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Is Restorative Justice a Viable Option in Crimes of Violence

Ezzat A. Fattah

Foreword

Introduction

What Is Wrong With Punishment ?

Are Victims Better Off In A Restorative System Of Justice ?

So What About Restorative Justice ?

Conclusion

Dedicated to the memory of my dear friend and esteemed
colleague Professor Koichi Miyazawa

FOREWORD

In July 2010 the world community of victimologists and criminologists lost one of its illustrious members: Professor Koichi Miyazawa from Keio University in Tokyo, Japan. Professor Miyazawa was a pillar of Japanese criminology and victimology. He was an erudite scholar with a long list of publications including several books and dozens of articles. He was a dear friend and esteemed colleague and was a mentor for a whole generation of Japanese lawyers and criminology professors. He played a major role in the establishment of the World Society of Victimology and generously sustained it morally, intellectually and financially over the years. He successfully organized several

scientific meetings attended by hundreds of scholars from all over the globe including the 4th International Symposium in Victimology in Kyoto, Japan in 1982. The list of Professor Miyazawa's achievements is too long to produce here. My friendship with him extended over two decades during which he treated me like a brother. He visited me in Vancouver and I visited him in Japan. Together we attended countless meetings in different countries. Our relationship was one of genuine mutual respect and sincere comradeship. My sorrow over his passing away is too much to express in simple words. It is a heartfelt pain that is not easily described in any language. It gives me some comfort to be able to contribute to this publication dedicated to his memory. And as Professor Miyazawa was a strong proponent of and an eloquent advocate for Restorative Justice I thought an essay on this promising model of justice would be the most appropriate tribute to his legacy. In some way it is a follow up to the essay I contributed to his 1995 Festschrift and whose title was 'Restorative and Retributive Justice Models: A Comparison'. In H-H. Kühne (ed.) *Festschrift für Koichi Miyazawa*. Baden-Baden: Nomos Verlagsgesellschaft.

INTRODUCTION

"Restorative Justice" is a topic that is very dear to my heart. Having been preaching non-violence all my adult life, having fought tooth and nail against the medieval practice of the death penalty, and having written extensively opposing the concept of punishment and the inhuman practice of incarceration, my preference for Restorative Justice is clearly understandable. My favoring of R.J. over punishment is not merely a humanitarian stance, it is based on a strong conviction that it is a better, viable and more effective alternative to the deliberate infliction of pain aimed at making the wrong-doer suffer for the harm he has done. This is why any attempt to discuss R.J. or to show its merits must inevitably address what is fundamentally wrong with society's current response to violent and harmful acts. The reasons for my long and

strong opposition to the institution of punishment are both simple and straightforward. They can be summarized in just one sentence: punishment is morally wrong and serves no useful purpose, it is not a reliable deterrent, is destructive, wasteful and not cost-effective. Since the Age of Enlightenment, philosophers and scholars have discussed at great length the morality of punishment, and with only a few exceptions (such as E. Kant, and Hegel), concluded that punishment is intrinsically wrong, that it is an evil and as such can only be justified on utilitarian grounds, that is, if it is proven that the good that could result from punishing a wrong-doer exceeds the wrong inherent in inflicting the punishment.

More than a century ago, Wines (1895: 284) drew attention to the fact that punishment is a tyrannical measure inflicted by a majority intent on imposing its will, its values, and its belief systems on a rebellious and indomitable minority. He wrote: *“Punishment is simply an act of the majority, which in a purely selfish spirit, sacrifices the criminal, for its own protection, upon the altar of a supposed social necessity”*.

The notion of Restorative Justice has emerged in recent years as an alternative to punishment and is rapidly gaining ground in many parts of the world. The benefits and the advantages of R.J. are by now well known. Instead of praising R.J. and highlighting its positive aspects, it may be more useful to put the emphasis in this essay on the failures, the futility and the detrimental effects of society’s current approach, namely the use of punishment (mainly fines and imprisonment) as the sole or the dominant response to undesirable and illegal behavior.

WHAT IS WRONG WITH PUNISHMENT ?

When discussing punishment with politicians, policy-makers, scholars, professionals, or with ordinary citizens, more often than not, most end up agreeing that punishment is bad. But then they always come up with what I call “the inevitable question”: Yes, punishment is bad, but what is the alternative? It is this seemingly resigned and

helpless attitude that punishment is a necessary evil and the mistaken belief that it is indispensable to the survival of society that makes it difficult to convince members of the general public that there are actually better, less costly, and more effective alternatives. The discussions, whether at a high scientific or scholarly level, or at a basic common sense, conventional wisdom level, invariably reveal that whatever support punishment may have is more out of despair than of any firm belief that it does, or may have, positive or salutary effects. That punishment has to follow any wrong-doing is a notion that is inculcated in the minds of children in their tender age “*if you commit sin you will go to hell, if you misbehave you will be caned, if you hit your sister you will be spanked, if you break the law you will go to prison*”. Later on it becomes really hard to break this strong mental association between crime and punishment. It becomes almost impossible, particularly for the average citizen, to conceive of a non-punitive society, a society without prisons, a community that does NOT respond to harmful actions by the infliction of pain and suffering. Advocating and gaining acceptance for an alternative, non-punitive justice paradigm becomes extremely difficult because the theological notion of a punishment that must follow the fault, the wrongdoing, is too deeply anchored in the minds of most individuals (Fattah, 1999: 162; Fattah, 2007)).

In fact, the idea of doing away with punishment altogether is not even acceptable to most criminologists, many of whom are becoming increasingly punitive because of a mistaken belief that by so doing they will be taking the side of crime victims. In her presentation of a feminist vision of justice, Kay Harris (1991: 94) questions this seemingly unshakable faith in the need for punishment. She writes:

Indeed, we need to question and rethink the entire bases of the punishment system. Virtually all discussion of change begins and ends with the premise that punishment must take place. All of the existing institutions and structures - the criminal law, the criminal processing system, the prisons - are assumed. We allow ourselves only to

entertain debates about rearrangements and reallocations within those powerfully constraining givens...The sterility of the debates and the disturbing ways they are played out in practice underscore the need to explore alternative visions. We need to step back to reconsider whether or not we should punish, not just to argue about how to punish.

What is rather surprising is that this uncritical adherence to the archaic institution of punishment remains widespread despite rapid and rather fundamental social evolution. The secularization of society, the liberalization of attitudes towards human misbehavior, the pursuit of cost-effective social policies and practices, have rendered the metaphysical notion of retribution and the theological concepts of expiation and atonement anachronistic and anathematic to contemporary thinking (Fattah, 2007).

And yet punishment persists and flourishes, even in the Scandinavian countries that were, together with Holland, the first to try to do away with it. At the 16th World Congress of Criminology (Kobe, Japan, 5-9 August, 2011) the participants were repeatedly told that punitiveness is growing and that the demands for punishment are increasing! In fact punishment has become so popular that recently the German criminologist, Dr. Helmut Kury together with Evelyn Shea edited three volumes to discuss the concept of punitivity, its international developments and its implications (Kury & Shea, 2011). With the notions of vengeance and retaliation becoming slowly, but surely, dated and obsolete and having been condemned as primitive and uncivilized, advocates of punishment are having no choice but to cling to the utilitarian yet disproven argument of deterrence. Yes, study after study has shown that this blind faith in punishment as a deterrent is both unwarranted and unfounded. And even if we ignore the vast volume of scientific research and try to counter the common sense argument of deterrence by appealing only to logic and reason, the same conclusion will have to be reached (Fattah, 2007). Moreover the practice of punishment suffers from an incorrigible paradox: where punishment

may be effective (such as in cases of economic crimes, corporate crime, white collar crime or other well-calculated rational offences) it is neither wanted nor meted out, and where it is strongly demanded, such as in crimes of violence, acts of terrorism, sexual offences, and the like, it is unlikely to have any deterrent effect. One of the foremost authorities on the general preventive effects of punishment is the Norwegian Professor J. Andanaes. Five decades ago, he was one of the most vocal advocates of punishment as a deterrent. No more, he has reversed his earlier position and has joined those who have been forcefully arguing against the presumed deterrent effects of punishment.

What should not be forgotten is that punishment, in addition to its futility, has tremendous human, social and financial costs. This is precisely why it is imperative to ask what exactly is being achieved by such a cruel, inhuman and archaic practice. If the ultimate goal of social reaction to harmful actions is the prevention of future harm and the repetition of the violence, then the preventive effects of punishment must be carefully scrutinized (Fattah, 2007).

ARE VICTIMS BETTER OFF IN A RESTORATIVE SYSTEM OF JUSTICE ?

Most people either forget or are unaware that victims are the primary losers in punitive justice systems. From the time personal conflicts were converted into public crimes, and the institution of restitution and composition (known as *wergeld*) was replaced by a punitive punishment, victims' interests were sacrificed and they were assigned a peripheral role in the CJ process. The new system completely ignored their plight and usurped their rights. The composition or the "*wergeld*" that was meant as a means of redress, as a way of compensating them for the injury, the harm, or the loss they have suffered, was replaced with a so-called penal fine that went to the king's coffers or to the public treasury. And for centuries the plight of victims went unnoticed, unrecognized and without remedy. Voices calling to

address and redress victims' disenfranchisement were not heard until the second half of the 20th century. Modest State compensation programs were set up in some countries but offered only symbolic recognition and continue to suffer from a chronic lack of funding and resources. Studies showed that only a very tiny minority of those victimized end up receiving any State compensation whatsoever. And for those who do, it is too little, too late (Fattah, 1999). Even worse, the studies found that those who go through the State compensation process were less satisfied than those who never applied for compensation. And as if to add insult to injury, the victim movement that was supposed to defend the interests of victims, to claim their rights and to speak on their behalf, was moving in the wrong direction. Its main concern was to increase the severity of punishment and to raise the level of penal sanctions. Somehow victim advocates failed to realize that since funds and resources are strictly limited, increasing the costs of the expensive system of punishment leaves less and less for victim compensation (Fattah, 1999; Fattah, 2007).

SO WHAT ABOUT RESTORATIVE JUSTICE ?

Showing the futility of punishment, its limitations, shortcomings, its costs and problems helps answer the question that is the title of the paper: "*Is Restorative Justice a Viable Option in Crimes of Violence ?*" If punishment is a dismal failure, if it does not achieve any of its avowed goals, then any alternative cannot be worse than what we have now, and will more likely be far better. Surely a justice paradigm that has healing, closure, redress and prevention as its primary goals is a huge progress over the punitive system that we have inherited from canon law. Despite the obvious benefits and advantages of Restorative Justice when compared to punitive, retributive justice there are still some pertinent questions about R.J. that need to be addressed and answered.

Is R.J. a viable option in crimes of violence ?

In North America, Asia and Europe the sensational tabloids as well as television have become the major source of information about crime. As a result, the few acts of stranger-to-stranger violence are now the ones that make the headlines and prime time news. This distorted reporting blurs the fact that violence is an interpersonal phenomenon and that crimes of violence are crimes of relationships. In Canada, for example, roughly nine out of ten acts of violence are committed between people who are related to each other or who know one another. Responding to acts of violence between family members or related individuals by means of incarceration can have nefarious effects. Punitive justice ruptures the social and familial bonds and destroys the chances for reconciliation. It widens the gap that separates the doer and the sufferer, generates further animosity and antagonism, and engulfs the parties in bitter, never-ending hostilities. It also forces others to take sides, thus contributing to the widening and perpetuation of the conflict (Fattah, 1995: 307; Fattah, 1999: 161). The same is true of sexual offences, which are predominantly committed by non-strangers. Despite the inordinate publicity and attention given to cases of stranger-to-stranger rapes, or to cases of children or teens who are abducted and sexually abused by their raptors, the fact remains that the vast majority of sexual offences are committed by family members, friends of the family, caregivers, neighbors, acquaintances, and so forth. A term has even been coined in recent years for a specific type of non-stranger rape: "date rape"!

Would R.J. be acceptable to the victim and the victim's family ?

There is no empirical evidence to support the claim that victims only want revenge or that nothing other than the punishment of the offender will bring them closure or satisfy their thirst for justice. If anything, whatever evidence we currently have does show that victims are not as vindictive or as bloodthirsty as some victim groups would want us to believe (Boers & Sessar, 1991; Pfeiffer, 1993). Healing, recovery, redress and prevention are the foremost objectives of crime victims (Fattah, 1997:

270). Even victims of the most serious and most heinous crimes of violence are not as vengeful as they are usually portrayed in the media or in the manifestos of right wing political parties. The powerful television documentary “*From Fury to Forgiveness*”, the experiences of M. Umbreit in the United States and Ivo Aertsen in Belgium demonstrate in a vivid and deeply moving fashion that even victims who lose their young children or close relatives to homicidal killers can show genuine forgiveness and can plea with the justice system for the lives of their victimizers (Fattah, 1999: 160).

How acceptable is R.J. to the general public ?

It goes without saying that a system of R.J. would have no chance whatsoever to succeed unless it is accepted by, and has the backing of the general public. Public demands for punishment and the loud cries for vengeance reflect a woeful lack of understanding of the realities of crime and justice. It is not difficult to imagine what would happen to society if every law violator, if every act of violence, if every sexual peccadillo and every property crime were punished by a prison sentence ? Who would be left out ? How many new prisons would be needed and how many thousand prison cells would be required ?

The general public is largely unaware that only a very small percentage of those who commit crime, even serious crime, end up being punished. Little do they know that the ones who end up in prison are neither the most dangerous nor the most serious predators. Quite often, they are the clumsy unsophisticated ones who were not clever enough to escape detection and avoid arrest. They are, in reality, the scapegoats whom society sacrifices at the altar of general deterrence ! Educating the public is surely in order. What most members of the general public do not realize, or fail to recognize, is that criminal behavior is not a unique behavior, and if it is not, then there is no valid reason to respond to it in a unique manner. In my book “*Criminology: Past, Present and Future*” (Fattah, 1997) I give countless examples to show that criminal behavior is not qualitatively distinct and that crime is not qualitatively different

from tort. The numerous examples I give leave no doubt whatsoever that for every behavior defined as criminal and made punishable by law, there are identical or very similar forms that are either perfectly legal or simply are dealt with by civil or administrative law, or that are subjected to the specific rules that govern numerous professional associations, medical associations, bar associations, academic associations, chartered accountants associations, securities commissions, stock exchange boards, race track commissions, etc., etc. Once this point is driven home, once the public is made aware that too many conflicts, too many serious law violations, too many acts of violence, are currently being dealt with outside of the criminal justice system and are not subjected to traditional sanctions; whatever objections or reservations they may have about a general system of Restorative Justice will gradually but surely disappear. There will still be the odd revolting case that will precipitate a cry for vengeance and will prompt calls for traditional punishments. But in the same way that the abolition of the death penalty has become accepted in most countries of the world and the calls for the execution of murderers have subsided, restorative practices will end up being accepted. And once their positive effects and their superiority over punishment have been amply demonstrated, public resistance to the new paradigm will eventually die down and the new system of justice will become widely accepted and supported. This support will be aided by the fact that restorative justice practices not only involve the community, but they also require the active participation of the members of that community.

R.J. and Post-Victimization Trauma — Does R.J. promote closure and healing?

It is often argued that punitive justice provides emotional satisfaction to the victim who has been injured or harmed by the offence. But it is not true that victims are satisfied ONLY when the offender is punished and made to suffer. This is because real justice involves much more than just quenching the thirst for vengeance. Victims who are absorbed by their hate and obsessed by their desire for vengeance are doomed

because they can never regain the peace of mind necessary for a happy existence. Victims who learn how to forgive cope better and heal quicker than other victims. Moreover, forgiveness elevates the victims to new moral heights whereas retribution lowers the victim and the State to the same level to which the offender has sunk by his crime. It is not difficult to contrast the humanizing spirit of R.J. with the brutalizing and demeaning nature of retributive justice, or to compare the healing effects of R.J. with the agonizing and antagonizing outcomes of punitive justice. R.J. aims at healing and redress rather than violence and duress; it favors the victim's gain over the infliction of pain. Retributive justice is past-based whereas restorative action is present- and future- oriented. In retributive justice systems there are no winners, only losers. The primary losers are the two main protagonists: the offender gets the punishment and the victim gets nothing. But they are by no means the only losers, because in punitive systems there are many other losers as well. And the ultimate loser is society itself (Fattah, 2004: 28; Fattah, 2007).

Is Restorative Justice the most appropriate response to gang violence ?

Conflicts and wars between rival gangs are the urban equivalent to the old family feuds that were quite prevalent in rural societies and led to interminable killings and counter killings. This is yet an important area where R.J. can succeed where punishment abysmally fails. 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 like Albania, Sardinia, Sicily, Macedonia, Egypt, etc., is mediation, reconciliation and compensation. Opponents of R.J. claim that these types of long-standing conflicts and blood feuds no longer exist in modern, industrialized, urbanized societies. They fail to recognize various types of conflict, common in urban centers that have replaced those traditional blood feuds. 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, supremacist groups and new immigrants in Germany and many other European countries, not to mention the ideological conflicts like those between pro-life and pro-choice groups or between environmentalists and loggers, etc., etc. The only remedy and the most effective means of dealing with 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* coupled with lack of communication, dialogue and mutual understanding. Punishment and penal sanctions, whether imprisonment or even the death penalty, do not change this attitude. If anything, they are apt to perpetuate and intensify the conflict and to escalate the level of intolerance and the ensuing violence.

R.J. and the Prevention of Future Victimization

R.J. 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; Fattah, 2007).

R.J. acknowledges that what victims desperately want even before redress, is to be free from fear and to be reassured about the impending 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 their safety from the threat of future victimization, a threat that disappears when reconciliation is achieved.

Conflict resolution and dispute settlement are probably the surest way to ensure that violence will not flare up again, that the emotions that fuel the aggression are held in check. If this is true, and I sincerely believe it is, then the best way to prevent future victimization are restorative justice practices. Unless and until reconciliation is achieved, the seeds of violence will always be there. The motives for violence will

continue to simmer until they get an opportunity to express themselves in renewed acts of hostility and violence. Restorative justice aims at restoring the peace and harmony disrupted by the offence, at revitalizing the bonds and the ties that were ruptured by the criminal act. And contrary to the punitive/retributive justice system that feeds on vindictiveness, and the thirst for revenge, R.J. promotes forgiveness, understanding and restitution. It gives the victim and offender a chance to meet face to face, to reach a mutual understanding of one another, to put the past behind them and to reach a fair and just agreement about the future. R.J. promotes closure and facilitates healing and is thus beneficial to the coping process, to the psychological well-being and the inner satisfaction of the victim, precisely the goals that victim organizations and victim services want to achieve. Punitive justice, as Nils Christie (1977) pointed out, steals the conflicts from their rightful owners: the victim and the offender. It takes over and reduces the main protagonists to mere spectators in a process that is more theatre than reality. A process where C.J. officials wear strange robes and speak a language that is almost incomprehensible to those whose conflicts are being judged.

Contrary to the punitive justice system that keeps victims and victimizers apart and stops or hinders any meaningful communication between them, R.J. brings them face to face and promotes peaceful interaction and dialogue between them thus allowing the victims to find the answer to their most pressing question: Why me? Victims who by themselves, or with the help of others, are able to find the answer to this haunting question seem to suffer less and to cope better than those who believe, or are led to believe, that their victimization was an unjust blow in an unlucky destiny or that it was a freak act of a deranged, sick or abnormal individual.

R.J. gives victims the opportunity to identify predisposing, vulnerability and other victimogenic factors that might have invited, initiated, triggered, promoted or facilitated their victimization. This enhanced awareness and this new understanding of why they were

victimized, of why they were selected as victims, help them regain control of their lives, enables them to shed the denigrating label of victim, the debilitating “mark of Abel” and allow them to put an end to the state of victimhood in which they inevitably found themselves as a result of the victimization (Fattah, 2000; Fattah, 2007).

Is a non-punitive justice system possible ?

Most societies that have not been influenced by monolithic religions such as Judaism, Christianity or Islam do not practice retributive punishment. They deal with conflicts, disputes and harmful acts in a constructive, peaceful restorative manner. Any objective comparison of the methods of conflict resolution in those societies is bound to show that people who were derogatorily labeled by the missionaries as primitive, godless and uncivilized were superior to us in more than one respect. It is certainly to their credit that they used peaceful, non-violent and non-destructive modes of settling disputes and of solving interpersonal and community conflicts. It is to their credit that they were able to realize the futility of punishment, the fact that it does not serve any useful purpose. They were more than cognizant of the detrimental effects of responding to violence with violence, of taking a life for a life, or an eye for an eye, and this was long before Gandhi uttered his now famous adage: *“an eye for an eye would make the whole world blind”* ! Those labeled by the missionaries as “savages” realized early on how illogical, futile, and unproductive it was to respond to harm by inflicting more harm or to try to alleviate the pain and suffering of the victim by making the offender suffer.

Luckily enough, in Canada we are slowly coming to the realization that when it comes to justice there is a lot to be learned from *Canada’s First Nations*. As a result, Canada is gradually taking steps that are putting it in the forefront of R.J. One initiative has been the development of three Canadian courts for use by the First Nations people only (Lynne Parker, August 2004, online), The purpose of those courts is to bring healing and restoration to the community. Describing one of the three

courts, Lynette Parker (2004) wrote:

The Tsuu T'ina Peacemaker Court began as a pilot project in 1999. It was developed by the chief and council of the Tsuu T'ina Nation with support from the Alberta provincial court. Its jurisdiction is as a provincial court restricted to reserve offenses, and it uses traditional peacemaking methods alongside the normal provincial court process. The judge, prosecutor, court clerks, court worker, and the probation officer are all of aboriginal descent. In addition, the court conducted a community consultation process to identify respected individuals for training and selection as peacemakers.

The court meets twice each month in the reserve's council chambers and begins with a traditional smidge ceremony. The crown council and peacemaker coordinator review all cases before the court to determine those that could be resolved through peacemaking. All adult and youth offenses except homicide and sexual assault are eligible. In addition, the offender must take responsibility for his actions and the victim must agree to participate before the case will be referred to peacemaking.

Cases selected for peacemaking are adjourned and the peacemaker coordinator assigns a peacemaker seen as fair to all sides. Peacemaking is done through a circle process involving the victim and offender, family members of each, and helpers or resource personnel(e. g. alcohol, addiction counselors). Elders are also included in each circle to ensure that peacemaking is conducted properly.

CONCLUSION

It is incumbent upon researchers and professionals who are concerned about violence, about sexual abuse, who are trying hard to find the best ways of healing the psycho trauma of victimization and to alleviate both the short and long term effects of becoming a victim, to lead the fight against the notion of punishment, to highlight its futility, its

deleterious effects on the prospects of healing the victim and rehabilitating the offender. They are the ones who can show that violence breeds violence, that the roles of victim and victimizer are not mutually exclusive but interchangeable. They are the ones who can show how yesterday's victims are tomorrow's victimizers and how today's offenders are yesterday's victims (Fattah, 1993). They are the ones who can educate an uninformed public about the interpersonal nature of crimes of violence, about the family ties and the personal relationships that bind the vast majority of the perpetrators and victims of violent acts. They are the ones who can show how restorative justice can restore, preserve and reinvigorate those ties and those relationships that were perturbed by the offence. They are the ones who can show the positive aspects and beneficial effects of R.J. practices. They are the ones who can help bring about the much needed paradigm shift and help rid society of the medieval practice of punishment and the primitive notion of vengeance.

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