

MORE THAN PUNISHMENT RESTORATIVE JUSTICE – A SOCIALLY RESPONSIBLE APPROACH TO REPAIRING THE DAMAGE INCURRED BY CRIME

Markus van Alphen MSc

info@MarkusvanAlphen.com

Abstract: Crime and how we deal with its aftermath is a cultural issue. The general approach is to ask the police to investigate and find the guilty parties, bring them before a judge and to mete out punishment. The victims are to a large extent ignored in this process. Punishment -or punishment alone- is not really a satisfactory solution and does not seem to have much effect on crime rates or on reoffender rates either. When dealing with youth delinquency a prison sentence may even make the problem worse: the young offender will receive a good education on how not to get caught next time! As a package the current judicial system: costs a fortune, is not very effective, largely ignores the needs of victims and is simply not socially responsible.

The alternative is restorative justice. The principle is simple, yet both socially responsible and effective: Before being brought before a court, offenders and their victims are given the opportunity to participate in a restorative justice conference. During this conference they, together with their respective social networks, develop a plan to restore the damage incurred inasmuch that is possible. A copy of this plan is sent to the judge, who may take this into account when sentencing.

The benefits: Victims' questions are answered, offenders gain insight into the consequences of their actions, thereby truly reducing the chance to reoffend, and by making good the damage done all may feel themselves valued members of the community again.

Keywords: Restorative justice, restorative justice conferencing, restorative practices, social responsibility, empowerment, facilitation, community involvement, crime, damage reparation, victims, punishment

VEČ KOT KAZEN: OBNOVITVENI PRAVNI PROCESI - DRUŽBENO ODGOVOREN PRISTOP K POPRAVILU ŠKODE, KI SO NASTALE ZARADI KRIMINALA

Povzetek: Kriminal in način njegovega naknadnega obravnavanja je kulturno vprašanje. Splošni pristop je prošnja policiji, naj razišče zadevo in odkrije krivce, jih pripelje pred sodnika in doseže kaznovanje. Žrtve v tem procesu pretežno ignorirajo. Kazen – ali zgolj kazen – v resnici ni zadovoljiva rešitev in ne kaže, da ima veliko vpliva na to, koliko je zločinov in zločincev povratnikov. Če gre za mladinske prestopnike, poslani v zapor, je problem še hujši: mladi prestopnik se bo tam odlično naučil, kako se naslednjič ne pusti ujeti! Gre za paket sedanjega sodnega sistema: stane ogromno, ni zelo učinkovit, večinoma prezre potrebe žrtev in enostavno ni družbeno odgovoren.

Alternativa je obnovitveni pravni proces. Načelo je enostavno, a hkrati družbeno odgovorno in učinkovito: pred postavitvijo pred sodišče storilci in žrtve dobijo priložnost sodelovati v obnovitvenem pravnem soočenju. Med njim skupaj s svojim družbenim omrežjem izdelajo načrt, kako bi kar najbolj popravili storjeno škodo. Izvod načrta pošljejo sodniku, ki ga bi naj upošteval pri razsojanju.

Koristi: Žrtve dobijo odgovore na svoja vprašanja, storilci dobijo vpogled v posledice svojih dejanj, zato bodo manj verjetno ponovno storili kaj takega, povrnili bodo škodo, kar bo vsem dalo občutek, da so spet cenjeni pripadniki skupnosti.

Ključne besede: obnovitveni pravni proces, obnovitveno soočenje, obnovitvene prakse, družbena odgovornost, pooblašanje, lajšanje, vključitev v skupnost, kriminal, popravilo škode, žrtve, kaznovanje

1. Introduction

Crime. No one likes it. Yet we as a society cannot pretend that it isn't there. It is there and how to deal with it is often an important theme in any political discussion. Most people agree that we need to be tough on crime. But what does that mean? Let us get clear first what we as society want, why we want it and then get down to how we get what we want.

What do we want

In negative terms: we don't want crime, we don't want to police people, we don't want.... This is the general (cultural) view as is the general approach in dealing with what we don't want: we go to war. The result: We win a battle here and there, but criminals adjust their methods and crime is still with us.

The opposite approach is to look at what we as a society *do* want. We want people to live happy lives. To do this a safe environment is required. This means that people respect one another and live in such a way as not to harm each other. In essence this is what social responsibility means, this time extended beyond the behaviour of organisations. Also individuals need to behave in a socially responsible way in order to create an egalitarian and socially responsible society.

Why do we want it

It boils down to the desire for an egalitarian and socially responsible society. When people behave in a sustainable way, society as a whole has a better chance of survival. The word “sustainable” in this context means that the impact we have on the shared resources balances well with the resources we have to our disposal. Dealing with crime places a collective burden on society which is paid for by the individuals in that society. It is however about more than how to apply and share resources. It is also about keeping individual and collective stress levels manageable, reducing anxiety and thereby increasing health, happiness and quality of life. In terms of systems theory this becomes a positive feedback loop: Happy, healthy citizens are less likely to turn to crime. In a utopian world we would have a society where rules are redundant because people naturally behave in a sustainable and socially responsible way.

How do we get what we want

The utopian ideal is a guideline, not a realistic goal. To move towards this ideal a first step is to look at different ways of dealing with unwanted behaviour. In essence it has to do with learning processes. In another article (Van Alphen, 2012), various considerations are given about these processes in terms with dealing with unwanted behaviour.

There are more options than using punishment as a measure to scare people into appropriate behaviour. This does not mean we shouldn't use punishment. But it should be a last resort. Why? The psychological basis as to why punishment has any effect at all comes from what is called operant conditioning (see for example Zimbardo, Johnson & McCann, 2009). Any act (behaviour) elicits some response. The consequence of this response is either positive or negative. This consequence becomes the motivator to either repeat the behaviour (if the consequence is positive) or to reduce the behaviour (if it is negative). This leads to a matrix of possible reinforcement strategies (see table 1):

Increase desired behaviour	Decrease unwanted behaviour
Reward	Abstain from reward
Abstain from punishment	Punishment

Table 1: Reinforcement strategies.

The funny thing is that punishment is the least effective strategy for stable behavioural change and reward the most effective. The greatest effect arises when something is intrinsically rewarding. By that is meant the behaviour is not rewarded materially, but the behaviour itself makes the individual feel good about himself or herself. Durkheim (1895) already in the late 1800's argued that punishment works poorly in changing the behaviour of the offender, so this is no new insight.

The challenge then is how to *deal* with crime in such a way that we get people to feel good about themselves. Sounds paradoxical!

Society's current approach is to focus on the act, find out who did it and punish the perpetrator. An alternative approach is to focus on the *consequences* of the act. In any crime some kind of damage is incurred. The damage may be material. Yet almost always some damage is done to the feelings of others and to the relationship between people. And this is the key to the restorative justice approach: It is only when a perpetrator realises the impact his or her act has had on other people (most notably the victims) that we can appeal to his or her sense of being human. No one feels good knowing he or she has inflicted pain on another.

In our current approach the victims and the impact the crime had on their lives is not adequately dealt with. Nor does the offender really understand the scope of the damage incurred when a prosecutor lays charges. After all, the prosecutor wasn't there when the crime was committed, the victim was. Neither has the prosecutor needed to deal with the aftermath, or needed to get on with his or her life. When victims, together with important others, are able to explain the impact on their lives and ask the questions they have, the offender can start to have an idea of how far the consequences of his or her actions have reached.

We need to appeal to perpetrators' sense of being human. Usually when a perpetrator realises how much this act has influenced the victims, materially and immaterially, they will feel bad towards their victims. By asking

perpetrators to repair, inasmuch as is possible, the damage done, they are able to soften this bad feeling. This is the intrinsic rewarding element. Together with insight into the consequences of the act, this increases the chance that the perpetrator will not repeat this behaviour.

2. Restorative justice conference

A restorative justice conference brings together those involved in the wrongdoing. Not only the perpetrators and their victims, but also the social network around the victims and around the perpetrators. There are several reasons for this, the most important being that all of these people have directly or indirectly been affected by the incident.

Another important reason is that the feeling of shame experienced by perpetrators is increased when they realise the effect of what they have done is not limited to the victims and their environment, but also their own social network has been affected.

Shame is paradoxically a beautiful emotion as it carries within itself its own solution. We really only experience shame when something we have done does not match up with our idea of who or what we are (our self-image). When the shame experience is intense enough, we tend to accept that we have somehow been lacking (Van Alphen, 2004). Remaining in this bad feeling indefinitely would be detrimental for our (mental) health. The acceptance means that we see what we have done to be in error, to be a mistake. The obvious solution is to repair that mistake by apologising and making good on what we have done.

The other reason to include the social network of the offenders is for support. Also perpetrators need the support of those near them to give them the ultimate message: What they have *done* is wrong because it has in some way violated other people. But it is only the act that is condemned, not the person. One of the essential ingredients of the restorative approach is to integrate the perpetrator and his or her act into the community, rather than to isolate them. By including the social network of the offender, they play a part in the solution, thereby lowering the chance of reoffending.

A fundamental question is: Is this approach appropriate for all forms of crime? In my opinion: Yes. The bigger the impact of the crime, the bigger the necessity to deal with it with more than only punishment. John Blad (2008) mentions six criteria which need to be met before punishment is effective. He goes further to deduce that as the severity of the crime increases, ever fewer of these criteria are met. This means that as the severity of the crime increases, punishment has an ever smaller chance of effecting meaningful change in the behaviour of perpetrators. In the television documentary *Facing the Demons* (available from the International Institute for Restorative Practices) the restorative justice conference around the murder of a young employee of a Pizza Hut in Australia is followed.

A recent critical discussion (Filipovic, 2013) on whether restorative justice is appropriate in domestic violence cases perhaps rather highlights the benefits than the dangers. One of the problems is that many of the victims of domestic violence do not want to leave or want to return to their abusive partner. In cases like this more is required than merely making good the damage. A plan needs to be set into place to ensure that the abuse stops. This plan will have a bigger chance of success if those who care about the perpetrator and the victim are involved in making that plan and are a part of the solution. In cases like this a mixed form of restorative justice and family group conferencing (see van Alphen, 2013) is probably appropriate. To sum up, in my opinion any form of unwanted behaviour may be addressed in this fashion: Either on its own or as a prelude to a traditional criminal process.

There are contra-indications. For one, not all victims will want to face their perpetrators. Especially if the crime was some time ago, it may be that they feel they have sufficiently processed the incident and do not want to reopen it and rehash all the bad feelings associated with it. The perpetrator needs also to accept that some wrong has been done and be willing to face his or her victims. In short, all those attending the conference do so on a voluntary basis.

Preparation

A restorative justice conference needs adequate preparation. The key person in the preparation and in leading the conference is an independent facilitator. Independent means that the facilitator has interest in neither the case nor in the outcome of the plan. The facilitator needs to be involved with the process of the conference and not get involved with the content. This doesn't mean that the facilitator doesn't listen to the stories. All parties have their emotions and will want to vent these emotions by telling their stories and the facilitator may provide a listening ear. The purpose, though, is to ensure that all involved are identified and given the opportunity to attend or contribute. Telling their stories is also a good preparation to actually attend, as that is exactly what they will have to do during the conference.

The preparation involves telling participants how the conference is arranged, what is expected of them and answering any questions they may have. The preparation also includes the logistics of agreeing an appropriate date, time and place and ensuring the safety of all participants.

From past to present

The conference begins with an introduction as to the reason for coming together. All the parties present are given the opportunity to briefly introduce themselves. The conference is scripted, meaning that the process follows specific steps in a specific order. The first stage is that all are given the opportunity to share their story, starting with the perpetrator. The typical questions asked by the facilitator are: “What happened?”, “How did you think about it then?” and “How do you think about it now?”

These questions are answered by everyone present, also by the victims, their social network and the social network of the perpetrators. The goal is to let everyone explain how they experienced the incident and its aftermath. Emotions are vented and a beginning is made in understanding the motivations of the perpetrators and the consequences of the wrongdoing. The perpetrators are also asked who they think were affected by their actions and how they were affected.

The negative emotions need to be ventilated first so that space can be made for different emotions. The incident and all the emotions it caused are in the past. The effects continue into the present. This is why the final question to the victims is to ask what the hardest part has been for them. This brings into focus what the essence is, what the most important aspect is that needs attention.

The result of this first phase is that perpetrators start to realise the full impact of what they have done: On the victims and their social networks and also on their own family and friends. Often this realisation leads to a spontaneous apology.

For the victims this phase often gives them answers to the questions which they have been burdened with since the incident. Often one of these questions is “Why me?” Hearing the explanation from the perpetrator can answer this. Often victims are involved simply because they happened to be there. If they hadn’t been there and someone else was in their place, this other person would have been the victim. Merely the fact that the crime was not directed at them *personally* can provide a sense of relief and provide an opportunity to feel better about themselves.

From present to future

The next step is to see what can be done. Now the participants are invited to come up with suggestions as to how to make amends. It is a form of negotiation in which victims express their needs and together with the perpetrators and all others present look for ways to meet these needs. The facilitator’s role is again: facilitation – leading the process without getting involved in the content. After all, only when both victims and perpetrators are happy with a solution does the chance increase that what is agreed is actually done. This plan of action is committed to paper and is signed by all present.

The closing of the formal part of the conference leads to an informal part: accompanied by something to eat and drink, participants are given the freedom to chat with one another in an informal context. This is the first step of reintegrating into the community.

If a criminal proceeding is to follow, a copy of the plan is sent to the judge who may consider it during the process.

The result

Perhaps the best way to see the effects of this approach is to watch the films *Facing the Demons* and *Burning Bridges*, both available from the International Institute of Restorative practices. For victims and perpetrators alike, the long term effects are positive.

Does this approach have any effect on reoffending? In the studies done thusfar there is no conclusive evidence other than that there is no negative effect. That is, reoffender rates *do not increase* when a restorative approach is used. Wilcox, Young and Hoyle (2004) found that over a period of three years reoffender rates reduced in Thames Valley police force when restorative cautioning was implemented. When compared with one other police force the reduction in reoffender rates was significantly lower for three years, with another only for the first two years. Although the latter is yet unexplained, the results are encouraging. The authors add that other programs such as “prison straight” and boot camps have a negative effect: reoffender rates increase where these approaches were implemented.

The question on impact on shared community resources has also not been fully answered. What does a restorative justice conference cost and what does it save. On the cost side of the equation we can be brief. In comparison with the whole judicial process the additional cost of the conference is small. A rough estimate: Depending on the size of the conference the total expenditure of the time of a facilitator and renting a suitable space to host the conference is in the range of 1.000 to 2.000 Euro. In 2010 it cost the Netherlands 217 Euro per day and for young offenders even 499 Euro per day to imprison an offender (Gevangenezorg Nederland, 2010). So even a reduction of 10 days in the sentence would amply cover the cost of a restorative justice conference. To conclusively answer these questions would involve a complex longitudinal study over several years.

3. Conclusion

There is no panacea in dealing with crime and unwanted behaviour. This does not condone carrying on with a system based on the Old Testament view of an eye for an eye, nor the current approach of isolating perpetrators as a deterrent or as a way to “correct” individuals who behave in a socially unacceptable way. Just as society is a dynamic system, so should we rely on scientific insights to adjust the ways we deal with the aberrant elements of the so-called social order.

Practically this means adjusting our view. Durkheim goes so far as to argue that we need crime in order to define society. I would propose a less radical position and take it from a purely utilitarian point: If you are a victim of some crime, what would you prefer as an outcome? Is the knowledge that the perpetrator was caught and punished enough for you? Would it help if some of the damage were repaired? Would you have more peace of mind if you knew why it happened and why specifically *you* were affected? How would you feel about it if the perpetrator also learnt something from the whole exercise?

From the point of view of society I believe the last question to be the most important. It is OK to make a mistake, because we are human. If someone does something which does harm to another, what is the most important: Surely it would be better if this individual realises *why* what was done is not OK rather than only *that* it is not OK? Fully realising *why* reduces the chance that what was done is repeated. Realising *that* usually means adjusting the course of action to not get caught again.

In conclusion I would like to invite collaboration between researchers and professionals in the realm of crime and justice to set up projects where the restorative process can be properly studied and evaluated.

Literature

- Blad, J. (2008). *Strafrechtelijke Rechtshandhaving*. [Criminal justice enforcement]. Boom Juridische Uitgevers, Den Haag, 2nd edition, 21-42.
- Durkheim, E. (1895/1950). *The Rules of Sociological Method*. (S. A. Solovay, & J. Mueller, Trans.) New York: The Free Press.
- Filipovic, J. (2013). *Restorative justice in domestic violence cases is justice denied*.
<http://www.guardian.co.uk/commentisfree/2013/jan/12/restorative-justice-domestic-violence>, accessed on 15-1-2013.
- Gevangenzorg Nederland (2010). Accessed via internet on 19-01-2013:
<http://www.gevangenzorg.nl/faq/prijscelperdag>.
- International Institute for Restorative Practices. Referenced via the internet: www.iirp.edu
- Van Alphen, M.F. (2004). *Shame and Decision Making*. Accessed via the internet on 25-01-2013:
<http://www.markusvanalphen.com/articles/>
- Van Alphen, M.F. (2012). *Dealing with Incidents at Schools using Restorative Practices*. Contribution to the 1st Chance4Change International conference: Overcoming and preventing stress in the individual & Quality of life / well-being in urban areas on Wednesday, 19 September 2012, Maribor, Slovenia. www.Chance4Change.eu.
- Van Alphen, M.F. (2013). *Family Group Conferencing – a systemic, socially responsible way to support individuals with problems*. Contribution to the 8th IRDO International Conference. Maribor, Slovenia.
- Wilcox, A., Young, R., & Hoyle C. (2004). *Two-year resanctioning study: a comparison of restorative and traditional cautions*. Home office. Accessed via the internet on 19-01-2013:
<http://webarchive.nationalarchives.gov.uk/20110218135832/http://rds.homeoffice.gov.uk/rds/pdfs04/rdsolr5704.pdf>
- Zimbardo, P.G., Johnson, R.L., & McCann, V. (2009). *Psychology: core concepts*. 6th Edition. Pearson Education.