POLSKA AKADEMIA NAUK • INSTYTUT NAUK PRAWNYCH
ZAKŁAD KRYMINOLOGII

PL ISSN 0066-6890

ARCHIWUM
KRYMINOLOGII

DOI 10.7420/AK2012A

TOM XXXIV/2012

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THE DAWNING OF A NEW ERA IN SOCIAL REACTION TO CRIME: PROMISE, POTENTIAL AND LIMITATIONS OF RESTORATIVE JUSTICE

Prologue: On moving backward

The field of punishment and corrections is a terribly frustrating field. It seems that for some reason every forward, progressive step we make is somehow followed by several backward, regressive steps. One would have thought that crime rates have some impact on the policies of social reaction. Alas, this does not seem to be the case. Crime has been showing a downward trend in most American and Canadian cities in recent years. Several explanations have been offered for such an encouraging trend. It seems however that politics and ideology always retain the upper hand in these matters.

A good example is the new Canadian crime Bill (Bill C–10) euphemistically called *The safe streets and communities act* which makes a number of major changes to the justice and corrections systems including the toughening of jail sentences and the introduction of new mandatory minimum sentences for certain drug and other offences. This retrograde Bill ignores the basic principles of rehabilitation by precluding judges from considering the specific circumstances of the offender and the offence and by tying their hands. Among many other regressive measures the Bill will eliminate conditional sentences which are served in the community or under house arrest, for a range of crimes. Changes to the *Youth Criminal Justice Act* will impose tougher sentences for violent and repeat young offenders, make it easier to keep such offenders in custody prior

to trial and expand the definition of what is considered a "violent offence" to include "*creating a substantial likelihood of causing bodily harm"* rather than just causing, attempting to cause or threatening to cause bodily harm. Despite severe criticism from several quarters, the conservative Government went ahead introducing a host of backward measures that fly in the face of criminological theories and the findings of empirical research. Other than ideological principles and convictions it is hard to find any logical, practical or economic justification for such measures. Some have pointed the finger to the thriving and highly profitable prison industry which stands to make enormous profits through the construction, maintenance (and even the running) of the new penal institutions that the implementation of the Bill will inevitably require (see below).

In his sobering article *"The Caging of America: Why do we lock up so many people?"* Adam Gopnik (January, 2012) finds no more chilling document in recent American life than the 2005 annual report of the biggest of private prisons firm, *the Corrections Corporation of America*. In its report, the company (which spends millions lobbying legislators) cautions its investors about the risk that somehow, somewhere, someone might turn off the spigot of convicted men. It states:

Our growth is generally dependent upon our ability to obtain new contracts to develop and manage new correctional and detention facilities. ... The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws. For instance, any changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional facilities to house them.

In Canada, I personally blame the punitive wave on religious fundamentalism, fanaticism and right wing ideology, an ideology that appeals to the basest of human emotions: the desire for revenge.

Introduction

The main objective of this conference is to discuss Restorative Justice and to debate its merits, its positives and its shortcomings. It seems rather obvious that restorative Justice has no chance of replacing the present criminal justice system unless it gains wide public acceptance and support. To do so requires a full blown two tier plan for action: *first* and foremost we have to show and to document the inherent defects of current punitive policies, their ineffectiveness,

their enormous human, social and material cost and their detrimental consequences for victims and offenders, for individuals, communities and society.

The *second* step requires demonstrating and documenting the superiority of restorative practices as a justice model and showing the viability of the Restorative paradigm as a feasible and better alternative to the present system of retributive justice. Promoting Restorative Justice requires us to show and to prove the improvements Restorative Justice can bring and the advantages it offers over current practices. These are the general ideas that guided me in the preparation of this address. To start I will ask some fundamental questions about justice. Next, in the first part I will offer some criticism of retributive/punitive justice. This will be followed by a discussion of some of the not too visible or obvious benefits of restorative justice and I will follow this up by a brief discussion of restorative justice's limitations and some of the dangers associated with its full implementation. As you can see from this plan it is neither my intention nor is it my task to bombard you with information. We live in an age of information overload. Every type of information is now available at one's fingertips on the internet. I see my role here not as an information-provider but as someone who asks tough questions leaving it to you to find the answers, raises important issues, offers constructive criticism, formulates and advances challenging ideas, and who, hopefully, leaves you with something worth thinking about.

I have to admit at the outset that I am a strong opponent of retributive justice and have fought for the abolition of both the death penalty and the prison system for as long as I can remember (Fattah, 1978; 1982a; 1982b; 1995; 1997b; 2002; 2004; 2007). Throughout my professional career I advocated for the decriminalization and depenalization of countless offences and for diverting wrongdoers from the criminal justice system. I offered compelling arguments to show that crime is not a unique type or a *sui generis* category of behaviour. I maintained, citing countless examples, that criminal behaviour is not qualitatively distinct, that there is no qualitative difference between crime and civil tort, thus undermining the basic rationale for the existence of a distinct criminal justice system with its own arsenal of sanctions (Fattah, 1997c:46). To buttress my arguments I offered overwhelming evidence to show that criminality is neither an intrinsic quality of the behaviour so defined nor an innate character of the prohibited act. I demonstrated that for every behaviour defined as criminal and sanctioned by law, there are identical or very similar types of behaviour that are neither illegal nor punishable. I repeatedly pleaded for the abandonment of archaic theological, philosophical and legalistic concepts that continue to dominate penal law and are always offered as the justification for a distinct legal system dispensing justice of a different kind and meting out sentences of imprisonment or even death

(Fattah, 1992). So I do admit to a negative bias against punishment, retaliation and retribution.

It is also no secret that I am a fervent proponent of *Restorative Justice* and have argued for its adoption and implementation in most of my publications in the last quarter of a century. This, however, does not mean that I blindly support it without any reservations or qualifications or that I see it as the most appropriate reaction in every situation or in all circumstances. I hasten to assure you that my wholehearted support for Restorative justice is not out of desperation to see an end to the destructive, wasteful, costly, burdensome and ineffective system of punishment, but is based on an unshakeable deep conviction of its superiority, its viability, its vitality and its effectiveness as a mechanism of dispute settlement and conflict resolution.

Despite my firm belief in, and my strong leaning towards Restorative Justice, my approach to it is as critical as it is to other justice paradigms and justice models. My conversion to the cause of Restorative justice is not based on blind faith or divine revelation but on a full understanding of its potential and its limitations, its benefits and its dangers, its positives and possible shortcomings, its advantages and the inevitable problems that its general and full implementation will inevitably raise.

Because I realize that I am speaking to the converted, my presentation offers a plea for realism and a warning that Restorative Justice is not a panacea for social misbehaviour nor is it a fully fledged solution to the so-called crime problem.

Having made my position clear, I will leave the modalities, the practices, the experiences of R.J. to those speakers who are daily involved in restorative activities such as mediation and arbitration whose first hand experiences are so invaluable to us because they provide credible testimony of what takes place in the field, in every day encounters. My focus is on the legal, philosophical, sociological, criminological and psychological aspects of this revived and energized old practice of dispute settlement and conflict resolution. I am interested above all in what justice really mean, in the diverse conceptions of justice, its subjective interpretations as well as its objective manifestations. I am particularly interested in the vast cultural variations in doing justice. Looking into my own backyard, the vast Canadian territory, I asked myself countless times: "*Are offenders and wrong-doers sent to prison because it is just to do so or because it is a convenient way to appease the victim and calm society's conscience?*" I could not for the life of me understand how punishing someone by depriving them of their liberty and keeping them in cage-like cells for months or years without end could be a just reaction to whatever wrong they may have done or be described and seen as

doing justice! I ended up thinking: "do not fool yourself, prisons exist not because they do justice or have been effective in protecting society or preventing crime. They do exist simply because they have "always" been there. They are self-perpetuating institutions".

A basic, fundamental question: What is justice?

My focal interest thus lies in exploring and understanding what justice really is. It seems rather axiomatic that we cannot talk about, discuss or advocate Restorative Justice or for that matter any other justice model or paradigm without first understanding what justice is. The terminology of justice has expanded exponentially in the last two or three decades. One can hardly keep up with the terms used to describe various types of justice. My very quick search yielded at least three dozen justice types: traditional justice, formal justice, ordinary justice, retributive justice, punitive justice, vindictive justice, retaliatory justice, distributive justice, restorative justice, peace-making justice, transitional justice, transformative justice, informal justice, healing justice, satisfactory justice, real justice, relative justice, relational justice, commutative justice, procedural justice, contributive justice, instrumental justice, corrective justice, organizational justice, procedural justice, legal justice, social justice, rough justice, street justice, vigilante justice, etc., etc. This is by no means an exhaustive list. So much ink is spilled by the authors trying to describe and explain each adjective but hardly any effort is made to define the noun itself as if justice can be universally defined or uniformly applied, as if the term *"justice"* is self-evident or self-explanatory (Fattah, 2002:312). This is surprising because to my knowledge there is no agreed upon or universal definition of justice! The definition of justice in the dictionary is very disappointing. The definition says that "*justice is the upholding of what is just*" or "*the quality or fact of being just*". So what exactly is just? Similarly, to define injustice as "*that which is not just*" does not seem to be very enlightening or vey explanatory. Those definitions reminded me of the highly criticized definition of crime which says that "*crime is what the law says it is".*

Is there such a thing as natural justice, divine justice? Is justice a biological instinct, is it a psychological imperative? Is the thirst for justice an innate need, an inborn yearning, and if so, how and why is it that so many human beings are not moved by the social and economic injustices that they see all around them all the time? Or is longing for justice an acquired rather than an inbred desire? Is justice a transcendental notion, an immutable concept or is it an evolutionary idea that changes with the times to adapt and become congruent with

the cultural and moral thinking of the era? If justice is evolutionary, how is it that the notions of retribution, vengeance, retaliation and punishment are as alive today as they were hundreds of years ago?

Yes, what exactly is justice? Is justice a universal concept? Do people in different cultures share a common understanding of what justice is? Are there cultural variations in the perceptions of justice and in defining its requirements? How exactly do people who somehow escaped the influence of Western theological and moralistic teachings understand the term "justice"? Do they have in their native language a word equivalent to the word "Justice"? Is justice a theological notion, a philosophical idea, or is it simply a legal concept? Is justice an abstract notion like heaven and hell or is it a concrete, tangible and measurable entity? Is justice a philosophical abstraction, a legal fiction or is it a cultural and a sociological construct? Is justice an absolute or a relative concept? Is justice a subjective feeling or an objective reality? Can justice be quantified and mathematically measured? Can justice be theorized? Is a general universal theory of justice possible?

Despite the dearth of sociological, anthropological and cross-cultural studies aimed specifically at discovering the notions, the conceptions and the ideas of justice among various communities, in particular communities that are as close to the state of nature as can be, some authors, (for example Rawls, 1971) have attempted to formulate a western ethnocentric justice theory. Let us see how successful such valiant attempts could be. A theory is a scholarly construct aimed at explaining a natural, social or behavioral phenomenon. It is a construct that lends itself to empirical testing and validation. According to Webster's 20th Century Dictionary, "*a theory is a formulation of apparent relationships or underlying principles of certain observed phenomena which has been verified to some degree*". A theory requires valid proof of its acceptance and this is what distinguishes theory from a hypothesis or mere speculation. It is possible therefore to develop a criminological theory formulated to explain crime or delinquency or a penological theory such as "*deterrence theory*" which maintains that fear of punishment or the actual experience of punishment does deter people from committing crime.

Justice however is neither a phenomenon nor a theory. It is an idea or better still an ideal, a desideratum. Justice is a subjective feeling and this is precisely why a theory of justice seems no more possible or feasible than a theory of love or hate. This is not to say that it is not possible to study, analyze and compare methods of conflict resolution and dispute settlement in different communities. It is not to deny the possibility of discovering what may be described as a philosophy of justice or developing a justice paradigm or a justice model (Fattah, 2002).

But justice is not something tangible or cognizable. Justice is an abstract notion, a vague concept, it is not something you can touch, taste, smell or hear. Abstract concepts are difficult to grasp. They are hard to define or to describe. They do not have objective or universal meaning. They are perceived differently, interpreted subjectively and understood in completely diverse ways.

Like justice, retribution is an abstract notion, not a theory. To equate retribution with justice denotes faulty logic. Retribution is nothing other than a philosophical or theological justification for the deliberate infliction of pain and suffering on a fellow human being. And the justification is not only ethically flawed, it is morally indefensible. You may agree or disagree, but I personally believe that there is a huge difference between philosophizing and theorizing.

How abstract can the concept of justice be?

To illustrate the extent to which justice is an abstract concept let me give you a concrete example from my home country Canada. Twenty-five years ago, Canada's federal government decided that the criminal justice system needs a complete overhaul and set up a *"sentencing commission"* charged with "*... the responsibility of examining sentencing in Canada and of making recommendations on how the process should be improved*". After conducting a thorough review, the Commission concluded *"that there are serious problems with sentencing in Canada and that these problems cannot be eliminated by tinkering with the current system or exhorting decision-makers to improve what they are doing. The system is in need of fundamental changes in its orientation and operation. Unfortunately these are not novel assessments. The problems have existed for a very long time and in recent years have become the source of extensive discussion and debate. Yet the changes that have occurred have been piecemeal in nature while the overall context in which sentencing takes place has remained virtually unchanged for over a century. Over the course of time, various commentators, federal commissions and committees have identified many of the same problems identified by the Canadian Sentencing Commission. Problems - such as the over-reliance on custodial sanctions and the existence of unwarranted disparity in sentencing - do not require almost two and a half years of inquiry by a nine member Commission to be discovered. Identifying the problems may be relatively easy. Determining the solution is not. The Government of Canada established the Canadian Sentencing Commission in recognition that there exist serious problems in the structure of sentencing and that these problems could only be resolved by a comprehensive set of recommendations which reflected the complexities of the criminal justice system as a whole. The members of the Commission accepted this assessment and were mindful of what had been said about sentencing over the past century". p. xxi*

A few million dollars and thousands of printed pages later; the Commission reached the "earth-shattering conclusion" stating in no uncertain terms that

The fundamental purpose of sentencing is to preserve the authority of and to promote respect for the law through the imposition of just sanctions...

... The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence.

In other words, the most appropriate philosophy for criminal justice is *"just deserts"*! Not a mention of victims, their needs and/or their rights, not a word about providing redress to those victimized, nothing! The commission's conclusion was hardly a surprise to me. Having appeared before *the House of Commons Standing Committee on Justice and the Solicitor General* in 1988 and been accused by one of its members, of wanting to revolutionize the justice system simply because I called for an end to punishment, it would have been too optimistic to expect something truly progressive or other than reactionary from such a backward-looking body. In my comments on the *Sentencing Commission* report and recommendations contained in a brief submitted to the *Standing Committee* in March 1988 I wrote:

In an era meant to become the golden age of the victim, there seems to be a growing obsession with punishment, euphemistically called "just deserts". Yet having punishment as the central focus of our criminal justice system is neither morally legitimate nor practically effective. It can only act to the detriment of the victim. Dispute settlement, mediation, reconciliation, arbitration, reparation, are concepts foreign to a system based on punishment, a system that regards the crime not as a human action but as a legal infraction. The operation of such a system acts to intensify the conflict rather than solving it. And instead of bringing the feuding parties together it widens the gap that separates them (Fattah, 1988).

Some years later, Todd Clear (1994) expressed similar views affirming that penal harm does not help the victim and cannot make the victim whole again. Instead the focus on getting even with the offender could in some ways divert the victim from his/her personal path of recovery. Clear adds:

In this way, the emphasis on penal harm may actually be a disservice to the victim, in that it promises that if the State is only able to impose a penalty severe enough, the victim will be able to overcome the crime. The focus is placed on what happens to the law violator, not what happens with the victims. The victim's victory at sentencing is eventually exposed as a pyrrhic conquest, for the problem faced by the victim does not center on the offender (1994:173).

Part one: Reflections on social reaction to crime in the 21st century

As a lawyer and social scientist I have always been fascinated and intrigued by the phenomenon of social reaction to crime: its history, its manifestations and forms, its current state and its possible future. It always perplexed me that despite the ever growing secularization of society and the quasi complete separation of Church and State, social reaction remains dominated by theological teachings and religious philosophy. Despite its historic failure in preventing crime or reducing offending rates, and despite its horrendous human, social and financial costs, punishment continues to thrive and flourish. How could this be explained? How is it possible that in this day and age, in the 21st century, an advanced, civilized society such as the United States continues to practice the archaic relic of the death penalty?

One of the republican candidates aspiring for the nomination to the US presidency in 2012, Mr. Rick Perry, could not hide during the nomination debates his pride at having signed more death warrants than any other governor in the history of the state of Texas. He boasted about this despite the fact that the innocence of some of those for whose execution he was responsible was proven notwithstanding the overwhelming hurdles in the way of establishing that a judicial error was made?

Were Beccaria to come back?

If 18th century Italian philosopher and justice reformer *Cesare Beccaria* were to be resurrected and were God to send him back to earth to check and report on the state of criminal justice in post industrial, 21st century societies, there is little doubt that he would be utterly shocked to find out that criminal justice has changed little, if at all, in two and half centuries since his immortal essay *"Dei Delitti e Delle Pene"* was published anonymously in 1764! Surely he would be overwhelmed by the drastic social changes and the technological innovations he will see all around him, but he would also be amazed that penal philosophy has undergone little change and is still dominated by the theological teachings of the Old Testament. He would certainly be at loss to understand that retribution continues to be the key principle in sentencing and that criminal court judges continue their futile and hopeless struggle to make the punishment fit the crime!

A confirmed abolitionist, Beccaria would undoubtedly be disheartened to learn that the *Talion Law* principle of life for life is still being practiced in the two most powerful countries on earth, namely the USA and China, as well as in a host of developing countries such as Iran and Saudi Arabia.

Beccaria would be dismayed to find out that legal vengeance is the current norm of criminal justice. Probably what would shock Beccaria most would be to discover that the two main punishments meted out by the criminal courts in his time, namely fines and incarceration, remain the main punishing tools in present day courts of law.

As a libertarian and staunch defender of the rights of the individual, Beccaria would have hard time comprehending that in supposedly free, democratic societies, people are being punished and incarcerated for using drugs such as marihuana, cocaine, ecstasy, amphetamines, etc. when the use of other mind altering and mood-modifying drugs such as alcohol, tobacco and caffeine is perfectly legal and rampant.

Having forcefully stressed the need to protect the citizens against the despotism of power one has to wonder what Beccaria will think when he finds out that the richest and most powerful country on earth practices targeted assassinations and extra judicial killings of suspects who were never charged or faced justice in a court of law?

Beccaria would be devastated when he learns that 2,284.000 Americans are behind bars and that six million are under correctional supervision. Even more shocking to Beccaria would be the statistics showing that 50,000 Americans are daily in solitary confinement while 70,000 are raped in American prisons every year (see Gopnik, 2012; Stewart, 2012).

Beccaria who must have been very familiar with the Roman practice of throwing early Christians to the lions would undoubtedly be horrified to discover that in this day and age, in the Louisiana State Penitentiary at Angola, hard core inmates sentenced not only to life imprisonment but to sentences of 90, 100 or 150 years, are being thrown to the angry bulls, under pretext that it is a rodeo.

Beccaria will seek leading criminologists and Stockholm prize winners in his attempt to understand and to find some explanation for why despite social upheavals, despite the technological revolution, the CJS has remained archaic in its philosophy, its outlook and its tools. He would want to know why the CJS has remained insulated from whatever progressive changes and advances that have taken place in society and why the system has resisted every attempt to modernize and change.

Alas! Beccaria is bound to be terribly disappointed as very little in-depth research has been done to adequately explain the real reasons for criminal justice's misoneism and resistance to change. And he definitely would want to understand why it is that despite the ever growing secularization of society, criminal justice has been totally unable, even unwilling to free itself from the shackles of religion, to shed its retributive mantle, to adopt new progressive policies and philosophies, and to pursue new avenues and horizons.

Yes, Beccaria would undoubtedly be distressed to discover that whatever little or cosmetic changes have taken place in the past two centuries have not been bold, progressive, earth-shattering changes aimed at revolutionizing the CJS and bringing it to the standards of the space age but rather regressive changes that continue to drag the justice system ever closer and closer to state vengeance. Beccaria would be deeply puzzled that a society which made spectacular advances, achievements and unbelievable innovations in every sector and every aspect of human life has been totally lacking in imagination when dealing with offenders and law violators. He would be perplexed that a society that managed to send astronauts in space can find no other solution to crime and conflict but sending offenders to prison.

Beccaria's report to God will surely not be flattering to the human race. He will report that while humans showed enormous ingenuity in inventing and practicing methods of torture and modes of punishment they were totally unimaginative when it became necessary to find more humane and less barbaric means of dealing with wrong doers and law violators.

A puzzling question: Is punishment synonymous with justice?

What the *Canadian Sentencing Commission*'s report, mentioned earlier, did was to revive a troubling question that has haunted me throughout my professional life. How could it be that punishment, the deliberate infliction of pain and suffering, the degradation, the deprivation of liberty, be called or perceived as *justice*? How could it be that putting a human being full of life to death in a deliberate, calculated, cold-blooded manner be called or perceived as *justice*? Even more incomprehensible to me is that the death row inmate has to be physically healthy and of sound mind to be executed!

For over half a century I have been trying desperately to find the answer. Finally I came to the painful conclusion that support for punishment is not a reflection of *the monstrous side of human beings* (which is the title of the new

book I am working on) nor is it due to the sadistic impulses of politicians and law makers. It is above all an expression of exasperation, helplessness; hopelessness that creates an attitude of total resignation and leads to the mistaken belief that punishment is indispensable and irreplaceable.

Nothing exemplifies more this total resignation and utter lack of imagination than a paper signed jointly by Dan Prefontaine and Yvon Dandurand of the "*International Centre for Criminal Law Reform and Criminal Justice Policy*". The paper entitled "*New Directions in Sentencing- Is Punishment Working?"* is based on a seminar organized by the *National Judicial Institute on Criminal Law, Procedure and Evidence* held in Vancouver on March 13–15, 1996. A quotation from the paper will help, I hope, illustrate what I mean. It reads:

The organizers of today's seminar are challenging us to reflect on "whether punishment works". We would suggest, however, that the obvious answer to that question is "It better work", because we have not yet invented anything that can replace it as a credible response to wrongful and harmful social behavior. If punishment does not work, then we surely have to abolish our whole criminal justice system, because the whole system is predicated on the assumption not only that punishment does work, but also that it is necessary to restore and maintain peace and harmony in the community. (p. 4).

Here you have it, a seminar bringing together some of the brightest and learned judges and lawyers in Canada telling us that punishment better work because nothing has been invented to replace it and since the whole system is built on it, if it is shown that it does not work the whole system would crumble. Well with all due respect to the authors and all the fine legal minds who attended the seminar I would like to strongly affirm without any hesitation that punishment does NOT work and that there are better, more constructive, and less devastating methods of restoring and maintaining peace and harmony in the community other than punishment. And we should all be grateful that today's symposium is devoted to one of those methods, namely *restorative justice.*

If the view expressed in the above quotation is that of the learned judges, lawyers, legal scholars and researchers, is it any wonder that no one seems to dare denounce the punishment mania or to challenge the institution of punishment as an archaic, antiquated, anachronistic or as a barbaric and inhumane mode of social reaction to harmful, injurious social acts? Is it any wonder that the criminal law has remained frozen in the era of vengeance and continues to be fixated on punishment and to have it as its corner stone?

How is it that almost three centuries later, the abstract notions of the *Enlightenment* era that underlie the penal law of western societies such as free will, moral guilt, moral responsibility, *mens rea*, malicious intent, malice

aforethought, premeditation (not to mention fictitious concepts such as *dolus eventualis* or so-called indirect intention) remain immune to challenge or even criticism? How is it that no one is bold enough to declare those notions and concepts outdated, unscientific and in flagrant conflict with the findings of the behavioral and social sciences?

How it is that punishment has become synonymous with justice and that justice has become a euphemism for punishment? How it is that justice and punishment have become almost interchangeable terms? How is it that slogans such as "*justice for victims*" are invariably interpreted as demands for more and harsher punishments?

How is it that victims who, as Nils Christie said, are the primary owners of the conflict (Christie, 1977) whose property rights were usurped, and whose rightful dues paid to them in the form of "*wehrgeld*" or composition were expropriated by the state, were led to believe that justice is vengeance and retaliation and that the harsher the punishment, the more just is the judgement?

How is it that the theological and abstract notions of retribution, expiation, atonement and penitence became so entrenched in people's minds that no rational thinking, no scientific evidence, no economic crisis, no humanitarian endeavor seems to be capable of shaking such religious beliefs or lessening the incessant demands for punishment?

How is it that punishment has become so universally accepted, extremely popular and so widely practiced that people and governments, even in the hardest economic times, are more than willing to waste billions and billions of dollars for no other reason but to inflict pain and suffering on those fellow citizens who have violated man made laws?

To find the answer to these difficult questions one needs to look at those rare places on earth where the inhabitants are as close to nature as could be, where overzealous missionaries did not venture and to the very few communities and cultures that somehow escaped or were shielded from the teachings of the old and new Testaments. In those communities, like the Canadian North, prior to European settlements, one will discover different practices, different modes of dispute settlement and conflict resolution, peaceful and more harmonious methods of doing "justice". One will find the true origins of the restorative justice paradigm.

Part two: The dawning of a new era in social reaction to injurious & harmful behaviour

The dark tunnel of punishment has been a long and painful one. For centuries both lay persons and professionals have been desperately searching for some light at the end of the tunnel. Many like me have been dreaming of a new non-punitive era in criminal justice. The advent of Restorative Justice rekindled the hope that this new era is dawning upon us.

Restorative Justice is by no means a new concept or an ingenious idea. Nor is it a radical or revolutionary method for solving conflicts or settling disputes. What it is, is a rational, peaceful and constructive way of restoring harmony and order that were disrupted by the harmful or injurious act.

Restorative justice offers a great promise. It offers to move us, or rather to remove us, from the medieval system of punishment that has been in place for centuries to a new era of social reaction to harmful, injurious behaviours, to personal conflicts and disputes. It promises us a peaceful, constructive, less onerous, less costly, less wasteful, less painful way of dealing with those who offend. It offers justice without caging those responsible. It promotes forgiveness, not revenge. It restores harmony while ensuring redress to the victim. It promises to get us out of the big penal mess we are in right now.

I still remember with ever growing nostalgia the 1960's and early 1970's when serious attempts were made aimed at the humanization of the criminal justice system. Unfortunately, those progressive penal policies were soon replaced by regressive changes during the conservative era of Ronald Reagan, Margaret Thatcher and Brian Mulroney in Canada. But the futility and the enormous costs of the new wave of repression were bound to call into question the rationality of those punitive policies. The search for less destructive and less costly alternatives became a priority. Inspired by how native and aboriginal communities deal with conflicts and harmful actions, with offences committed by some members of the group against other group members, there were demands for peaceful and reconciliatory means of conflict resolution. Critics of the system wanted to make justice work and to make offenders pay. Restorative justice proponents called for the socialization and humanization of justice, for the personalization and civilization of conflicts. Victims' advocates demanded that justice be made more sensitive to victims and more responsive to their needs and their wishes. Soon restorative justice became an attractive option. It is not difficult to understand and explain the irresistible appeal and the growing popularity of restorative justice. Restorative justice calls for restitution not retribution, for redress not revenge, for reconciliation not retaliation, for reparation not incarceration (Fattah, 2004).

The major appeal of restorative justice is that it reconciles the aims of those who demand recognition of and a voice for the victim and those who feel that punishment is an abuse of the State's power and a misuse of public funds. What draws people from different backgrounds and different ends of the political spectrum to restorative justice is its ability to satisfy those who are in favour of active victim participation in the justice process and those who believe that offenders need to be sensitized to the pain and suffering they had inflicted upon their victims, those who feel that redress to the victim should be the primary objective of the justice process and those who want to hold offenders accountable for their actions (Fattah, 2004).

Some overlooked benefits of restorative justice (see Fattah, 2004)

The benefits of restorative justice and the clear advantages it has over the current punitive system of criminal justice have been explained over and over again in the abundant literature on restorative justice. They are well summarized in the preamble to the recommendations made to the *Council of Europe by the Committee of Experts on Mediation in Penal Matters chaired by Christa Pelican with the active participation of Ivo Aertsen.* Among other things, the Committee (1999) stressed that mediation in penal matters is a flexible, comprehensive, problem-solving, participatory, and viable alternative to traditional criminal proceedings, an alternative that satisfies a strongly felt need to enhance active personal participation of the victim, the offender and others who may have been affected, as parties, by the offence. The Committee also noted that mediation enhances the involvement of the community and recognizes the legitimate interest of victims in having a stronger voice in dealing with the consequences of their victimization, as well as their need to communicate with the offender to obtain an apology and reparation. The committee also emphasized that mediation encourages offenders' sense of responsibility and offers them practical opportunities to make amends which may further their reintegration and rehabilitation. It also has the potential of increasing the awareness of the important role of the individual and the community in preventing and handling crime and resolving its associated conflicts, thus encouraging more constructive and less repressive criminal justice outcomes.

All of those arguments are well known to those with an interest in restorative justice. I personally have discussed them at some length in my writings on the topic (Fattah, 1993; 1995; 1998; 1999; 2000). So is there anything that has not been said or remains to be said about the positives of restorative justice? Are there some hidden benefits that have been somehow overlooked and have not been thoroughly discussed in the fast growing literature on this exciting and promising model of justice? I will briefly discuss eleven of the less often discussed or overlooked benefits of restorative justice.

1) Restorative justice avoids the inherent arbitrariness of retributive punishment and the enormous disparities in its application

Arbitrariness is a structural, innate and irremediable defect in retributive systems. To maintain that a given number of days, months or years in prison is a fair and equitable punishment for offences such as assault, rape, robbery, or else, strikes me as the height of arbitrariness (Fattah, 1982). It is rather difficult to understand how intelligent people: lawyers, scholars, academics and others could believe and maintain that pain can be measured and dispensed according to some kind of mathematical formula. How could they believe it is possible to create some kind of equation that would make a prison sentence fit a crime that has caused physical or psychological injury, material harm or loss? That a seriously flawed concept and a fundamentally defective sentencing model like "*Just deserts*" could be accepted and implemented for so long is a mystery. When Prof. Graeme Newman of the School of Criminal Justice at Albany suggested many years back, at a meeting of the *American Society of Criminology*, that carefully measured electrical shocks be used to inflict a just dosage of pain on criminals, those attending the meeting simply laughed at him. And yet his suggestion makes more sense than the arbitrary use of imprisonment as a retributive sanction. Surprisingly, sentencing models that adopt a very similar punishment philosophy, such as the *Just deserts model*, are not greeted with laughter, and more surprisingly, they are even taken seriously by some scholars and policy makers. Except in a purely theological perspective, retribution is not, and can never be, an instrument of justice. To speak, therefore, of' retributive justice, is a contradiction in terms. And as it is impossible to establish a fair equation between the punishment and the crime, between the pain to be inflicted upon the offender and the pain caused by the offence to the victim and his/her family and associates, we should stop associating justice with retribution, as is often done when the popular term 'retributive justice' is used. We should also remove the word "just" from the sentencing model that is erroneously called "*Just deserts*" and call it instead 'the arbitrary desert model'.

2) By settling conflicts through a process and outcomes somewhat similar to that of civil courts restorative justice offers a remedy* to *the arbitrary distinctions between civil and criminal conflicts

Punitive/retributive justice is based on an erroneous premise, the premise that crime is a unique, distinct or exceptional category of behaviour. It is also based on a false dichotomy between the so-called crimes and civil wrongs. Both the premise and the dichotomy are fallacious. A comparison between acts made punishable by the penal law or criminal statutes and similar behaviours that are

left unregulated, or are regulated by non-criminal rules or by administrative bodies, reveals that there is no qualitative difference between criminal and non-criminal behaviour. In fact, for every behaviour defined as criminal and sanctioned by law, there are identical or similar types of behaviour that are neither illegal nor punishable (see Fattah, 1997). If crime is not qualitatively different from civil torts or civil wrongs, then there is no valid reason to accept redress to the injured or harmed party in the latter and to insist on sanctions of a completely different nature for the former. One also has to wonder why it is that in the case of civil torts the damages ordered by the court go to the victim whereas in criminal offences the penal fine goes to the public treasury. Surprisingly, many of those who oppose the notion of restorative justice and continue to demand retribution, even for non-violent crimes, have no problem accepting administrative or civil remedies for various types of corporate, white-collar and professional crimes, and voice no objection to the civil regulation of corporate wrong doing.

3) Restorative justice avoids the vagaries and inherent injustice of punitive systems

The enormous and inevitable disparities in the application of retributive punishments make a mockery out of what is supposed to be a fair and equitable justice system. No sentencing guidelines, no sentencing model has ever, or will ever, be able to remedy even partially the flagrant punishment disparities. Whether the disparities are a direct outcome of structural flaws in the system, whether they are the result of attitudinal differences, systemic discrimination, or whether they are due to misguided reforms (such as Victim Impact Statements and the right of allocution), the end result is the same. Offenders who commit similar or identical crimes end up receiving enormously different punishments. The disparity in sentencing has become even greater with the introduction of what could only be described as lunatic laws such as *'three strikes and you are out'* which make a travesty out of what is supposed to be a fair and equitable justice system. In the American states, which introduced those laws, such as the State of California, a person with two felony convictions who commits an act of shoplifting could be sent to prison for life. Another found guilty of a serious crime, such as forcible rape, and who receives the average penalty for rape is sentenced to five years.

4) Restorative justice avoids or at least minimizes the inherent bias of punitive justice

Punitive justice is not only arbitrary but is inherently discriminatory as well. It is manifestly biased and it is this bias that explains why the vast ma-

jority, the bulk of those incarcerated are the powerless, the poor, the have not's, the members of racial, ethnic and religious minorities. Take, for example, the advanced and generally progressive country like Canada. Despite enlightened attempts by the Government in 1996 to alleviate just one aspect of the manifest bias against members of Canada's first nation, by changing the Criminal Code requiring sentencing judges to look for alternatives to imprisonment "*with particular attention to the circumstances of aboriginal offenders*", members of Canada's 1st Nation continue to be overwhelmingly overrepresented in Canada's penal institutions. On April 17, 2012, an editorial in *The Vancouver Sun* (P. A 14) stated that:

"*Aboriginal overrepresentation is a long standing and growing problem. For example, in 1988 aboriginals accounted for 10% of federal inmates (those serving two years or more), while making up just two per cent of the population. By 1999, the percentage of aboriginal inmates in federal custody had increased to 12 per cent, and by 2005, aboriginals accounted for 17 per cent of the federal inmate population. And aboriginal overrepresentation is more dramatic still in provincial reformatories.... Reports over the years have pointed to institutional bias within the criminal justice system itself – specifically to evidence that courts are more inclined to deny bail and to impose more and longer prison terms on aboriginals than on similarly situated non-aboriginals*".

But punitive justice discriminates in so many other tangible and intangible ways. Having abolished the death penalty, incarceration is now the most severe sanction meted out by the criminal courts. Despite the fact that it is the most unjust and most unfair sanction there is, there is an overreliance on imprisonment as a means of punishing offenders and every alternative proposed over the decades to reduce its use has failed. The principles of retribution, of just deserts, of proportionality all require making the punishment fit the crime. When the sentence to be meted out is imprisonment, all three principles require a dose of deprivation of freedom that equals the harm or injury done to the victim. In this context I always find it interesting to quote Gilbert & Sullivan who in their operetta "*The Mikado*" refer to this eternal dilemma in a light-hearted verse:

My goal is all sublime
I shall achieve in time
To make the Punishment fit the crime!

The pains of imprisonment vary greatly from one offender to another so how on earth could individual judges in their wisdom come up with a length of incarceration that corresponds to an assault, rape or robbery

The system of punishment in every country on earth that practises it is characterized by the enormous disparities and unwarranted and unexplain-

able variations in sentencing from judge to judge and from court to court. What is disconcerting is that the variations do not follow any discernible pattern that would help explain their existence. Attempts to remedy the enormous disparities in sentencing such as fixed sentences, minimum sentences, presumptive sentences, etc. make a mockery of the principle of proportionality. The so-called principle of just deserts requires that the amount of pain the offender is made to suffer is equal to the pain he had inflicted upon his victim. But is pain quantifiable? Do we have an accurate means of measuring an accurate dosage of pain? Rather than the infliction of pain there must be some way or resolving conflicts and settling disputes where there is some gain for the person or persons who suffered at the hand of the harm doer. This is precisely one of the primary objectives of restorative justice.

5) Restorative justice would put an end to the unfair and shameful practice of plea bargaining

Plea bargaining is an unfair and shameful, though popular, justice practice, more Common in Anglo-Saxon systems than the justice systems of continental Europe. In the United States, for instance, 90 per cent of all the cases in which offenders are charged end up with a plea bargain (Ranish & Shichor, 1985). The offender, or more frequently his lawyer, makes an agreement with the prosecutor (sometimes with the blessing of the judge) by which he/she accepts to plead guilty to a lesser charge in exchange for a milder sentence. For obvious reasons, victims are excluded from the negotiation process that leads to the guilty plea. They get surprised, frustrated and resentful when they discover that the charges laid by the prosecutor or the Crown attorney bear no, or little, resemblance to the actual offence committed against them. And when the mild sentence resulting from the bargain is finally pronounced, they become infuriated and feel betrayed by the criminal justice system, by society, and by society's representative, the prosecutor. This sense of betrayal is an inevitable characteristic of punitive justice systems because they promise victims more than they can deliver and create expectations that can never be fulfilled in practice.

6) Restorative justice encourages and enhances victim reporting

Legalistic interventions usurp the victim's decision-making powers. The current system of criminal justice gives victims no say and no choice. It snatches the conflict from its legitimate owner, the victim, and hands it to the public prosecutor (Christie, 1977). By so doing it discourages in many instances victim reporting of the offence. Victims who, for one reason or another, do not want the offender punished (either by a prison sentence or a penal fine) are

naturally reluctant to go to the police with their complaints. The same is true of victims who are related, in some way or another, to their victimizers. Knowing that the arrest and subsequent punishment of the offender will sever the bond or will strain the relationship beyond repair, they simply refrain from reporting their victimization to law enforcement bodies. Replacing punishment with a non-punitive conflict resolution mechanism would render those victims less reluctant to report. Restorative justice alternatives also promote the reporting of victimization by members of disadvantaged social groups that dislike, distrust, or try to avoid the police. Speaking of the promise of restorative justice in the case of wife battering, Presser and Gaarder (2000, p. 186) suggest that restorative justice has the potential to increase victims' likelihood of reporting the abuse. This is because it offers an array of flexible interventions, which can be particularly appealing to women who distrust the criminal justice system such as members of social, ethnic and religious minorities.

7) Restorative justice minimizes the chances of retaliation and the risks of repeat victimization

This is without doubt one of the most positive aspects of restorative justice. Conflict resolution and dispute settlement are undoubtedly the most effective means to ensure that the violence will not flare up again, that the emotions that fuel the aggression are held in check. Most acts of violence are retaliatory in nature and a very high percentage are committed between people who are related to one another by some family relationship or other personal ties. Unless reconciliation is achieved, the seeds of violence will always remain. Restorative justice aims at restoring the peace and harmony disrupted by the offence, at revitalizing the bonds and ties that were severed by the criminal act. And contrary to the retributive system that feeds on vindictiveness and the thirst for revenge, restorative justice promotes forgiveness, understanding and restitution. It gives the victim and the offender a chance to meet face to face to reach a mutual understanding of one another, to put the past behind them and to come to a fair and just agreement about the future. Restorative justice makes wounds heal and is thus beneficial to the coping process, to the psychological well- being and the satisfaction of the victim.

8) Restorative justice is the only possible way of dealing effectively with the new blood feuds in modern society

There is a great deal of anecdotal and historical evidence showing that the most effective, perhaps the only way, to settle blood feuds in agrarian societies such as Albania, Sardinia, Sicily, Macedonia, Egypt, Nigeria, etc., is mediation,

reconciliation and compensation. Opponents of restorative justice claim that these types of long-standing conflicts and blood feuds no longer exist in modem, industrialized, urbanized societies. They fail to recognize various types of conflict, common in urban centres that have replaced, or are the modern equivalent to, the traditional blood feuds in agrarian societies. Among those are youth gang wars, drug dealers turf struggles, blood battles between organized crime factions, settlement of accounts between members of rival groups, such as motorcycle gangs, etc. Add to this the racial, ethnic and religious conflicts like those between Catholics and Protestants in Ireland, Arabs and Jews in the Middle East, Muslims and Copts in Egypt, Christians and Muslims in Nigeria, Supremacist groups and new immigrants, or ideological conflicts such as between the pro-life and pro-choice groups, environmental conflicts, etc. The only remedy and the most effective solution to violent acts emanating from those conflicts and similar ones are mediation and reconciliation. This is because the attitude that is basically responsible for the violence and for the conflict in the first place, is *INTOLERANCE.* Punishment and penal sanctions, whether imprisonment or the death penalty, do not change this attitude. If anything, they are apt to perpetuate the conflict and to contribute to the escalation of violence. Restorative justice designates the prevention of repeat victimization as one of the primary goals of the process of mediation and reconciliation and as a strategic priority of victim services (Fattah, 2000). It acknowledges that what victims desperately want, even before redress, is the freedom from fear and from the threat of future victimization. This is why when victims ask for, or seek, imprisonment for the offender, it is not, as erroneously believed or as retributivists claim, to satisfy their thirst for revenge, but to seek some assurances about the threat of future victimization a threat that disappears when reconciliation is achieved.

9) Restorative justice personalizes the response

Philosophers who tried to find an acceptable ethical or moral justification for punishment always insisted that for punishment to be just, it has to be personal, meaning that it is inflicted on the guilty person and no one else. But retributive sanctions punish not only the guilty but the innocent as well, thus contravening one of the fundamental principles of justice. Punishment can never be made personal because its effects inevitably extend to others who have done no wrong. The worst example is undoubtedly the death penalty. But the same is also true of incarceration. A prison sentence is a punishment not only for the offender, but also for the family, the friends, and for everyone who cares about or relies upon the offender. If he is an employer it penalizes the employees, if he is a worker the incarceration can cause disruption in his work place, and so forth.

10) Restorative justice offers some remedy to victims whose offenders have not been identified, arrested, convicted and punished

The attrition in the legal process means that only a very tiny fraction of those who offend are punished! This is because a large number of offences, even serious offences, are never reported for one reason or another. Others are reported but no action is taken. Add to this that the clearance rate, particularly in property offences, is extremely low. In many cases no charges are laid and even when charges are laid, a number of cases end up in acquittal. All this means that more than nine out of ten victims get no satisfaction and no redress from the punitive justice system. This is not the case with restorative justice models that provide compensation as well as other help and assistance to those victims whose offenders are not known and have not been caught. Restorative justice is not to be pigeon-holed as a diversion or a mediation practice. Restorative justice is much more than just victim-offender mediation. It is about helping victims overcome the economic consequences and the traumatic effects of victimization, regardless of whether the offender has been identified and arrested or not.

11) Restorative justice is the most appropriate model for cases of undisputed harm

In the vast majority of criminal cases that reach the court the harm is not disputed. This inevitably raises the question of the criminal justice system's role in cases of undisputed harm. It may be argued that when the basic facts of the case are being disputed there is a need for a neutral, impartial mechanism, an adversarial system to establish what really happened, who is at fault, and what is the extent of the harm or injury that has been caused. But when the harm is undisputed, why should the system impose its own judgement on the parties rather than letting them reach their own agreement about the best, the fairest and most acceptable way of repairing the harm? Why should the system be allowed to substitute its judgement for that of the victim? Japan is a good case in point because in more than 95% of the cases with a known offender, there is a freely obtained confession. How can the involvement of a formal adversarial justice system be rationalized or justified? How can the enormous expenditures of the system be justified? To maintain that the unilateral determination of punishment is a process of doing justice simply defies logic and rationality. How can such an authoritarian, non-participatory process be preferable to restorative justice practices, be it mediation, sentencing circles, group/community conferencing or else?

Part three: On some of the dangers and limitations of the restorative justice paradigm

A) Some of the dangers to, and of, the restorative justice paradigm

In a paper I published some years ago (Fattah, 2004) I tried to draw attention to some of the dangers that Restorative Justice faces and some of the dangers it poses.

1) The danger of hasty and faulty implementation

The history of criminal justice is replete with good ideas that failed and good intentions that never achieved their potential. Unless we proceed carefully and measure our actions circumspectly, the fate of this promising paradigm may not be better than many of those that have preceded it. How many excellent ideas were introduced over the years into the justice system only to fade and die, sometimes a quick death and other times a slow one? Hopes were raised only to be shattered, and the great promises never materialized. Those innovative ideas that failed testify to the system's resistance to change, its reluctance to accept and accommodate new concepts and new models. This should be a warning particularly to those who naively believe that the only hope for restorative justice is to be implemented within or through the existing system of criminal justice.

2) The danger of failing to gain and secure the support, the involvement and the active participation of the community

Restorative justice is community justice. It has no chance of succeeding or replacing the existing punitive system unless it is fully endorsed by the community and unless members of that community are actively involved in the resolution of conflicts and the settlement of disputes. Without strong community support and without intensive and extensive community involvement there is a real danger of replacing a State-run bureaucracy and a State-controlled system with yet another bureaucracy and another system under state control. This is precisely what is happening in some countries where mediation is now a bureaucracy run and controlled by State prosecutors.

3) The danger of widening the net of social control

Because the danger of net-widening is ever present and too well known, there is no real need to dwell upon it in any great detail. Suffice, therefore,

to draw attention to the early warnings offered by some of those who assessed the pioneering experiments in restorative justice like Dittenhoffer & Ericson (1982, 1992:341) who wrote:

"Interests distinct from those of correctional reformers have particularly given credence to the theme that VORP is destined to become part of the widening net of social control, similar to many previous reforms which have enhanced the discretion of various officials in different ways".

Like many other innovative programs (community service is just one example) in the past there is a real danger that restorative practices will become an add-on to punishment rather than genuinely replacing it to become the sole or primary mode of social reaction to harmful, injurious behaviors.

4) The danger of restorative justice being co-opted by the existing agencies of the Criminal Justice System it replaces

As Davis (1992) warned in the early days of restorative justice, vested interests in the present system will do everything to marginalize new ideas, which threaten their basic assumptions or their very existence. If attempts at marginalization happen to fail, they will try to co-opt the new programs. This should lead to increasing caution about the dangers of compromise, and to reject any strategy based on the naive belief that the only way of implementing restorative justice is through pilot projects or small-scale experiments conducted within the system. Those who believe that this is the way to go should only look at mediation programs in different countries that had to close down because of lack of referrals from prosecutors.

5) The danger that restorative justice may develop into an offender – or victim-centered justice alternative rather than having both victim and offender as its central focus

In his insightful analysis of the history of victim initiatives, Paul Rock (1990:408) explained how many of those initiatives were not really meant to help victims but were designed to serve other purposes or some ulterior motives. He said:

"*... criminal injuries compensation was supposed to mollify the reactionary victim-vigilante and reparation was a device to divert offenders from custody. In both instances, victims were the creatures of penal imperatives, invested with the characters needed to get on with the business of reforming prisons. Compensation and reparation did not have much of a foundation in the declared or observed requirements of victims themselves: they were bestowed on victims in order to achieve particular ends".*

When restorative justice practices started in Canada and the United States spearheaded by the Mennonite Church, redress to the victim prevailed over every other consideration. Although the programs initially called themselves VORP "*Victim-Offender Reconciliation Programs*" their foremost objective was to ensure restitution by the offender to the victim and to see to it that the offender fulfils the obligations agreed upon in the mediation agreement. Not surprisingly they were sarcastically described as collection agencies for the victim. That the programs deviated from their original objectives was highlighted in one of the early evaluations of the programs by Dittenhoffer & Ericson (1982) who stated that:

"*This investigation has revealed the manner in which the programme actually does operate, only partially obtaining its goals and departing substantially from the picture painted by most descriptions of the programme".*

As the goal of reconciliation became secondary to that of restitution and as it proved to be an elusive goal, the programs had no choice but to change their name from "*victim-offender reconciliation programs*" to "*victim-offender mediation programs*". If there is a lesson to be learnt from those early restorative justice initiatives it should be the realization of how essential and how important it is to maintain a fair and equitable balance between the interests of the victim and the interests of the offender. Those pioneering efforts show how vital it is, for the credibility and effectiveness of the programs, not to tilt the scale or to favor one party over the other. Those early experiments should also teach us to stick to the defined objectives and not to let administrative or pragmatic considerations alter what the programs are set up to achieve.

6) The danger that restorative justice will become a victim of its own success

Nothing can be more dangerous than success, particularly rapid or quick success. The speed with which restorative justice programs, projects and experiments are being implemented is a constant reminder of the initial success and the instant explosion of diversion programs six decades ago. It should give us a reason to pause and reflect on how long the interest can last? How long can the enthusiasm be sustained before it begins to wane? How long can the state of euphoria be maintained? All this leads to the question: could restorative justice become a victim of its own success? The alliance formed around and is currently promoting restorative justice inevitably raises suspicion about the interests and the motives of the diverse groups that seem to be united in their support of the new model. Restorative justice seems to make strange bed fellows. Both those on the left and the right of the political spectrum seem to find some things they like in restorative justice. For those leaning to the left, it is seen as a more hu-

mane, less destructive alternative to destructive and debilitating punishments. It is regarded as a way of socializing, decentralizing, deprofessionalizing and deformalizing justice. To those on the right, restorative justice is appealing because it has the potential for reducing state expenditures on the criminal justice system and is guaranteed to shift the financial burden of victim compensation from the State to the offenders. What is difficult to figure out are the real motives behind the wholehearted endorsement of police forces like the RCMP. Be this as it may, it remains to be seen what negative (or positive) influence the diversity of interests, of motives, of ideologies will have on restorative justice. One cannot but fear that different groups will try to gain control of restorative justice programs, claim them as their own creation and try to gear them in directions that fit their own agenda, interests and purposes. This calls for enhanced vigilance and more alertness as well as strong defences to resist any such take-over attempts.

B) On some limitations of restorative justice

Restorative justice, despite its vast potential, is not the most appropriate mode of intervention in every single instance of harm doing. It is not feasible or even advisable in every situation or in all circumstances. It has certain limitations. Some of those limitations may be due to lack of mental competency of one of the parties, lack of consent or unwillingness to participate for one reason or another. There are also cases where there are multiple victims or several injured parties (and cases where there are multiple offenders) some of whom are willing to participate while others are not. Those few limitations are such that they do not affect restorative justice's viability as a general model of justice. Time constraints allow only a very succinct enumeration of the most important of those limitations.

1) Restorative justice is not to be recommended in the cases of severely deranged offenders. Their serious mental handicap will be a major hindrance when it comes to giving free informed consent to the practice, to participating meaningfully in mediation sessions, agreeing to the terms and complying with the conditions of the restorative agreement. The same problem arises in the case of child victims who are much too young to understand the practices, the objectives or to participate in the sessions. Like in other legal situations, child victims may be represented by their parents or guardians. However the ideal of having the harm-doer confronted by the primary victim and sensitizing him to their suffering may not be easy to achieve in

such scenario. On the side of the child victim, the major objectives of coping, healing, forgiving, moving forward may not be easy or possible to achieve when a meaningful interaction is not possible due to the age, the mental state, or the limited understanding of the person who suffered.

2) While restorative justice is possible and feasible in the case of violent, dangerous offenders it needs to be combined with certain treatment or containment measures that would ensure that the dangerousness of the offender is neutralized. The practical problem in some of those cases is how to secure the free, willing participation of the person who has been seriously victimized. In the current climate where revenge and retaliation are promoted as justice and where harsh sanctions are erroneously portrayed as doing justice to the victim, it is not surprising that some of the victims of serious offences may show a stubborn unwillingness to meet face to face with their victimizers.
3) One of the basic features of restorative justice is that it is a peaceful, voluntary and non-coercive mode of resolving conflicts and settling disputes. This volitional aspect raises certain issues and imposes certain limitations on the generalizability of restorative justice as the sole available mode of intervention. A question we hear from supporters of restorative justice is: if there is no qualitative difference between crimes and civil torts, why is it that mandatory mediation and arbitration are allowed in civil and labour disputes but are shunned when it comes to violations of this or that criminal code disposition?
4) In some cases, the same act may claim several victims, may injure or harm more than one person. How to proceed when some accept and are willing to participate while others refuse? In other cases there may be two or more harm-doers. What to do when some are willing and others are unwilling to participate in the restorative justice process?
5) Then there is of course the issue of victimless crimes or crimes without victims. As I repeatedly argued in the past, such actions that are simply deemed to be immoral, deviant, objectionable or not acceptable by some group or another have no place in the criminal code and should not be criminal offences in the first place. Aside from those behaviors there are others that cause harm in a general, diffuse, non specific way. They are not directed at a concrete person or body, for example, bribery, corruption or tax evasion, to name but a few. Although those harmful actions may not lend themselves to common

restorative practices such as mediation or arbitration, they still can be dealt with effectively by restorative remedies and in current practice they are dealt with by fines, restitution, community service, and so forth.

A proposed strategy for action

Obstacles on the road to a general institutionalized system of restorative justice and how to overcome them

There are several obstacles in the way of having the restorative justice paradigm, despite its obvious advantages and benefits, widely accepted and institutionally implemented. It requires a long and persistent but winnable struggle against deeply entrenched religious beliefs, philosophical views, ideological ideas and cultural attitudes. It also requires the vehement denunciation of the vested interests of the punishment machine, the lucrative prison industry that stands to realize obscene profits as a result of the new fad of private prisons or prisons for profit. The real and enormous costs of custodial sanctions that are usually kept secret from tax payers need to be widely publicized and severely scrutinized (See Gopnik, 2012).

The transition from punitive justice to restorative justice will obviously require some fundamental changes. It will require a switch from the theological notions of expiation and penitence to the social notion of restitution. The name penitentiary will have to be abandoned! Shifting to the new paradigm will require moving from the abstract (retribution) to the concrete (restoration); from the infliction of harm (punishment) to the reduction and prevention of harm (reconciliation). It will also require a move from the politics of exclusion to policies of inclusion; from segregation to reintegration, from costly incarceration to effective reparation.

Restorative justice forces us to abandon what is commonly called a "*philosophy of punishment*" in favor of a "*philosophy of Justice*" and "*sociology of justice*". It may very well be that certain religions dictate that those who do harm be punished. However the social sciences, particularly criminology, psychology and sociology offer substantive evidence to show that punishment is not only ineffective as a deterrent but is also unjust by any definition. Human behavior, and this applies to criminal and delinquent behavior, is motivated behavior that has causes. Whether one believes in theories that claim that the causes of crime are genetic and that criminals are born or adheres to the theories that maintain that criminals are socially and environmentally made, punishing them seems to be

unjust and unfair. Another philosophical/metaphysical concept underlying the notion of punishment and retribution is the abstract yet popular notion of "*free will*" which is utterly contradicted by the findings of behavioral sciences which prove that criminal and deviant behavior are the product of factors and variables and not the free volition of the actor. Believing in free will is the negation of the notion of causality, a negation no social or behavioral scientist would accept.

One important strategy for restorative justice proponents is to get the powerful victim movement/lobby on the side of restorative justice and make it attractive for politicians to jump, as they always do, on the bandwagon. It should be obvious to any rational thinking person that retributive punishment does the victim more harm than good. Except for the few victims who were taught from an early age that retaliation is an appropriate (or the appropriate) reaction to harm doing, retributive punishment clearly does nothing to alleviate the suffering of, or to redress the harm done to, the victim. And as if to add insult to injury custodial punishments deny offenders the possibility to work and pay restitution while State funds that could have been used to compensate the victim are wasted on keeping wrong-doers behind bars. We need to explain to those injured or harmed by crime and their lobby, if any explanation is needed, that the abstract goals of retributive punishment are antagonistic to the real interests of the victim and that their advocates' demands for more and harsher sanctions are detrimental to their recovery, restoration and well being.

Punitive justice is detrimental to the victim in other ways as well. Punishment can only be applied to those offenders who are identified, caught, charged and successfully prosecuted. Victims of unknown, uncaught or acquitted offenders get no redress and no relief whatsoever from punitive justice. State Compensation programs are strictly limited to victims of violence with onerous eligibility requirements and many restrictions and for the lucky few who qualify and are ultimately awarded, more often than not, it is too little and too late (Fattah, 1999b). Is it any wonder that victims who go through the cumbersome process and end up being compensated are less satisfied and more frustrated than those victims who do not take the trouble to apply for compensation in the first place? Restorative justice, on the other hand, does not require the identification of those who are responsible. The only proof required is the injury and harm done to the victim. A good example is the "*Claims Conference for Jewish Victims of Nazi Persecution*" that awards compensation and restitution to victims of Nazi atrocities and their heirs as well as help them recover confiscated and unclaimed Jewish property.

There is an urgent need to widely and publicly debate and compare the economies of punitive justice to those of restorative justice, the economies

of the infliction of pain vs. those of restoring the harmony. Contrary to the goals and objectives of the current punitive system of justice which have never been clearly defined or articulated any way, we need to publicize in great detail the major goals and tremendous benefits of a non-punitive system of restorative justice.

One of the basic issues that need to be widely and publicly debated is that of retribution. Is retribution an ethical and acceptable justice goal in modern civilized secular society? Is retribution acceptable at any price regardless of the human, material and social costs it requires? In an age where there is growing recognition that the conflict is the victim's property (Christie, 1977), that the offence is primarily against the victim and only secondarily against the state, when it comes to a choice between punishment & retribution vs. reconciliation & restitution – who should decide? Is it not logical that victims be given the right to choose their preferred mode of dispute resolution?

Conclusion

Tracing the origins of restorative justice to the practices of conflict resolution of aboriginal or indigenous people in pre-colonial societies does not mean that restorative justice is a simple means of doing justice. In fact restorative justice, if true in name and spirit, is a complex model that is not easy to implement in the highly urbanized, highly technological modern day society. The enormous diversity of types, practices and modalities described in the literature as "restorative" attests to such complexity. And naturally there is no agreement as to what qualifies and what does not qualify as a restorative practice. Be this as it may, there are still some things on which there is wide agreement. This is, for example, the case with mediation. Mediation is not restorative justice per se. It is simply a technique, a modality of reaching some agreement between the parties and achieving restorative ends.

So what are the chances of having our current criminal justice system replaced by a general, comprehensive system of restorative justice? A dose of realism is in order. When it comes to law and justice traditions are very powerful and long lasting. Social reaction to harmful and injurious acts is very resistant to change but, like everything else, it slowly and inevitably does. It would be both naive and wrong to believe that any type of punishment is permanent or immutable. After centuries of fierce resistance we have witnessed the change with regard to what seemed to be eternal practices such as lynching, the death penalty, corporal punishments and torture, to name but a few. Although torture, unfortunately, is making a comeback in the United States as documented by Larry

Siems in his excellent last year's publication "*The Torture Report*" (2011) this is, in my personal opinion, just a setback that is unlikely to persist. Regardless of what excuses or justifications may be used to legitimize it, torture is and will always be morally repugnant and universally condemned. And the same fate inevitably awaits inhumane and barbaric practices such as imprisonment because the difference between punishment and torture is simply a difference in degree. In fact, for many the deprivation of liberty can be as torturous as, or even more torturous than, physical or psychological pain. May I remind you of what Charles Dickens wrote after visiting the *Eastern State Penitentiary* in Philadelphia, widely regarded as a model prison, which at the time was the most expensive public building ever constructed in the USA (Gopnik, 2012) where every prisoner was kept in silent, separate confinement:

I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers... I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body: and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay.

Yes! There is nothing moral or ethical about the deliberate infliction of pain and suffering on a fellow human being or even an animal. This is why I find it surprising that eminent scholars like M. Tonry (2006:22) still believe that prospects for restorative justice are not too great in jurisdictions with highly moralistic attitudes toward crime because R.J. is seen as not proportionate enough to the harm or injury caused by the wrong doer. Tonry cites England, the US, Sweden, and the Netherlands as examples. Contrary to Tonry's belief, I would have thought that cultures with high moral attitudes would be more likely to come to the conclusion that the archaic, antiquated and primitive practice of punishment is highly immoral and deeply inhumane and thus would be the first to try to replace it with a less reprehensible mode of social reaction and a more morally acceptable model like restorative justice.

Epilogue

Social change in the 21st century promises to be the most radical and most sweeping ever! Globalization, mass communication, the powerful and far reaching social media, are bound to produce upheavals undreamed of a few decades ago.

We have seen some of their impact in the *jasmine revolution*, in the ouster of despots and dictators. We are witnessing the deep crisis of the capitalist system and the imminent threat of the crumbling of the economy of entire nations. We are witnessing the demise of dictatorships and the transition from totalitarianism to democracy from tyranny to participatory government. The dawning of a new era in politics and governance highlights the urgent need for a new paradigm for criminal law and criminal justice. Retributive justice, even if entails death, is not a commensurate response to acts of genocide, ethnic cleansing, mass extermination, use of weapons of mass destruction, and many other forms of crimes against humanity No one could argue that executing a dictator or a tyrant is a just, equal and proportionate response to the killing of millions or thousands of his subjects. Clearly, another type of justice is needed against those ousted dictators and despots and others responsible for horrendous acts of repression and genocide. South Africa's adoption of *transitional justice* and its truth commission provide a good example to follow. It clearly showed that there is a different and better way than easy punishment to deal with those who have committed indescribable atrocities and crimes. The model of *transitional justice* is both timely and vital as the number of countries that will achieve freedom from tyranny and oppression is bound to increase year by year.

Concluding remarks

Dear Friends, By calling for a new justice paradigm, for a general institutionalized Restorative Justice System that replaces the archaic punitive system we have now, am I being overly optimistic? Am I asking for utopia or lost paradise? May be it is my inner hope to leave the earth on an optimistic and promising note or maybe I am crying in the wilderness. May be I am dreaming the impossible dream. I keep attending Restorative Justice Conferences like this one hopelessly waiting for someone to join me saying "YES it is possible", "YES it is doable". Because if there is any hope for a brighter future for human justice it lies in your hands and rests on your shoulders. It is young people like you who can be the agents of real change. It is up to you to make what may now seem an impossible dream become a future reality, because you are masters not only of your own destiny but the destiny of many generations to come. If you have the will and determination you do have the ability to reduce the pain and suffering that is being inflicted on millions of people in your name and the name of a pseudo justice. You have the ability to change society to the better and to make the world a peaceful harmonious place for your children and grand children.

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