

Restoring Justice

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It is a great pleasure to be here at this important conference and to share the session with the Most Reverend Lawrence Burke S.J., Archbishop of Nassau. Some years ago in New Zealand the Catholic Bishops conjointly issued a pastoral letter to all Catholic congregations supporting the implementation of restorative justice principles in our criminal justice system. While other Christian denominations have also given support, it is important to remember that restorative justice has spiritual foundations that can take root in any of the principal faiths, but also that it depends upon no religious basis for its justification or development.

The term "restorative justice" applies to an approach to conflict resolution which seeks to bring together the parties most directly affected by crime (or other form of conflict) and to encourage them with the support of their relevant communities to address the harm done and try and agree what might be done to put right the wrong.

Compared with the common western form of criminal justice, the restorative intention is:

- to produce an agreed outcome rather than one imposed by the State,
- to heal the wounds of the parties caused by their conflict, and
- to address ways of avoiding such problems in the future.

While punishment has a role to play it does not have the primary place accorded to it in the usual court-based system.

Certainly in my country and perhaps in yours victims are portrayed by the news media as people wanting vengeance or retribution for what they have suffered. Our experience of restorative justice models is that typically this is not true of victims. Rather their prime concerns are to receive an explanation (and, they hope, an apology) for what has happened, to have their questions answered, to have their needs met (especially in terms of reparation) and to know that this is not going to happen again.

It must be remembered that restorative justice does not pretend to supplant the adversary system for dealing with disputed cases but rather is confined to those cases where guilt is admitted or (in the Youth Justice system) proved at a defended hearing. Therefore the traditional western protection of the rights of the individual defendant still apply.

Having been involved in both the traditional and the restorative types of system – as a District Court Judge since 1988 and as a Youth Court Judge since 1990 – I can say that the contrasts are remarkable. The contrasts to which I refer are these:

1. Victims are more satisfied with the restorative justice system than the normal court sentencing process. They feel that they are involved in a meaningful way and that their voices are heard. The restorative conference produces a recommendation to the Court which is not binding on the Court but has a considerable influence. For myself I take it as the starting point in any sentencing where there has been a restorative conference – that is, I ask myself whether there is any reason to depart from the solution which the parties themselves prefer. Interestingly enough, according to a recent Australian study, victims find the restorative processes more fair than Court processes – and that is true also of other participants in the conference (RISE Project, Canberra, Australia). It is noteworthy that in NZ, Victim Support has supported the government's pilot scheme for adults. (I understand that there is no Victim Support organisation here in the Bahamas and respectfully suggest that it might be an important step, in which the churches could play a part, if there were to be such a body established to represent and promote the interests of victims.)

2. Outcomes of restorative conferences are more imaginative than Court sentences. Judges are tied largely to the sentences allowed by their empowering statutes. Ordinary people do not start from these assumptions and will often devise imaginative and much more meaningful solutions – for example “Kevin’s Sentence” in Canada, or the “Youthful Parent” in Wellington.

3. Because the parties are able to meet together and talk about what has happened there is a real possibility for reconciliation and healing to occur. The usual Court processes prevent this because they discourage any direct dialogue at all between victim and offender. Indeed the British concept of putting the prosecution “to the proof” can be seen as a discouragement to people to plead guilty and accept responsibility for what they have done. In the Youth Court in New Zealand we avoid taking a formal plea of Guilty or Not Guilty and instead ascertain whether the charge is denied or not. If it is not denied it goes off to a Family Group Conference where it can still be denied but is normally admitted, either with or without variation in the formulation of the charge or the summary of facts supporting the charge. Once matters are admitted the parties can then move along the reconciliation path.
4. Responsibility for offending is seen in a wider context in a restorative conference. It is possible to look at the responsibility of different people for what happened and for that to be taken into account in formulating a plan or outcome.
5. Conference plans are more likely to be implemented than Court sentences. Restitution is more likely to be paid if the offender has agreed to it than if it has been imposed by a Court. (In fact families are more likely to offer to pay reparation for offenders than would ever occur in the Court setting in New Zealand).
6. The dynamics of restorative conferences have a lot to do with empowering the primary stakeholders, who under “conventional” adversarial processes are largely in the control of professionals such as lawyers, judges, social workers or probation officers. Restorative outcomes are much more likely under an inclusive and empowering process than one which excludes meaningful participation and disempowers the key players. While restorative justice 10 years ago was generally contrasted with retributive justice (i.e. concentrating on the object of the exercise) there is a growing acceptance that the difference lies more in the procedures than in the goals. I therefore prefer to look at the contrast between restorative justice and adversarial approaches.
7. Restorative justice is more inherently a community-based approach. Best practice in Youth Justice in our country is founded on a wide involvement of different community agencies or individuals able to contribute to a positive outcome. In one adult scheme in the city of Timaru there is a community panel of some 15-20 persons with expertise in a variety of areas and two of those panel members are selected for each case depending upon their particular areas of expertise or experience. They then become part of a restorative conference. The Timaru scheme won an international award in London last year for its outstanding results.

The New Zealand Law Society gave its support to the idea of piloting a restorative justice scheme for adults when that was mooted in 1994. It was very pleasing to see the legal profession supporting a new initiative and they have continued to do so. Partly this is due to their experience of the restorative processes in the juvenile system. However the point that most often worries lawyers is the question of fairness to different defendants. The concern is that there will be widely differing outcomes resulting from similar offending because of the differing membership of the restorative conferences and in particular the victims’ attitudes. The point is an important one and I do not dismiss it. However I believe that it is founded on a concern about fairness that looks entirely to a defendant’s viewpoint rather than asking what is fair from the viewpoints of defendant, victim and the community. Western legal systems have traditionally given very little weight to victims’ views about sentencing, perhaps so as to avoid subjectivity. While that aim has its justification, it is in my view counterbalanced by the following:

(a) Defendants take victims as they find them in many respects already. The same piece of careless driving of a motor vehicle can have very different consequences depending upon quite fortuitous events relating to the presence and position of other persons or vehicles on the road. The same driving (viewed objectively) can lead to a charge of careless driving, careless driving causing injury, or careless driving causing death – with three very different sentencing outcomes.

(b) Many of the elements of a successful restorative conference are already recognised as valid elements in mitigation of penalties – remorse meaningfully expressed, apologies made, restitution offered or paid, and the victim’s attitude to these elements. These elements therefore can lead to different outcomes in otherwise similar cases even under the standard western sentencing model.

(c) Consistency of outcome is not possible without the potential of some injustice. Sentencing grids or minimum mandatory sentences which work on two or three elements (e.g. nature of charge, number of previous convictions) can produce consistent outcomes only on those factors and by ignoring others. When considering fairness from all participants’ points of view, the restorative process is more likely to produce overall fairness (hence the RISE experiment results above).

(e) Traditional Court sentences depend in part on the quality of the lawyers and other professionals involved, and the identity of the Judge. The appellate structure itself recognises that there are areas of discretion which mean that there will be different outcomes in similar cases depending upon the Judge’s view of the matter and what he/she has been told.

(f) Finally, it is not suggested that conference outcomes should not be subject to some form of oversight by the Courts. In the adult models operating in New Zealand on a voluntary basis the Courts continue to sentence and can take account of the conference recommendations to whatever extent the Judge thinks proper. In the statutory Youth Court model which we operate, some conferences do not involve court processes (diversionary conferences). But all conferences require the agreement of all parties including the specialist police “Youth Aid” officers who, like all other participants, can veto a particular outcome if they think it is inappropriate. If agreement is not reached then the matter goes to the Court. Even where the Court has referred a matter to a conference, the result of a conference is only a recommendation to the Court. In this way the Court (and the Police) are able to filter out inappropriate outcomes or to approve them with adjustments that make the outcome fairer.

I wish now to stress the way in which restorative justice can help build stronger communities. Some people ask whether restorative justice can work where there is no sense of community e.g. in large cities or where people are separated by long distances from their natural community. Experience both in Canada and New Zealand has shown that restorative justice is a community-building process. When you bring together people (including a victim) who are asked to devise ways of making things right, you are inevitably putting some measure of support around the victim, the offender and those involved with them. People are asked to take responsibility for each other – and that is what a community is all about. There is some scope even for officials to be held accountable – police can be asked why it was necessary to arrest and hold a young person in the police cells; social workers can be asked why they have failed to carry out the terms of earlier conference outcomes or court sentences; where a school is involved, questions might be asked about the way the school has handled the matter – and so on. (New Zealand has recently tried out restorative conferencing in schools.) It can in fact be a form of participatory democracy at a

community level – ordinary people, affected by conflict, taking responsibility for doing something about it and in the process, to some degree, able to hold accountable not only the offender but also others who have some responsibility for the state of affairs.

How does all this apply to small Island states such as might be found in your part of the world (the Caribbean) or mine (the South Pacific)?

Let me explain what the South Pacific is like, and allow you to draw whatever comparisons with the Caribbean are appropriate. We have 22 island countries of the Pacific region, nearly all being south of the equator. The islands occupy 2% of an ocean area covering 30 million square kilometres. Almost all are politically independent and many are members of the Commonwealth. The people in the western part are Melanesian and those further east are Polynesian. (Fiji, near the middle, has some of each.) For most Pacific Island countries foreign aid is still an important part of their economies.

Some countries have more of their people living in New Zealand than have remained at home. There are 200,000 Pacific Island people living in New Zealand, two-thirds of them in my home city of Auckland - which has the largest Pacific Island population of any city in the South Pacific. New Zealand therefore has a very close connection and affinity with other South Pacific countries. However Pacific Island people in New Zealand comprise (in round terms) only 5% of our population, compared with 15% who are Maori (indigenous Polynesian people), 75% who are of European origin, and 5% of other (mainly Asian) ethnicity. So much for the figures.

According to my country's Department of Foreign Affairs and Trade the problems that confront the Pacific region include domestic violence, youth violence and suicides, police-community relations, corruption and nepotism, churches uncoupled from justice issues, and a rapidly growing drug culture. They advise me that the Pacific has come to be viewed by some as a region of instability which can attract particular types of crime that thrive in the "dark end of the free market" - such as drug dealing, international financial crime, or trading in passports or other identification documents. This is especially so where there is inadequate regulation of financial dealings, substantial exploitation of the powerless, and unresolved ethnic conflict. Political instability and coups are also a risk, and a recent fact in some countries.

New Zealand does not for a moment pretend to be free of all such problems or to have all the answers to them. Indeed I am told by Foreign Affairs that some of the best thinking and best legislation is being done in some very poor areas, an example being the new legislation on domestic violence produced by Kiribati, a tiny country close to the equator. What New Zealand seeks to encourage is the emergence of the South Pacific as a region of law-governed and democratic states where rights and security are safeguarded. Our Foreign Affairs Department considers that there is strength in collective processes, and to this end New Zealand has, in company with others, provided peace-keeping personnel in Bougainville and East Timor. Its senior Judges sit on the appellate courts of several smaller countries. Currently New Zealand police officers are working closely alongside police from other countries through the South Pacific Chiefs of Police Conference. Their current focus is on community safety, including domestic violence. The comment was made to me by Foreign Affairs that some issues like domestic violence cannot be addressed "from the top down" but require a "grass roots" or community-level approach. Restorative justice is seen as potentially able to offer considerable assistance in building up the local community's strength and resources. The empowerment of people through the restorative justice process increases their ability to find and implement solutions to conflict and the sources of conflict. It is therefore one element in building up and strengthening civil society and holding others, including officials, accountable.

Because it now has the backing of the United Nations (following the 10th UN Congress on Crime, 2000), restorative justice can also provide an international approach to justice issues with strong linkages across national boundaries and even between areas as far separated as the South Pacific and the Caribbean. New Zealand is therefore keen to explore the collective processes and co-operative links that might be developed between small state regions such as the Caribbean and the South Pacific. I would be particularly interested to hear during this conference from those who can see a role in this process for the courts and the legal profession - or, for that matter, any other sector.

Footnote:

I have left with the Bahamas Bar Association two diskettes with copies of other papers that I have written over the last nine years. These provide (inter alia) a fuller account of the New Zealand Youth Justice system, the potential of restorative justice with adults, the parallels with Alternative Dispute Resolution in civil disputes, the application of restorative justice in schools, its possible application in very serious crimes such as sexual abuse within families or rape, and a Christian perspective of restorative justice. I have hard copies of papers by a variety of other writers, which I will leave with the conference secretariat. There is now a considerable international body of literature on restorative justice but two helpful New Zealand books are "Restorative Justice: Healing the Effects of Crime" by Jim Consedine, and "Restorative Justice: Current Practice" by Jim Consedine and Helen Bowen, both of whom will be in Nassau for the Restorative Justice Workshop being organised by Archbishop Burke for 25-27 June 2001.