

Final Reflections on the Spirit of Justice

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This is the fourth major New Zealand conference on restorative justice I have attended in recent years. All been very worthwhile in fostering interdisciplinary discussion and in bringing together academics, practitioners and representatives of different social agencies for dialogue. They have also all been a great source of encouragement for those working at the coal face of restorative justice practice. But without taking anything away from previous conferences, this one, I believe, has significantly advanced the agenda. It has done so by coining the new concept of a “restorative society” and by asking how restorative values, practices, principles and processes might provide a new paradigm for approaching other major areas of social policy. The full significance of having raised this question at this conference is probably yet to emerge. But the very fact that we are now asking such questions as this is a further indication that, as Jim Ritchie surmised, we may indeed be on the cusp of something momentous, of a sea-change in the way we think about justice and a just society and of the role of the state in the resolution of social conflict.

In his seminal book *Changing Lenses*, Howard Zehr points out that throughout Western legal history there has always been a combination of centralised, state-administered forms of justice and local forms of community-based justice, with the weight of the balance changing from age to age. In recent centuries the balance has been substantially in favour of the state. But arguably the emergence of restorative justice represents a partial shift of balance back in favour of the community. This helps to answer the question that some have raised at the conference as to whether restorative justice qualifies as a genuine “movement”. In my view, it unquestionably does. Restorative justice is now an international movement of individuals and groups united in their desire to re-empower community-level agencies to deal with criminal offending and other social harms in ways that restore as much wellbeing and wholeness to human relationships as possible. Like all reform movements, it combines idealism with activism, and its impelled forward by a vision of a better society and by the belief that positive change *is* possible.

Although restorative justice first emerged in the criminal justice sphere, it has since been extended into family, educational and employment spheres as well, as has been evident in the presentations at this conference. I sincerely hope there will be

follow-up conferences that will cast the net even wider. Perhaps we will know that a sea-change really is under way when we have papers of “restorative accounting” or “restorative politics”! I say this not entirely tongue-in-cheek, for the way in which politicians and treasury officials calculate the financial feasibility of this or that policy is not an objective science. It reflects a larger worldview or value system that deems some ends to be more worthwhile or morally significant than others. According to prevailing valuations, it is a political or moral imperative to invest hundreds of millions of dollars in building new prisons, despite their manifest failure to do much good, while scrimping and scraping on prevention or rehabilitation programmes. The ambulance (or paddy wagon!) at the bottom of the cliff is considered a more expedient social investment than a fence at the top or a safety net half way down. The only way to challenge such idiocy is to promote a system in which individual funding decisions are evaluated in terms of the how well they contribute to fostering a larger social order that is committed to restoring people and situations to wholeness when harm occurs. Restorative accounting, in other words, would be number crunching done in service of a restorative society. Such a change in the way of doing the sums is not unimaginable; the advent of the so-called triple-bottom line shows that even accounting practice can be shaped by new moral sensitivities.

There has been quite a bit of discussion during the conference on the meaning of the term “justice”. Some speakers have taken a psychological approach to justice, viewing it as a human psychic need. Others have adopted more of a post-structuralist philosophical or sociological approach, suggesting that justice is an “empty signifier” whose content is determined by particular, and variable, historical and cultural traditions. Justice in other words is what a social consensus determines it to be. Still others have insisted on the objectivity of justice, urging that justice does have a certain stable content which can be concretised in universal legal norms. Such debates about justice are, of course, almost as old as human society itself. They will always be with us. But perhaps our difficulty in adequately defining justice is itself a sign that restorative justice theory is correct – justice is, finally, about human relationships, and just as human relationships are marked by an irreducible complexity and diversity, so too is justice.

In this respect I find it helpful to think of justice, like love, as being a generic or inclusive concept embracing a wide variety of applications. It is not a technical term with a circumscribed meaning but an umbrella concept with a wide semantic field. I also find it helpful to differentiate between three dimensions of justice. It has a *normative* or public dimension that stands over and above us, and that can be crystallised in legal and moral norms that summon our obedience. It also has an *experiential* or private dimension, something that satisfies our psychological need for resolution, vindication and restitution after a wrong has been done. Thirdly it has a

visionary or teleological dimension that points ahead to something greater in the future, that never allows us to rest content with the way things are now, however good they might seem, but impels us to reach forward for something better. To date, restorative justice has been most successful in the private or experiential dimension. It has developed practices that aim to leave people feeling more satisfied that their justice needs have been met. What is required now is much more theoretical or philosophical work on the normative dimensions of restorative justice, as well as more occasions like this one for dreaming about how to create a better society in the future.

Perhaps it is its combination of normative, experiential and visionary qualities that gives justice such a religious or spiritual aura. As the history of human thought shows, there has always been a close correlation between religious belief and judicial practice. It is not surprising then that there have been frequent comments at this conference on the spirituality of restorative justice. As one person commented to me, it is interesting that that when this topic arises Maori participants instantly know how to engage with it while many Pakeha do not. “Wairua” is a much more intelligible and tangible (!) reality in Maori discourse than “spirit” is in everyday Pakeha discourse. Having said that, one of the really interesting phenomena of our day, especially for someone in my field, is the way in which the term spirituality has come to be used with such positive connotations in an otherwise stridently secular society. “Spirituality” is a feel-good word while “religion” is still dogged with negative connotations (presumably when Tony Taylor spoke of “unencumbered spirituality” he meant spirituality unburdened by religious dogma and morality or by ecclesiastical structures). Yet although spirituality is now regarded as a good and desirable thing, the meaning of the term is almost as elusive as the meaning of justice. Like justice, we may have an intuitive sense of what the term represents but most of us would be hard pressed to define it in any clear-headed way.

But perhaps definitions are besides the point. Spirituality is primarily a matter of *experience* – the experience of being part of some larger reality or pattern of meaning; the experience of being able to penetrate behind surface appearances to encounter the essence of some thing or some person or some event, to be conscious of the depth-dimension of mundane reality; the experience of joy that comes from loving and being loved; the experience of being interconnected with the rhythms of the universe and the source from which they flow. A moment’s thought shows how closely related all this is with justice. Justice too is an experience before it is a concept; it is something we know in our hearts before we know it in our heads. Arguably one of the key contributions restorative justice theory can make today is to clarify the inherent spirituality involved in doing justice. Indeed if it is true, as I believe it is, that human beings are inherently religious by nature – in the sense of being driven by the

desire to find significance and depth and beauty and meaning in human existence by reference to some transcendent or supra-mundate reality – then it is impossible to achieve justice without cognition of its spiritual or even religious dimensions. Certainly it is impossible to *experience* justice without it satisfying our psychological need for meaning and validation and purpose, which are matters of the spirit. The *normative* and *visionary* dimensions of justice are also much more easily understood and articulated with the aid of religious or spiritual categories.

This brings me to another theme that has emerged several times in the conference, the importance of developing a new language to describe and promote restorative priorities. Someone pointed out how the neo-liberal economic rationalism that has dominated the international order for the past few decades only gained ascendancy after a whole new vocabulary was consciously devised by right wing ideologues to explain and justify the package of reforms being sought. These ideologues knew that those who claim the right to define the problem thereby acquire the power to determine the solutions. There is a lesson in this for the restorative movement. If we really do believe in restorative solutions, then we need to develop an operating vocabulary that is internally self-consistent, that is evocative of restorative values and goals, and that will resonate with the “felt needs” of the wider public.

The importance of language was illustrated for me in the two excellent presentations by Judge Carrie Wainwright and Nicola White on the immensely significant work of the Waitangi Tribunal. I was struck by how positive, and how hopeful, the achievements of the Tribunal have been in addressing in a peaceful way the dreadful legacy of historical abuses and betrayals of Maori by the crown. The Tribunal has served for years both as a *truth* commission (where stories of injustice have been told and validated) and as a *justice* commission (where recompense has been made, and where, unlike Australia, powerful and genuine apologies have been offered and received). What is sad is how little the Pakeha community understands of the work of the Tribunal and its historical justification, and how little pride we take in the success of our own truth and justice commission compared to those mentioned in the sobering survey of failed or flawed commissions provided by Rod Alley and Andrew Ladley. What is also sad is how threadbare is the language used in the public arena to characterise the Tribunal’s work. By and large we use the language of “grievance” and “settlement”, not the language of “truth” or “justice” or “apology” or “forgiveness” or “reconciliation” or “healing”. How different the Pakeha community might feel about treaty matters if it understood more clearly the extent to which the Waitangi Tribunal functions as a truth, justice and reconciliation commission, not just a vehicle for putting tired old grievances to rest. On a similar note, I have sometimes wondered if a sharper distinction between guilt and remorse would help with the buy-in of the wider community. Many Pakeha today rightly insist they cannot be held

responsible for, or feel guilty about, injustices perpetrated by our forebears. But this does not preclude us from feeling a deep sense of remorse or regret that such wrongs were committed against Maori, which in turn should impel us to do all that is necessary to see those wrongs righted, even if we are personally not responsible for them.

Yet another theme that has pervaded discussions over the last two days is the need to acknowledge both the light side and the dark side of human behaviour and the way in which any satisfactory account of justice must satisfy both sides. James Liu observed how if anyone hurt his young daughter he would be “very Old Testament” in his response! All of us can relate to this. I agree that we need to reckon with both the lighter and the darker sides of justice, but our goal should be not so much to balance the demands of each as to foster ways in which the darker, or more punitive, aspects of justice can be moderated or restrained or transformed by the lighter, more restorative aspects. Take prisons as an example. In one sense imprisonment represents the dark work of justice (or what Martin Luther called the “alien work of love”) – the need we feel to impose the pain of long term isolation as a necessary punishment for criminal offending. Most of us would accept that prisons are a sad necessity, at least in some cases. But it is not enough to defend the existence of prisons by appealing to justice’s darker side. Our reliance upon them must always be constrained by a commitment to develop restorative alternatives, and what goes on inside prisons must be moderated or transformed by restorative values and programmes. The impressive work of Prison Fellowship New Zealand in this respect is a sterling example of how the darkness of punitive justice can be lightened by programmes based on restorative commitments. As our prison population burgeons to historically and shamefully high levels, there is an urgent need for a public debate in New Zealand on what Canadian writer David Cayley calls “the expanding prison” – the way in which modern society is becoming increasingly acclimatised to totalitarian modes of social control and the way in which prisons are expanding to colonise more and more areas of social life.

This brings me finally to the connection between restorative and retributive approaches to justice. Several speakers have observed that we will always need both, that restorative justice is not an alternative to retributive justice but a complement to it. There is obvious truth here. Restorative justice works best when offenders freely accept their responsibility for doing wrong and seek to rectify it. But not everyone hauled before the court is guilty of wrongdoing, so there will always be the need for a system that can fairly adjudicate in cases of contested guilt, as well as for one that has the power to keep truly dangerous offenders off the streets. So restorative and retributive approaches to justice are both valid and necessary; they have a complementary role to play in the justice system. But there is another sense in which both approaches are not really that different. Both share something profound in

common. Both seek to access the same fundamental human justice need, though in different ways. The justice need to which I refer is this – *the need to know that those who have unjustly imposed pain on others do not escape from sharing in the pain they have unleashed*. Let me explain further.

According to retributivism, when a wrong has been done, justice requires punishment. The scales must be balanced. The offender must be made to suffer a commensurate amount of punitive pain (punishment is, by definition, pain delivery) to the harm he or she has inflicted on the victim. But why is it that *pain* is understood to be the only adequate way to redress serious wrongdoing? The reason is because to suffer a wrong is, in essence, to *suffer*, and it is morally unacceptable for someone to inflict avoidable suffering on another person without themselves sharing experientially in the consequences of what they have done. Instinctively we know that justice requires a co-participation in suffering. Since the victim has been made to suffer at the hands of the offender, the offender must now be made to suffer at the hands of the law. Both parties do not suffer in the same way, but at least they both suffer, so that some equity is achieved. If an offender escapes entirely from participation in pain after having needlessly unleashed pain on another, a fundamental injustice results. Hence our drive to punish.

Now it is true that restorative justice is much less preoccupied with punishment than is retributivism. It is more interested in promoting healing and reconciliation than in measuring appropriate doses of punitive pain for particular crimes. But there remains an important sense in which restorativeness still shares the same basic understanding of justice as retributivism – *that justice requires a co-participation in pain*. In the retributive paradigm, the offender's participation in pain is ensured by imposing external penalties on them, such as imprisonment, fines or community service. Such punishments are intended to hurt the criminal, though they usually do little to help the victim. In the restorative approach, the offender's participation in pain is elicited by having them personally confront the suffering of their victim and acting to bring about change, both in the victim's situation and in their own. Arguably the most exquisite pain associated with criminal offending comes, not from incurring secondary penalties, but from facing up to one's culpability for violating another human being and striving to remedy its consequences. The shame and distress entailed for offenders in confronting the personal consequences of their actions, accepting responsibility for them, seeking reconciliation with those whom they have harmed, and working to restore the damage caused should not be underestimated. The suffering entailed is often intense, sufficiently intense to satisfy the victim's need to know that their abuser has not escaped pain in the course of inflicting it. Without that awareness of a co-participation in suffering, their sense of injustice would remain

unassuaged. So both restorative and retributive conceptions of justice are united in their recognition that victim and offender must share in a “fellowship of suffering” if justice is to be achieved. They differ on how such fellowship is most effectively secured.

In finishing, let me move from the abstract to the concrete by citing just one or two of the practical steps towards a more restorative society that have been mentioned in passing during the conference. Judge Phil Recordon spoke of his belief in the effectiveness of specialist courts, such as drug courts, youth courts and family violence courts. Recent experimentation in specialist courts is itself a tacit concession that more is needed to combat offending than a monolithic system for meting out punishment. Chief Youth Court Judge Andrew Becroft spoke powerfully of the “genius” behind our youth justice legislation, but called for research into how well the youth court itself conforms to the restorative principles undergirding the legislation. David Hurley, after noting how many pieces of New Zealand legislation mention mediation or other non-litigious forms of dispute resolution, called for the creation of a single, independent mediation service to bring greater consistency of practice. Finally, Judge Fred McElrea reiterated his proposal for the creation of community justice centres to provide a wide range of non-adversarial and restorative justice options to the community. This seems like such a sensible idea maybe it is time to devise a pilot project trialling one or two such centres. Perhaps at a future conference, we should take some of these proposals, and others like them, and work at policy recommendations that will add flesh to the bones. It is important that we do not lose the momentum generated over the past two days or to allow the concept of a restorative society to slip from view.

Gay’s notes:

- Consider further options for defining justice – Liu, Baehler.
- Expand on the concept of a restorative society.
- Consider restoration as primary but recognise retributive responses as inevitable in some cases and at some times for both psychological reasons eg exemplary denunciation, and to prevent further danger/harm and because of the enormity of what has occurred. cf responses after WWII