005). The succeeding Menem regime, under the guise of 'national reconciliation', would later issue pardons to the members of the junta prosecuted under Alfonsín (Moon, 2012).

Both the South African and Argentinian cases highlight that the implementation of restorative policies in transitional justice are "not just purely moral endeavours but thoroughly political practices" (Ibid.: 188). Restorative justice practices implemented into political process are often mobilised to political *ends*, conditioned by the pragmatic necessity of consolidating the political gains of transition.

The Case for the Profundity of Restorative Justice

The normative underpinnings of restorative justice – its 'profundity' – are fundamentally dissimilar to retributive

justice; so conceived, restorative justice should be acknowledged and evaluated as a model of justice in its own right, rather than just the 'next best alternative' to retribution. To start, Clark (2008) notes that retributive and restorative justice propose drastically different framings of and responses to crime. Retributive justice views crime as a violation of the law, and is hence primarily focused on the punishment of offenders. Contrarily, crime through a restorative lens constitutes "a violation of people and relationships" (Ibid.: 340); accordingly, restorative justice emphasises the rehabilitation of the relationshipor *social equilibrium* between victims, offenders, and their communities, which does not necessarily entail punishment. Particularly, it seeks to achieve a more far-reaching, deep-rooted notion of justice than the punitive model in three ways.

First, restorative justice's emphasis on collective resolution may facilitate national reconciliation more successfully than retributive justice. As the Rwandan example demonstrates, the very demands of punitive justice and legalism, such as an excessively protracted justice process, may only sustain and/or worsen the social divisions leading to and resulting from the atrocity, and impede national reconciliation (Mamdani, 1996). However, restorative justice is an inclusive participatory process whereby all parties with a legitimate stake in the offence – victims, offenders, families, bystanders, and society-at-large – are involved in the justice process, thereby "[replacing] the divisive experience of the genocide with the cohesive experience of securing justice" (Daly, 2002: 376). This is significant given the "embedded nature of the Rwandan violence", whereby a significant proportion of the civilian population was involved, directly or otherwise, in the genocide (Drumbl, 2000: 303); the practice of restorative justice through *gacaca* arguably served to foster communal reconciliation and (re)build a shared national consciousness far more successfully than the conventional punitive model.

Second, and relatedly, restorative justice affords greater space to recognise the spectrum of behaviours between victim and perpetrator in atrocities, thereby presenting a more holistic model than retributive justice through which the harms of the past may be addressed. Drumbl (2000) ventures that punitive justice, by its very nature, produces and reinforces the false dichotomy of 'innocent' versus 'guilty' in its conceptualisation of atrocity: 'victim' versus 'perpetrator', 'good' versus 'evil'. Accordingly, this binary negates the realities of complicity: "there is, in fact, a middle ground and it is densely populated" (Ibid.: 295). By ignoring broad societal complicity in atrocity, such as that observed during the Rwandan genocide, one risks negating or even preserving the underlying socio-structural conditions that enabled such violence in the first place. In contrast, restorative justice moves away from such a singular or universal approach to atrocity, given that "there is no blueprint for how an ideal restorative justice system should work" (Braithwaite, 2003: 3). Its provisions for *all* participating citizens, no matter their positions on the victim/perpetrator spectrum, to be involved in the justice process, and articulate in their own way their individual stories within the injustices, hence provides a more localised, inclusive form of justice through which atrocity may be better addressed.

Third, restorative justice reinstates the voice of the victim within the justice process. Johnstone (2002: 13) asserts that one of the most critical deficiencies of the contemporary punitive model lies in "its almost total neglect and disempowerment of the victim… which amount to secondary victimisation". Perpetrators have tended to occupy the most visibility within the criminal justice process – in part a corollary of the Nuremberg legacy – while victims are largely regarded as an afterthought and their stories ignored, if heard at all. To this end, restorative justice presents a crucial paradigm shift in that it privileges the participation and empowerment of victims in the justice process, affording them greater control over the narrative of, and response to, the wrongdoing. This crucially highlights the therapeuticpotential of restorative justice for victims (Johnstone, 2002); for example, Kiss (2000: 73) maintains that the South African TRC was not merely a product of political necessity, but an instrument of a deeper victim-centred justice that "[affirmed] the dignity and agency of those who have been brutalised by attending to their voices and making their stories a part of the historical record". The localisation of justice through restorative practices of collective resolution further ensures that "justice is visible to those who suffered", breaking any cycles of denial (Daly, 2002: 377).

Nonetheless, this essay offers that the pragmaticism and profundity of restorative justice are not mutually exclusive; in fact, they are often indistinguishable and mutually constitutive as justifications for restorative justice. While Daly (2002: 367) is right to conclude that "justice that exists only in theory is no justice at all", equally important in the implementation of restorative justice is how such practices are framed and articulated. Returning to the case of the

South African TRC, while one cannot deny that its restorative provisions were indeed the product of a political settlement primarily designed to preserve political stability in the post-apartheid era, it must also be acknowledged that the frame of restorative justice provided the moral language that the new ANC government unequivocally mobilised to ground and bolster its moral authority. In so doing, the new regime sought to distinguish itself from the preceding apartheid regime and consequently strengthen its own political legitimacy.

Reflections on the Tenability of Restorative Ideals

Finally, this essay attempts a more critical analysis of two hitherto presented claims about the ideals vis-à-vis implementationof restorative justice: (i) is restorative justice is in fact morecost effective than retributive justice? (ii) Are restorative practices as restorative as claimed?

The claim that restorative justice practices are less costly than retributive justice practices may indeed be challenged (Johnstone, 2002). The vision of restorative justice, in Braithwaite (2003: 1)'s view, is not just reforming the criminal justice system but an ambitious long-term redesign project that involves the "radical transformation" of social relations, legal systems, welfare structures and politics towards the broader reduction of injustice. In this vein, restorative justice necessitates the correction of structural power imbalances within society, credible investment in comprehensive social support, and broader revitalisation of communities. As such, if Braithwaite is to be at all taken seriously on his account of the need for far-reaching social transformation that works towards a deeper and more enduring social equality, restorative justice is certainly neither 'cheap' nor easily achievable. Additionally, restorative justice is unavoidably relativist: given that restorative justice is primarily concerned with context specificity in the restoration of victims, offenders and communities, there is no universally transplantable template for an ideal restorative justice system that can serve every situation in which it might be used. The process of thrashing out, through collective resolution, an idiosyncratic, localised paradigm of restorative justice that best fits the circumstances of the specific injustice may betray said initial pragmatic appeal.

Conversely, the question of whether restorative justice in post-atrocity contexts has truly been restorativecannot be ignored. Are victims really privileged in the restorative justice process? The South African TRC provides a sobering reflection of the practical difficulties of "ensuring equal concern for all stakeholders" – one of Braithwaite (2003: 10)'s 'restorative values' – particularly for the needs of the victims. Wilson (2001: 550 –1) argues that the despite the TRC's professed commitment to restorative justice, in practice it "did little more than exchange immunity for a confession" and failed to adequately support victims beyond the "lofty talk" of reconciliation during its hearings. Indeed, the amnesty of perpetrators indisputably took precedence over the restoration of victims throughout South Africa's restorative justice process: the amnesty provisions were set in place prior to the establishment of the TRC, as part of the political bargain for the country's democratic transition. In this regard, the restorative functions of the TRC, such as truth-telling and reconciliation, were completely subordinated to the overriding politicalnation-building objectives of the post-apartheid regime (Wilson, 2009).

Herein lies the broader point that must be acknowledged: the *ideals* of restorative justice, which the two claims above address, must be distinguished from the wholly imperfect *implementation* of these ideals, and the politics that inevitably surface alongside the mobilisation and actualisation of restorative principles into political process. The two aforementioned ruminations seek to address the gap between the theoretical ideals and expectations of restorative justice, and how they translate in practical application. As illustrated earlier, restorative justice practices implemented into political process are then often mobilised to political ends. This is not to say that we should forgo one for another, but rather that attention must be brought to such complexities of restorative justice, in order to acquire a more sensitive and nuanced understanding of the debates at hand.

Concluding Considerations

This essay has attempted to demonstrate that oft-contested pragmatism and profundity of restorative justice are not mutually exclusive; instead, they feed into each other as modes of justification and framing of restorative justice practices. More generally, this debate highlights the following considerations that must be recognised: first, restorative justice practices, when implemented into political process, become instruments of their own that may be

then mobilised to political ends; second, a distinction must be made between the idealsof restorative justice and how they are mobilised and adapted as practices into specific political contexts.

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Date written: May 2020