Is Punishment the Appropriate Response to Gross Human Rights Violations?

Is a Non-punitive Justice System Feasible?

A PAPER PRESENTED BY EZZAT A. FATTAH
Ph.D., D.h.c. (Liege), F.R.S.C. Professor Emeritus School of Criminology Simon Fraser University Vancouver, Canada
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Centre for the Study of Violence and Reconciliation
PO Box 30778, Braamfontein 2017, South Africa
Telephone: +27 11 403 5650
Fax: +27 11 339 6785

Abstract

Is Punishment the Appropriate Response to Gross Human Rights Violations? Is a Non-punitive Justice System Feasible?

Proponents of Restorative Justice in the West often forget that Africa is the cradle of R.J. Social evolution in pre-industrial African societies and saw the move from private vengeance to group retaliation which, in turn, paved the way to a system of composition, the earliest form of R.J. The current punitive system was imposed by the colonial powers and surprisingly remains in place long after independence was achieved. It is baffling that despite the manifest advantages and benefits of R.J. over a punitive, retributive system, whose sole aim is to inflict pain and suffering on the wrong-doer, there is still reluctance to do away with the ideas of expiation and penitence in favour of reconciliation and compensation. The strong support for victims of crime, coupled with the fact that victims are the main losers in a punitive system of justice, have not succeeded in convincing politicians, lawmakers or the general public to abandon this medieval practice. And yet, the destructive and detrimental effects of punishment are too evident to ignore. There are many reasons why punishment can never be an appropriate response to harmful and injurious acts. The unanimous view is that for punishment to be morally acceptable in a democratic just society it has to be proportionate to the injury or the harm done. This noble objective of fairness is utterly impossible to achieve in practice. This is why Transitional Justice is becoming the preferred mode of dealing with atrocities committed by previous regimes in countries in transition to democracy. All this suggests that the time is right for a paradigm shift in society's response to crime. Many years ago I argued that this can be achieved by moving from a guilt orientation to a consequence orientation thus removing the artificial boundaries arbitrarily erected between civil and criminal law. This goal will hopefully be attained by the implementation and full institutionalisation of Restorative Justice.

Introduction

Thirty-five years ago, in the heated struggle to get Canada to abolish capital punishment, I decided to test the popular and widely-held, though unproven, belief that the death penalty is a unique deterrent. To do so, I conducted a study of the quantitative and qualitative regional variations in criminal homicide rates across Canada. It would take too long to summarise here the details of the study or its findings. The results showed that the faith placed in the deterrent effect of the death penalty lacked any scientific or empirical support. Actually, it suggested strongly that the supposedly unique deterrent effect is not fact but fiction.

One of the lessons I learned from the study is that homicide research can, in many ways, be very enlightening for the discipline of criminology, much more so than other offences against property or against the person. When shortly afterwards I was visiting the Ivory Coast as a guest professor at the University of Abidjan, I decided to do a study of African homicide to gain a better understanding of the impact culture has on the rates, the nature and the types of criminal homicide. As a former French colony, the Ivory Coast inherited a good system of record keeping and this, I thought, would both facilitate and enhance the validity and reliability of the study.

Having obtained the needed authorisation, I carefully examined the national police records on criminal homicide during the previous ten years.

Very soon I noticed that there were few, if any, cases recorded in the rural areas and the small villages of the Ivory Coast. Could it be that the rural population in the country was much too peaceful to kill one another? Well no! There was in fact another explanation. Once I probed further into the possible reasons for such a flagrant discrepancy, it did not take me long to realise that there were two, almost parallel, systems of justice operating in the Ivory Coast. One was the Western punitive system, inspired by the expiatory and retaliatory teachings of the Old and New Testaments, a system that was imposed on the Ivoirian population by the colonial power, France. The system used mainly a two-pronged weapon in its response to crime: death and imprisonment. The second was the indigenous, tribal system, or call it patriarchal if you want, which used customary rules and traditions to solve conflicts and to settle disputes of all kinds between the members of the community.

Getting no satisfaction from the Western system of punitive, retributive justice, and unable to comprehend why the State should steal the conflicts from their rightful owners (to use Nils Christie's idea) while doing nothing to compensate the victim's family or to achieve reconciliation between the feuding clans, those victimised simply did not report the homicides to the police, preferring instead to have the matter dealt with according to their norms and their customs. The two elements of this indigenous justice were compensation (for the death, injury or harm done) and reconciliation aimed at restoring the peace disrupted by the offence and at ensuring a future of harmonious co-existence.

This was a valuable learning experience. It brought to mind a truly remarkable case that I came across when studying the history of capital punishment in Canada. This truly amazing case happened in a British settlement in the Canadian North during the early days of the British Colonial Rule. It is the story of an Indian Chief of one of Canada's First Nations tribes whose son was killed by the son of the British Garrison Commander. Bent on showing the fairness and equality of British justice, the officer insisted that his son be executed in conformity with British law. The pleas of the victim's father fell on deaf ears. He offered to adopt the killer so that he may replace his slain son. He could not, despite his personal grief, understand the rationale for the death penalty, the wisdom of doubling the loss instead of trying to minimize it. He asked himself and the commander: What purpose would be achieved by taking the life of the culprit? But to no avail. The Talion Law: a life for a life, an eye for an eye, and a tooth for a tooth, had to be applied. And the so-called civilised Western justice had to prevail and did! The evident futility and destructiveness of such punishment was not enough to persuade a dedicated military officer to bend the rules or to listen to the wisdom of the Indian Chief, even if it meant sparing his own son.

All this was an eye opener. It convinced me that punishment is not and can never be the answer. It convinced me that there must be a better solution, a better response to harmful, injurious acts. In the search for a more constructive and less violent way of conflict resolution I came across the tales of cultural anthropologists who studied what Western scholars denigratively called "primitive societies".

Those were societies that have escaped the influence of Judaism, Christianity and Islam and thus were not inspired or affected by the religious notions of expiation, resipiscence and penitence.

What is truly remarkable is the quasi-universality of the historical evolution of social reaction to harmful and injurious acts. The reports of social and cultural anthropologists show that in every society studied there was an evolution from private vengeance to group vengeance to a system of composition which is the earliest form of restorative justice. Moving from vengeance to compensation was a normal progression because retaliation proved detrimental to the group.

As Barnes (1972:48) pointed out:

> The most serious shortcoming of the system of clan retaliation was that it provided no satisfactory method of bringing a quarrel to an end… Therefore, an injury once perpetrated started a perpetual vendetta which was likely to render life extremely precarious to members of both clans.

It is rather amazing, therefore, that despite enormous social evolution and vast intellectual progress in the last two centuries, our criminal justice system remains frozen in the era of retaliation. It continues to be fixated on the notion of retribution and the need to inflict pain and suffering on the offender by way of making him pay for the injury or harm he has done. It is quite baffling that in this day and age, in the 21st century, we continue to accept the punishment response as a given and fail to see its destructive and nefarious consequences whether the penalty is death or imprisonment.

My favouring of Restorative Justice over punishment is not merely a humanitarian stance. It is based on a deep conviction that it is a better, viable, constructive and more effective response to harm than the deliberate infliction of pain and suffering. This is why any attempt to discuss Restorative Justice or to extol its merits must inevitably address what is fundamentally wrong with society's current response to violent and harmful acts. Instead of praising R.J. and highlighting its positive aspects which are by now well-known, a more critical approach would put the emphasis on the failures, the futility and the detrimental effects of the current response, namely the use of punishment and penal sanctions as the sole or the dominant response to undesirable and illegal behaviour.

What are the Obstacles Delaying the Full Institutionalisation of Restorative Justice?

If Restorative Justice is a better system, what are the obstacles delaying its implementation and full institutionalisation? This is a very valid question.

When discussing punishment with politicians, policy-makers, scholars, professionals, or with ordinary citizens, more often than not, they end up agreeing that punishment is bad. But then they always come up with what may be called "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 (or as they say in French "un mal nécessaire"), it is the mistaken belief that it is indispensable to the survival of society, which 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 common sense, conventional wisdom level, invariably show that whatever support punishment may have is more out of despair than 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 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).

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 secularisation of society, the liberalisation of attitudes towards human misbehaviour, 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.

And yet punishment persists and flourishes, even in Scandinavian countries that were, together with Holland, the first to try to do away with it. With the notions of vengeance and retaliation becoming slowly but surely dated and obsolete and having been judged by modern thinkers as primitive and uncivilised, advocates of punishment are having no choice but to cling to the utilitarian, yet unproven, 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 one ignores 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. The practice of punishment suffers from an incorrigible paradox: where punishment may be effective (such as in cases of white collar crime

or other well-calculated rational offences) it is not wanted, and where it is wanted, such as in crimes of violence, acts of terrorism, sexual offences, and the like, it is unlikely to have any deterrent effect. Moreover, punishment 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 scrutinised.

The Faulty Premises Underlying the Use of Punishment

The punishment response is based on several faulty premises.

One such premise is the erroneous belief that criminal behaviour is somehow unique or a distinct type of behaviour that needs to be punished by a specific class of criminal sanctions. If this premise is incorrect, and it is easy to show that it is, then punishment has no moral or rational justification. While the general public may be under the impression that crime is qualitatively distinct, criminologists have shown over the years, with examples at hand, that criminal behaviour is not qualitatively different from non-criminal behaviour. They showed that for every behaviour defined as criminal and sanctioned by the criminal code or by criminal statutes, there are identical or similar types of behaviour that are neither illegal nor punishable (Fattah, 1997:49).

Leslie Wilkins (1964:46) noted that "at some time or another, some form of society or another has defined almost all forms of behaviour that we now call criminal as desirable for the functioning of that form of society".

Surely, there is no qualitative difference between crime and civil torts and in many instances the same act is both a crime and a tort. And yet society's response to them is very different. It is also important to keep in mind that not all types of violent, aggressive, or assault behaviours are made criminal by the law. Many forms of violence are condoned and tolerated to the extent that they become culturally legitimate. Until a few years ago, the Canadian Criminal Code (and many others) did not define forcible sexual intercourse with one's own wife as a crime. But the same act perpetrated on a woman who is not the man's wife did qualify as a serious crime punishable by imprisonment for life. Although the behaviour in the two cases is identical, in one case it is criminal, in the other it is not, depending on whether the two parties are bound by marriage or not. The same can be said of statutory rape and other sexual behaviours with minors, where an arbitrarily determined age, an age that changes over time and varies greatly from one society to another, is the deciding factor whether the behaviour is criminal or not, is punishable or not.

Until recently, use of the strap in school for misconduct, using violence to discipline or control the behaviour of inmates in penal institutions, and flogging offenders guilty of certain crimes were all seen as legitimate forms of violence, and those on whom such punishments were inflicted were seen as deserving targets. Milder forms of violence within the family are not criminal in most jurisdictions. Children are considered legitimate targets for the use of physical force in the process of training and control, and for a long time, husband-wife violence was regarded as legitimate by both the police and the courts.

It is a well-known fact that crime, delinquency and violence start and reach their peak in the teen years, and are more prevalent among boys than among girls. The reason is not a mystery. For the most part, delinquent and violent acts are those of suppressed youth protesting the values and norms being imposed upon them by the older generation, and expressing their defiance of, and their revolt against, authority. After a few years, delinquency and violence decline because those youthful rebels no longer feel the need to assert their independence or to impose their own will. Forget about the explanations that point to the raging hormones and rising levels of testosterone. It is this misguided search for the elusive causes that has led criminology astray. If most of delinquent and violent acts committed by young offenders or juvenile delinquents are acts of rebellion, revolt or defiance, then responding to them by violence can only make a bad situation much worse.

Another faulty premise underlying the use of penal sanctions is the mistaken belief that criminals are radically different from law-abiding citizens, a belief that leads to the creation of a false dichotomy between criminals and non-criminals. Faced with horrendous and horrible acts committed by fellow humans, it is in human nature to try to distance ourselves from the perpetrators of those acts. An easy way of doing this is to think of them as abnormal, as different, as suffering from some kind of pathology. It is comforting to see them as monsters, as depraved psychopathic individuals. Positivist criminology takes as its point of departure that criminals are fundamentally different from the rest of the population. Hence the primary goal of scientific inquiry is to identify those distinguishing characteristics that differentiate criminals from the rest of us. The well established tendency of positivist criminology to "overpathologize" offending and offenders and to focus on their supposedly abnormal personalities, deviant characters, or irrational modes of thinking discounts the fact that most criminal behaviour is of a mundane, opportunistic, and rational nature. The Japanese criminologist Hiroshi Tsutomi (1991:14) said it best when he wrote: "People commit crimes not because they are pathological or wicked, but because they are normal".

It is very true that the vast majority of criminals are normal people driven by the same motives that drive all of us. Whatever difference there may be lies not in the goals being pursued but in the means to achieve those goals. The popular saying "the end justifies the means" is an effective technique of rationalization used by criminals and non-criminals alike. It is the justification used by individual terrorists and terrorist groups and has recently been adopted by leaders of democratic countries such as the USA and Britain. Positivist criminology's assertion that "people who break the law are often psychologically atypical" or that "offenders are… atypical in personality" (Wilson and Herrnstein, 1985:173) is contradicted by the observations that anyone placed in certain situations, under certain conditions, and subjected to certain pressures and constraints is capable of committing acts of extreme atrocity, cruelty, cupidity, dishonesty, and so forth (Fattah, 1997: 128/129). The experiments of Milgram (1969) and of Zimbardo (1972) prove it. So does Nils Christie's (1952) study of Norwegian guards in German concentration camps during the Nazi occupation of Norway in the Second World War. The same was shown by Christopher Browning's (1992) study entitled "Ordinary Men: Reserve Police Battalion 101", by Daniel Jonah Goldhagen's (1996) study of "Hitler's Willing Executioners", by James Waller's (2002) research into how ordinary people commit genocide and mass killing. There is no lack of historical evidence confirming those authors' assertion. One has only to think of the Mai Lai massacre in Vietnam, or

the atrocities committed by the American soldiers in Abu Gharib prison in Iraq and in Guantanamo Bay in Cuba, to name but a few. The studies of Milgram, Zimbardo, Christie, and Browning, among others, are of extreme relevance to those who are trying to comprehend and deal with the atrocities and gross human rights violations committed by former totalitarian, dictatorial regimes. They help understand the behaviour of those responsible for those atrocities, particularly those who were obeying orders or were totally intoxicated by the powers they held over their helpless captives. The psychological processes of rationalisation, neutralisation, demonisation, deindividuation and dehumanisation of the victims shed much better light on the perpetrators' seemingly incomprehensible behaviours than any search for the abnormalities or peculiarities of their character and personality. They should be pivotal in any attempt to find the most appropriate ways of dealing with their crimes.

Another faulty premise underlying the punishment response is the erroneous belief that incarceration, with the degradation, humiliation and dehumanisation that it entails, is bound to transform the offender into a better and more honest or docile person upon release. That some continue to believe that the prison experience can be a positive experience is truly mind-boggling. The depravation of freedom and the detention in crowded inhumane conditions can only breed hate, hostility, resentment and anger. It creates resentful, vindictive and vengeful individuals who cannot wait to get out to take their revenge against society. Is it any wonder that recidivism rates are so high? Isn't this the reason why both juvenile and adult institutions have been described as "schools of crime"?

The faulty premises underlying the punishment response are too many. Yet, probably the most erroneous of all is the idea that courts of justice can mete out penal sanctions that are proportionate to the injury or the harm done, that they can make the punishment fit the crime.

It is utterly ludicrous to think that imprisonment can be a fair, just, and personal punishment that is commensurate with the wrong being punished. The plain truth is that the punishments that are daily dispensed by the criminal justice system are blatantly arbitrary and unjust and thus cannot be ethically condoned or morally defended. And while the requirements of efficacy, profitability and necessity do not withstand any empirical test, it is the condition of proportionality that can never be met by punitive sanctions, particularly imprisonment. More than two decades ago, in an article published in the Canadian Journal of Criminology (Fattah 1982), I went to great length to explain how impossible it is to make a prison sentence proportional to the offence being punished. And yet, imprisonment continues to be used as the primary means of retribution. This despite the fact that it is totally impossible to rationally or equitably determine what prison term is a fair expiation for an attack on property, or to create an equitable balance between physical and sexual assaults and a given number of days, months or years in prison. Despite well-meaning attempts such as "the justice model", "the principle of commensurate deserts", "the presumptive sentence", the arbitrariness of such equation is both evident and inevitable. Yes, it is possible to grade various offences according to their objective and / or perceived seriousness. However, to come up with a prison term equivalent to theft or robbery, to assault or rape, is inevitably arbitrary, capricious and despotic. As the inherent problem of equating the amount of deprivation of liberty with the degree of moral guilt of the offender, or with the extent of the

harm done, has never been solved, the capricious determination of the length of imprisonment is left either to the arbitrariness of legislators or the discretion of sentencing judges, with all the disparities and inequities that ensue. To continue to accept and to apply a punishment that poses such insoluble ethical, fairness and equity problems is, sad to say, a clear indication that we are more committed to the justice principles of the eighteenth century than we are to the egalitarian and human rights principles of the twentieth century (Fattah, 2002:315/6).

Suppose it is argued that punishment will be proportionate not to the seriousness of the offence but to the moral responsibility of the offender. Could this proposition serve as a basis for a more equitable system of punishment? The answer, needless to say, is a categorical NO. This is because the degree of moral responsibility of the offender, which is unique for every accused, can never be quantified or measured. It is therefore, a serious scientific error to advocate a sentencing system which supposedly will dispense varying dosages of punishment on the basis of an abstract notion (moral responsibility) that is neither susceptible to quantification nor measurement (Fattah 1992:78).

Nor is fairness and equity achieved when the determination of punishment is made solely on the basis of the nature and the seriousness of the offence being punished. It is neither fair nor equitable to give those found guilty of identical or similar crimes identical prison sentences. The same prison term does not entail the same amount of pain and suffering, does not involve identical deprivations, and does not carry with it the same consequences to different offenders. The pains and consequences of imprisonment are far different even when offenders are kept in the same institution, in similar conditions, for the same length of time. As long as it remains impossible to measure the pains of imprisonment (Sykes, 1971) and to weigh the sufferings and deprivations resulting from it for each individual offender, the use of incarceration as a retributive sanction will never be justified in a democratic and just society.

The inherent unfairness and arbitrariness of a sentencing system based on the questionable premise of just deserts were highlighted by Thomas Gabor (1998:85) who pointed out that:

> A sentencing system based on desert might not be so objectionable were commensurate or proportional sentences readily quantifiable as justice-oriented sentencing guidelines suggest. These highly systematised schemes promote the illusion that there is a fairly precise penalty fitting each type of offence.

Is There a Viable Alternative?

This brings us back to the eternal question, "If we do away with punishment, what is the alternative?" This question is more telling about our criminal justice system (CJS) than anything else. The primary problem with our CJS and our criminal justice policy is the total lack of vision, the absence of innovation, and the strong resistance to experimentation. While every other sector of public policy has undergone radical changes in the second half of the 20th century, the CJS continues with the archaic practices of medieval times. Just ask yourselves "in what way is what we do with criminals now any different from what the courts did in the early 20th century or even in the 19th century"?

You may say, at least we abolished the death penalty. Far from it! Capital punishment is still practiced in many countries in the world including the most populated country (China) and the most powerful country (the USA). You may say, well, we have succeeded in doing away with the abominable practice of torture. People are no longer being tortured to extract confessions or to force them to provide information. Well, think again! Surely the shocking pictures from Abu Ghraib prison in Iraq or from Guantanamo Bay in Cuba could not have been so easily and so quickly forgotten. Yes, torture, which was believed to be the trademark of the inquisition, is back with vengeance. And its traumatic effects on the victims far exceed any effects caused by conventional individual crimes. Some years ago, Denmark took the initiative of establishing a center for the treatment of torture victims. Maybe we should start thinking about creating similar centers in other countries of the Western world because the number of victims now is surely higher than at any time in recent memory.

Is Punishment the Right Response to Torture and Gross Human Rights Violations?

Is punishment the appropriate answer to torture? Definitely not, because it never reaches those who are responsible, those untouchables at the top. Contrary to the popular rhetoric about the bad apples, torture in most cases is not the initiative of individuals. More often than not it is a government policy. How just and how fair is it to punish those who were obeying orders or following policies when those who are really responsible are left unpunished? This is to say that punishment is never an appropriate response. Although the futility of punishment has been a proven fact for centuries, the horrific acts of recent years have exposed one of the fundamental shortcomings of the punishment response. Obviously punishment is not, and cannot be a deterrent for so-called terrorists or for suicide bombers. Their actions prove that when the motives are strong, people will sacrifice anything, even their lives!

Furthermore, no punishment yet invented could be an appropriate or proportionate response to the horrendous acts of genocide that seem to have become commonplace in recent years: in Bosnia, in Rwanda, in Sudan, etc. How can the punishment of a handful of carefully selected offenders be an adequate retribution for the extermination of hundreds of thousands of victims? And what exactly is being achieved by incarcerating those individuals for varying terms of imprisonment? Surely, in those cases punishment is no more than a symbolic gesture and a hollow one at that.

This is one thing the black leaders of South Africa, like Nelson Mandela and Desmond Tutu, realised once the apartheid rule came to an end. They could have arrested hundreds or even thousands of those who were responsible for the atrocities against black people, and subjected them to all kinds of punishment. But what purpose would this have achieved? A temporary and ephemeral satisfaction of the vindictive instincts of an oppressed population? Instead, they wisely chose the moral high ground. They were fully aware that what has been done could not be undone, and rather than retaliating against some of those responsible (they obviously could not punish everyone who was) they decided to show forgiveness and opted for reconciliation through the establishment of the Truth and Reconciliation Commission. The healing effects of this conciliatory approach were truly remarkable

and will remain in the Annals of History as a bold and highly successful experiment. Just imagine what would have happened to the country if the thousands and thousands of those responsible for the atrocities of the apartheid regime were executed or sent to prison!

Is Punishment the Answer to Terrorist Acts?

As many acts of violence, and acts labelled as terrorism, are rooted in injustices that are unacknowledged or denied, punishing the perpetrators is simply to double the injustice. It can only enhance the chances of further and more serious violence. On August 7th, 2004, psychiatrist Jerrold Post who interviewed many potential and unsuccessful suicide bombers was quoted in the Globe and Mail (p.A6) as maintaining that suicide bombing is gaining new converts. Asked why this is happening he responded with a single word "despair". He said suicide bombers are people who see no other solution for the forces they see arrayed against them and no other way of avenging their family's losses.

> "I think one has to look to the despair that they are experiencing… These are not deviant, psychologically disturbed individuals. Everyone of them I have talked to has made perfect sense".

Dr. Post's explanation illustrates the sheer lunacy (or shall I say the hypocrisy) of reintroducing the death penalty by the interim government in Iraq, as if those who are willing to sacrifice their lives or who are facing death every minute of the day, will be deterred by the prospect of a death sentence! Isn't this another example of how irrational the reaction can be when frustration with a certain behaviour has reached a high level?

If violence, if terrorism are the acts of people who are driven to it by hopelessness and despair, by their unheeded cries for justice, is it conceivable that punishment will deter such hopeless and desperate individuals? It is precisely, in those cases as in most others that Restorative Justice with its emphasis on mediation, reconciliation and reparation, proves to be a much more appropriate and much more effective response.

When examining the viability of R.J. in the cases of violence, one has to keep in mind that gratuitous violence is extremely rare, it is the exception, not the rule, and so are unmotivated and unprovoked violent acts. Moreover, violence that is sexually or financially motivated constitutes only a small fraction of all acts of violence, just ten per cent of all violence if criminologists are to be believed. The vast majority of acts of violence are retaliatory in nature. Study after study has shown that retaliation is a key ingredient in violence (Felson and Steadman, 1983). In fact, there are reasons to believe that revenge is the most prevalent motive for the use of force (Black, 1983; Marongiu and Newman, 1987). Researchers affirm that violence in most instances is an expression of a grievance, a response to an attack, injury, or provocation. As Black (1983) points out, violence is a mode of conflict management resembling the modes used in traditional societies, which have little or no formal law.

If we analyse the most serious form of violence, namely homicide, we find that it is rarely predatory in nature. Relatively few homicides are committed for financial gain

or for sexual gratification. In the vast majority of cases the killing is a reaction (or rather over-reaction) to some form of victimisation. When aggression is met with aggression, when violence is countered with violence, the roles are simply reversed. The initial aggressor becomes the victim and the initial victim ends up being the victimizer. Labels are applied not on the basis of the original roles but on the final outcome. The violent response, though defined as crime by the law, is perfectly legitimate in the eyes of the perpetrator who perceives violent retaliation as an act of justice, as a rightful reprisal.

All this is to show that individuals defined and labeled, as "criminal" are not fundamentally different from those considered to be law-abiding citizens. It shows that offender and victim populations are not mutually exclusive but are homogenous and overlapping (Fattah, 1994). By ignoring offenders' history of victimisation, a false dichotomy between offenders and victims is made. And by ignoring the dynamics of violent behaviour and the rapidly changing nature of potentially violent situations, a predator-prey model is created. The model reinforces the popular dichotomy between the active aggressor and the passive sufferer, the guilty offender and the innocent victim, the good Abels and the evil Cains, the first deserve our condemnation and the latter our sympathy and commiseration (Fattah, 1994). So deeply entrenched is the belief in the predator/prey, the active doer/passive sufferer model of criminal victimisation that any attempt to introduce the characteristics or the behaviour of the victim as an explanatory variable is invariably greeted with a great deal of hostility and antagonism. The dynamic concepts of provocation and victim-precipitation are often singled out for particular criticism and summarily dismissed as irresponsible attempts to blame the victim!

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, unrecognised and unremedied. 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 victimised 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 realise that since funds and resources are strictly limited, increasing the costs of the expensive system of punishment leaves less and less for victim compensation.

So What About Restorative Justice?

Showing the futility of punishment, its limitations, shortcomings, its costs and problems helps answer the question: "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. Rather than regurgitating or reciting the positives of R.J., the paper will briefly address some of the most pertinent questions that are frequently asked whenever R.J. is debated.

Is Restoriative Justice a Viable Option in Crimes of Violence?

The sensational media in North America and in Europe mean that the few acts of stranger-to-stranger violence are the ones that make the headlines. This distorted reporting blurs the fact that violence is an interpersonal phenomenon and that crimes of violence are crimes of relationships. More than nine out of ten acts of violence are committed between people who are related to, or who know one another.

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; 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, the fact remains that the vast majority of sexual offences are committed by family members, friends of the family, neighbours, acquaintances, and so forth. A term has even been coined in recent years for a specific type of rape: "date rape".

Would Restorative Justice be Acceptable to the Victim and the Victim's Family?

There is no empirical evidence to support the claim that victims 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; Sessar, 1998; 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 Mark 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 plead with the justice system for the lives of their victimisers (Fattah, 1999:160).

How Acceptable is Restorative Justice 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 are punished by a prison sentence? Who would be left out?

The fact is that as a result of gross under-reporting, a very high percentage of crime, even serious crime, is never reported to the criminal justice system and is dealt with without recourse to that system. And as a result of ridiculously low clearance rates as well as the attrition in the criminal justice process, only a tiny fraction of all those who commit criminal offences are charged before the courts (Fattah, 1998). 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 but scapegoats sacrificed at the altar of general deterrence! Educating the public is surely in order. What most members of the general public do not realise, or fail to recognise, is that criminal behaviour, as mentioned earlier, is not a unique behaviour, and if it is not, then there is no valid reason to respond to it in a unique manner.

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 C.J.S. and are not subjected to traditional sanctions; whatever objections or reservations they may have about a general system of R.J. 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, 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.

Restorative Justice and Post-victimisation Trauma: Restorative Justice as a Tool for 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 humanising spirit of R.J. with the brutalising and demeaning nature of retributive justice, or to compare the healing effects of R.J. with the agonising and antagonising outcomes of punitive justice. R.J. aims at healing and redress rather than violence and duress; it favours 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 major protagonists: the offender gets the punishment and the victim gets nothing. But they are by no means the only ones, because in punitive systems there are many other losers as well. And the ultimate loser is society itself (Fattah, 2004:28).

Restorative Justice is 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, industrialised, 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, 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 solution to violent acts emanating from those conflicts and similar ones are mediation and reconciliation. This is because the attitude that is basically responsible for the violence, and for the conflict in the first place, is intolerance. Punishment and penal sanctions, whether imprisonment or the death penalty, do not change this attitude. If anything, they are apt to perpetuate and intensify the

conflict and to escalate the level of violence. R.J. designates the prevention of repeat victimisation as one of the primary goals of the process of mediation and reconciliation and as a strategic priority of victim services (Fattah, 2000).

R.J. acknowledges that what victims desperately want even before redress, is the freedom from fear from the threat of future victimisation. This is why when victims ask for, or seek, imprisonment for the offender, it is not, as erroneously believed, or as retributivists claim, to satisfy their thirst for revenge, but to seek some assurances about the threat of future victimisation, a threat that disappears when reconciliation is achieved.

Restorative Justice and the Prevention of Future Victimisation

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 victimisation 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 revitalising 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 satisfaction of the victim, precisely the goals that victim organisations 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 incomprehensive 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 meaningful communication 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 victimisation 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 victimisation. 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, enable 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 victimisation (Fattah, 2000).

Is a Non-punitive Justice System Possible? A Scandinavian Example

Though largely unnoticed and unheralded, two years ago marked the 50th anniversary of a remarkable achievement. Half a century ago, and precisely in 1954, a new criminal code, specifically drafted by Prof. Verner Goldschmid for the former Danish colony, the large Artic Island of Greenland, was promulgated. Inspired by the old traditions of the people of Greenland, this unique criminal code is solely offender treatment oriented which sets it apart from other Western criminal codes, including that of Denmark itself. Here is how this unique code is described by one commentator (Schechter 1983:70):

> …the unique Greenland Criminal Code attempts to graft traditional Inuit concepts of rehabilitation onto a Western, and specifically Danish, system of laws and procedures. The philosophy behind even the enlightened Danish penal system is punishment - a repressive means of social control whose object is forced conformity with society's norms. In contrast to this "conformity model", the object of Inuit customary law is neither punishment nor justice, but the elimination of conflict and the restoration of harmony - a philosophy dubbed "The Arctic Peace Model".

One has to ask, why is it that the example of the Greenland Criminal Code was not followed by others? Why is it that the philosophy that inspired it did not tempt those criminal law reformers who in the past 50 years were busy modernising the criminal codes of their countries? Why is it that the restorative/treatment practices incorporated in the Greenland Criminal Code were never adopted by other countries around the world? Is it the traditional obsession with punishment? Is it Western arrogance that does not allow us to admit that there are certain traditions and certain customs of so-called "less civilised" people that are superior to ours and may be beneficial to our societies? And yet any objective comparison of the responses to harmful actions and the means of conflict resolution is bound to show that those people who were labeled by the missionaries as primitive, godless and uncivilised were superior to the colonizers 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" realised early on how illogical 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 coming to the realisation that when it comes to justice there is a lot that can be learned from Canada's First Nations. As a result,

Canada is gradually taking steps that are putting it in the forefront of the Restorative Justice movement. 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 offences, 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 smudge 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.

Could Restorative Justice and Punitive Justice Co-exist?

Fearing that replacing the current punitive system entirely with a new restorative one may be an utopian dream, many proponents of R.J. have resigned themselves to the idea that it is possible to have two parallel systems, operating side by side, or at a minimum having a R.J. component operating within and under the aegis of a dominantly punitive system. In my humble opinion, such vision of a dual system is faulty and misguided. I do believe that since punishment and healing are mutually exclusive, such a double philosophy and dual objective systems can never work in practice. I am utterly convinced that nothing less than a fundamental paradigm change can remedy the deep-seated problems of our current justice system. As an old criminologist, I have keenly observed for over four decades, every attempt made to reform the CJS, to correct its shortcomings, to remedy its failings, to lower its costs, to reduce its clientele. To my utter disappointment NOTHING worked! The punitive philosophy that permeates the system defeats any and every attempt at reform. How many alternatives to incarceration were introduced over the years and hailed as the answer to the overuse of imprisonment and the overcrowding of prisons. Nothing helped! All they did were to widen the net of social control. And many so-called alternatives, such as community service orders, electronic surveillance, even probation, are being widely used as additives to incarceration

instead of being alternatives to prison! Unless there is a radical change in philosophy, unless there is a paradigm shift, all the talk about R.J. will be in vain. Any attempt to introduce the concepts, the principles, and the practices of R.J. within a primarily punitive system is bound to fail.

The Need for a New Paradigm! From a Guilt Orientation to a Consequence Orientation

It is truly amazing that criminal justice policies and practices fail to take notice of a very important fact. The vast majority of cases dealt with by the criminal courts are offences of strict liability, of negligence, of omission and the like (see Barbara Wootton, 1963). How did this come about? Why was it necessary to abandon at such a large scale, the traditional and deeply anchored notions of criminal intent, moral guilt, and moral responsibility? The answer is simple. It is evident that the social consequences of those behaviours were deemed to be more important than the moral considerations which required that wickedness, malice, evil intent be a prerequisite for criminal punishment. The need to regulate those behaviours, because of their actual or potential social harm, overrode the requirement of moral guilt. The growing complexity of society inevitably led to a declining emphasis on the classical notion of mens rea and to a growing emphasis being placed on the consequences of the act. Naturally, this tendency was more pronounced in certain sectors than in others. That harm is slowly becoming the primary criterion for criminalisation can be seen in recent criminal code reforms in many countries. For example, in the report of the Finnish criminal law committee, quoted by Lahti (1990), the Committee's first task was to locate those forms of behaviour that appeared to be the most harmful when judged in the light of specific goals of each sphere of life. To do so, the Committee used a test question: Does certain behaviour harm or endanger the interest of an individual or of society, and if so, to what extent? In other words, the notion of harm was the yardstick the Committee used to judge whether a given behaviour should or should not be criminalised.

As the criterion for criminalisation, the notion of harm is in perfect harmony with the generally accepted goals of modern criminal law. If we accept that the primary goal of the criminal law in modern society is to prevent the occurrence of socially harmful, socially damaging and socially injurious actions, then it is only logical that the eligibility of any given behaviour for inclusion in the criminal code (as well as the seriousness assigned to various actions) be judged according to their actual and potential harm and not according to the wickedness or degree of malice of the perpetrator. This however is not the way present criminal codes deal with various categories of criminalised behaviours. Homicide is a good case in point because it illustrates well the difference between a guilt orientation and a consequence orientation. In Canada, in the USA, and in many other countries ten times as many lives are lost to negligent manslaughter as to willful homicide. And yet the less harmful intentional homicide is punished way more severely than the negligent homicide. Why? Because the punishment is based on the notion of moral guilt and not on social harm. The result is anomalous! A person who intentionally kills a single individual is punished much more harshly than a contractor who is responsible for the death of hundreds because he used faulty material in the construction of a multi story building or a bridge that later collapses.

I have outlined the details of the proposed paradigm in a number of papers I published. Suffice here to just mention the headings of the principal elements of the paradigm: a) A move from moral responsibility to social responsibility; b) A move from legal fiction to social reality; c) A move from repression to regulation; d) A shift of emphasis from deterrence to social prevention; e) A switch from intimidation to mediation and from segregation to reconciliation; and f) abandoning the notion of retribution in favour of restitution. The acceptance of the new paradigm is bound to lead to the removal of the arbitrary boundaries erected over the years between criminal law and civil law. And it will hasten and pave the way to the implementation and full institutionalisation of Restorative Justice.

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Centre for the Study of Violence and Reconciliation

PO Box 30778, Braamfontein 2017, South Africa
Telephone: +27 11 403 5650
Fax: +27 11 339 6785
Website: www.csvr.org.za