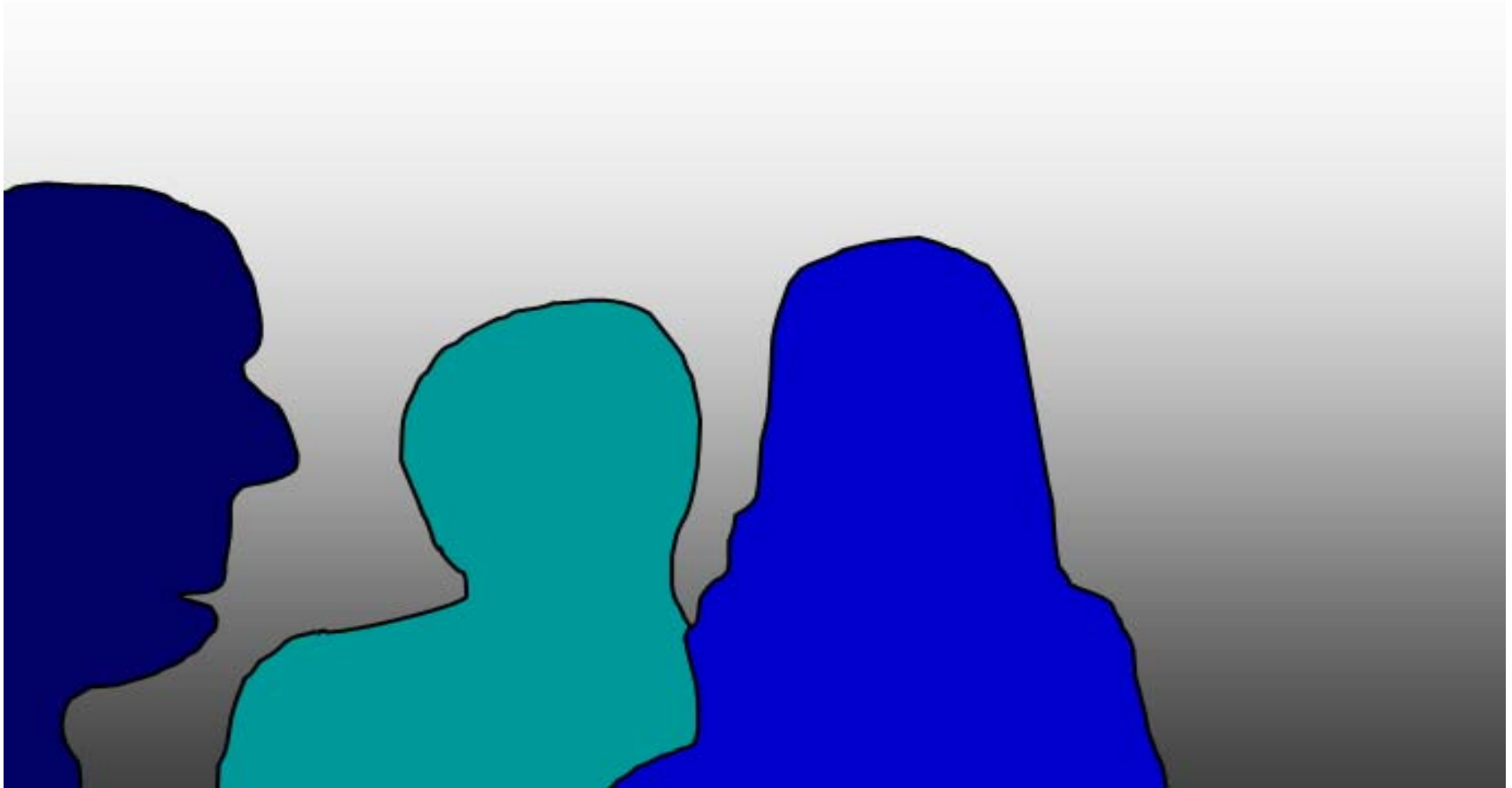


# Restorative Justice – A Victim Oriented Approach (?)

*Michael Kilchling*



- Introduction: The Rise of Restorative Justice in Western Societies
- Historical and Political Background
- Theoretical Approaches: Retributive Justice versus Restorative Justice
- Restorative Justice as Victim Related Approach
- Implementation of Restorative Justice
- *Afternoon group exercise: Restorative Justice in the Case of Terrorism?*

# Introduction

- International Restorative Justice movement:
  - Europe
  - North America and Canada
  - Australia and New Zealand
- Since mid-1970s
- First pilot projects
  - Kitchener/Ontario
  - Wagga Wagga/Australia
- One of the most successful movements in criminal justice theory and policy

# Historical and Political Background

- International movement fueled by an array of diverse theoretical & ideological approaches, and additional political & historical factors
- Theory:
  - Crisis of rehabilitation
  - Abolitionism (Christie 1977: Conflicts as Property)
  - Re-discovery of traditional dispute resolution approaches (Braithwaite 1989: Crime, Shame and Reintegration; 2002: Restorative Justice and Responsive Regulation)
  - Communitarism
  - Movements of informalisation, de-professionalisation
  - Religious approaches (in particular in the US)

- International victim movement
  - Participation, restitution/compensation
- Criminal policy
  - International trend towards diversion and informal case resolution of criminal cases
  - International trend towards mediation in various areas of law
- History
  - Limitations of prosecution through formal criminal justice channels in many current conflict and post-conflict societies
  - Adaption of the restorative justice model

- Common denominator: dissatisfaction with the traditional criminal justice system, in particular its:
  - Limited options for participation in the formal criminal process
  - Formalities of the criminal process
  - Punitive orientation in the sanctioning
  
- Promotion of the restorative justice model as an alternative to the retributive concept of criminal justice



- Purism (Marshall 1999): *"Restorative justice is a process whereby parties with a stake in a specific offense resolve collectively how to deal with the aftermath of the offense and its implications for the future."*
  - process-oriented, focus on inter-personal communication
- Maximalism (Bazemore & Walgrave 1999): *"Restorative justice is every action that is primarily oriented towards doing justice by repairing the harm that has been caused by a crime."*
  - outcome-oriented, focus on restorative solution (reaction, consequence, including even coercive restorative sanctions)

# Theoretical Approaches: Retributive versus Restorative Justice

- Origin: Lex Talionis
- Principle of causality between a human action and a reward or punishment (Kelsen)
  - Compensation for action in form of punishment or reward
  - Adequate punishment as the means for producing the balance between the offense and its punishment
- Punishment as application of the categorical imperative (Kant)
  - It would be immoral and disrespectful *not* to punish
  - Any deviation from the principle of retribution had to be regarded as a public violation of justice
  - Example of the self-dissolving community: execution of punishment is imperative even in case of dissolution (Kant, *The Metaphysics of Morals*, Cambridge 1996, p.106)

- Modern shape/approach:
  - Systems of mandatory prosecution
  - Concept of just deserts
  - Principle of (strict) proportionality

- Concert intervention by state institutions through formal procedures which have specific social functions:
  - Individual and general deterrence (positive, negative)
  - Rehabilitation
  - (where necessary:) Incapacitation

- Four key principles:
  - (Re-) personalisation
  - Participation
  - Reparation/restoration
  - Re-integration
- (Re-) personalisation
  - Victim empowerment
  - Crime is a violation of persons rather than the law (Zehr 2002)

- Participation
  - Victims
  - Offenders
  - community/communities
- Reparation/restoration
  - Victims' needs
  - Material reparation (restitution, compensation), emotional restoration
  - Symbolic reparation
- Reintegration
  - Offenders and victims
  - Offender accountability and responsibility
  - 'reintegrative shaming' (Braithwaite)

- Different modes of application
  - Micro level: individual victimisation, interpersonal conflicts
  - Meso level: conflicts within a group or community
  - Macro level: transitional justice
    - » post conflict societies
    - » mass victimisation, gross human rights violations
    - » traumas, wounds of past experiences



- Basic approach:
  1. Minimisation of the harm and compensation for it at both the individual and the societal level
  2. Reaffirmation of the subjective rights of the persons involved
  3. Restoration of the social peace and mutual trust

(Braithwaite and Strang 2001)

# Retributive versus Restorative Justice

- Retaliation
- Punitive
- Retrospective
- Re-establishing the social and moral balance existing before the *crime* was committed
- Deterrence
- Expressive
- Paternalistic
- Instrumental logic of the law
- Restoration
- Social
- Prospective
- Future-oriented
- Affecting future behavior and restoring the *harm* caused
- Reconciliation
- Moral
- Emancipatory
- Emotional needs of human beings

- Focus on blame and guilt
- *"Did s/he do it?"*
- Imposition of painful punishment
- Deterrence
- State control
- Inquisitorial procedure
- Formal
- Exclusionary
- Case related
- Focus on liability and problem solving
- *"What should be done?"*
- Restitution
- Reconciliation
- Autonomy
- Dialogue and negotiation
- Informal
- Participatory
- Going beyond the individual perspective of the criminal justice system

- The dualistic concepts are too simplistic and do not reflect social reality
- Obscure political alliances
- Restorative practices can affirm or even strengthen existing social inequalities
- Restorative justice establishes new forms of professionalisation and expertise
- Erosion of legal safeguards and rights
- Trend towards formalisation of informal justice ('regulated self regulation', Crawford 2002)
- Significant victim empowerment?
- Impact on recidivism?
- Enhancing community safety?

# Restorative Justice as Victim Related Approach

- Purpose of procedure
  - Offender oriented (guilt)
- Type of procedure
  - Formal
  - No forum for expression or discussion of victim impact if unrelated to the relevant legal subjects
  - Judge or jury as decision makers
- Role of the victim
  - A minor participant (witness, evidence, cross-examination)
  - Only very little attention in common law systems (victim impact statements)
  - Only few civil law systems provide for a (quasi) party status (partie civile, accessory prosecution, acusación particular)

- Outcome of procedure
  - Offender oriented (acquittal or punishment)
  - No or only indirect profit for the victim

- Prioritisation of the victim
- Purpose of procedure:
  - Victim oriented
  - Process oriented (emotional impact, coping and healing)
  - Outcome oriented (compensation, reparation, emotional stabilisation)
- Type of procedure
  - Informal
  - Forum for expression and discussion
  - Mediator as a neutral ('all-partial') supervisor
- Role of the victim
  - A main participant
  - An equal party



- Outcome of procedure:
  - Victim oriented
  - Directly addressed to the victim
  - (Further) penal treatment of the offender is not relevant

# Implementation of Restorative Justice

- UN:
  - *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (ECOSOC Resolution 2002/12 of 24 July 2002)*
- Council of Europe:
  - *Recommendation R (99) 19 Concerning Mediation in Penal Matters (15 September 1999)*
  - *Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters (CEPEJ(2007)13 of 7 December 2007)*
- European Union
  - *Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings*

- CoE 1999 Recommendation R (99) 19  
Concerning Mediation in Penal Matters

## **I. Definition**

**These guidelines apply to any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator).**

- CoE 1999 Recommendation R (99) 19  
Concerning Mediation in Penal Matters

## **II. General principles**

1. Mediation in penal matters should only take place if the parties freely consent. The parties should be able to withdraw such consent at any time during the mediation.
2. Discussions in mediation are confidential and may not be used subsequently, except with the agreement of the parties.
3. Mediation in penal matters should be a generally available service.
4. Mediation in penal matters should be available at all stages of the criminal justice process.
5. Mediation services should be given sufficient autonomy within the criminal justice system.

- EU Framework Decision of 15 March 2001 on the Standing of Victims in Criminal proceedings:

## Article 10

### Penal mediation in the course of criminal proceedings

1. Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure.
2. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account.

- Criminally relevant conflicts
  - *Penal mediation (and other restorative practices)*
- Conflicts which have a potential to produce criminally relevant conflicts in the future
  - *Family mediation*
  - *Divorce mediation*
  - *Etc.*
- Conflicts with educational impact
  - *E.g., school mediation*

# Different Areas of Application

- Juvenile Justice
- General Criminal Justice



- Front end of prosecution
  - (Material) exemption from punishability
  - Measure of (prosecutorial) diversion
- Far end of prosecution
  - Measure of (court) diversion
  - Waiver of sentence
  - Mitigating factor
  - (Formal / material) penalty
  - Probation / parole
  - Ex post mitigation / waiver of execution of penalty
  - Measure during prison term

- Victim/offender mediation (direct, indirect)
- Arbitration
- Family group conferencing
- Community conferencing
- Police mediation / restorative cautioning
- Sentencing circles
- Court mediation (judge of peace)
- Programmes with surrogate encounters:
  - » Victim impact panels
  - » Victim sensitive offender dialogue
  - » Victim empathy programmes

## Thank you for your attention

Dr. Michael Kilchling

Senior researcher

Max Planck Institute for Foreign and International Criminal Law

Günterstalstr. 73

D-79100 Freiburg i.Br.

Tel.: +49-761-7081-230

Fax: +49-761-7081-294

[m.kilchling@mpicc.de](mailto:m.kilchling@mpicc.de)