

The state of the ‘art’

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1 Restorative justice as art

There is something in restorative justice that resembles *art*.

In many respects, restorative justice is made of the same fabric or material as art: creativity and rigour, imagination and insight, preparation and improvisation, vocation and inclination, talent and skill. Both (good) restorative justice and (good) art are groundbreaking and far-reaching; both bring about ruptures with mainstream practices and ‘classic’ thoughts and trigger innovation; both carry a ‘political’ dimension when denouncing problems and/or advocating transformations (see the ‘critical’ commitment of restorative justice in criminal justice reform: Aertsen & Pali, 2017). Finally, both restorative justice and art pioneer cultural change and may even give rise to new paradigms, either by reaching out to the ‘new’ and the unexpected or by resuming and revitalising the past.

Unsurprisingly, then, the presence of art in the restorative discourse is constantly growing (Lippens, 2017; Pali, 2017, 2018, 2020; Varona Martínez, 2020): literature, performing arts, cinema and painting are increasingly integrated into the ‘lifeworld’ of restorative justice, its theory and practice. In 2020 the European Forum for Restorative Justice (EFRJ) initiated the REstArt Festival, gathering the restorative community worldwide around artists, filmmakers, musicians, painters ‘with the aim of offering a forum to discuss justice, solidarity and repair in today’s societies’ (EFRJ, 2020; see also Pali & Biffi, 2017).

Art is so consonant with restorative justice (and vice versa) as to itself become a ‘mediator’ or ‘facilitator’ of restorative encounters or to provide a concrete, tangible shape to unspeakable experiences and stories (Aldington, Wallace & Bilby, 2020).

Art is increasingly used as a means of dissemination, information, awareness raising, training, etc. in the field of restorative justice. Art is deemed more suited to these tasks than other ‘traditional’ dissemination tools: a visual testimony, a poem, a painting, an *artefact* made by the very participants in a restorative dialogue at the end of their meeting, as in Clair Aldington’s work (Aldington, 2017), may be much more meaningful and insightful in conveying restorative justice than a ‘distant’, academic article evaluating the effectiveness of restorative processes.

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Art, in fact, allows direct experiences, and restorative justice is an experience *first*. Although restorative justice has developed robust theoretical grounds, its inner nature seems to always exceed abstract theorisation in favour of actual and factual occurrences well rooted in both reality and the 'lifeworld' of people (Kremmel & Pelikan, 2017; Wachtel, 2014). To make a restorative encounter with the 'other' possible (the difficult, and yet significant, other), a *direct encounter* with restorative justice is necessary in the first place, not only to *understand* what restorative justice is and what it proposes but also to *feel, see, taste and touch* what restorative justice is like and what it is really about: this experiential texture seems to be much more persuasive to the potential parties of restorative processes than academic consensus, empirical evidence, statistics, surveys and data (no less important, of course). Just like the most meaningful human experiences – such as love or friendship – what is convincing about restorative justice is its direct connectedness to both life and reality, and particularly to the experience of injustice and the human reaction to it, which constitutes the quest for justice. At the same time, this experiential, 'immersive' factor – which is typical of art too – seems to be part of the requirements of a 'fully informed' consent to restorative processes, where *trust* in mediators and facilitators, and in the procedure, is essential to voluntariness, participation, involvement, engagement. This is not the case, of course, with adversarial and judicial conflict resolution mechanisms, which rely on the authority of both the law and the third party, and on subsequent enforcement powers.

Like art, restorative justice entails a 'fruition': a full participation, an active and personal engagement.

As is widely recognised, the rise and history of restorative justice are linked, among other reasons, to the dissatisfaction of citizens – accused persons, offenders, victims, families, communities, etc. – with abstract, formalistic, legalistic, coercive, punitive mechanisms to respond to conflicts, criminal offences and other social harms. Restorative justice has proposed itself as something different in nature – either alternative or complementary – to those mechanisms: something (more) meaningful, close(r) to people and their needs, something capable of approaching, of acknowledging and recognising their stories, their sorrows and concerns, their hopes and longing, what matters to them; in a word, their lives. The 'promise' of restorative justice (Folger & Bush, 1994) is that people's intricate and often painful stories and lives be met with the mediation of listening without judging, facilitating without simplifying, accepting without approving, supporting without taking sides, encouraging without deluding. Restorative justice is both humble, direct, simple, rooted in reality, yet complex, sophisticated, open to the unknown and intrinsically risky (as is every serious human relationship).

These 'ambivalent' activities require from facilitators and mediators (but, to a certain extent, from parties too) a great deal of *talent* and *soft* skills, together with the capacity to combine rigorous competence with flexibility and openness to creativity: here lies another reason, maybe, why restorative justice is a sort of art. And here lies, in my view, the reason why restorative justice – just like art – is open to all but is not for all: certain personal characteristics of both the parties

involved and the facilitators create the conditions for the encounter to be – or become – meaningful. This, of course, has nothing to do with personal positive 'qualities', in terms of values or ethics: restorative justice is open to all, especially to the most unlikely ones who often prove to be extraordinary subjects. But, once again, restorative justice seems to best fit those who have both an *inclination* towards it and some sort of *talent* for it. Both inclination and talent, however, are not preconditions for restorative justice: as in art, they can be unexpectedly discovered, educated, fostered and nurtured thanks to encounters, the opening of possibilities, a favourable culture and practice.

2 Inclination, talent, vocation

The concept of *inclination*, as drafted and developed in philosophical terms by Adriana Cavarero (2016), has particularly inspired and framed my reflections. According to Cavarero (who interestingly builds her arguments on a significant amount of art and literary works), a moral and political shift in subjectivity and agency should take place: from the individualistic, muscular (and masculine) vertical posture towards a more relational, altruistic (and feminine) posture, capable of leaning towards the others and actually feeling inclined towards them.

I cannot but sketch a few insights here stemming from this interesting alternative posture that I propose to export in the field of restorative justice. First, restorative justice seems to intrinsically prefer curved shapes, such as the circles around which the parties of a restorative process usually sit. Second, restorative justice follows by principle the twisted ways of injustices and the non-linear directions of conflictual or violent situations, alongside people's stories and multifaceted individual and collective needs. Third, restorative dialogues pivot around questions, which are often more important than answers. The curved sign of the question mark, rather than the vertical, affirmative and erect sign of the exclamation point, seems to be distinctive of restorative justice. Finally, restorative outcomes are not, by definition, 'linear' as in zero-sum games, since they are 'aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender', as stated in the UN Basic Principles (ECOSOC, 2002: Rule 3). Furthermore, restorative outcomes are not even necessarily 'tangible' (Council of Europe, 2018: Rule 51), although they are always experiential.

Focusing on mediators and facilitators, a series of matters concerning their training and competence, in relation to skills and talent, arise at this point and become thorny with the increasing development of restorative justice.

Once again, in my view the posture of the third party should indeed resemble Cavarero's ethical inclination: facilitators should possess a vocation for restorative values, enabling them to *care* for those who access restorative justice, to lean towards each party, to bend down to the low ground, where injustices take place and harms occur. Again, it seems to me that the right posture of facilitators is not the 'straight' one of the 'expert' but the bended 'postural ethics' (Cavarero, 2016) of the relational and altruistic subject together with the typical vocational

attitude of the real artist. Interestingly, consistent with restorative standards and values, mediators and facilitators – who should be recruited from all sections of society – should possess personal and life skills more than theoretical knowledge or ‘technical’ competences (e.g. Council of Europe, 2018; UNODC, 2020).

The issue of soft skills in restorative practices and methodologies is in fact of extreme interest and is worth studying further, especially when dealing with the implementation of restorative justice in criminal matters. During an ongoing EU-funded project concerning judicial training in restorative justice (RE-JUSTICE, 2019) – in which my institution and myself are involved together with other European universities, schools for the judiciary, and judicial training bodies – the topic of soft skills that prosecutors and judges should acquire or exercise when referring cases to restorative justice organisations or judicially supervising the restorative outcomes has emerged not only as a fascinating challenge to the principle of judicial impartiality or neutrality but also as an enriching input to the faculty of judgment. How can a blindfolded, legalistic and hitherto mostly punitive criminal justice become acquainted with soft skills? With what consequences? Antoine Garapon (1997) has offered insightful reflections on ‘judging well’. On a more autobiographical note, it is also worth exploring the teachings about soft skills and judgment presented by US Justice Guido Calabresi (2014), not to mention the beautiful story of a fatherly and decade-long relationship Elvio Fassone (2015), an Italian magistrate, has managed to create with the very young man he condemned to life imprisonment: indeed, a restorative process turned into a lifelong correspondence and then a book.

A thorough analysis of the liaison between the hard and soft skills that mediators and facilitators on one side, and prosecutors and judges on the other, should have in relation to restorative justice may prove useful in understanding the inner nature of restorative justice itself and the reasons why it seems ‘to work’.

3 The art of restorative justice and the faculty of judgment

The intimate bonds between restorative justice and art are also made visible theoretically by the strong philosophical connections between restorative justice and *aesthetics*: the place where restorative justice and aesthetics meet is the theory of judgment, a place where we again find imagination (Pali, 2020) at work in the fascinating interaction between normativity and creativity.

Restorative practices make use of *reflective judgment*, as conceived by Immanuel Kant (1790: para 6 ff.) in the realm of aesthetics and then developed in the domain of political philosophy by Hannah Arendt (1961, 1978, 1982, 2003) and further applied by political philosopher Alessandro Ferrara (2008) in contemporary political studies.

Restorative justice does not resort to determinant judgment, as is the case in ‘classic’ criminal proceedings where judgment is ‘determined’ by – and therefore results from – the application of established a priori criteria. On the contrary, restorative processes host reflective judgments: they stem from a sort of

'recognition' of a *general* – and potentially *universal* – property or value in the *particular* given situation. This recognition is triggered by both imagination and the relationship with the other to which the encounter and dialogue give birth. Because of this peculiar feature of the general/universal to make itself visible in the very particular, potentially to everyone, reflective judgments do not need enforcement, because they possess 'the rightful claim to the assent of everyone' (Kant, 1970 [2000: 98]). Following Arendt and Ferrara, when we step into something that lets a universal value or property shine through a particular case, we are facing – philosophically speaking – an example that carries its exemplary normative validity. That is, the capacity to trigger our imagination, persuade us and lead us to the recognition of the universal in the particular. The particular is unique, diverse, complex, multifaceted, multicultural, etc., but its exemplarity reveals something *beyond*: something general and common to humankind, because of our common belonging to humankind. In my personal experience as a restorative practitioner, this common (universal) ground is the (only?) point where the parties of the restorative encounter can meet, recognise each other and take on commitments for their future lives (together or distant).

I like arguing that restorative justice is an exemplary justice, carrying its non-coercive (non-determinant) persuasive normativity (Mazzucato, 2017).

Restorative processes enable participants to carry out continuous reflective judgments about wrongs (and rights), injustice (and justice), mutual relations (and obligations) and the future (and the past or present): the topics addressed during a restorative dialogue have the texture of exemplarity and its normative validity. The narrative dimension of restorative justice, the involvement and engagement of the direct stakeholders together with the relevance of the legal framework in both the participants' interaction and in the mediator's/facilitator's interventions, combine the particular and the universal and the individual and the general, just as examples do: the single and unique story of the persons involved reveals general, and potentially universal, concepts of wrongs and harms; the single and unique outcome of the very encounter may let a general, and potentially universal, idea of redress or 'justice' filter.

4 *Leges artis*

Leges artis, the laws of the art: this Latin expression is used especially in medical and technical fields to refer to compliance with standards necessary to carry out certain activities *correctly* and *properly*.

These rules have little to do with legalistic, strict commands and more to do with proper orientation in the realm of care, mastery, expertise, ability, even dexterity. In a word, art, again. The 'laws of the art', therefore, cannot be 'obeyed' but only respected: compliance here necessarily involves constant attention, quest and questioning, a continuous dialogue between the rule and the reality the rule regulates, a permanent interaction between skills, life and experience. The laws of the art are per se flexible, because they need to be *adjusted* to the given situation. This regulation is not of a 'one-fits-all' kind. On the contrary, the law of

the art must allow some degree of ‘play’, or ‘tolerance’:¹ correct, proper, careful actions *ex lege artis*, ‘according to the law of the art’, are ‘responsive’ in nature.

The phrase *leges artis* aptly fits the idea I would like to convey here. Just like any other art, restorative justice has its own rules: rules of care meant to guide towards the appropriateness and correctness of the process and its outcome; rules of which avoidance may cause either risks or harms or entail the lack of ‘restorativeness’ of both process and outcome.

The field where the ‘art’ of restorative justice is performed is democracy *au sens large*. Following Albert Dzur’s inspiring statement (2018), the challenge the art of restorative justice faces is to bring democracy to ‘unlikely places’, especially to *the most* unlikely place of all: criminal justice, the paramount siege of responses to wrongdoing, the very place that managed over centuries to transform the virtue of justice into something that has made humankind cruel and inhumane.

Consequently, and accordingly, the *leges artis* of restorative justice – as established, among others, by the Council of Europe Recommendation (2018)8 (Rule 14) – pivot around the following:

Voluntariness; deliberative, respectful dialogue; equal concern for the needs and interests of those involved; procedural fairness; collective, consensus-based agreement; a focus on reparation, reintegration and achieving mutual understanding and avoiding domination.

Interestingly, Rule 14 of the Recommendation further underlines how ‘[t]hese principles may be used as a framework with[in] which to underpin broader reforms to criminal justice’. Rule 15, in turn, establishes another *lex artis*, setting a condition for a restorative process to be properly carried out: ‘Restorative justice should not be designed or delivered to promote the interests of either the victim or offender ahead of the other’.

Around and about these pivotal concepts flourish other interconnected elements or standards related to designing the restorative nature of a process and/or outcome: freedom as non-domination, responsibility-taking, empowerment, forward-looking commitments, etc. (Braithwaite, 2002).

These are the methodological and practical guidelines that make something ‘restorative’: to comply with these criteria – the restorative *leges artis* – is a ‘duty of care’ on the part not only of practitioners but also of legislators and policymakers. Voluntary acceptance and compliance with these features are also a condition for the parties involved in a process for it to be actually called ‘restorative’.

Finally, the comparison with *leges artis* allows me to stress once again how, adapting Braithwaite’s words, important it is for standards to be ‘open-textured’ to ‘allow a lot of space for cultural difference and innovation, while giving us a

1 ‘Play (*noun*): ... the space in or through which a mechanism can or does move ...; scope or freedom to act or operate’; ‘Tolerance (*noun*): ... the capacity to endure continued subjection to something ... without adverse reaction’ (Soanes and Stevenson (2010): entries ...) *Play*, para 4; *Tolerance*, para 2).

language for denouncing uncontroversially bad practice' (Braithwaite, 2002: 565). Restorative *leges artis* are the 'soft skills' of (restorative) criminal law: as such, they too are worth deeper analysis in relation to the hard, but necessary, fundamental principles and safeguards of criminal law and justice (legality principle, strict liability, due process of law, etc.).

5 A vulnerable art: the risks of a 'restorative populism'²

As in other fields, the increasing interest around restorative justice and its steady growth in recent years – unthinkable only a few years ago – expose restorative justice to new risks.

One is *over-professionalisation*, which would cause (again!) the 'theft' of conflicts from the real experts, i.e. the persons and communities involved (Christie, 1977), after the promise of not doing so. Jointly comes the danger of making restorative justice a *business*; this would result in both élite restorative justice and 'mcdonaldisation' of restorative processes (Umbreit, 1999) in clear contrast to the genuine bottom-up restorative justice of the origins; costly training courses; competition among restorative services over funding. Together with the business often comes the *fashion*, attracting those in search of money, success, visibility.

The result is the loss of the (original) 'art', thus creating a great(er) gap between the (necessary) vocational nature of restorative processes and their actual daily practice. Based on voluntariness and participation, instead of power and authority, and leaning towards the lifeworld of people, the art of restorative justice is vulnerable.

Among the dangers I fear most is the well-known tendency of criminal justice systems to resist changes, renewal, reforms. With some relevant exceptions, the famous statement of one of the characters of *The Leopard*, an Italian novel by Giuseppe Tomasi di Lampedusa (1958, [2007: 19]), seems to apply to criminal law and criminal justice worldwide; it reads: 'If we want things to stay as they are, things will have to change'. It seems that criminal justice reform has accelerated thanks to restorative justice. But despite restorative justice being almost omnipresent in academic and political discourse in many countries, it is still extremely underused, with little or no real impact on the criminal justice system, which remains largely punitive and retributive in nature (again, with some exceptions).

Furthermore, in several systems (probably the majority), restorative justice in criminal matters tends, in the eyes of the law, to be placed on the same footing as reparation, community service, negotiated settlements between the victim and the accused person, focusing more on the tangible outcome rather than the voluntary and participatory encounter of those concerned.

2 I owe this expression to a dialogue with Giulio Russi, former coordinator of the centre for restorative justice of Bergamo, Italy (Centro di giustizia riparativa, Caritas Diocesana Bergamasca).

Needless to say, the real ‘systemic’ (or paradigmatic) novelty brought by restorative justice is precisely the encounter and togetherness of the most unlikely parties in the most unlikely place (Dzur, 2018) in the aftermath of a criminal offence. Reparation and community service were there long before victim-offender mediation and restorative justice started. The core property of restorative justice is to be the *justice of the encounter*, which is not imposed or enforced by the law or the judge. The arguments by Gerry Johnstone on the tensions and overlaps between voluntariness and coercion are extremely valuable (and true), and so are Theo van Willigenburg’s reflections (2018) on the ‘powerful motive’ of retribution: they sound to me as a confirmation of my fears and a further warning sign.

I am afraid that every attempt by national and European legislators, policymakers, justice institutions and academics to marginalise the relevance of the dialogue between the parties, in favour of ‘solutions’ – but actually ‘sanctions’ – is a serious problem for a genuine restorative justice.

Along these lines, one major threat to restorative justice, in its aim of underpinning criminal justice reform, is to conceive, regulate and apply it in retributive terms in the frame of a punitive criminal justice system that does not change, in other words, to transform restorative justice into a *payback sanction*, and, even more so, to transform it into a *victim- or community-centred payback sanction* (Balta, 2019). And, finally, to inoculate a good deal of typically retributive penal ethicism: under the cover of making amends, pursuing the offender’s remorse, repentance and correction instead.

John Braithwaite (2002: 565) had pointed to this danger decades ago when stigmatising retributive ‘practi[c]e masquerading as restorative justice’. In turn, Paul McCold (2004) has stigmatised the apparent similarities between restorative justice and community justice that bears an ‘underlying authoritarian assumption’. David Garland (2001) has thoroughly described the ‘history of the present’ where the victims and the community – willingly or unwillingly – become key factors of penal practices, presented as mild and new, that increase the ‘culture of control’.

I ask myself whether we are standing by another form of populism (Dzur & Hendriks, 2018): *restorative populism* in criminal matters.

6 Work of art: prospective evolutions

The liaisons between restorative justice, law and art that I have tried to sketch in the foregoing lead me to a provocative question: will the rigorous development of restorative justice according to its *leges artis* (i.e. values and standards as drafted by the United Nations and Council of Europe) nourish criminal justice in terms of *beauty*?

To put ‘beauty’ next to criminal justice sounds almost blasphemous: there is nothing beautiful, really, in victimisation, enforcement, convictions, punishments, prisons, etc. But if we dare take the ‘art’ of restorative justice and its *leges artis* seriously, some beauty may exemplarily shine through criminal

justice practices: the beauty of human dignity and agency; the beauty of efforts in transforming wrongs into rights; the beauty of unthinkable encounters and dialogues precisely with the 'difficult others', the distant others, the unlikely others, the enemies; the beauty of inclinations towards the redress of injustices.

When I use the term 'beauty' here, I do so in philosophical and logical terms: in no way do I mean to sweeten the harsh, often tragic, dimensions of criminal offences and criminal justice for all those involved, nor do I want to *anesthetise* conflict, violence, crime, coercion, etc. I am not speaking about a romantic type of (unreal) justice; rather, I refer here to beauty as a philosophical virtue entailing its specific normativity, which brings about truth(s) (be they personal, collective, narrative truths), reconciles the world as it is and as it should be (even according to the just law), and exemplarily corresponds to core experiences that matter in the lifeworld of human beings. Not a subjective, emotional justice, but a rigorous, truthful, experiential, exemplary justice in philosophical terms, capable of transforming the brutal properties of criminal justice into reflective, responsive, transformative, participatory, far-sighted ones.

This, in my view, is the challenging task of the art of (restorative) justice: to approach the complexity of the quest for justice in the real world, combining hard and soft skills harmonically, and complying rigorously with the proper restorative *leges artis*, in order to amend in democratic ways what has proved wrong and harmful, and to prospectively avoid its reoccurrence.

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