

Justice After Conflict:
Evaluating Restorative, International, and Lay
Approaches

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INEQUALITY, HARM AND PUBLIC POLICY

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The need to examine social problems and redefine social myths is certainly a necessity when academics review criminal justice interventions. Over the years, offenders have been sentenced to the death penalty or life imprisonment without much, if any, empirical evidence. Since then, of course, there have been numerous attempts to create a new criminal justice system or to change the existing one. In general, most reforms have ultimately been considered failures, either because the justice system failed or was abandoned prematurely because the system did not pay sufficient attention to two aspects: first, the need to respond with different types of justice interventions depending on the nature of the conflict, and second, the challenges that each intervention faces and the search for solutions. For this reason, this paper discusses three types of justice interventions with a contextualisation of a particular country and how they address harm. First, restorative justice is assessed and shown how apartheid-era harms were addressed in the case of South Africa and the Truth and Reconciliation Commissions. It then examines the situation of victims at the Nuremberg Trials after World War II. Lay justice in the context of Japan is also assessed. Finally, a joint comparison of three justice interventions is presented.

RESTORATIVE JUSTICE

When intervening in the criminal justice system, Ame and Alidu (2010: 254) argue that democracy, as a form of government, creates the conditions for the criminal justice system to develop. This means that the promotion of democracy and democratic institutions serves to restore the original status quo of victims and societies. All of this can be achieved through restorative justice and peacemaking criminology, such as truth and reconciliation commissions (TRC). Restorative justice is often defined in contrast to retributive justice. Zehr (1990) explains that crimes are not seen as violations of the law with the state as the victim, but rather crimes are seen as "violations of people and relationships." And rather than punishing offenders through means such as fines or penalties, this type of justice intervention prefers to reintegrate offenders back into society (McLeod, 2015).

During decades of conflict in South Africa, and faced with the challenges of the new democracy and negotiation processes, a TRC was established in 1994 (Maepa, 2005: 66). It appears as a response to the injustices of apartheid and its continuing impact on the present. Through this restoration, the TRC sought to depoliticise the crimes of the past in order to facilitate social and political transition. This aimed to engage the actors affected by the segregation harms (either victims, perpetrators, or families) in collectively identifying their harms, needs, and obligations to prevent a recurrence of events. Although this has been the main strategy, many survivors lack the means to deal with the physical and psychological consequences of apartheid episodes, as well as the hurdles they must overcome to have their claims heard (ICTJ, 2013). This mirrors Pemberton's (2015:24) theory of social harm, in which he

argues that our relationships and processes with our societies interfere with the fulfilment of our own human needs.

Overall, the South African TRC is considered one of the most outstanding examples of transitional justice processes. It was designed to provide a clear picture of the past, promote reintegration and reconciliation, create a human rights culture, and facilitate a peaceful political transition from the end of apartheid to Mandela's inauguration as president in 1994 (Mc Leod, 2015). Moreover, this type of justice is seen as an innovative response that, in the case of South Africa, conviction of crimes and defence of the rule of law were important but would be difficult to achieve through normal legal processes, according to Allais (2011 cited in Mc Leod, 2015).

INTERNATIONAL JUSTICE

Another form of justice intervention that fights impunity and deterrence is international criminal justice. A historical development of this type of justice was the International Military Tribunal at Nuremberg (Tomuschat, 2006: 830) when it began to respond to atrocities committed during the Second World War (Kirsch, 2006: 2). Without the Nuremberg Trials, there would have been no ad hoc tribunal to recognise a principle that is now universally accepted: No one is above the law. So is impunity for serious crimes, regardless of the rank or nationality of the perpetrators concerned (Kaul, 2013: 640). Furthermore, thousands of people are affected when massive historical events such as military conflicts take place that will shape the future of humanity and entire nations. However, one of the least discussed aspects of the trials is the little importance given to the rights of victims and survivors of Nazi policies. The International Criminal Court (ICC), known as the first international attempt to establish a permanent tribunal to prosecute war crimes (Boller, 2004: 281), was the first court of its size to explicitly provide reparations for victims. This reparation, as Mégret, Heidy and Stephan argue, was intended to heal the victims and enable them to come to terms with the past and the future (Wemmers, 2009). They should also acknowledge their harms and provide them with justice and protection. Participation in international justice would allow victims to have their voices heard and their needs met, as well as further reparations that provide material and symbolic redress to heal their suffering (Moffett, 2012). The Nuremberg Trials were the first to place human rights above state sovereignty and to establish an international judicial body to enforce these rights. They began to use deterrence techniques by ensuring that the right actors faced the legal consequences (Cooper, 2009: 92). To achieve this, they developed Article 2, which stated that criminal responsibility shifts from the state to the individual and therefore the responsible individual should be punished (Greppi, 1999).

LAY JUSTICE

Since the late 1990s, there have been numerous criminal justice interventions in Japan. One reason for this is increased victim awareness, which has led to greater involvement of victims in criminal proceedings, and the other is the involvement of lay people in the justice system. This unique system is the first mixed court system in which a collegial body of professional and lay judges decides on convictions and sentences (Ivković and Hans, 2021: 69). A main advantage of this method is its ease of access, cost-effectiveness and public participation, but this has led to a romanticisation of the local justice system with coercive aspects and its function in enforcing social control (Waldorf, 2006: 10), as no official lawyers or judges participate.

The need for this arose 40 years ago when evidence made it indisputable that convicted defendants could not have committed the murders that led to their conviction and, in some cases, the death penalty. Some Japanese statistics show that the prosecution rate in murder cases has dropped by 40% since lay judges were appointed, but as lawyer Kanno argued, "these kinds of judges are not used to court cases, and when confronted with evidentiary crimes, they make their decisions from the citizen's point of view" (Shimbun, 2017). Although citizens did not welcome this system at first, they began to cooperate with the system simply because of their own personalities, in order to be obedient to the authorities and to fulfil the obligation asked by the government (Hirayama, 2020: 295). However, these public procedures may suffer from subjectivity. Even though the very intention of the lay justice system is to include people with diverse backgrounds and characteristics, judges tend to be selected from a particular group of people, which is detrimental to victims as the outcomes of sentences may become predictable (Hirayama, 2020: 298). A clear answer to this is a more diverse panel of lay judges with different viewpoints, feelings and experiences. The next step is to educate from an early age about the justice system and how society can support victims of crime. Either by working with rehabilitation or reintegrating offenders (Hirayama, 2020: 301). In some of the worst cases of genocide, victims are desperately poor and want reparations (as in the Gacaca genocide). The establishment of a compensation fund aims to pay for some of the damage caused by this type of genocide. However, the local justice system usually fails to establish a compensation fund, and the incentives for survivors to participate are reduced as a result. (Waldorf, 2006:59)

CONCLUSION

First, restorative justice usually starts from the premise that individuals who are personally involved in the conflict are involved in the case and therefore it should be resolved by them. This type of justice helps to see justice in relation to a more 'communitarian' view (Garbett, 2017:203). It goes beyond a 'punishment-focused approach and is concerned with the healing of individuals, communities and nations, even when harm has resulted from wrongdoing' (Van Wormer & Walker, 2013 cited in Garbett, 2017: 204). As a result, international justice has proven incredibly helpful and has significantly expanded its scope. Today, under the United Nations, it deals with most cases of mass atrocities around the world. The greatest and clearest advance in international criminal law has been the ending of impunity for war crimes and genocide, and the protection of human rights (Lockamyeir, 2022).

However, some of these measures are not the principal and recurrent method of prosecuting crimes. This is because one of the aims of many proponents of restorative justice is to de-dramatise crime, and there is a danger that a move to this type of justice could reduce the sense of injustice attached to crime and harm (Bussmann, 1992 cited in Johnstone, 2011: 24). This involves the allocation of sentences to offenders determined by certain principles, such as punitive sanctions that are commensurate in severity with the degree of conduct, and the maintenance of a consistent sentence for each related case (Johnstone, 2011: 27). On the other hand, the legitimacy of international justice, the support of networks of institutions and the use of coercive powers are necessary for effective enforcement of criminal law, making it a costly and slow process. For this reason, international justice systems are not very effective in addressing harm, as they are entirely dependent on states to fulfil their functions (Damaška, 2004: 1031). It is also not victim-centred, as only victims can participate as witnesses in international trials, which makes witness protection and rehabilitation difficult. However, lay justice entails a large number of harsh decisions, including the death sentence as a heavy burden. Taguchi (2013) explains how a former lay judge argues in a trial that everyone had doubts about the death penalty verdict. And that their final verdict does not just mean affecting a life, but rather the final decision to take a life (Vanoverbeke and Fukurai, 2021: 80). Apart from the pressure to decide, there is a risk of poor participation in the processes, which can be influenced by highly centralised and authoritarian regimes (Waldorf, 2006:65).

Overall, however, the main purpose of all justice interventions is to remedy harm in the most effective, cost-efficient and rapid way. When it comes to taking responsibility for their actions and repairing the harm caused, Zehr firstly explored and strongly emphasised perpetrator-victim reconciliation in RJ conflict resolution. This has led to theoretical developments such as 'reintegrative shaming' and 'responsive regulation' (Braithwaite, 1989 & 2002 cited in Johnstone, 2011). Furthermore, Teitel (2000)

argues that RJ provides a template at both the macro and micro levels that is broadly consistent with the accepted requirements of conflict transition. Because of these features, restorative justice has become increasingly important in moving society out of violent and divisive political conflicts (McEvoy and Newburn, 2003). Secondly, serious crimes against human rights are brought before international or national courts (depending on universal jurisdiction) and these should facilitate the extradition of offenders to provide legal assistance and protection for victims and witnesses by following the International Human Rights standards (United Nations, 2005: 5) which prohibit 'torture and other forms of cruel, inhuman or degrading treatment or punishment'. Lay justice emphasises that it is a state-directed form of justice, but one problem is that it may not be sufficient to punish a crime, as no legal procedures are involved in the process, which is conducted subjectively and without sufficient knowledge.

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