
RESTORATIVE JUSTICE AS A NEW (SUSTAINABLE) PARADIGM OF JUSTICE

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Abstract

Not only is restorative justice (RJ) an increasingly developing area within scholarly debate, it is also a field where legislation is making significant progress. It is in statutes that practical solutions need to be sought out and eventually enshrined in law in order to accommodate individuals' demands for justice. Therefore, in a scenario where the economic impact of a traditional judicial matter may "skyrocket" to egregious levels, RJ may well represent a new and alternative model for the judicial system. Against this backdrop, this article, first and foremost, discusses and analyses the history and evolution of RJ. Thereafter, attention is turned towards the most recent applications of RJ, such as for the resolution of family conflict.

Keywords: restorative justice; legal costs; comparative analysis; United Kingdom; Scotland; Italy.

[A] INTRODUCTION

Based on a Hindu saying, the community mantra would be: "he who batones is forgiven" (Weitekamp 1989). Restorative justice (RJ) is a method whereby victims will be restored of the damages suffered, but it is also a means of restoring the community. The restoring activities encompass, among their objectives, property lost, personal injury and, more generally, a sense of security.¹ Furthermore, an additional aim is to restore harmony, in light of a shared feeling that justice cannot be served while an underlying injustice still persists (Braithwaite 2000).

¹ An example could be the failure of a justice system where it is stipulated within its own legislation that women cannot walk alone at night because that would not be safe.

It is crucial, first and foremost, to emphasize that RJ² should not bring to mind a romantic notion about the world and its “law and order”. Rather, the purpose that RJ strives to achieve is the re-establishment of fundamental rights, proportionality, rule of law and the separation of power (Braithwaite 2017). A corollary of this is that RJ does not aim to abolish the key elements of the criminal judicial system of the state. Nevertheless, thanks to RJ, power can be shifted—from central bodies to civil society. Consequently, the judicial system continues to be democratically administered by the community, within a pre-determined legislative framework.

RJ is “an old idea with a new name”:³ under the “umbrella” of RJ, potentially, scholars mean two different things. Moreover, not only does RJ have deep intellectual and cultural roots, but its origins can also be described as somewhat “mythical”.

This adjective is reminiscent of Greek tragedy (Soulou 2021). The real essence of the latter is close to contemporary social thinking, so long as tragedies can be considered representations in action of an experienced crisis (Morineau 2017). Additionally, RJ and Greek tragedies have other common roots.

The first one is compliance with a ritualized process; the second is the analogy between the “chorus” and the role of the facilitator. The latter element is the human-centric approach: the human being is in the centre of the process in order to understand both feelings and skills of an individual (Chapman & Ors 2018).

With regard to the intellectual and cultural aspect, the language also alludes to Judeo-Christian traditions:

History of service and advocacy of justice for the poor and needy as an act of love and obedience to God (Kuzma 2000).

Additionally, RJ is a “mythical” matter; indeed, it is a rhetorical and artificial venue and, because of this, there is “a presentation of distorted past” (Sylvester 2003) and, through forensic language and fantasy narrative, the main “actors” are able to find a reparative solution.

This practice involves two disputants (the “micro” or the “macro”) and involves long-standing societal ills, for example South Africa’s apartheid

² RJ is defined as “[d]esignating a form or concept of justice that punishes or rewards a person in accordance with, and in proportion to, their conduct ... Also in later use: designating a system of justice based on punishment of the offender, rather than on rehabilitation.” (The Oxford English Dictionary, *sub verbo* “retributive”, online).

³ [The Centre for Restorative Justice](#), Simon Fraser University.

era. RJ, in this first scenario, requires voluntary participation, since victims and offenders in conflicts are in the same venue.

The focus is both on victims and offenders in a conflict in order to restore social harmony. In contemporary practice, the best *loci* for RJ projects are multivarious, since they include indigenous groups, religious bodies, community organizations and government programmes (such as police, prisons and social welfare). More precisely, nowadays, the common features of RJ can be found in a shared vocabulary:⁴ “constitutional” charts and documents; the language of decolonization of social justice and of political partisanship.

The common element of RJ is the will to restore a social relationship in order to establish or re-establish social equality (Llewellyn & Howse 1999). In this context, the language remembers an oppressive “state” and, consequently, the victims’ marginalization. To summarize, RJ encapsulates, in itself, three main topics: firstly, violence and marginalization; secondly, an oppressive element; and, finally, the power of language in order to establish justice. The latter is the quintessence of RJ—as far as the offender has a “debt to society”, the reintegration price consists in the rehabilitative treatment (Fletcher 2006). A normal life for the criminal imposes an obligation that he or she repair a damage both with the victim and with society.

It is crystal clear that RJ has *per se* a definition problem, the latter, in fact, is a “vexed problem”. RJ, in other words, has grown significantly in terms of its use, and has become also increasingly hybridized. To elaborate, the term “restorative” is applied in a host of practices, such as community reparations boards, surrogate victims or offender meetings, community service. Additionally, this term is also applied both in a multitude of settings, for instance schools, prisons and workplaces and in a variety of contexts, for example, criminal justice, transitional justice, institutional responses to abuse and so on (Daly 2016).

Among scholars, it is possible to observe two different and also opposite stances. On the one hand, there is the position of the so-called “purists”: they argue that RJ is a process (Dünkel & Ors 2015). On the other hand there is the position of the “maximalists”, who argue that RJ is an “option” that encourages outcomes to repair harms caused by crimes (Walgrave 2011).

⁴ In relation to this expression, some scholars prefer “common vocabulary” (Chiste 2013).

Ultimately, RJ, from a United Kingdom (UK) perspective, could be defined as:

A process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future (Marshall 1995: 16; see also McCold & Wachtel 2012).

This definition encapsulates two minimum elements: 1) a meeting between victims and their offenders; 2) after this meeting, an outcome will ensue. From this standpoint, only three models of RJ meet these requirements, more specifically: 1) mediation; 2) conferencing; and 3) circles.

[B] RESTORATIVE JUSTICE AND ITS STRICT RELATIONS WITH THE COMMON LAW LEGAL SYSTEM

RJ is strictly connected with common law; hence it unfolds case by case via three different channels: an administrative one; legislative change; or community initiatives (Daly 2008). In the UK, RJ came from New Zealand via Australia because in New Zealand this practice in the criminal justice field was largely inspired by community practices well known amongst Māori peoples. More precisely, in New Zealand, RJ is an integral part of the youth justice process.

In the UK, it is the Scottish legal system that has veered significantly towards the main idea of RJ: indeed, the logo of Scotland Restorative Justice is a Celtic knot. The latter is a metaphor that

represents the intertwining of the ancient Celtic peoples. It is a symbol of peace with one's self and in one's relationships with others (Scottish Executive 2005).

Moreover, after the devolution of criminal justice authority from England to Scotland, Caledonia has been identified as the catalyst for the development of efforts to "tackle youth offending" (Scottish Executive 2012).

Along the same lines, devolution (the process whereby, since 1998, Scotland was given a certain level of autonomy) has led to other outcomes, for example the release of "Lockerbie Bomber", Abdel Basset Ali alMegrahi, and his return to Libya. The motivation was based on "compassionate grounds", and it highlighted that

Scotland's laws and Scottish values dictate that justice must be done but that mercy must be available. To act otherwise would be to

discard the values by which we seek to live and debase the beliefs we seek to uphold (*BBC News* 2009).⁵

A quite different application of RJ is the approach in Northern Ireland where the concept under discussion has grown up in a post-conflict society. It is crystal clear that RJ, in this scenario, had a utilitarian soul. After the Northern Ireland Peace Accord came into effect in December 1999, the first RJ scheme was encapsulated into different projects in both Belfast and Derry-Londonderry. The main goal was to deal with young offenders, their victims, families and communities (Schrag 2003).

However, it is the RJ Scottish experience that better shows the intimate link between justice, education and young people. The reference is to the Children (Scotland) Act of 1995 (c 36). This has consolidated the diversionary programme, thanks also to devolution from English to Scottish control (Chiste 2013).

The main idea is that RJ is crucial in order to build a society where a potential conflict between victims and offenders is resolved among themselves without a third party. In other words, offender and victim have a meeting in the same place to stage a trial. In the meeting, the parties discuss the facts, their feelings, how to realize a reparation and, finally, behaviour for the future.

[C] RESTORATIVE JUSTICE: COMMUNITY, JUSTICE AND CITY

The sociological approach of RJ in Scotland and Northern Ireland is based on the idea that RJ is a way whereby society—ie the community and the city—can show the balance existing in a social context.⁶ This also explains two other hot topics: namely, RJ as a methodology in family conflict and the new challenges of RJ.

As far as the first issue is concerned, it is important to clarify that family violence is not a unitary phenomenon, since it involves varying levels of violence, different levels of frequency and persistence and, not least, different interpersonal and structural dynamics. In the “patria” of RJ, New Zealand, an empirical study showed that the strength point of

⁵ This decision was also supported by the Church of Scotland and the Catholic Church in Scotland.

⁶ “Our challenge as practitioners, writers and trainers, in the effort to widen the scope and reach of Restorative Justice to embrace Approaches and Practices, is to ensure we do not dilute its powerful message, we do not lose its unique gifts to transform the way we respond when things go wrong between us, we do not undermine its capacity to transform justice systems across the planet” (Hopkins 2015).

RJ in domestic abuse is the protection of the victim. In other words, family and friends are more proactive and conscientious in safeguarding the vulnerable person/people.⁷

To elaborate, RJ is a vehicle against the isolation of both the victim and the offender: the dialogical activity builds a family and friends network, in order to provide social support during the rehabilitation process. As far as domestic violence and abuse are concerned, the priority, also after the possible reconciliation, is safety, therefore the network should also include an operator of justice. This is the peculiarity of RJ in a family violence context.

To summarize, RJ is incompatible with family violence, hence the emphasis on face-to-face processes and reconciliations between parties may not always be appropriate. By contrast, RJ is a community-based process in which the group does face at least two duties: to create a safety net for the victim; and to stimulate a discussion about the behaviour. This community framework becomes responsible for facilitating the appropriate solution to any harmful behaviour: not only is the attention drawn to ensure the safeguarding of the victim, but also the focus is on monitoring the offender's behaviour.

Based on the foregoing, it is worth stressing that RJ requires a discussion about the restorative city and the use of RJ in family violence is a good example. As RJ in a resolution of family violence alludes to the responsibility of the "group", the individual in a society is responsible for the impact on others. In other words, communities are responsible for the good of the whole and the latter also includes the well-being of each member. The interaction of any individual with any other individual affects those individuals and affects the collective impact and, at the very least, also the overall well-being of the collective. In this line of reasoning:

The mutual responsibility between individual and community at the core of restorative justice does not entail the suppression of individuality to serve the group, but entails attending the individual needs in a way which takes into account the impact on the collective and seeks to meet needs in a way that serves both, or at least balances the needs of the individual and the group (Pranis 2002).

Moreover, domestic violence is not merely a private matter, since it also involves a mutual responsibility and, at a minimum, it also represents a cost for both social services and medical care. Ultimately, it becomes

⁷ Also in this paragraph, it is important to highlight that the restorative process is not about decriminalization because often in family violence there is an imbalance of power. Nevertheless, this imbalance could be better managed via protection conferences than through a court. It is also clear that it is possible if there is also a protected social community or group.

crystal clear why RJ in family violence and restorative city are two sides of the same coins.

The concept of “restorative city” (Mannozi 2019) in a nutshell, is:

A big vision that has at its heart a long-term commitment to building a better future for the city and its people. The aim has been to generate a common restorative language through which all children and young people experience education, criminal justice, social services, and so on (Green & Ors 2013: 47).

Under the “restorative city”, RJ would unleash a triangle of relationships; the three corners of this triangle are the victim, the offender and the community (Cunneen & Hoyle 2010). An empirical case study was Hull city where, thanks to education, criminal justice, social services and social experiences, children and young people have resolved their own problems.⁸ More precisely, the objective was:

To build a highly positive school culture and an exceptional sense of community and helped its pupils develop the skills to feel respected, secure, happy and able to make the most of their lives (Mirsky 2009).

One more example is the Scotland experience of tackling hate crime.⁹ The recommendations of the Scottish Government were to “use the restorative justice methods with the victims and perpetrators of hate crime” (2016). In the following year, 2017, the Scottish Government launched its own guidance for the delivery of RJ in Scotland in which it specified the aim. In particular, the last goal was to

Ensure that, where restorative justice processes are available, these are delivered in a coherent, consistent, victim-focused manner across Scotland, and are in line with the EU Victims’ Rights Directive (Scottish Government 2017: para 1.1).

It is crucial, for the successful use of RJ, on the one hand, to implement an informational structure and, on the other, to remove social barriers. The purpose of this is to create a robust information-sharing agreement, as well as resources, training and gaining buy-ins. This new approach would engender alternative responses to the traditional forms of punishment of hate crime. A key, also important for RJ, is to ensure that participants feel represented by the communities to which they belong, hence the need for community involvement. Finally, it is essential to stress that RJ

⁸ This study in Hull was a Pilot Scheme run by the Youth Justice Board.

⁹ Although Scotland is considered one of the world’s friendliest countries, the most recent annual data published by the Crown Office and Procurator Fiscal Service (2020) showed that hate crime and prejudice in all their forms are “alive and kicking”. Additionally, this report demonstrated that there was an increase in the number of charges reported in 2019-2020 compared with 2018-2019 for all categories of hate crime.

is not “soft justice”: this is an elephantine mistake (Hamad & Cochrane 2020).

Additionally, RJ could lead to the creation of a restorative city and new forms of justice because the administration of justice is under strict control of the citizens themselves. However, this view of justice, in a purely orthodox interpretation, contrasts with the professional justice of lawyers (Braithwaite 2017). This sentence does not become the real aim of RJ, because RJ is not totally alternative to the criminal justice system but is a continuum. Not only is RJ after the “crime”,¹⁰ but it is also before it: social and criminal harms are both the cause and the consequences of a communication breakdown. This ultimately highlights that by the term “restorative city” we refer both to restorative practice and to RJ.¹¹ The first one provides the skills, the technique and format for building a relationship (Bankhead & Barry 2018). The second one repairs the relationship after the broken or damage.

A further development to RJ in the restorative city is the field of eco-crime. By this topic we mean a new subject, where the centre is not between intra-individual relations, but also inter-individual, where the victim is the environment. From this perspective, the “spokespersons” of the latter have not only become the aboriginal people and their heritage but also the environment itself. In some cases (*Urgenda v The Netherlands, Juliana v United States* 2015; *Future Generations v Ministry of the Environment* 2018), the court recognized as responsible the government and companies in order to extend greater protection of human rights and judiciary action for the climate.¹² According to this line of reasoning too, it was held that it is an obligation on the part of the state to take reasonable measures “to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources”. Consequently, the state was called for a “comprehensive clean-up of lands and rivers damaged by oil operations” (*Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria* 2002).

¹⁰ Not only does the crime break the law, but it also violates relationships: from the crime arises the obligation to make things right (Zehr 1990).

¹¹ The Council of Europe has defined RJ as a “any process which enables those harmed by crime, and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, through the help of a trained and impartial third party (hereinafter the ‘facilitator’” (Recommendation on restorative justice in criminal matters, 2018, §3).

¹² See United Nations (UN) Framework Convention on Climate Change 1992. Article 1(1) requires duties of control pertaining to adverse effects on the: “Composition, resilience or productivity of natural and managed ecosystems”.

Thus, an environmental harm could be established, from a legal perspective, on the basis of two different criteria: both the sustainability mantra and human rights.¹³ The backdrop is the idea that humans and human activities are strictly integrated and connected within nature and the environment.¹⁴

[D] RESTORATIVE JUSTICE IN A RESTORATIVE CITY AND SMART JUSTICE IN A SMART CITY?

This article shows how city and justice or, better, society and RJ are two parallel “beings” that walk together. Such consideration is also corroborated by new developments in RJ, such that RJ may also be the “guarantor” of nature and ecosystems in an era where environmental and social governance is a mantra.

Moreover, it is the same concept of community that has evolved in the practice of RJ. Initially, the early models included only victim and offender and the mediator was represented by the community. Yet, the evolution of RJ has seen, first, the introduction of family support and, thereafter, there are different shaped models, for example conferencing and circle models, where we can see a third party who is a facilitator. The latter is expected to facilitate the understanding of this “process”. Finally, these other models—circle and conferencing—are based on programmes to provide social work services for individual victims, offenders and their families. In these, the facilitator role is limited to determine who should participate. Consequently, this facilitator will prepare the parties to ensure that they partake in both participation and organization of the restorative process (McCold 1999).

Thus, the burning question is concerned with the evolution of this particular form of justice in a technological city. If RJ brings to mind a restorative city, the question is whether a smart city assumes a smart

¹³ Principle 1 of the Stockholm Declaration 1972 states that: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.” Additionally, the UNHRC (2012) has emphasized that there is also an existing human right, a “green” right: namely “human rights vulnerable to environmental harm”.

¹⁴ The reference is to the word “*milieu*”: the image of nature is shaped by humans who, in return, determine their own collective and individual subjectivity through such shaping activity. In other words, *milieu* designates a physical and sensorial action between human and non-human beings, such as natural resources or nature in general. Additionally, *milieu* also refers to the development of human personhood into a specific venue. See Hall (2013); Droz (2022).

justice. In this regard, the reference is to robotic justice, or robo-judge, and its implications in conflict resolution.¹⁵

First and foremost, it is important to highlight that often in literature the binomial smart-city and justice refers to social dividing as a result of the development of information technology (IT) in a city (Rosol & Blue 2022). By contrast, in this article, justice in a smart city is a judicial process with an alternative approach, such as RJ. In other words, the main issue is so-called e-justice—or e-RJ.

Inherent to e-justice is a digital approach to all the public services related to justice: for example, this could encompass an app for a lawyer thanks to which the latter would be in touch via smartphone with tribunals. This app is not utopia, since it already exists in two forms in the real world: namely, COLLEGA (in English “colleague”)¹⁶ and ANTHEA.¹⁷ The first is used to find a domiciliary, a substitute for a hearing, or a colleague who can carry out any type of administrative activity in one of the Italian judicial offices. The second one provides tools to divorced couples for managing affairs related to the new family status and the handling of children in cases of parental conflict. Also, with ANTHEA the parties in the divorce proceedings have a specific chat with restricted and regulated access that checks that communications are based on civil and appropriate language. The use of this app must be approved by the judge in charge of the case after studying the dispute.

It is clear that ANTHEA acts as a mediator in a specific controversy and the human judge stays in the background. Additionally, the court may also use this app if a protocol (ie an ANTHEA protocol) has been drafted in its region (Lupo & Carnevali 2022).

Another example is the “smart-court” in China to promote the modernization of China’s trials including the procedural system and the actual participation of the parties before the court (Zu 2019). All of this is based on an online mechanism in order to conduct the dispute resolution process in a transparent environment.¹⁸ The central point seems to be an enhancement of transparency, fairness and efficient and people-centric justice.

¹⁵ From a critical perspective, see Mackinnon & Ors 2022.

¹⁶ See the COLLEGA [official website](#).

¹⁷ See the ANTHEA [official website](#).

¹⁸ Supreme People’s Court, “Opinions on Accelerating the Building of Smart Courts” (Judicial Document, 12 April 2017) No 12.

Since 2017, also in China, there has been an e-justice process of information and judgment online: there is an IT platform that supports this service and collects the data of all the different participants (Shi & Ors 2021).

However, in the Western world, the UK was the first country, in 2018, to hold a video-trial in the tax tribunal: the appellants and representatives from the tax office attended remotely from their home or office (Acland-Hood 2018).

Since RJ is closely connected to community and its changing systems, this IT development could have an impact also on the “new” community. The standpoint is that in the some countries, such as China and Japan, in a restaurant the waitress may not be human but synthetic. Additionally, in most sectors, such as transportation or urban mobility, scholars are beginning to discuss the status of “remote operators” or liability of autonomous systems.¹⁹

As a result of this, potentially, in the near future, controversy may also arise from human and synthetic beings with regards to liability and, consequently, damages. For this reason, RJ could also change its own skin and reflect the new society. Although most scholars (Giuffrida 2019; Wendehorst 2020) say that liability lies with both manufacturer and operator, it also possible that, in future years, robotic beings will be liable. In other words, if an AI system has personhood (Allain 2013), a synthetic being would also be expected to be liable for damages (Select Committee on Artificial Intelligence 2018). In this case, AI becomes an independent “person” under the law, with rights and duties (Sullivan & Schweikart 2019).

To conclude, RJ too may change, and in a future world, seemingly, we could see human and synthetic beings that have meetings to resolve a legal conflict. This will be the most significant sign of an interaction, without discriminatory biases, between two different and opposite “worlds”.

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¹⁹ To summarize, the question is: “It is the year 2023, and for the first time, a self-driving car navigating city streets strikes and kills a pedestrian. A lawsuit is sure to follow. But exactly which laws will apply? No-one knows” (Kingston 2016).

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