

Aspirations of Proponents and Experiences of Participants in Family Group Conferences

Introduction

Restorative justice proponents have rather ambitious aspirations. They envisage the creation of a ‘third model’ (Braithwaite (2003a)) or a ‘replacement discourse’ (Dignan 2002, 2003) or a ‘fully fledged alternative’ to both punishment and offender rehabilitation paradigms (Walgrave 1995, 1999, 2000). They aspire to develop a model of criminal justice which empowers stakeholders in crime (McCold 2000) and ‘restores the deliberative control of justice by citizens’ (Braithwaite 2003a:87). Proponents wish that the form of criminal justice advocated by them will place victims at its centre and treat their needs as the primary concern (Mika and Zehr 2003, McCold 2000, Restorative Justice Consortium 2002, Claassen 1996). Some also believe that restorative justice should offer a way of ‘doing’ criminal justice which is characterised by voluntariness (Marshall 1996, McCold 2000, Restorative Justice Consortium 2002, Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (UN) (2000), Council of Europe Recommendation N R (99) 19 of the Committee of Ministers to Member States Concerning Mediation in Penal Matters).

No doubt these aspirations, if put into practice, imply radical changes for the way crime is traditionally responded to, and, according to proponents, such changes could bring about various benefits for victims, offenders and society in general. However, critics have expressed numerous concerns about possible dangers of pursuing the restorative ideals in practice (Johnstone 2003: part E). One source of dangers is that restorative justice’s ‘soul’ may be inherently flawed (Toews and Zehr 2004:viii).

That is, it may be that restorative justice philosophy suffers from fundamental problems, limitations and tensions, it may be based on questionable and mistaken assumptions and, if put into practice, may be a recipe for a disaster.

But even if restorative justice ideals are not intrinsically faulty, both critics and proponents of restorative justice have pointed out another source of dangers associated with putting aspirations of advocates into practice. Restorative justice may lose its 'soul' as a result of being co-opted and diverted from the original vision. There are historical precedents of criminal justice interventions which went astray, resulting in undesirable consequences and serving functions rather different from those that had been intended (Rothman 1980, Cullen and Gilbert 1982, Martinson 1974, Toews and Zehr 2004:vii-viii). And there are no guarantees that restorative justice may escape the fate of earlier well-intended criminal justice reforms. In fact, there are good reasons to predict the likelihood of restorative ideals being diluted and distorted when put into practice. One major reason is that the aspirations of proponents are pursued through criminal justice agencies, and restorative justice values do not fit well with the ideology underlying the 'traditional' criminal justice system. When applied within the hierarchical and coercive structures of criminal justice, restorative justice reforms may result in something not only different from what had been originally envisaged but even worse problems than those which the reforms had been designed to remedy (Levrant et al 1999, Mika and Zehr 2003, Zehr 1990, Toews and Zehr 2004: vii-viii).

This article will examine four key aspirations of restorative justice advocates:

- The aspiration to create an alternative to the punishment and rehabilitation paradigms;
- The objective to develop a victim-centred form of justice;
- The desire to construct a voluntary way of ‘doing’ justice;
- The hope to craft a model of criminal justice which would empower stakeholders in crime.

These aspirations will be analysed in the light of the evidence collected in the course of an empirical study, which involved interviews with participants in family group conferences. The paper will ask: How realistic and desirable are the aspirations of restorative justice advocates? What happens when these ideals are pursued in practice? How valid is the concern that implementing restorative justice within the framework of criminal law may lead to distortion and subversion of the original vision?

The empirical study

This study was carried out in summer 2002 in a family group conferencing project situated in the South-East of England, which dealt with juvenile offenders. The legislative framework within which the project operated was provided by the Crime and Disorder Act 1998. Most funding came from the Youth Justice Board, and referrals – from four Youth Offending Teams.

47 participants in family group conferences and 6 professionals involved in the conferencing process or its preparation were interviewed. Out of the 47 participants, 13 were offenders, 17 victims, 13 offender supporters, and 4 victim supporters. 16 case studies were examined. The case studies included a variety of offences: assaults,

a robbery, burglaries, thefts of a vehicle, theft and handling stolen goods, and criminal damage.

Semi-structured interviews were employed as the primary research method. Other research methods included non-participant observation and documentary analysis of documents kept in the project.

It is important to note that this empirical study was confined to one restorative justice project and the number of interviewees was rather small. So, it is important to look at the arguments, criticisms, and claims made on the basis of the empirical findings in the light of this fact.

What are the main findings of this study? What implications can they have for the restorative justice theory and practice? To what degree have the aspirations of restorative justice advocates to create a radical alternative to the traditional ways of thinking about crime and justice, which would be characterised by a victim-centred, empowering, voluntary process, been achieved within one restorative justice project?

An alternative to punishment?

Restorative justice is portrayed by a number of its proponents as an alternative to the 'traditional' way of responding to crime – punishment of offenders (Zehr 1990¹; Walgrave 1995, 1999, 2000, 2003, Wright 1999, McCold 2000). However, there has been strong opposition to advocates of this view. A number of theoretical arguments have been put forward to challenge claims that restorative justice presents an

¹ See however Zehr (2002:13, 58-9) for criticism of his earlier view.

alternative to punishment (Barton 2000, Daly 2000, 2002, Duff 2002, 2003, Johnstone 2002, Dignan 2002). Rather, it has been argued, it is an alternative *form* of punishment, because restorative sanctions may be unpleasant, painful and burdensome (Daly 2000, 2002, Duff 1992, 2003).

What do the findings from this empirical study have to add to this debate? The majority of offenders and offender supporters in the sample did not interpret the conferences they attended as punishment². Rather, they saw restorative justice as a strategy aimed at offender rehabilitation. Similarly, most victims felt that the conferences were not punishment³. They either saw them as a measure designed to rehabilitate offenders, or an opportunity for offenders to apologise to their victims, or an opportunity for participants to express their feelings, or some combination of the above.

The finding that participants in restorative justice conferences – especially offenders – did not generally understand conferences as a form of punishment is interesting, given that they tended to see conferences as painful experiences. The finding is particularly remarkable in the light of the fact that in the majority of cases offenders were ordered by the court to attend the conference and apologise to victims, and a refusal to comply with the order could lead to offenders returning to court. How can this finding be explained? One possible explanation is that the way restorative interventions were

² Out of 13 offenders, only one thought that the conference was a punishment and two were not sure whether it was a punishment. Three out of 13 offender supporters thought the conference was a punishment.

³ Only two out of 17 victims believed that conferences were punishment.

prepared and conducted could have concealed the essence of restorative sanctions. Despite the fact that conferences were usually court-ordered, conference organisers avoided resorting to openly coercive and repressive methods to make offenders participate and apologise in conferences. Rather, they preferred more subtle and less visible ways of achieving that goal.

When preparing offenders for restorative encounters, conference organisers acted towards them in a friendly, caring, and sympathetic way. This discouraged resistance on the part of offenders and served to promote their willingness to submit to the care and guidance of facilitators. Facilitators promised offenders various benefits which they would derive from participating in conferences and apologising: offenders were promised that attending a conference would help them put the offence behind and move on, it would help them stay out of future trouble and would enable them to make the most of their lives, and so on. This made some offenders believe that despite its painfulness, the participation in the conference and an apology to victims could be in the offenders' own interest. A conference was not a measure designed to punish, humiliate, or hurt offenders. Rather, it was an attempt to help them.

Facilitators also encouraged and subtly pressured offenders to adopt particular self-identities – the identities of repentant individuals who have understood the wrongfulness of their past actions, wish to put right their wrongs and not repeat their mistakes. This was achieved through skilful questioning, probing, reframing and rephrasing offenders' statements, focusing offenders on certain issues, praising and encouraging them, and using other invisible techniques designed to construct – and make offenders embrace – the desired self-identities. If conference facilitators

successfully achieved this task and offenders adopted such identities, the offenders were likely to believe that they attended a conference and apologised to victims *because they wanted to do so*. Such a belief discouraged offenders from viewing restorative conferences as a form of punishment if punishment presumes sanctions inflicted upon, rather than voluntarily assumed by, an individual who had committed a crime.

During the actual conferences, facilitators continued to act towards offenders in the same friendly, caring and sympathetic way as during the conference preparation stage. They avoided expressing an open disapproval of the offending behaviour (delegating this function to victims), and demonstrated a deep concern for the well-being of offenders and a willingness to help to enable them to make the most of their lives. Such treatment by facilitators did not appear to fit well with the offenders' idea of punishment as being unpleasant measures imposed by a repressive authority with an intention to hurt them.

Most victims attending conferences (following careful preparation prior to conferences by facilitators) had demonstrated a great deal of understanding, kindness, generosity and forgiveness towards offenders. Often victims appeared to derive no obvious benefit for themselves out of attending conferences. They made it clear to offenders that their main, or even sole, reason for participating was the altruistic desire to help them. Several victims shook offenders' hands at the end of the conference, some of them cried, touched by the offenders' apologies, and attempted to comfort offenders' mothers who were crying, one victim offered 'his' offender free driving lessons, another victim offered an offender an apprenticeship in his company.

Such kindness, forgiveness, generosity and obvious willingness to help made it difficult for offenders to see victims as punishers, even despite the disapproval they expressed.

The hospitable, informal and friendly atmosphere within which conferences were conducted could be another factor preventing offenders from interpreting conferences as a form of punishment. This atmosphere was in sharp contrast to the environment in which offenders found themselves in the police station (following arrest) and the courtroom. During conferences, participants usually sat in a circle to underscore the non-hierarchical nature of restorative encounters, they were encouraged to use their first names, they were offered drinks and snacks, they could mingle and chat during coffee breaks, they were made to feel comfortable and relaxed.

Another factor could be that offenders were allowed, indeed encouraged, to actively contribute to discussions and decision-making during conferences. Their active involvement in the conferencing process and the requirement that they agree to outcomes did not promote their understanding of conferences as a punishment (if punishment presumes imposition of sanctions on a passive recipient by an authority figure).

The finding that the majority of participants in restorative justice interventions did not conceptualise conferences as a form of punishment might offer some support to the claim by advocates that restorative justice is an alternative to the punishment paradigm, and does not seem to strengthen the argument of critics that restorative

justice is an alternative form of punishment. It seems that the meaning which participants in restorative justice conferences attached to the concept ‘punishment’ differed from the meaning attached to it by critics. Painful, unpleasant, judicially ordered and enforceable sanctions imposed in response to a criminal offence may not be necessarily seen as a punishment by people who have been subjected to those sanctions. However, two points need to be noted in relation to this conclusion. First, it is important to point out that some interviewees did see conferences as a form of punishment, consistently with the claim of the critics. Second, the suggestion made above that the punitive essence of restorative interventions could have been masked and concealed from their participants should not be overlooked. It also needs to be noted that while the interpretation of the nature of restorative interventions by the majority of participants differed from the interpretation by critics (who believe that restorative justice is a form of punishment), the participants’ interpretation of the substance of restorative encounters did not completely coincide with the interpretation by advocates either. Advocates refuse to see restorative justice as a form of punishment and view it as a measure aimed at reparation of harm. While most participants in conferences similarly refused to see restorative justice as a form of punishment, as noted earlier, they viewed it as an intervention aimed at offender rehabilitation. The last point will be the subject of the next section.

An alternative to the offender rehabilitation paradigm?

When advocates present restorative justice as an alternative to the rehabilitation or treatment paradigm (Walgrave 1995, 1999, Bazemore 1996, McCold 2000)⁴, it is argued that the rehabilitation paradigm focuses on identifying and meeting offenders' needs, views offender accountability as irrelevant, and ignores the needs of victims. In contrast, restorative justice is presented as attaching primary importance to the needs of victims (Restorative Justice Consortium 2002, Zehr and Mika 1998). Also, holding offenders accountable is seen as one of the fundamental restorative principles (Zehr, 1990; Declaration of Leuven; Zehr and Mika 1998). To what degree has the aspiration to create an alternative to the treatment paradigm been realised within the restorative project of this study?

As has been pointed out earlier, the vast majority of victims, offenders and other conference participants felt that restorative justice interventions were a form of offender rehabilitation. The interviewees thought that the main – or even the only – beneficiaries of the conferences were offenders. It was generally felt that restorative justice conferences were aimed primarily – or even solely – at making offenders realise the wrongfulness of their actions in the hope that such realisation would stop them re-offending.

Several victims believed that the motivation behind inviting them to the conference was not to benefit them, but to help rehabilitate offenders. Those victims said they had no objections to this and were happy to help. Yet, it can be argued that victims

⁴ The view that restorative justice and rehabilitation are alternatives is not universally held by proponents. Some are willing to combine restorative and rehabilitative justice (Wright 1996, 1999, Bazemore 1999).

were effectively *used* for the benefit of offenders⁵. It may be counter-argued that even if this criticism is valid, it is weakened by the fact that victims must consent to be so used. If such consent is given, the ethical problem ceases to exist, or at least is minimised. However, there is a serious danger of conference organisers subjecting victims to subtle, virtually invisible pressures in obtaining their consent to attend conferences, for example, by appealing to their ‘social duty’ in helping young people stay out of trouble, or perhaps hinting that the offender could be the victim’s child or grandchild. If, as a result of such subtle pressures, victims agree to participate and help offenders, their consent may not be as free and voluntary as it might appear.

Another finding which might indicate that victims could have been used for the benefit of offenders is the following. Within this project, conferences consisted of two parts. The first part focused on the offence that had been committed, and during the second part, with the help of professionals, offenders and their families were expected to develop a plan how to keep offenders out of future trouble. Victims were invited to the first part of the conference, but were not allowed to participate in the second part⁶. Only offenders and their families could attend. In interviews, some victims had expressed a desire to participate in the second part of the conference. The exclusion of victims from participating in the second part of the conference might help support the argument that victims were used during the first part of the

⁵ Even if in reality victims were not used for the benefit offenders, the victim perception that they were is significant in itself, given the difficulties many restorative justice practitioners face when persuading victims to take part in restorative interventions.

⁶ According to project workers, this was done because the information that is private to the offender’s family is shared during the second part of the conference.

conference to educate offenders about consequences of their actions, and once their presence was no longer necessary, they were asked to leave. In addition to being morally problematic, the finding that victims could be used to rehabilitate offenders puts into question proponents' claims that restorative justice, as practised within this project, presents an alternative to the rehabilitation paradigm.

Some victims felt that they did not have a sufficient opportunity to discuss the conference shortly afterwards⁷, and some felt that they were not given proper feedback. So, during interviews they asked me to call them if I obtained any information about how 'their' offenders were getting along and to share that information with them. Some other complaints were also made by victims, which may be interpreted as indicating that some of their needs had not been given sufficient attention (see below the section: 'A victim-centred justice?').

I had an opportunity to examine pre-conference reports in individual cases. It was notable that the main focus in the reports was on identifying reasons for offending behaviour, needs of offenders and possible ways of meeting those needs. I did not see similar detailed descriptions of needs of victims and suggested ways in which those needs could be met. This finding does not seem to fit well with the claim of

⁷ After the conference victims were asked to fill in a conference evaluation form and send it by post to conference organisers. Also, conference organisers normally called victims after the conference to thank them for participation. Yet, that was clearly insufficient for at least some victims. Some of my interviewees wished that instead of offenders and their families staying after the first part of the conference and victims leaving, offenders and their families left, and victims stayed and had some form of a de-brief, so that they could share their views and opinions with each other.

restorative justice advocates that the primary concern of restorative justice is victims and their needs. Nor does it fit with the sharp distinction which restorative justice proponents draw between the rehabilitative and restorative paradigms of justice on the grounds that the former ignores needs of victims, while the latter prioritises them. The strong emphasis of pre-conference reports on identifying and meeting needs of offenders brought restorative justice, as practised in this project, very close to the traditional offender welfare approach.

Certain other findings do not appear to suggest that restorative justice, as practised in this project, fundamentally differed from the offender welfare or rehabilitation approach (which overlooks offender accountability and focuses on meeting offenders' needs). Several victims and their supporters mentioned that they felt uncomfortable because of what they perceived as a non-punitive and non-blaming approach adopted by conference organisers towards offenders. These victims and supporters wished that during the conferences facilitators had actively expressed their disapproval of offenders' actions, however they felt that conferences and their preparations were conducted as if the offender had done nothing wrong. One victim commented on the approach adopted by facilitators:

I think [the way the conference was conducted was a] too soft approach. I think it could've been a harder and a more direct approach, without being offensive. ...I felt [the conference facilitators] were almost too... almost too accommodating, too sympathetic to the perpetrators, than the victim. It was almost conscious that here we have two young people who might be daunted by this situation, so we'll make them feel as comfortable as we can.

A somewhat similar view was expressed by Victim Support representatives who came to one of the conferences to represent a victim who could not attend the conference. Victim Support representatives feared that if the victim came to the conference, she would have felt uncomfortable, because the conference looked more like a birthday party for the offender, rather than a criminal justice intervention. There were huge amounts of food, and everybody was nice and kind to the offender.

The above findings seem to suggest that restorative justice, as practised within the project which I studied, with its over-emphasis on offender rehabilitation, can hardly be seen as an example of full-blown restorative justice. At the same time it would be unfair to suggest that the experiment fits perfectly well within the offender rehabilitation paradigm. As will be pointed out below, some needs of victims were addressed in line with restorative principles (in particular, the need to express emotions and a disapproval of the offending behaviour, and the need to ask questions)⁸. Also, offender accountability was not totally ignored: offenders were invited (or pressurised in some cases?) to acknowledge the wrongfulness of their actions and apologise to victims. In some cases, offenders were even asked to do some material reparation. The project in question can be seen as a mixture of the rehabilitation and restorative paradigms, as it contained elements of both.

⁸ Although cynics may point out that those needs of victims appeared to be prioritised, addressing which could simultaneously facilitate – or at least did not present an obvious danger of impeding – the achievement of the goal of offender rehabilitation.

A victim-centred justice?

In the previous section I touched on the question of how much importance was attached to needs and interests of victims within the project of my study. I shall now explore this issue further.

One of the most important claims made on behalf of restorative justice is that it is a victim-centred justice, the primary concern of which is healing those who have been hurt by crime (Zehr 1990, McCold 2000, Mika and Zehr 2003, Restorative Justice Consortium 2002, Claassen 1996). Do my findings support this claim? To what degree this aspiration has been realised in the investigated restorative project?

One factor that puts into doubt the centrality of interests of victims is that this project was limited to juvenile offenders. The consequence of this limitation is that only those victims whose offenders were juveniles could get a chance to participate in restorative justice encounters (and thus derive the benefits promised by restorative justice proponents). The fact that the age of offenders determined the entitlement of victims to benefit from restorative justice conferences is rather difficult to reconcile with the claim that restorative justice views interests of victims as paramount. The age of offenders appears an illogical and unfair basis for allowing some victims to benefit from restorative justice encounters and denying that opportunity to others. One of the conference facilitators I interviewed criticised the project for discriminating among victims on the grounds of the age of 'their' offenders. Her explanation of the existing situation was that the project was funded mainly by the criminal justice system, whose primary concern was the prevention of re-offending among juveniles, rather than promoting victims' interests. As the conference

facilitator has put it: ‘Let’s face it, the money is there because of crime agendas rather than victim agendas. It is not a service that is offered universally to victims...’

Another finding which may cast doubt on the validity of claims that restorative justice is a victim-centred justice within this project is that a considerable number of conferences went ahead in the victims’ absence. Yet, conferences never took place without the offender attending. It is remarkable that in a significant number of cases it was thought that a conference without victim participation could benefit offenders. Yet, it seems it was never believed that a conference without offender participation would be helpful to victims.

Some findings indicate that certain actions and attitudes of conference facilitators made several victims feel uncomfortable. Some examples were already provided in the previous section (e.g. victims feeling that facilitators acted as if the offender had done nothing wrong, victims complaining that facilitators were too sympathetic and accommodating to offenders, victims not receiving feedback concerning the achievements of conferences). Another example would be a conference, at the beginning of which a facilitator asked the offender if it was okay to start. The victim (who was a child) was not asked a similar question. According to the victim and her mother, it created an impression that the victim was not as important as the offender, and, unlike the offender, the victim was not entitled to an inquiry if she was ready to start the conference.

One more factor that makes the importance of victim needs and interests questionable within this project is that too little attention was attached to material reparation. If restorative justice were indeed a victim-centred justice, it would probably be

reasonable to expect that reparation of material harm caused to victims by offenders would be seen as a significant requirement. However, according to my interviewees, the issue of material reparation was not even raised in 12 out of 16 cases. In only two cases was compensation ordered by the court, and in only two other cases was a possibility of material reparation discussed in conferences. This finding appears to contradict the claim made in the project's official statement of principles that '[t]he primary focus of conferences will be the offence that has been committed and reparation of harm'. If the reparation of harm was indeed 'the primary focus', it seems that it was defined rather narrowly and limited to *symbolic* reparation by way of apology. Although victims generally considered symbolic reparation important, some of them indicated in interviews that they also desired material reparation.

Prior to conferences victims were given a leaflet entitled 'Restorative Justice. Victims have a voice too' consisting of a set of rhetorical questions, through which the leaflet appeared to pre-define the role of the victims. This role seemed limited to asking questions and expressing how victims felt. Without denying the value for victims of an opportunity to ask questions and express emotions, it can be argued that the role allocated to victims within the project of my study was narrowly restricted. Victims hardly had any real say over how crime should be responded to, or in defining offenders' obligations.

In the light of the above findings, to what degree the aspiration of proponents to make needs and interests of victims the top priority of restorative justice has been realised within the project of my study? Victims were invited to the first part of the conference to ask questions and express their feelings and disapproval of the

offending behaviour. Following that, as I have pointed out earlier, they were expected to leave. Some victims felt that they did not receive proper feedback after the conference. Victims rarely got any material reparation. Even the possibility of it was rarely discussed in conferences. Some words and actions of conference facilitators made victims feel that offenders were the central figures within the conferencing process, as well as the only – or at least the main – beneficiaries of the restorative encounters.

Yet, it is important to point out some evidence indicating that interests of victims, at least in one case study, were put above interests of offenders. In that case study, before the conference, one of the four offenders had shown no remorse and expressed threats directed at the victim. The question was whether or not to invite him to the conference. Conference facilitators felt that it could be in the interests of the unremorseful offender to attend the conference and be confronted with the human costs of his actions. Yet, it was feared that his attendance and his attitudes could upset and frighten the victim. The dilemma was resolved by giving priority to the interests of the victim (which in this case appeared to conflict with the interests of the offender).

A voluntary process?

Within the restorative justice discourse, the conventional way of ‘doing’ justice is frequently criticised for being coercive and repressive, and restorative justice is presented as an alternative characterised by a consensual voluntary process (Marshall 1996, McCold 2000, UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, Council of Europe Recommendation N R (99) 19

of the Committee of Ministers to Member States Concerning Mediation in Penal Matters). It is argued that ‘restorative justice requires cooperation and cooperation cannot be compelled or imposed’ (McCold 2000:382).

However, it is important to note that proponents accept that where voluntary restorative justice is impossible or considered undesirable, judicially imposed coercive sanctions are acceptable, indeed necessary (Walgrave 1999, Bazemore and Walgrave 1999, Declaration of Leuven, Claassen 1996, Restorative Justice Consortium 2002). That is, the judicially enforced sanctions should function as a back-up for the voluntary restorative justice. Using words of one advocate,

Some formal coercive authority will always be necessary as backup and for failure to comply with restorative agreements. Government agencies have to be involved when the offense is deemed too serious for an informal voluntary response alone. ...When [restorative] programs cannot reach agreements or when offenders fail to comply with agreements, or when offenders deny their responsibility, decline to cooperate, or whose victims decline to participate, offenders would be adjudicated in court. Those who eventually plea or are found responsible would be ordered to pay victim restitution and participate a set number of hours of work in community service projects.

(McCold 2000:394-5)

What was the position within the project I studied with respect to the issue of coercion? Can restorative justice within that project be classified as voluntary?

The promotional leaflet given by the project conference organisers to participants claimed: ‘Restorative Justice is *entirely voluntary* so if you do not want to take part you cannot be forced to’ (my emphasis). However, it appears from my findings that a

number of offenders did not see restorative justice as ‘entirely voluntary’. For some offenders in my sample attending a conference was court-ordered. Most of such offenders did not seem very enthusiastic about attending. It appears that their attendance was motivated by fear of punishment. For other offenders participation in conferences was optional in the sense that it did not form part of the court order. This happened when YOTs believed that a conference would be beneficial for an offender in a particular case and made referrals to the family group conferencing project. Some of the offenders in these cases felt they were merely encouraged to participate. Others felt that their invitation to participate was accompanied by a degree of pressure. Using words of one offender, people organising the conference and the Youth Offending Team workers were ‘quite pushy’ in trying to persuade him to attend a conference. A degree of informal pressure was exerted over offenders, which made them agree to participate in conferences, even though they did not really want to do so. A number of offenders in my sample were unsure whether or not their attendance was optional. There was a similar finding in relation to offenders’ parents.

Conference facilitators whom I interviewed argued that offenders should not be pressurised into – and during – the conferencing process. Using words of one of the facilitators, ‘If it is restorative, it has to be restorative. It can’t be prescriptive. It can’t be forced.... It has to be voluntary in the purest sense of the word for it to be meaningful’. When asked to explain why voluntariness was so important, the facilitator offered practical reasons. Coercion will provoke resistance on the offenders’ part and will block their ability to empathise:

I think if young people were... their arms twisted up behind their backs, and route-marched up to these things, there would be, I suspect, resistance to taking part in that process. That would block their ability to empathise. They would be sitting there feeling miffed that they were made to come. They wouldn't listen. If they can come to a conference with an agreed expectation, then they feel okay about coming. You can lead a horse to water, but you can't make it drink. I think it is important that it is voluntary in the purest sense.

(From an interview with a conference facilitator)

What happens if an offender, who is ordered to attend a conference and apologise, is unwilling to do so? It appears from an interview with a conference facilitator and from observations during my fieldwork that restorative justice practitioners employ a set of various subtle techniques to obtain the offender's agreement to participate in a conference and apologise to the victim(s) (e.g. multiple private meetings, use of praise and encouragement, skilful questioning, reframing and restating what offenders are saying in a way that focuses them on certain issues, evoking empathy in offenders, etc.). It seems this is done in such a subtle way that an appearance of a voluntary consent to participate and apologise may be created. Offenders may be made to believe that, despite the fact that attending a conference and apologising was required by their court order, they freely chose to do so.

My findings seem to indicate several problems with the proponents' claim that restorative justice process is voluntary. Firstly, proponents seem to assume that restorative justice operating in the shadow of the criminal justice system can be free from coercion. This assumption overlooks a possibility that at least in some cases the consent of offenders to participate in restorative justice programs may be motivated by the fear that unless they agree to take part in a restorative justice encounter

‘voluntarily’, they will be subjected to judicial sanctions. Given that the threat of judicial sanctions is looming in the background, it is misleading to claim that restorative justice is voluntary.

Secondly, it appears that when certain restorative justice proponents claim that the restorative justice process is voluntary, they appear to equate coercion to formal judicial coercion, backed up with legal sanctions (McCold 2000). However, coercion need not come from state authorities and need not have the force of the law attached to it. It may take a very different form – informal pressures – and come from different directions (e.g. victims, families of offenders, other community members, YOT workers) yet secure the same results – obedience and compliance – without resorting to forceful legal methods. The insights of the interviewees who felt that their consent to participate in conferences was obtained through subtle informal pressures suggest that the claims that the restorative justice process is voluntary present a misleading picture of it.

Thirdly, proponents of restorative justice tend to make a neat distinction between ‘voluntary’ and ‘coerced’. My findings indicate that this distinction is not necessarily so clear-cut in the minds of participants in family group conferences. Thinking about restorative justice in ‘either/or terms’ (that is, either the process is wholly coercive or wholly voluntary) is simplistic and too crude to capture the subtleties and complexities of what happens in practice.

An empowering justice?

Restorative justice advocates criticise the ‘traditional’ criminal justice process on the ground that it disempowers stakeholders in crime (Zehr 1990, Wright 1996, 1999, Van Ness and Strong 2002, McCold 2000, Barton 2000, Braithwaite 2003a). It is argued that within the highly professionalised criminal justice process, legal and treatment experts have ‘stolen’ conflicts (using Christie’s expression (1977)) from victims and offenders, and turned stakeholders in crime into ‘idle bystanders in their own cases in what, after all, is *their* conflict’ (Barton 2000:67, original emphasis). In contrast, restorative justice is presented by some of its proponents as a lay-oriented process⁹, empowering stakeholders in crime to actively participate in developing their own solutions to their problems (McCold 2000, Marshall 1996, Braithwaite 2003a, 2003b). Does restorative justice, as practised within the project of my study, deserve the title of empowering justice?

⁹ Some, however, question the desirability of de-professionalisation (Olson and Dzur 2003).

(a) Victim empowerment

As far as victims are concerned, some of the findings make the degree of their empowerment questionable. Restorative justice conferences take place after sentencing, so even if they empower victims to some degree, it often happens after victims were disempowered by the criminal justice system. So, one victim I interviewed was willing to come to court because she wanted to hear the offender's side of the story. In spite of this, she was told that 'there was no need' for her to come. Another victim was invited to court and spent the whole day in the waiting room, only to be told to go home, as the offender changed her plea to 'guilty' at the last moment. One victim was forced to testify in court and was so traumatised by the criminal justice process that he refused to attend a conference.

As noted above, victims appear to have a rather limited role within the restorative justice process. It seems all that a victim's empowerment involves is the following: tell offenders how they felt, ask questions and express disapproval (assuming they do so within ground rules). By allowing victims to attend conferences, express emotions, ask offenders questions and receive an apology, an illusion might be created that victims play an active role in the criminal justice process, and the restorative justice process 'belongs' to victims. In reality victims do not appear have any real say over how their case should be dealt with.

(b) Offender empowerment

There are several findings which make the validity of the claim that restorative justice empowers offenders doubtful. One such finding is that attending a conference and apologising to victims was not optional for many offenders. As far as offenders

whose conferences were not court-ordered are concerned, it is far from obvious how voluntary their attendance and apology was, especially when one considers the subtle pressures employed by YOT workers and conference organisers which were aimed at making offenders attend and apologise.

It may be argued that offenders were ‘empowered’ in the sense that they had an opportunity to explain their actions from their own perspective and give victims and other conference participants reasons behind the offence. In practice, however, it appears that offenders will not necessarily be listened to. Some offenders revealed in interviews that they did not even try to present their side of the story in the conference because they did not feel they would be believed. Thus, in one case, in order to avoid a trial, an offender pleaded guilty to something he claimed in the interview he did not do. He was ordered to attend a conference and apologise to victims, which he did without even attempting to defend his innocence.

Another finding which makes the degree of the offender empowerment questionable is that several offenders said they wished they could invite friends to conferences as supporters, but they were not allowed to do so¹⁰. It appears offenders were ‘empowered’ to choose people who they wanted to support them during conferences only to the extent that their choices coincided with those of conference organisers.

¹⁰ It appears from my conversations with conference facilitators that they do not allow offenders to bring their mates to conferences, because they believe it is ‘unsafe’ to allow such people to attend restorative justice encounters.

Some offenders felt they did not have much say over the rehabilitation plan which was developed during the second part of the conference mainly by professionals and offenders' families. That fact does not add any strength to the claim that restorative justice, as practised within the project of this study, empowers offenders¹¹. During the second part of the conference which I observed, I noticed that the main participants in the discussion were the conference facilitator, the offender's mother and the YOT worker. The offender's father and brother had some input into the discussion, but the offender remained silent throughout the meeting and spoke only once, when he was asked a direct question.

(c) Offender family empowerment

Some offender supporters said that for various reasons (such as victims taking a too dominant role) they were not involved to the degree they desired during the first part of the conference. However, they felt sufficiently involved in the second part, which aimed at creating a rehabilitation plan and required mobilising family resources to prevent re-offending.

The fact that the rehabilitation plan was created by offender families was used by the project workers as an ultimate example of restorative justice empowering families to develop solutions to their problems and exercise self-government. However, on the basis of the documentary evidence which was kept in the project and which I examined (pre-conference reports created by YOT workers and rehabilitation plans) it appears that the plan can hardly be seen as a pure creation of the 'empowered' families. The basis for the plan had been developed to a large extent by YOT workers

¹¹ In one case the offender rehabilitation plan was created while the offender was not even present.

long before the conference and was contained in a pre-conferencing report. A typical pre-conferencing report provides a detailed description of the reasons why (according to the drafters of the report) the offender gets into trouble and proceeds to instruct the family what they need to do. The list of the ingredients under the rubric ‘what the plan needs to include’ tends to be extensive and detailed and sets a clear agenda for what the family needs to put in the plan. The plan devised by the family during the conference usually consists of answers to the questions posed in the pre-conferencing report.

It would not be true to suggest that professionals writing a pre-conferencing report are the sole authors of the plan resulting from a conference. The family clearly make an input. However, that input is carefully restricted by the framework set out in the pre-conferencing report. The professionals drafting the report pre-determine the nature and the focus of the plan which the family would develop in the conference, ensure that the plan satisfies certain criteria and aims to achieve certain outcomes¹² and assign a specific role to the family¹³. The professionals carefully guide the family in creating the plan, while delegating the task of fleshing out the detailed provisions of the plan to the family. During the conference which I observed, a conference facilitator and a YOT worker led the discussion and played a significant role in shaping the plan which the family developed under their guidance. The professionals provided the framework, direction and oversight, while the family were allocated the function of working out details within that framework and putting the plan into practice.

¹² Namely, stopping re-offending.

¹³ Which is primarily to help stop re-offending.

One implication of such separation of functions between the professionals and the family is that the resulting plan is likely to be better tailored to the circumstances of the family and, consequently, more effective in achieving its goals than a plan authored by professionals alone, because the family are the best judges of how they can mobilise their knowledge and resources in working towards the desirable outcomes. Yet, the separation of functions allows the professionals to retain an overall control of the nature, contents and goals of the plan.¹⁴

The second implication is that allowing the family to develop the details of the plan (although within a framework set out by professionals) makes the family believe that they themselves designed the plan during the second part of the conference. That is, it serves to mask the fact that the input by the family might have not been as significant as it may appear. This may create a sense of empowerment in family members and reinforce their enthusiasm in implementing ‘their’ plan.

It is also significant that offenders are given a chance to participate in the development of the plan¹⁵. Even though the plan does not have any powers of official enforcement attached to it beyond the duration of the court order, the fact that offenders participated in its creation and agreed (or were made to agree?) to the plan may give them extra encouragement to comply with it. Importantly, if offenders violate the plan, the pressure to comply will come from their family, rather than the

¹⁴ The argument that professionals retain an overall control is supported by the fact that the plan must be approved by a YOT worker.

¹⁵ Although see the findings mentioned in the previous subsection.

state authorities. Such enforcement of the plan can be very effective, and in its duration it may continue far beyond a court order. Thus, offenders' families may be 'empowered' to govern their kids in such a way as to promote the agenda of the criminal justice system.

Conclusion

This article looked at some aspirations of restorative justice advocates in the light of the findings of one empirical study. Restorative justice proponents aspire to develop an alternative to punishment and rehabilitation paradigms. They aim to create a way of 'doing' criminal justice which would place victims at its centre, and which would empower stakeholders in crime. Some also argue that this way of 'doing' justice should be characterised by voluntariness. The findings of this empirical study seem to demonstrate a significant gap between aspirations of proponents and practical realities of restorative justice. Restorative justice, as practised within one restorative project, can hardly claim the title of a victim-centred, empowering, voluntary justice which presents a true alternative to the 'traditional' response to crime. It appears to come very close to the offender rehabilitation paradigm, with some elements of restorative justice added to it.

How can the existence of the gap between aspirations of advocates and practical realities evident in this study be explained? One explanation has been offered by critics who argue that certain aspirations of proponents have not been thought through very well. They are simply unrealistic (as well as may be undesirable). For example, the presentation of restorative justice as an alternative to punishment and

rehabilitation paradigms is misleading (Johnstone 2002, Daly 2002). When proponents criticise punishment and rehabilitation and distinguish restorative justice from them, in essence, they criticise – and contrast restorative justice to – caricatures of both paradigms. The punishment paradigm is presented as either having hurting offenders as the sole reason, or as a simple form of deterrence, and rehabilitation is conceptualised as a highly medicalised model of penal treatment (Johnstone 2002: chapter 5). Such presentations of the two paradigms of criminal justice are inaccurate, and contrasting restorative justice to the caricature images of punishment and rehabilitation is not only deceptive, but also may be damaging. At least arguably, the objectives of restorative justice could be achieved more successfully if goals and methods of the rehabilitation and restorative models were combined (Johnstone 2002:111), and presenting restorative justice as a more constructive form of punishment, rather than an alternative to punishment, could have practical advantages in promoting it (Daly 2000).

An aspiration to create a voluntary form of justice is another example of a restorative ambition which has not been thought through sufficiently well. It is misleading to claim that restorative justice is characterised by voluntariness when the threat of judicial punishment is looming at the background of the supposedly ‘voluntary’ restorative interventions (as pointed out above, in the project of this study most conferences were ordered by the court and a failure to comply with the order could lead to offenders returning to court and receiving a more severe punishment). In such circumstances, the consent of many offenders to participate in restorative encounters was promoted largely by the fear of judicial sanctions, rather than by a voluntary desire to meet victims. Besides, it is deceptive on the part of proponents to equate

coercion to *judicial* coercion and limit it to official legal sanctions. This empirical study found that there may be other sources of coercion which are informal and more covert and complex in nature. Also, it is misleading to think of coercion in ‘either/or’ terms: either coercive or voluntary. Such way of thinking is too naïve and fails to reflect the intricacies and complexities of what really happens. Proponents aspiring to develop an ‘entirely voluntary’¹⁶ way of ‘doing’ criminal justice probably need to re-examine their ambition in the light of the above arguments and accept that totally voluntary restorative justice can hardly ever be possible.

Another explanation for the existence of a gap between aspirations of proponents and practical realities of restorative justice identified by this study relates to the fact that this project operated under the aegis of the criminal justice system and attempted to practise restorative justice within the ideological and structural framework of the system. As noted earlier, it received most of its funding from the Youth Justice Board and referrals from Youth Offending Teams, with conferences either being ordered by a judge or forming part of a flexible court order. The legislative framework was provided by the Crime and Disorder Act 1998, which defines the principal aim of the youth justice system as prevention of offending by children and young persons.

This context within which the project functioned may explain such findings as the over-emphasis placed on offender rehabilitation, the spin-off of which was neglecting some needs of victims and ignoring some of their interests. Also, it may shed some light on the findings relating to the nature and extent of the empowerment of conference participants. They appeared to be ‘empowered’ only to the degree that did

¹⁶ Using the words from the promotional leaflet of the project of this study.

not endanger the achievement of the objectives of the criminal justice system¹⁷. Indeed, in some ways stakeholders were ‘empowered’ to *facilitate* the attainment of the system’s goals¹⁸. It should not be surprising that attempts to incorporate restorative techniques in the shadow of the criminal justice system through a piece of legislation, the overarching aim of which is prevention of re-offending among juveniles, has led to the alteration of the original vision of restorative justice. To a large degree, restorative justice was made to serve the agenda of the system, and when that agenda did not appear to fit well with the aspirations of proponents, those aspirations have been abandoned or diluted.

Findings of this empirical study may offer some support to the concerns about possible dangers resulting from pursuit of restorative ideals in practice, which have been expressed by critics and some proponents. The study demonstrates that practising restorative justice under the tutelage of the criminal justice system within

¹⁷ A limited role assigned to victims within the conferencing process, the restrictions placed on who could be invited to attend conferences, the pre-conferencing reports carefully pre-defining a framework within which families were expected – and subtly pressured – to develop ‘their’ rehabilitation plan are examples of this phenomenon.

¹⁸ The main goal, of course, was prevention of re-offending. Its attainment was facilitated through such measures as empowering victims to express their emotions (which could produce the sense of guilt and empathy in offender and result in them refraining from further offending), empowering offenders to accept responsibility for their actions and apologise (which is painful and thus could discourage offenders from future unlawful conduct), empowering offenders’ families to develop a rehabilitation plan under the guidance of – and within the framework set out by – the professionals and then implement it (which may be an effective way of promoting law-abiding behaviour on the part of offenders – see discussions above).

the framework of criminal law may lead to co-optation and compromising restorative ideals. The findings may also suggest that some aspirations may have not been given sufficient scrutiny by proponents and perhaps need to be re-evaluated.

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