

# RESTORATIVE JUSTICE IN PRISONS: “DO NOT ENTER WITHOUT PRECAUTIONS”

## ABSTRACT

*Over the past decades the notion of restorative detention has become quite popular amongst policymakers and scholars. Restorative justice promoters might consider this development as an enormous step forward in the shift from retribution and vengeance to a more human approach to the execution of punishment. For many years in fact, restorative justice had to struggle with an embarrassing gap between its far-reaching ideological promises of introducing a criminal justice paradigm shift on the one hand, and the lack of practice that goes beyond the level of measures of diversion in cases of minor crime on the other hand. Unmistakably, the sudden access to the prison population is an opportunity to demonstrate the restorative justice potential in exactly those kinds of cases it was originally meant for, i.e. situations in which the formality of the traditional procedure is likely to overrule the subjective needs for information, communication and restoration of dignity of those involved. However, the brief restorative justice history clearly demonstrates the risk of cooption, turning it into a justification of the old penal justice paradi-*

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\* PhD candidate Ghent university Department of social welfare studies, and fellow researcher at the Leuven Institute for Criminology, e-mail: Leo.vangarsse@ugent.be

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Leo Van Garsse\*  
Ghent University  
Department of Social Welfare  
Studies

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***gms instead of introducing a new one. The author of this article was for many years closely involved in the development of victim-offender mediation and restorative justice in Belgium. He only partly shares the common enthusiasm for the upcoming restorative detention. Instead, he observes that the few restorative justice programmes which were welcomed within the penitentiaries generally are the ones which focus upon the morality of the offender by promoting victim awareness. At the same time, the victim selectively welcomed is not that much a concrete person with mixed and critical feelings and with developing standpoints, but preferably a stereotype of a suffering vulnerable individual, a suitable object for protection and care. Restorative justice was never said to be value free. But still, in what kind of pedagogy does restorative justice want to play a role? This article is a plea for radicalising the critical potential of restorative justice, deliberately focussing not only on the parties' very personal needs, but also on the paradoxical context of a self-defined 'restorative detention', claiming to address them.***

## INTRODUCTION

One of the embarrassing features of social work and social policy in general is that it consists of intervening in a field of tension between the private and the public sphere while at the same time being part of it. As a consequence, the outcome of the action is always – at least partly – out of reach of the initiators, even though they are being held responsible for it (Luhman, 1995; Lorenz, 2004; Heyting, 1998). We will not open the discussion on the extent of criminal policy being part of social policy (or vice versa), but probably it is fair to say that the same feature goes for all sorts of actions carried out in the name of humanising the way our societies used to deal with crime. It might be a good reason to somehow distrust the successes of the methods applied and broaden the reflection to their side-effects in confrontation with the initial goals.

The past decades in the field of criminal justice (CJ) policies, the notion of restorative justice (RJ) got quite popular. In the starting period there used to be a huge gap between philosophy and practice. The founding fathers, Nils Christie (1977) and Howard Zehr (1990), suggested an alternative way of dealing with crime with the revolutionary potential of the repositioning of criminal justice in a less authoritarian, a more democratic and participative way. Anthony Duff (2001) even classifies restorative justice in the department of 'abolitionist' visions on criminal justice and punishment. These far-reaching ambitions were not reflected in the way restorative justice practices entered the criminal justice field. Mostly, the

new approach was seen as a somewhat exotic way of dealing with minor crime or with misbehaviour of youngsters (Miers and Willemsens, 2004). The approach was accepted as a set of educational measures to divert minor cases from the 'real' criminal justice procedure. In the few countries where it gained a legal basis, restorative justice was usually given a place in the context of either probation, or juvenile justice (Walgrave, 2008). Reflecting on the pioneering period of victim-offender mediation in Germany, Thomas Trenczek illustrates restorative justice as being extremely vulnerable for cooption by the criminal justice system it was supposed to oppose. Moreover, he states that the approach was 'sold' from the start, the initiators not taking up seriously their responsibility for the RJ "stated goals" and giving in for pragmatic survival (Trenczek, 2001). Reflecting upon our own experience of implementing victim-offender mediation in the Belgian criminal justice system, we too must confess that the apparent success of our efforts was dominantly due to the ambivalence in the aims underlying the offer and in the multitude and the heterogeneity of the effects to be expected from it (Van Garsse, 2008). And obviously, the (relatively) easy adoption of mediation in the context of serious crime by law by the Belgian Parliament in 2005, was influenced by all sorts of pragmatic reasoning as well as political opportunism (Van Garsse, 2013b). On the other hand of course, after years of frustrating experimentation in just a few files a year, this kind of legislation was a pre-condition to finally build sustainable learning experience with mediation in serious crime and in prisons. And in the meantime, profiting from pioneering efforts in countries such as the US (Umbreit, 2001) and Canada, Belgium is far from the only country to consider the notion of 'restorative detention'. An important RJ breakthrough, or just another cooption?

## **CONTEXTUALISING THE SUCCESS OF RESTORATIVE DETENTION**

Historically, the relation between punishment and offender-assistance is a field of enormous ambivalence. Paradoxically social work, aiming to emancipate people from external pressure, was conceived as an element in a controlling and disciplining criminal justice policy (Lorenz, 2004). Up till now, this double nature has remained one of the basic features of all sorts of social work (Michielse, 1977; Lorenz, 2004). It was above all obvious in the way social work initiatives were developed in the context of probation and imprisonment, afterwards heavily contested by critical social sciences. It might have been one of the reasons why social work currently seems to have – for a great part – left prison and punishment, including the development of restorative justice, as a concern for lawyers and criminologists (Bradt, 2009; Toews and Harris, 2011).

But for the initiators of RJ, generally speaking, the prison environment was not considered a priority either, prison being considered the place by excellence for execution of punishment rather than an environment for renegotiating the matter. The advocates of victims' rights strongly questioned the involvement of the victim, fearing a pressure upon the victim to serve as an alibi for a mitigation of the sentence or a conditional release. Furthermore, they opposed a systematic offer of victim-offender mediation out of fear that contacts between victim and offender would result in secondary victimisation or in all sorts of opportunistic abuse (The European Forum for Victim Services, 2004). And, of course, the more serious the cases, the more the judiciary feared the mediation process would interfere with the CJ procedures. For all those reasons, mediation practice had to focus on the pre-trial stage, allowed to work preferably in cases where the suspect was not in a complicating circumstance or remanded in custody. For a long time in most countries, prison administration, even those sympathising with the promise of early mediation outcomes, did not consider this offer relevant for the work *intra muros*, as they could not imagine prison staff having any responsibility beyond the holding inside – in dignity – of the offender nor beyond the preparing of his/her release.

Looking at all this, it is quite surprising to currently find 'restorative detention' as part of the common-sense in prison policies. In the meantime, in many countries worldwide, prison overcrowding has developed from a marginal phenomenon to a structural problem since the eighties. Caught in a tension between the irresponsibility of impunity and the obvious individual, social and economical costs of a disintegrating punishment, European states tended to meet human rights standards by trying to improve the living conditions in prisons whilst at the same time making them more 'effective' in the eyes of the general public. Humanising prison was reduced to decent social service-providing to inmates, as many and as 'good' as in the outside world, whilst at the same time stimulating them to take up their responsibilities to restore and to refrain from reoffending. This was exactly the terminology used in the recent mission statement of the Flemish community towards the prison population (see amongst other documents: Flemish decree on service-provision to inmates, 2013).

All of a sudden, meeting the rights of the victims was considered as an opportunity for detention to regain credibility. But obviously, this new interest of the judiciary and the prison administration is more concerned with meeting the victims-rights *as such*, rather than taking into account the victim as a legal subject, owner of rights. Again, Belgium is a good example. The notion of restoration prominently figures in official 'explanatory memoranda' of the laws on the inmate's legal rights position. But this is not reflected in the formal legal articles but rather very scarcely and defensively (Van Garsse, 2005; Dupont and Peters, 2007). For-

mally, in the procedure on conditional release, no place is given to the victim, unless in the department of 'possible counter-indications' to be checked out. Moreover, notwithstanding the legal possibility for parties to make use of mediation pre- as well as post-trial and for the judiciary to take their agreement into account at every stage of the judicial procedure, is not even mentioned (Van Garsse, 2005).

Inviting the offender to show his empathy for the victim's suffering, the law appears to stimulate participation in a variety of victim awareness programmes, leaving a face-to-face meeting with the victim no more than a marginal opportunity. In June 2013 the Belgian government launched a discussion on a bill making the prisoner's efforts to financially reimburse the victim a formal *condition* for early release. A remarkable decision directed to a group of people of which the great majority belongs to the lower classes in our societies, characterised by unemployment and poverty (Toews and Harris, 2011). How 'restorative' exactly is all this? And to what extent can this still be linked to the notion of 'justice'?

## THE PRISON: THE PLACE TO BE FOR MEDIATORS!

Nevertheless at first sight there are a lot of good reasons for restorative justice practices to embrace the actual opportunity to expand activities within the prison context. The possibility to access them is explicitly recommended by the Council of Europe (Council of Europe Rec. (2006)2 Art. 103.7). As a former practitioner in victim-offender mediation, I can see indeed of lot of reasons for enthusiasm for mediation *intra muros*.

First of all, one could argue that mediation in the pre-trial stage is rather threatening the legal rights position of the parties involved. A sufficient degree of independent legal protection is a prerequisite, not always easy to put in place. Quite a few lawyers would wonder why mediation should not be postponed until the less turbulent stage of punishment, when any unexpected interference with criminal justice proceedings has been excluded. Some victim advocates argue that, from the victim's perspective, mediation requires the mutual position amongst parties to be undisputable. In this view, mediation is seen as a forum for interpersonal exchange in a context free from pressure or hidden opportunism. Therefore, discussions on guilt and responsibility should be avoided. Some programmes even tend to leave any discussion on the amount of money to be paid out from the mediation dialogue, leaving it all to the decision of the judiciary. The whole focus, then, should be on the sharing of feelings of pain and remorse in an atmosphere close to psychotherapy. We saw the limits of that reasoning during a study visit to a service in Texas engaged in organising victims- offender mediation with prisoners from death row. Another argument in favour of the prison as a context for mediation is

the offer to the parties involved of a high degree of physical protection. Probably, apart from some extremely exceptional cases, this is not exactly the first concern neither of the mediator, nor of the parties. But still, in the case of relational incidents or severe violence, one can imagine the prison stage to be a safe 'time-out' and a space of safety and rest appreciated by both victim and offender. The prison is holding some more paradoxical advantages for a mediator still. One of them is the aspect of time. During the pre-trial stage the mediator is typically in a hurry, having to cope with all sorts of deadlines due to the judicial procedure. Arguing against mediation, lawyers and the judiciary often state that this offer risks the slowing down of the proceedings. This argument at least is overruled during the execution of punishment, where the ultimate 'deadline' is a given from the start, since the offender is 'doing time'. Moreover, there is no problem anymore of reaching the offender. He/she should be available for mediation every day. Entering the prison, the mediator is entering an environment wherein the object of his/her effort, quite different from in the outside world, is in the whole system's common focus.

However, the reason by excellence for mediators to look out for working with prisoners fortunately is not so much related to pragmatic benefits as to the nature of the cases this category of offenders is likely to bring forward. The more personally and emotionally the parties are involved in the crime, the more they tend to benefit from mediation. This goes for both victims and offenders. The more superficial their involvement is, the more mediation tends to be used instrumentally, just to get a profitable agreement with the offender or a more lenient sentence. But in almost every mediation practice all over the world, cases of serious crime are only scarcely referred to mediation by the judiciary. Moreover, a lot of lawyers would oppose their clients engaging in dialogue, unless post-trial. Therefore, it is fair to say that, from a mediator's pragmatic viewpoint, the prison environment is quite an attractive workplace. Not getting inside might result in being condemned to handling minor cases with a poor outcome.

## **THE FRIGHTENING POPULARITY OF RESTORATIVE DETENTION**

During the past couple of years, re-orienting detention to the promotion of victim restoration seems to have gained popularity, as if it were a new fashion. Looking at the European Prison Rules (Council of Europe, Rec(2006) 2) prison staff would need quite good arguments not to allow the offenders to participate in restorative justice programmes. Likewise, the recent directive of the European Commission stresses the victims' rights to be compensated and supported in their

restoration from the harm suffered (European Union, Dir. 2012/29/EU). As far as Belgium is concerned, the 2005 and 2006 legal elaboration of the prisoners legal rights position stresses restoration as one out of two instrumental goals of detention, the first being the social re-integration of the offender. In the same line, the Flemish Community formally engaged in a collaboration with the federal prison administration in order to make prison environments focus on a sense of humanity, responsibility and restoration. This is surprising indeed, taking into account the persistent and still growing overcrowding of Belgian prisons, leading time and time again to quite critical reports from the inspections of the UN Committee for the Prevention of Torture. More generally, it is somehow in contrast to the perception, shared by many, that our communities are suffering from a growing degree of 'punitivism' (a term introduced by Garland ).

For Belgium at least, the relationship between this 'punitivism' and the upcoming 'restorativism' appears to be complicated and not free from ambivalence (Van Garsse, 2013a). Taking a closer look at the nature of the restorative practices currently promoted for use within prisons (Van Camp, et al, 2004; Toews, 2006; Edgar and Newell, 2006; Barabás, Borbala and Windt, 2012) it is striking how broadly the notion of restorative justice is defined, implying all sorts of peace-making programmes, relaxation and conflict resolution and a long list of efforts to promote amongst groups of prisoners, amongst prisoners and their families, or even amongst guards, a 'culture of respect'. As far as the orientation to victims *sensu strictu* is concerned, a lot of attention is paid to courses focusing on the promotion of victim awareness. Also, in the name of restorative justice, financial compensation of the victim is facilitated and stimulated. Compared to all this, relatively little attention is paid to the voice and the particular needs of the victim-*in-person*, let alone to a systematic facilitation of meetings between victims and offenders during detention.

Van Dijk (2008) cynically questions the empathy for victims as it suddenly shows up in all sorts of official bodies and regulations. He wonders whether this is a new justification of the old policies one is looking for: an inclusion of the victim to paradoxically legitimise a final and definitive exclusion. Looking at the selective way prisoners are actually given access to restorative practices in general and to mediation in particular, we can wonder whether restorative detention is a striking confirmation of Van Dijk's thesis. It is obvious at least that the victim is rather welcomed as an idea, then as a natural living person with a certain opinion. Paradoxically, victim-oriented detention is quite defensive towards what the victim could bring in from the outside (Van Garsse, 2002; 2005). The reason might be that the criminal justice system is inclined to welcome the victim mostly as a representative of an endangered species in need of judicial protection, to be used as a pedagogical



tool, while at the same time disliking the risk of giving the floor to a victim acting as a critical citizen who might question the judicial intervention as such (Christie, 1986). Restorative detention promoters Edgar and Newell (2006) suggest that it would be quite naive to expect prison administrators to go for restorative justice out of temptation of its perspective on a paradigm shift in doing justice. Instead they would evaluate RJ popularity as an instrumental benefit: a bunch of educative and 'humanising' methods easily applicable within the structures *as they are*.

## THE PRISON AS A DANGER-ZONE: BASIC PRINCIPLES ON THE RUN

But it is not only the marginal status of mediation in the practices of restorative detention causing worries. Looking beyond pragmatism, there is doubt whether the prison environment can be a place for mediation at all. In all sorts of literature and regulation the offer of mediation is strictly linked to the basic principles of neutrality, confidentiality and freedom of participation. At the same time the writings on the experiences with victim-offender mediation demonstrate extensively the problematic nature of those principles in practice. And one could wonder whether the prison context is making it any easier. Neutrality in victim-offender mediation holds something of a contradiction in it. How can the mediation offer be neutral, if the one party is invited to take place in the chair of the offender, and the other in the far more comfortable seat of the victim? How can the meeting be neutral if the issue on the agenda is not just a conflict, but a crime, leaving unquestioned the social mechanisms behind any criminalisation? Mediators can seek some comfort considering that their work is part of a justice system in a *democratic* legal state and therefore open to the possibility of opposing the social rule regarding the possibility to be opposed and disciplined by it. But how much of this democratic access to a contradictory debate is left to a convicted offender whose guilt is an official fact, whose expressions of remorse cannot be heard other than as an attempt to self-justify and whose promises to compensate for the damage can, given his/her lack of any work or income, not sound other than easy lies?

The same kind of consideration goes for the principle of voluntary participation. Taking part in a mediation process should not be romanticised. It is above all a demanding enterprise with an unpredictable outcome. Even the best mediator cannot guarantee restoration, neither can victim or offender. Moreover, mediation is a risky thing to do, since words once spoken cannot anymore be unheard. And faces once seen, can never again hide from each other in anonymity. At the same time these problematic features are what makes the offer of mediation a confir-



ming message of belief in human capacity. But it also makes it irresponsible or hypocritical if done under pressure or obligation. Parties should at least have the right to refuse or to stop the process whenever they want to. Independent legal assistance should be available any time (Council of Europe, Rec. (99)19). But, what else could a prisoner's solicitor advise his/her client than to take the risk to expose him/herself and his/her story to the victim? And how can a refusal of the victim to meet the offender in prison be taken otherwise than as – at least partly – a subtle action of revenge (The European forum for Victim Services, 2004)?

This brings us to the principle of confidentiality, a principle as important as it is fragile. The basic feeling of people, victims as well as offenders, in the aftermath of crime is one of insecurity. They do not know what to expect next, and they often suffer loss of self-confidence in coping with reality (Aertsen, 1993). This is not exactly inviting for engaging in the vulnerable effort of a mediation process. The essential task of the mediator consists in "creating a safe spot" (Umbreit, 2001), where people can exchange personal feelings and private matters, without the risk of finally being used or abused. Part of this is an atmosphere of confidentiality. As far as the mediator is concerned, confidentiality can be guaranteed by an ethical code or by a formal provision of professional secrecy. As far as the judicial procedure is concerned, an explicit legal prohibition can be foreseen to take into account any one-sided report or information originating from a mediation process, unless agreed upon by all parties involved (see Belgian law on mediation, 2005). But as far as the parties are concerned, confidentiality can never transcend the status of a gentlemen's agreement. The more the contexts of victim and offender are eager to get informed, the more fragile this kind of agreement is. And which context can be hungrier for information than the prison, where every visit is registered and every incident reported upon? Moreover, how could one blame a parole board to ask for it, and how could one blame the parties (or their representatives) to respond?

Summarising all this, it is fair to say that for a mediator entering a prison it is like playing soccer on a minefield. Prisons might look quite inviting for a restorative justice input, but, as a system, independently from the intentions of the staff, detention is above all built upon the principle of providing security by (temporary) exclusion and deprivation of freedom. If 'responsibility' is about authentic acting while manifesting 'ability to respond' (Duff, 2001), \prison, being a total-institution, can hardly be a suitable place for it. In this kind of system the more authentic one is, the greater the risk to be perceived as opportunistic and to pay the price for it. Moreover, in terms of *capabilities to restore*, detention appears to be the place by excellence to have them diminished, postponed or expired.

## RESTORATIVE DETENTION AS A RESTORATIVE JUSTICE DILEMMA

Considering the actual circumstances, the opportunities and the risks, the upcoming popularity of restorative detention sort of traps restorative justice in a dilemma. On the one hand, one could resist the seduction of the sudden accessibility to the prison by a refusal to engage in an environment likely to moralise people instead of making them stronger. The price of this refusal would be abandonment, in the name of ideological correctness, of the cases that might need a restorative offer the most. On the other hand, one might choose to fully embrace the given opportunity, hoping to strengthen the restorative impact by the gradual establishment of convincing practices. The strategy would be of closely collaborating with the judicial authorities in order to demonstrate to them how a restorative approach can contribute to their job within the system. As it leaves everything open, keeps everybody on board and is not likely to provoke anybody, this option is attractive in all its pragmatism. But, it might also be naïve (Mathiesen, 1974). Trenzcek (2001) evaluates this pragmatic approach as one of the basic reasons for the marginal position of restorative justice within the criminal justice system. In his view restorative justice should have been far more radical and explicit on its underlying goals. Ten years later, speaking for Belgium and despite the promising legal regulations, we are still confronted with the gap between all the talking and writing on restorative justice and the low number of cases referred (Van Garsse, 2013b). There is of course also a third option consisting in not bothering about the context at all. The mediator's responsibility is limited to the proper application of the mediation methodology, and the same goes for all the other RJ-techniques. One is supposed to work with the questions the way they are presented. In this neo-liberal view, the mediator is hired to do what he's supposed to do - be a specialist in mediation. All the rest is not the mediator's job to manage or to judge, it is 'the other's responsibility'. This third option is quite popular these days, as it offers the illusion to nicely fit with the principle of 'neutrality' and with the concept of a mediation service being a private and independent body. But this a-political peace-making mission is far from politically neutral (Valverde, 1999; Mouffe, 2005) just as the notion of justice is not, let alone deprivation of freedom. To keep silent is confirming things as they are. One might wonder whether restorative justice, being a promoter of 'ability to respond' as a precondition for human dignity, can afford this silence.

## TAKING RESTORATIVE JUSTICE SERIOUSLY

Restorative justice indeed tends to be addressed as a neutral set of techniques, to be applied in whatever circumstances they might seem useful (Walgrave, 2003; United Nations, 2006; Van Wormer, 2006). In this instrumental approach, restorative justice is usually linked to protecting the victim's position by promoting the offender's awareness of the harm done. And, let's be honest: who can oppose this, as long as it does not cost too much and does not hinder the everyday routine of our institutional procedures?

However, in the view of the initiators of the RJ-movement, restorative justice is above all a normative theory on how justice *should be* done in the context of a democratic legal state (Christie, 1977; Zehr, 1990; Dzur and Olson, 2004, Walgrave, 2008). According to these authors, restorative justice is not focused either on the effectiveness of its techniques, nor on victim protection, as in a specific view on democratic citizenship in its relation to criminal justice (Zehr, 1990; Walgrave, 2008). In this view restorative justice should be seen as part of a much broader opposition to the routine-based over-institutionalisation of our societies, as had been criticised already decades ago by many (Marcuse, 1972; Illich, 1974; Freire, 1972). The main point in this reasoning are the institutional definitions being a cause of massive alienation of the citizen from his/her own perceptions, feelings and capacities. Inspired by his close friend Ivan Illich (Christie, 2001: personal communication) Christie ironically called this mechanism, projected in the context of criminal justice, a 'theft' (Christie, 1977). Taking this seriously from the official administrator's point of view, would make the intervention of the mediator in a prison far less a *'fait divers'*. Indeed, they would have to expect the mediator to be like a Trojan Horse in the castle of justice. He is indeed a specialist in triggering people to question the legitimacy of all current definitions and roles: the one of the event as a 'crime', the one of the offender as the responsible agent of a moral 'wrong', the one of imprisonment as a logical and 'just' consequence. They all have to be sort of deconstructed in a process of meaningful inter-subjective communication (Duff, 2001).

But this subversive feature of restorative justice also applies to the parties involved. They are invited to ask themselves questions that would have never popped up from a simple consideration of their personal interests, be it the offenders' or the victims' ones. On the contrary, they are invited to challenge those interests with their own perceptions and deeply 'felt sense' on doing the right thing in a situation so complicated and unique that only they can judge it. We can imagine some sources of the hesitation of victim services to embrace restorative justice. Their concerns result in all sorts of protective measures and preconditions (European Union 2012; The European Forum of Victim Services 2004). Indeed, the victim,

as a given entity composed of notions like 'harm', 'suffering', 'vulnerability' cannot expect to be protected by the restorative justice practitioners, as far as this composition limits and presses people to respond to expectations that might not fit their own personal identities. This line of reasoning comes close to the radical reasoning of Van Dijk (2008) observing the way our societies deal with "bad" victims, those not meeting the unspoken rules and expectations. The Belgian experiences with mediation during detention and the interpretation of the legal regulation on execution of punishment illustrates the ambivalence of inviting the victim, hoping he or she will not show up (Van Garsse, 2005). And as far as the offenders are concerned, we have the impression that those who really want to restore are often distrusted as opportunists, while those who do not, are blamed for their presupposed lack of morals.

Far from starting from a dogmatic definition of what might be the client's 'real' view, restorative justice strongly advocates for time and proper space to consider original answers to evident questions, while making use of any source of external advice available. In all this, restorative justice is far from an easy plea for anarchism or against the criminal justice system and punishment. On the contrary, focusing on contradictory debate and 'subsidiarity' (a poor translation of the French notion of "subsidiarité") as fundamental principles of the public procedure, they contribute to an emancipation of criminal justice, of just being swallowed as a (bad) product or abused as a weapon. This line of thought fits with the Trenzcek (2001) reasoning that restorative justice practitioners should distrust any partnership with justice administration going beyond a contribution to the democratic debate, in general and in particular cases, on doing justice. How demanding all this might be for the judicial bodies in general and for all those involved, democracy is a quite demanding form of government anyway (Mathiesen, 1974; Mouffe, 1989, 2005; Biesta, 2011).

## **ABILITIES TO RESPOND: ARMING THE MEDIATOR**

At this point, we are a long way from any enthusiasm for restorative detention. One might even wonder whether the notion of restorative justice as we described it, is applicable at all. Some might reject it as a representation of an elitist concept of democratic citizenship, excluding the most vulnerable and socially disadvantaged from participation in responsibility. Victims' advocates might refer to all sorts of post-traumatic disorders making victims incapable of taking a stand at all. People working in prisons or in probation might refer to the well known fact that the lower classes, the poor and even the mentally weak are disproportionately overrepresented in all sorts of penitentiary establishments. One more reason to

keep mediators out of prison and to restrict the restorative justice contribution to some moral education and victim-awareness. The 'real goal' of this would then be to let the offenders know that they should at least feel guilty and to give victims the message that they are at least protected and not (completely) forgotten.

These remarks should be taken seriously. The definition of responsibility as the 'ability to respond' (Duff, 2001) is in fact more than just a nice quote. Every mediator will recognise that mediation is demanding and presupposes some personal capacity from everybody involved. However, far too easily this requirement is individualised, medicalised even, justifying the need for a preliminary 'diagnosis' by experts to select suitable cases. We'd like the promoters of these approaches to face the reactions of the people, victims and offenders, not allowed to communicate with the other party for being diagnosed as not (yet) being up to it. They offer excellent examples of (secondary) victimisation. Moreover, even subscribing the need of ability to respond, based upon our practice as a mediator we strongly oppose the remarkable trend to individualise the problem, which seems to throw us back into the 19<sup>th</sup> Century's 'Social Defence'-reasoning. Responsibility is far more than a feature within an individual. It is a capacity that greatly depends upon the preparedness within the social environment to allow a person to act in a human way, meaning: establishing and revealing one's personal identity (Freire, 1974, Biesta, 2011). Responsibility is about freedom to act (Arendt, 2007) and about the capacity to mobilise means and distribute meaning outside of ourselves: to be taken into account. We're close here to the notion of 'human dignity', not as a personal feature but as a social responsibility. Duff (2001), a legal scholar, goes pretty far linking this line of thinking with the question of legitimacy of punishment in a democratic society. Could we ever punish anybody who has not been offered by his social surroundings a sufficient 'ability to respond'? Even in the very practice of mediation, let alone some exceptional cases, responsibility on restoration is rather a matter of contexts (parents, families, colleagues, neighbourhoods) than a problem of isolated individuals.

This approach to responsibility is far from a plea to refuse people an expert's advice before engaging in mediation or restoration. But it strongly questions the right of all sorts of professionals of not informing people on the possibility to ask for it, and of their right of being respected in this choice. It also questions the right of the judiciary to be indifferent to the mediation outcome while informed on it by the parties, as their right *not* to somehow relate to it while motivating their decision. Finally, it radically opposes the popular paradox of urging people to take up responsibilities while holding them in a situation where taking action and ability to compensate for damages are systematically hindered. It is perverse to stigmatise

prisoners for being immoral, blaming them for being blind for the damage they caused, while rewording prison work with two Euros an hour, or less.

This human rights approach to restoration, democratic responsibility and punishment radically influences the perspectives on restorative detention. It makes detention a social problem, instead of a (temporary) solution, and a place of bringing people and their surrounding into contact, instead of isolating them from each other. In this approach the mediator critically questions every referral. If people's choice to participate appears to be a result of external pressure, he/she would actively stimulate parties to refuse. On the other hand the mediator would openly criticise any hidden selectivity in referring to mediation as a denial of a right for information and communication. S/he would oppose any precondition on the agenda of the mediation meetings or on the content of an agreement, unless requested by the parties directly involved. During the process of communication and exchange, this same mediator would welcome resistance and anger, rather than stimulating for remorse and forgiving. S/he would actively stimulate parties to ask for a second opinion from people in their surroundings any time they might feel the need. He would explicitly and openly expect any official body to take agreements amongst parties into account, however controversial their content might be, and s/he would overtly criticise a systematic refusal to do so.

Making the mediator a Trojan Horse inside the prison walls, transforms him in the outside world into an active ambassador of the prison as a public monument that, in a democratic society, cannot be more than a stone out-cry of social and societal incapacity (Van Garsse, 2002; 2006). This mediator would analyse and criticise waiting lists for public services, and – if present - even more preconditions possibly discouraging or disabling victims or offenders to make use of them. He would organise himself as far as possible in independent but transparent networks, in order to visibly contribute in our societies to the constant debate on the paradoxes of criminal justice in general and on detention in particular.

## **THE RESTORATIVE FUND: TRYING TO TRANSLATE PRINCIPLES INTO PRACTICE**

Ending this article with a list of some provoking principles might be a little easy and cheap. Detention indeed is a field likely to be the target of all sorts of under-nuanced critics, often blind to the deep societal nature of the problems it is supposed to offer a legitimate answer to. It should be admitted that restorative justice sometimes is part of this, proclaiming the RJ-movement to instigate sort of a revolution within criminal justice, the promise of putting an end to every need for

punishment through exchanging the old idea of revenge for the new one of restoration (Walgrave, 2008). But this cannot be an alibi for taking detention for granted, or even worse, for 'instrumentalising' it as a space and time suitable for moralisation and disciplining on behalf of the supposed interest of "the" (ideal) victim. Isn't there really any other choice but just taking or leaving the prison environment as a restorative facility? Based upon the previous paragraphs the answer has to be searched for in a legal/human rights approach (Van Garsse, 2002).

From the late eighties onwards, during the further development of victim-offender mediation in Flanders (Belgium), one of the points of reference was the right of the capacity for responsibility as constitutive for human dignity. Working first with young offenders, mediators soon noticed the tension between a protective and a supportive approach. They also noticed the difference between inherent capacities to restore, and the structural inhibitions to actually engage in it. More concretely one could observe victims being condemned to either the role of an educator, or one of parental financial burden. Both of these roles reduce the young offender to an incapable object of intervention, paradoxically blamed by all for lacking responsibility.

These observations from 1991 onwards triggered the establishment of a restorative fund, enabling these youngsters to engage as volunteers in self-chosen community-work, the victim being reimbursed for the damage suffered. In the meantime, this offer is generalised all over Flanders at the institutional level of the provinces.

Ten years later, in the search for ways to make detention a more restorative facility, a group of researchers at the Leuven Catholic University found themselves confronted with a similar problem. They suggested the provision of a fund, comparable to the one for the youngsters and working in a similar way. Their reasoning was taken up during the years of discussion in the Belgian Parliament on the legal rights position of the prisoner. Paradoxically, while adopting restorativism as a main focus of detention, Parliament refused to go into the arguments for a prisoner's right to an income decent enough to enable them to at least start reimbursing their victims (Dupont and Peters, 2007). In practice they did not wait for further regulation. An experimental restorative fund for prisoners was raised in 2001 as a private initiative taken by an NGO. Networking with the prison administration, the provinces and the Flemish Community resulted in an administrative decision to expand the availability of this fund to all prisons. Even so, its implementation is taking longer than expected. The dynamics in this development are revealing for the complexity of the underlying reasoning. At first, most prisons were not quite in favour of adopting the fund, predicting that, looking at the kind of offenders they were used to getting, the initiative could not function. On the



other hand, most social workers regarded it as a part of their core-business, not to be taken over too much by mediators. Since that time, the situation has changed radically. The prisons are now urging initiators to generalise the initiative as soon as possible, whereas social workers, however, still considers it part of their responsibilities, and are not ready to fully engage, pointing their administration towards the waiting lists they are already struggling with. At the same time they denounce the relatively low number of cases the fund seems to have been able to handle so far. And this is partly due to justice administrators being very anxious to take too much risk by giving a prisoner permission for some hours of supervised voluntary work *extra muros*.

Notwithstanding all this, nobody is pleading for an abolishment of the project. All are in favour of continuation. But the original rights perspective of the initiative is in great danger of being taken over by a focus restricted to the practical effectiveness and feasibility of the formula *as such*. The fund risks becoming a weapon of the professional groups concerned in the battle on - who has to go how far, taking how big a part of the 'risk' of failing. Similar to mediation, the enthusiasm for the fund survives thanks to the anecdotes popping up during the meetings, demonstrating that, despite the quite humble nature of the whole project, the intervention of this fund can be of considerable influence as a catalyst of mutual recognition amongst the parties involved. It also holds the potential of provoking the engagement of external agencies to creatively and constructively contribute to a societal reaction on crime. Above all this fund is breaking down the evidence of detention being but a waiting-room for immoral and dangerous people to return into our societies and an undeserved punishment for victims, having but to wait, to fear and to hide.

In all this, this fund is far from a solution to the problem of prisons lack of responsibility. It is rather meant as an instrument to expose its irrational nature. In this sense it cannot be more than a humble instrument in a transitional stage to a more fundamental reconsidering of the use of exclusion by detention as the prototype of punishment in a democratic society (Van Garsse, 2009).

## CONCLUDING BRIEFLY

Taking into account the general atmosphere in our societies these days, as well as the persisting prison overcrowding in many countries (like Belgium), we do not share the actual enthusiasm amongst practitioners for restorative detention. On the one hand, one can observe the criminal justice system welcoming restorative practices mostly at those stages of the judicial intervention where their

structural impact cannot be but marginal: as a diversion measure in minor cases or, as far as serious crime is concerned, as a 'cultural' attribute at the stage of detention, post-trial. On the other hand, the restorative justice potential welcomed is not the political perspective it stands for, but the growing collection of fragmented methods focusing on moral education and on the standardised provision of short term responses to highly complicated and (inter)subjective concerns. Some would consider this a precious starting point to be used in order to build a step by step increasing credibility. They would point out the impact of victim awareness programmes and restorative justice panels upon the participants, be they offenders or even witnessing victims. They would count on the long term process of gradually changing prison culture from an atmosphere of distrust and hostility to a learning place for respect and democratic citizenship. Some of them regard the growing list of restorative methods as an opportunity for social workers to strengthen, in an environment characterised typically by repression, the perspectives of wellbeing and human dignity for offenders as well as for victims (Toews and Harris, 2011; Van Wormer, 2006). However, this attractive focus upon methodology does not fit restorative justice as a normative theory upon the participative way justice should be done in a democratic legal state. Sobering practices like the one of the Flemish restorative prison-fund, clearly demonstrate how a focus on the application of a (highly defensible) method, instead of fighting over-institutionalisation, is likely to derive a reinforcement of or even a supplement to complicated rules and rigid procedures. Still we would not like it to disappear, be it more as a presentation of the paradox than as a speedway to restoration.

Our plea is for restorative justice entering the prison in an offensive way, as an approach questioning the irrationality of taking somebody's freedom hoping to stimulate responsibility. Questioning also the paradox in protecting victims while pretending to free them from fear and dependency. We will not state that restorative justice is opening up a perspective on a level of common morality that would render punishment superfluous. But we do believe in restorative justice as a way to transfer the social pedagogical message that doing justice in a democratic society can only be achieved through citizens' rights for participation and critical involvement in the way their cases are being handled and in the way their interests as a citizen are being served (comp.: Duff, 2001). Consequently restorative detention could be of use, albeit not as a challenging working environment for experts in restorative methodology, but rather as a striking paradox.

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Leo Van Garsse

Sveučilište u Ghentu

Studij socijalnog rada

## RESTORATIVNA PRAVDA U ZATVORIMA: "OPREZ PRI ULASKU"

### SAŽETAK

*Tijekom proteklih desetljeća pojam restorativnog pritvora postao je vrlo popularan među kreatorima politike i znanstvenim radnicima. Promicatelji restorativne pravde takav razvoj mogu smatrati golemim napretkom u pomaku s odmazde i osvete na humaniji pristup izvršenju kazne. U stvarnosti, restorativna se pravda mnogo godina bori s neugodnim jazom između njezinih dalekosežnih ideoloških obećanja uvođenja promjene u paradigme kaznenog pravosuđa s jedne strane i, s druge strane, s nedostatkom prakse koja nadilazi razinu mjera diverzije, to jest odvracanja (eng. diversion) u slučajevima maloljetničkog kaznenog djela. Nedvojbeno, iznenadni pristup zatvorskoj populaciji prilika je da se potencijal restorativne pravde pokaže točno u takvim slučajevima kojima je izvorno namijenjena, odnosno situacijama u kojima će formalnost tradicionalnog postupka vjerojatno obeskrjepiti subjektivne potrebe za informacijama, komunikacijom i povratom dostojanstva uključenih osoba. Međutim, kratka povijest restorativne pravde jasno pokazuje rizik od kooptacije, zbog čega se ona pretvara u opravdanje starih paradigmi kaznenog pravosuđa umjesto da uvodi nove. Autor ovoga članka dugi je niz godina blisko uključen u razvoj posredovanja (medijacije) između žrtve i počinitelja te restorativne pravde u Belgiji. On je tek djelomice sklon predstojećem restorativnom pritvoru. Umjesto toga, napominje da su malobrojni programi restorativne pravde koji su uvedeni u kaznonice uglavnom oni koji se usredotočuju na moral počinitelja, podizanjem svijesti o žrtvi. U isto vrijeme, selektivno odabrana žrtva nije zapravo konkretna osoba s pomiješanim i kritičkim osjećajima koja razvija svoja stajališta, nego po mogućnosti stereotip ranjive osobe koja pati i koja je pogodan predmet zaštite i brige. Za restorativnu se pravdu nikada nije tvrdilo da je objektivna. Ipak, u kakvoj bi vrsti pedagogije restorativna pravda željela igrati ulogu? Ovaj je članak molba za radikaliziranjem kritičkog potencijala restorativne pravde; hotimice je usmjeren ne samo na intimne potrebe uključenih strana, nego i na paradoksalni kontekst samodefiniranog „restorativnog pritvora“ u kojem se navodno one rješavaju.*

**Ključne riječi:** Restorativni pritvor, odgovornost, participativna pravda, kooptacija, demokratsko građanstvo

