

Some Considerations of Restorative Justice Before and Outside of Contemporary Western States

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Abstract. This article provides an overview of the main themes and controversies in the restorative justice discussions in Europe and the US with special attention to the role of victims and mediators. This discussion is contextualized through a short description of the history of both state-centered and community-oriented restorative systems in response to law violation. Indigenous and pre-state formation responses to crime have predominantly been of a restorative nature with an interest in healing the harm experienced by all participants, aimed at addressing social problems and strengthening the community as a whole.

Keywords: Restorative Justice, Mediation, Punitiveness, Indigenous Justice, Islamic Law.

INTRODUCTION AND OVERVIEW

Just a few years ago, John Braithwaite (2013, p. 12), one of the fathers of contemporary restorative justice, wrote: “Of all the great institutions passed down to western civilization by the Enlightenment, none has been a greater failure than the criminal justice system.” He compared it, as one example, to medicine and concluded with McElrea (2013, p. 12) that “[the criminal justice system] has been less adaptive than other institutions, less responsive to transformations to the environment in which it operates.” He points to the

(re-)emergence of Restorative Justice as one such reform capable of being evidence-based and more responsive. In many instances, this approach has shown itself successful through lower recidivism rates, redress of the victims' material and financial needs, healing of the communities involved as well as an overall greater sense of satisfaction among the participants within the process.¹ The unusual trait of this reform is its partial origin in pre-state formations in Western cultures and precolonial traditions in most indigenous cultures. Indigenous jurisdictional practices in Africa, New Zealand, the Middle East or North America provide important lessons from long-term experiences and practice, but their authorships are often not acknowledged. An integration of restorative justice provides alternative narratives, where indigenous approaches reveal potentially superior practices while affirming the strengths of Western laws with their emphasis on evidence, separation of powers and a preventive mechanism for the abuse of power (Braithwaite 2013, p.13).

Restorative justice has seen a major "rediscovery" in recent decades as evidenced in the exponential growth of the literature in that field (see, for example, Clamp 2016; Hopt and Steffek 2008a; Johnstone and Van Ness 2007a; London 2011; Weitekamp and Kerner 2002). Medieval Europe, as well as the tribal societies in the past and in the present, had employed this approach to address the violations of local laws. An extensive number of empirical criminological studies over the last half of the century have repeatedly shown that the traditional, state-centered solutions to crime problems, prevalent in Western countries, cannot substantially – if at all – reduce the conflicts caused by crime. These traditional approaches have essentially concentrated on the harsh forms of punishments of offenders while ignoring the needs of the victims of crimes, using them only as witnesses during court proceedings (Kury 2013).

The emerging academic field of victimology argued that victims of crimes are receiving too little attention and support (Braithwaite 1989). International empirical research shows clearly that most victims, with the possible exceptions of some of those victimized by very severe crimes, are more interested in restitution of the damages caused rather than the severe punishment of the offender (Sessar 1991; 1995). Yet the predominant government reaction to crime is organized in a way that disregards these needs of most victims

¹ For an overview of restorative justice practices in contemporary Western countries, see Helmut Kury and Annette Kuhlmann (2016) "Mediation in Germany and Other Western Countries. *Kriminologijos studijos*, Vilniaus Universitetas, 4, 5–46.

and of those broad segments of the population who are more concerned with restoring peace in a society and reducing the conflicts caused by a crime. A “rediscovery” of this alternate approach has addressed these needs more fully. The punishment of offenders should be used more intensively to change their behavior, to include them in society, to prevent recidivism and, in such a way, to reduce further victimizations.

Restorative justice presents a different approach to achieving justice than the traditional court system. Whereas court systems depend on punitive measures and do not attend to victim concerns, restorative justice focuses on repairing the harm caused by an offense, bringing the offender back into society, and giving all actors affected by the crime (the offender, the victim and the community) a direct voice in the justice process (Gromet 2009, p. 40).

Despite the mounting evidence of the positive responses from all the participants involved in the process, politicians and justice professionals generally continue to be more oriented toward punitive reactions to crime (see Kury and Shea 2011b). The perception of the public is shaped by the highly selective and sensationalized media reporting about crime (see Carrabine 2011; Hestermann 2010; 2016; Jewkes 2008; Kappeler and Potter 2005). As a result of these distorted perceptions, restorative justice is seen as a “mild” reaction, ineffective in crime prevention compared to hard punishment (Lummer 2011, p. 240f.; Kury and Shea 2011a).

At the same time, a large number of studies have shown the counter-productive effects of imprisonment, at least in the form that imprisonment is organized today.

“There is no indication that harsher or more intensive punishments lead to greater public safety and peace. On the contrary, the more the public policy relies exclusively on repression and punishment, the more this will lead to more imprisonment, more humane and financial costs, less ethics, less public safety and a lower quality of social life” (Walgrave 2008, p. 54; see also the meta-analysis by: Dölling et al. 2011; Hermann and Dölling 2016).

Wright (2003, p. 17) points out: “Punitive sanctions are not very effective in deterring offenders, but once the offence has been committed, they deter them from admitting their actions.” Braithwaite (2005, p. 285) agrees when he writes: “Criminal justice with its commitment to punishment is intrinsically the major obstruction to good communication, because it encourages cultures

of denial.” Ostendorf (2011, p. 25) points out: “Society does neither see offenders within their social surrounding and relations, nor in the concrete situation of the offence. Offenders personify evil, they become offenders without any reason. The offence stands in the focus, from the evil offence it is referred to the evil offender” (as cited in Kury 2014). If victims and offenders communicate, the offender returns to being human, “if there are victims, responsibility is shifted, back and forth like wagons at a railway station” (Ostendorf 2011, p. 24). This lack of understanding of the potential of restorative justice is frustrating and not helpful for those affected; both parties come away without an understanding of the dynamics involved in the crime, the underlying the penal process and thereby are left without of a sense of support. Retribution and rehabilitation approaches place the offender largely in a passive role, the victim and society as a whole are excluded from the process. The restoration model relates to the victims, the community and the effect of the crime. The traditional system of sanctions gives the offender contradictory information, rehabilitative and punitive signs. The paradigm of restoration, in contrast, is clear; it offers the victims, the community and the offender active parts in the resolution of conflicts. The traditional punitive model increases the damage caused by the offender by adding additional problems for victims and offenders; it concentrates on the past and points to the personality of the offender first. Restoration, in contrast, focuses on the present and the future with the goal to reduce the emotional and material damage ensued.

MEDIATION AND RESTORATIVE JUSTICE

With the growing interest in restorative justice, a number of related, but not identical concepts have been used that have blurred the discussion. In their *Final Research Report to the European Commission*, Weitekamp et al. (2013, p. 7) discuss the results of an international project on Peacemaking Circles: “The field of restorative justice seems particularly prone to a diversity of terms and definitions and a resulting lack of clarity regarding their meaning which is probably at least partly due to the fact that practical approaches have been outrunning its theoretical development.” Restorative Justice, Victim-Offender-Mediation (VOM) and Conferencing have often been distinguished from each other (Weitekamp et al. 2013, p. 7ff.). The Council of Europe (1999, see

Weitekamp et al. 2013, p. 11) defines mediation as “any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator).” Victim-Offender Mediation is seen as part of Restorative Justice, defined by the United Nations as: “Restorative process means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles” (United Nations Office on Drugs and Crime 2006, p. 100).

The understanding and scope of the concept of mediation varies for different legal systems. Hopt and Steffek (2008c, p. 13) define the most basic characteristics of mediation as (1) the existence of a conflict, (2) the engagement to solve the conflict on a voluntary basis, (3) the systematic promotion of the communication between the different parties and (4) the acceptance of responsibility for the solution identified without any of the mediator’s decision-making power.

Voluntarism is a particularly important topic here, because agreements based in mediation have practically no chance to be implemented by force. Another controversial aspect of mediation is the role of the mediator and his/her decision-making power – or, more specifically, the lack thereof (Hopt and Steffek 2008c, p. 12). As a result, the agreement of solving the conflict lies with the responsibility of the parties. The mediator, who plays an important role in the outcome, should have underwent proper training and have enough experience. Like in psychotherapy, the result of any mediation is especially dependent on the relation between the expert (mediator) and his clients (Grawe et al. 1994, p. 775ff.). The interpersonal experience, the feeling to be understood and accepted is one of the most important topics to solve in the conflict (Kiesler 1982). There are differences between countries regarding the question if mediators are allowed to propose solutions.

Other debates include the scope of this practice; mediation cannot be limited to the solving of legal conflicts – most social conflicts cannot be solved by justice institutions. It is important to see that mediation is not only used to reduce conflicts of penal law matters but also in non-penal law conflicts, for

example, in regard to social problems. Most experts generally agree that the power of mediation can be seen in that the procedure is focused on a solution of the social conflict and that regulations based on law only have supporting functions. Mediation is experienced in a broad range of conflicts, like wars (see for Ruanda: Palmer 2015) or problems in schools or domestic abuse (see Olweus 1993; Weitekamp 2015).

The systematic promotion of communication through the mediator is a key theme throughout these debates in connection with confidence in the procedure and the neutrality of the mediator. All legal systems agree that mediation has positive impact based on the effective communication supported by specially trained professionals in cases where the spontaneous engagement of both parties to reduce a conflict was no longer helpful.

In sum, there are a number of specific benefits to the use of mediation. It reduces costs, since this process usually proceeds more quickly than the use of standard legal channels. Additionally, the recidivism rate is regularly lower than in traditional sanctioning. The confidentiality of the participants is protected, because mediation only includes the parties involved in the conflict with the facilitator, in contrast to the public nature of court proceedings. This also implies that the participants retain control over the resolution of the controversy, in contrast to court sessions, where control resides with the judge or jury. Compliance to the mutually agreed upon outcome is usually high, since these outcomes were mutually developed and agreed upon. Mutuality in itself is another characteristic of mediation. The mere fact that the parties agreed to work together fundamentally changes the nature of the conflict. Mediators are trained, neutral facilitators who can guide the participants through this process.

Braithwaite (2009, p. 497), one of the founding fathers of the newer movement in mediation, highlights the important distinction between “mediation” and “restorative justice” and points out: “Mediation between just a victim and just an offender can be described as a ‘restorative process,’ but it does exclude other stakeholders such as the family of the offender.” Menting et al. (2016, p. 413) points out: “The importance of family in the etiology of crime is undisputed.” Mowen and Visser (2016, p. 503) have found in their study that “reducing barriers to family contact – especially the cost of visitation and visitation procedures – may lead to positive change within family relationships for formerly incarcerated individuals. Furthermore, developing programs to

assist individuals with mental health issues to maintain family relationships may create avenues to help those individuals keep, or re-establish, family ties after release.”

Braithwaite (2009, p. 497) defines Restorative Justice, in contrast, as “a process where all the stakeholders affected by a crime have an opportunity to come together to discuss the consequences of the crime and possible path towards a resolution to right the wrong and meet the needs of those affected. Of course, such an ideal is secured to greater and lesser degrees.” On the basis of this definition of the process, “one on one victim-offender mediation is not as restorative as a conference or a circle to which victims and offenders are encouraged to bring their families and other supporters. In a restorative justice conference both victims and offenders are asked to bring along the people who they most trust and respect to support them during the conference.”

But Restorative Justice refers, according to Braithwaite (2009, S. 497), not only to processes, “it is also about values. It is about the idea that because crime hurts, justice should heal. The key value of restorative justice is non-domination” (see also: Braithwaite and Pettit 1990; Braithwaite 2002). The active part of this value is empowerment. Empowerment means preventing the state from “stealing conflicts” (Christie 1977) from people who want to remain with those conflicts and learn from them by working through them in their own way.

According to Walgrave (2007, p. 559) the difference between restorative justice and criminal justice can be seen especially in the following different characteristics:

Crime in restorative justice is defined not as a transgression of an abstract legal disposition, but as social harm caused by the offence. In criminal justice, the principal collective agent is the state, while collectivity in restorative justice is mainly seen through community. The response to crime is not ruled by a top-down imposed set of procedures but by a deliberative bottom-up input from those with a direct stake in the aftermath.

The difference of these definitions implies a difference in procedures.

Contrary to formalized and rational criminal justice procedures, restorative justice processes are informal, and include emotions and feelings. The outcome of restorative justice is not a just infliction of a proportionate amount of pain but a socially constructive, or restorative, solution to the problem caused by the crime. Justice in criminal justice is defined “objectively,” based

on legality, while justice in restorative justice is seen mainly as a subjective-moral experience (Walgrave 2007, p. 559).

This difference in procedures highlights, again, the humanizing impact of restorative justice. But it demonstrates also the greater difficulty of the procedure, which requires well-trained experts who are much more involved in the emotional process of conflict solution than in the very formalized, classical juridical trial.

One important aspect of mediation and restorative justice is victim-offender restitution, i.e., the repair of the damages created by the crime. Heinz (1993, p. 376) points out that victim offender restitution is on the one hand, strongly correlated with the idea of repair of the damage, yet on the other hand, it has a broader framework with the central concern of compensation, of satisfaction. The goal is that through the consideration of the interests and needs of both parties, compensation is agreed upon, ideally even a reconciliation could be reached. This would be arranged by using the opportunity of a private-autonomous solution. The offender should learn to see and accept the impact of damages of the crime on the victim and should accept his/her social responsibility.

Another point of debate is the relationship between mediation and retribution. Some scholars argue for an integration of both principles, because wrongdoing requires some suffering for the offender to make moral reparations and reinforce the values of the community (Barton 1999; Daly 2002; Duff 2003; Gromet 2009; Robinson 2003). Walgrave (2007, p. 565) highlights a less punitive aspect of this argument, saying that “restricting restorative justice to voluntary deliberations would limit its scope drastically” (also see Dignan 2002), and the mainstream response to crime would remain coercive and punitive. The criminal justice system would probably refer only a selection of the less serious cases to deliberative restorative processes, thus excluding the victims of serious crimes who need restoration the most.

SOME HISTORICAL PERSPECTIVES ON COMMUNITY RESPONSES TO CRIME

Advocates of mediation and restitution in the aftermath of crime often refer to historical examples. For example, Frühauf (1988, p. 8) discusses the history of restitution and shows that this is one of the most interesting topics

in the history of punishment. Pre-industrial systems of sanctioning predated the origins of written laws (also see Hagemann 2011). For example, the Code of Hammurabi, developed around about 1700 B.C., is one of the oldest law books handed down, and it describes, besides severe forms of punishment, a series of regulations regarding restitution for the victims by the offenders in the instance of theft, in cases of bodily harm or even in the context of killings. Broader and more detailed are the measures of restitution of victims by offenders in the laws of the Hethiters, known from the time before about 1300 B.C. So, these alternative approaches to reduce conflicts in societies caused by crimes have a long and obviously successful history.

Intensive and broad regulations of restitution in most cultural regions seem to be a general phenomenon as Frühauf (1988, p. 11) shows with examples from antiquity, the Islamic penal system, and other highly developed cultures and tribes. For examples about punishment and restitution in the Bible, see Burnside (2007). Sharpe (2007, p. 26) points out: "Reparation has been a vehicle for justice throughout human history." On the basis of the behavioral research, Rössner (1998, p. 878) concludes that penalizing behavior with the aim of establishing peace is part of a biological program of mankind. There would be no human community without systematic measures to reduce conflicts. Historically, until the medieval period, the restitution of penal peace by social compensation was the main topic of penal laws and justice.

Frühauf (1988, p. 13ff.) also presents an overview of the development of restitution in the last centuries of the German law. Since the 5th century A.C., different nations throughout the region had increasingly created written laws in this regard. The "Lex Salica," for example, which was developed between 507 and 511 A.C., defined a catalogue of penances, which fixed, for each crime, a restitution of the offender to the victim, including for crimes of killings. The punishment of offenders by restitution was at that time seen as normal and usual (1988, p. 17). The offender was pressured to retribute the damage caused by his criminal act. But in the subsequent centuries, the principle of restitution of the damage caused by a crime was increasingly replaced by harsher punishment.

With the establishment of kingdoms, the distribution of power between state and tribes changed fundamentally (Frühauf 1988, p. 37). The kingdoms were interested in an abolition of the old ways of regulating laws, because they

wanted to increase their power by bringing jurisdiction into their own domain. This was the beginning of a fundamental change in the means of social control. The new kingdoms established a generalized penal system and law, law violations were now sanctioned increasingly by the king (or queen), the influence of the population diminished. The establishment of state penal laws and procedures at the beginning of the Medieval age meant that the formerly private conflict became a public one (Rössner 1998, p. 880). The concept of restitution did no longer fit into the new concept of state-centered, authoritarian punishment. The restitution of the social balance, damaged by the criminal act, was taken away from the community and was managed now by the state in a special relationship of power between the state and the offender. No more of inclusion and integration, but exclusion and separation became the goal. The conflict, as well as the cooperation in solving and reducing it, was taken away from the victim (Christie 1977).

The manner of punishment now became a measure of power. Especially in the use of the death penalty, the combination of a shift toward the power of the kings and the enforcement of the new authoritarian penal laws becomes clear (Frühauf 1988, p. 43). After a trial, the state enforced a *Friedensgeld* (money for peace), which was just a fine. So, punishment became also an income stream for the state. This was the beginning of a problem that continues up to this day: at the end of the age of the Franks (Franken), the money to be paid to the state had become the dominant form of punishment, the fine had to be paid directly to the judge. The damages caused to the victim were his/her own problem (Frühauf 1988, p. 44). This regulation did not change substantially until today. In Germany, for example, a special 1976 law regulates the restitution of victims of violent crimes (*Gesetz über die Entschädigung für Opfer von Gewalttaten – Opferentschädigungsgesetz OEG*; see the overview in Schwind 2016, p. 461ff.), but, in practice, only a relatively small number of all victims actually receive any (financial) restitution because of the extensive formal obstacles (see the overviews in Villmow 1988; Villmow and Plemper 1989; Villmow and Savinsky 2013). Schwind (2016, p. 461) shows that in Germany, we experienced a “Renaissance of the victim of crimes” over the last 30 years, which led to a “cascade of victim protection laws” (Barton 2012, p. 130). However, a clear underlying concept is missing to this day (Weigend 2010, p. 55).

Frühauf (1988, p. 45) discusses an all-around “fiscalisation” of penal law on the background of the massive financial interests beginning with the emer-

gence of kingdoms and the state. Fines were, and still are today, an important source of income for the state; the topic of restitution for victims as a responsibility of the state has regained some attention only in recent years. Frühauf (1988, p. 59) points out correctly that the regulation and control of justice in a society by the state is the most effective way to control the social behavior of its citizens despite the new problems that have arisen as a result of such regulation. Overall, we have more justice and more equal treatment of all penal cases. In this regard, this development, beginning in the Middle Ages, has been a significant progress of civilization. But Rössner (1998, p. 880) also points out that within the concepts of penal law, as laid out by Kant and Hegel with their absolute theories of punishment, which have retained their formative influence on the politics of punishment and crime control to this day, there is no place for restitution and solution of conflicts.

This might be one of the reasons why the victim-offender restitution in the development of German penal law over the last decades has not reached the importance it used to have centuries ago. In contemporary German penal practice, victim-offender restitution plays a reduced role (Rössner 1998, p. 880f.). Schmidt (2012, p. 191) points out that victim-offender restitution has recently regained importance, but overall, in the handling of crimes, it still only plays a minor role. For example, in the German state of Northrhine-Westfalia in 2007, 4 535 cases of victim-offender restitutions were practiced in contrast to the 184 800 traditional decisions of punishment that same year. The prosecutors and judges regularly have no special training in alternatives to classical sanctions, like restorative justice. Also, the public is not informed about these “alternatives” and so are primarily interested in harsh punishment, often supported by politicians (see also Kury and Kuhlmann 2015).

TRADITIONS OF CRIME RESPONSES AMONG INDIGENOUS PEOPLES OF NORTH AMERICA

The replacement of community jurisdiction with state-centered, authoritarian punishment also characterizes the colonialism of North America. State-centered punishment was used to subjugate Native Americans, many of whom in turn used their traditional approaches to law violations as forms of resist-

ance – at first secretly, then parallel to the Western state-centered system. Finally, today, the development of the traditional forms of dispute resolution is acknowledged in the 1993 Indian Tribal Justice Act (25 U.S.C. § 3613 (a), (b) (9)), which not only validates these legal practices, but also provides financial assistance. In an ironic return of the repressed, native Peacemaking Courts have been instrumental in the (re)emergence of restorative justice in the United States and many of their practitioners are sought-after speakers.

Sullivan and Tift (2013) articulate the dominant paradigm underlying contemporary Western justice system as a rights- and deserts-based one, reinforcing the existing social arrangements, which stands in contrast to the needs-based approach of restorative justice. Rights-based social arrangements focus on hierarchies with the belief that access to resources, privileges and rights is allocated according to rank. Desert-based arrangements imply meritocratic beliefs, where status, worth and benefits are conferred based on achievement and contributions, i.e., they emphasize individualism. “Justice is done when available benefits and burdens are eventually distributed in proportion to what someone did to merit them” (2013, p. 209). This approach is not limited to the material level. Power and control in relationships and daily life are also organized in accordance with desert-based ethics. Those who are seen as less deserving have less of a voice in decision-making in the definition of their own and the community’s needs and in the ways those needs are addressed. The experiences of others exercising power over oneself leads to a sense of being a spectator of one’s live, a form of “mental alienation.”

Under such a paradigm, the response to a harm situation is to impose a “counter-harm” for two reasons; the offender is seen as deserving such a loss, and it is seen as the way to restore this desert- and rights-based social arrangement. These are obviously measures essential in efforts to colonize a people. Henham (2014, p. 5) argues that “for a more inclusive kind of sentencing, informed by a penal ideology which takes greater account of the relationship between morality and social norms within different groups and communities,” and he points out (*ibid.*, p. 157) that “the structures and norms of criminal justice should be regarded as important tools for promoting social cohesion simply because of their unique capacity to influence social morality.”

A response to the needs of the person hurt in the harm situation is not necessary, because the approach focuses on equalizing harm and restoring the

hierarchy. A needs-based approach, such as restorative justice, in contrast, derives from a different paradigm, one in which the focus is on the well-being of everyone involved. Needs are defined by the participants themselves and their voices are listened to. A sense of justice then derives from the experience that everybody's voice and needs having been heard, respected, and attended to with the goal of an "equal wellbeing."

It is a process of presenting and listening to the other, the understanding, respecting, and reconciling divergent realities and truths. Hence, justice done restoratively requires that the participants continually remain open to each other's concerns, ideas, needs, feelings, desires, pain and suffering [...]" (Sullivan and Tift 2013, pp. 211, 214).

This approach focuses on the reconciliation of individuals, but it also strengthens the group as a whole, may it be the family, the community, or other kinds of social organization – not only in the present, but also in the future with its inherent preventative impact (Gray and Lauderdale 2006). In the words of Robert Yazzi, Chief Justice of the Navajo Nation (2000): "Western adjudication is a search for what happened and who did it; Navajo peacemaking is about the effects of what happened. Who got hurt? What do they feel about it? What can be done to repair the harm?"

Many indigenous cultures all over the world have a heritage of justice systems based in mediation, restitution and restoration, for instance, the Chinese I Ching (Wilhelm [1956]; 1983, p. 61), the Maori (PBS 2013), African tribal societies (Akeredolu 2016; Bennett et al. 2012) or North American Indians (Grinnell 1915; [1923]; 1972a; 1972b) to name just a few. Although there also are tribal societies that rely on retaliation, such as, most notably, Chagnon's Yanomamo (2012). Hascall (2011) mentions Gronfors's (2001) work on the Finnish Roma in this regard. While blood feud is a powerful deterrent to conflict, it is exactly the fear of its destructive effects that contributed to the emergence of justice systems, the restorative justice systems in particular.

North American Indian tribes were and still are today exceedingly diverse in all aspects of culture, linguistics, economics, politics, social life and spirituality. Some tribal groups lived in permanent settlements or urban areas; many lived in bands, small nomadic or seminomadic groups that formed seasonally. Survival for these communities depended on a balance between individual initiative and responsibility and the group as a whole; thus, the restoration of

peace was essential for everybody's survival. The foraging bands in particular were highly egalitarian and the leaders had no overall authority; they tended to be highly regarded individuals who gave advice, were skilled at facilitating consensus in political decision-making but had no authority to make or enforce any decisions (Oswalt 2009). For instance, among the Inuit, disputes were seen as conflicts between individuals and had to be settled by these individuals. One way of settlement was a song duel where the persons involved expressed insults to one another in songs composed for this occasion. The audience's applause determined the winner. After that, the affair was considered closed. If social harmony was not restored, which was the explicit goal, one of the contestant would leave the band and settle in another group. So, the focus was not on the attribution of guilt, nor on the identification of an offender, but on restoring peace (Haviland et al. 2011).

While these foragers lacked formal laws in terms of a written legal code, applied in trials and enforced, they did have means of social control and dispute resolution. Laws, in the sense of formal rules of conduct that, when violated, led to negative sanctions, did exist (Hoebel 1954, p. 28). The earliest discussion of tribal law was written by Llewellyn and Hoebel in 1941, a book on jurisprudence of the Cheyenne, a North American Plains tribe, with detailed accounts of practices of conflict resolution and case law. Hoebel himself had conducted extensive field work among the Northern Cheyenne, Shoshone, Comanche and Pueblo tribes in the 1930s and '40s to study their legal systems. In his interviews, he was able to talk to many tribal members who had still grown up prior to the tribes' confinement to reservations. Subsequently, he published the first systematic account of indigenous legal systems based on practices in several different tribal societies (Hoebel 1954). Another classic work in this field is a study by Strickland (1975) about the Cherokee law and justice system. He emphasizes both the continuing role of traditional spiritual practices in Cherokee jurisprudence and that tribe's ability to use the legal system to protect their traditional culture.

The ancient Cherokee way of law did not end with the adoption of written laws in 1808 but lived on in many ways through the period of Anglo-American adaptations. It is ironic that the written laws adopted in 1808 ceased to function in 1898, while informal magical and spiritual aspects have survived into the twentieth century. The magic is not all that remains. Much of the spirit

of the written law and the traditional rule of law survives. No other Indians have been able to use white man's law and white man's courts with the success of the twentieth century Cherokee (Strickland 1975, p. 188).

The approaches to resolving conflicts and restoring this balance differed significantly between tribes. The greatest threat to tribal cohesion was homicide and competition over women. Theft is a problem in societies with marked differentials in property and status, but not among foragers. The Cheyenne legal system relied on restitution, punishment and reintegration as well as supernatural responses. Like many other tribal societies throughout the world, the Cheyenne used multiple forms of exchange, which went beyond trade and included gift exchanges to establish, strengthen and restore relationships. Restitution was therefore a natural outgrowth of these customs to address any breach of social conduct and recreate balance in the community. For instance, if a man who had stolen another man's wife sent a chief with an offer of several horses, the abduction was accepted (Hoebel 1954, p. 58). One major difference to Western values is the role of the individual. In native traditions, personal interests and the interests of the tribe cannot be separated; "self-interest is tribal interest" (Winfree 2002, p.289).

Enforcement of penal decisions was the responsibility the military societies, fraternal organizations, in which all males retained membership. The tribal council only had executive and judicial authority, acting as peacemakers. Members of this council were leaders who embodied ideal Cheyenne character traits, such as patience, generosity, wisdom and spiritual expertise. Supernatural forces were an essential part of most indigenous jurisprudence. The smoking of the pipe would invoke these dimensions and change the meeting into a ritual. The supernatural powers may be directly employed to punish an offender or detect a liar (Hoebel 1954, p. 138). The sponsorship of a Sun Dance, a major tribal renewal ceremony, may be part of the rehabilitation of an offender as well as restitution for an offense (Hoebel 1954, p. 253).

Homicide, with its inherent dangers for revenge killing, constituted a particular challenge to Cheyenne and other North American tribal societies and was also a serious affront to the supernatural powers and therefore required drastic measures. Such cases might require a renewal ceremony of the Sacred Arrows in case of the Cheyenne, the most ancient and powerful purification ritual (Schlesier 1985). During the hours of the core of this ritual, when the

feathers of the ancient arrows were replaced, there had to be absolute silence in the camp – even the dogs had to refrain from barking. The emotional impact must have been impressive. A most dangerous and potentially divisive incident was thereby transformed into a deeply unifying ceremony (Hoebel 1954, p. 158).

The process of the colonialization of the North American peoples had lasted several centuries but was extremely traumatizing. The process included warfare, mass deaths through infectious diseases, and, later on, forced migration, policies and litigation, especially through the Supreme Court (Cornell 1988). Many tribes experienced massacres, such as the Sioux (Lakota) at Wounded Knee in 1890 or the Cheyenne at Sand Creek (1864); others were forced to leave their homelands and migrate, such as the Cherokee's and other southeastern tribes' Trail of Tears (1830) or the Navajo's Long Walk (1863), before they were limited to reservations.

The imposition of a foreign, Western legal system, incomprehensible to indigenous worldviews, was another essential tool of colonialization through the attempt to destroy indigenous cultures and institutions. The Supreme Court decision in *Ex Parte Crow Dog* (1883) is a case in point. Crow Dog was a Lakota Sioux who had killed a Lakota tribal chief. According to tribal tradition, he paid restitution to the victim's family, but federal authorities prosecuted him. A federal court found him guilty for murder and sentenced him to death. The Supreme Court, however, found that federal courts had no jurisdiction when a tribal court had already tried the offense. This case led to the *Major Crimes Act* (1885), which placed major crimes committed by Indians against other Indians on a reservation or tribal land under federal jurisdiction. This law in particular limited tribal jurisprudence and tribal sovereignty and remains particularly controversial today. In the 1950s, Congress passed the Public Law 280, which expanded federal law enforcement in several states to state governments for criminal offenses on Indian land, creating complex conflicts over criminal jurisdiction on Indian land between federal, state, local and tribal police (for a detailed history of the dismantling of tribal jurisprudence, see Pommersheim 1995; Prucha 2000; Meyer 1998; Wilkins 2010).

But many tribes retained their own justice system to protect their cultures and resist colonialization, at first secretly and parallel to the dominant state system, then increasingly openly (for the Kickapoo tribe, see Kuhlmann 1989).

Sometimes, these continuing practices are described by unsuspecting anthropologists. For instance, Lurie, the main ethnographer for the Winnebago (now HoChunk) tribe, describes an incident mentioned in the local newspaper (Atkinson 1913) subsequent to a tribal member's murder of his sister's husband: "A group of men gathered for a whole day in a long wigwam in the Baraboo area to discuss the matter. Yellow Thunder was finally able to secure the murderer's release by paying an indemnity to the dead man's family in the form of blankets, calico, and ponies" (Lurie 1978, p. 703).

Zion, in an interview with Sullivan (2002), describes how the Navajo began, intentionally, to use formal judicial terminology to describe traditional practices as a way to integrate these in the local court proceedings: "Little by little, traditional law principles crept into Navajo Court of Appeals decisions" (p. 168, also see Meyer 1998).

Many of these indigenous cultures have now resurrected their traditional justice approaches, adjusting it to fit contemporary societal and judicial circumstances (Nielson and Zion 2005, p. 3). These approaches address community needs for conflict resolution more adequately, especially in regard to juveniles, domestic disputes as well as victims and incarcerated offenders. A justice system based in traditional practices asserts tribal values and thereby protects and revitalizes the indigenous culture and tribal identity and can address the needs and problems resulting from colonization, contributing to decolonization and the articulation of new tribal identities (Austin 2009).

The success is indicated in several studies discussing lowered recidivism rates (Meyer 1998, p. 51). Yet there are also critics who point to the potential of ideological struggles and power imbalances in these approaches. Some hope that indigenous forms of justice can be ways to reduce over-incarceration, but the application of traditional forms of justice raise concerns for some who believe it is too soft, while others worry about the severe forms of corporal punishment. Again, others argue that indigenous justice initiatives can reflect gender inequalities prevalent in some traditions. Other criticisms argue that not all members in a native community are traditionalists (Milward 2008). The successful models integrate traditional tribal systems of dispute resolution while also integrating elements of Western legal concepts, for instance, the independence of the judge or procedural fairness (due process) (Zion 1999). The most well-known of such indigenous tribal courts is the Navajo Peacemaker

Court. A short description of this approach also acknowledges the important impact that this tribe's judicial practices have played in the emergence of restorative justice in the United States and beyond today.

The Navajo (or Dine as they call themselves) live in the southwestern United States and are the largest Indian tribe in North America with c. 300 000 enrolled members. Originally, they were hunters and gatherers until contact with the Spanish, when they became sheep herders. A number of subsequent oppressive policies colonized the tribe (Kluckhohn and Leighton [1946], 1974). The criminal justice system played a dual role in this process for the Navajo as well as the other Native American tribes. On the one hand, criminalization was used to enforce the policies of colonization (Ross and Gould 2006); on the other hand, tribal judicial systems have become a means of reestablishing tribal sovereignty; the right to govern themselves had been retained in treaties and confirmed in policies, but only after the Red Power movement and the 1975 Self-Determination Act were tribes able to regain measures of self-government (Nagel 1997; Wilkins and Kiiwetinepinesik Stark 2011).

In 1958, the Navajo tribal court was established, yet it was modelled after the Western adversarial system and inconsistent with the tribe's traditional, more harmonious approach to conflict resolution. To enable the tribe to claim ownership of Navajo common law and culture, the tribal chair asked a then-justice to create a judicial process based on Navajo common law and practice, yet compatible with Anglo-American legal practices. The Peacemaker Court emerged in 1981 and grew in popularity to 1 600 cases in its first decade of existence. This court addresses civil, criminal and family matters through referral by tribal courts, the tribal police or by individual choice. The final agreement is legally binding in the Navajo as well as the state legal systems (Austin 2009). Peacemaking goes beyond restorative justice – it is based on a different, a horizontal paradigm, in contrast to the hierarchical one described by Sullivan and Tiff (2013). In terms of Western concepts, it is related to Pepinsky's and Quinney's (1991) work on peacemaking. The difference between Navajo peacemaking and restorative justice is complex and an ongoing debate (Zion 1999). But some central traits include the role of ceremony, the inclusion of all affected, the understanding of the law violation and its outcome. It is also predominantly used in civil cases, particularly those related to in-group conflicts (Sullivan 2002).

The philosophy of the Navajo is essentially spiritual and sees the connection of all aspects of life. "People see beyond the physical world; they have a capacity for all around, *circular vision*, a metaphysical construct foreign to many Western traditions" (Winfree 2002, p. 291) The spiritual world and everyday life are not separate, that world is not above nature or the cosmos but an integral part of it. Differences or polarities, such as male and female, are seen as in creative tension and in balance or equality. There is therefore always an inherent goal to reestablish solidarity based on equality and harmony. This ontology is based in the relationship with the Holy People who created the world in accordance with these values and the religious ceremonies that empower people to participate in the ongoing process of creation. Words are sacred in this context because they are conduits of power to heal or to harm and are part of the individual's responsibility of self-determination (Austin 2009).

It stands in contrast to the Western legal system, which is grounded in Feudalism and the Enlightenment principles of the primacy of rational thought, abstraction and individual rights as separate from the community, regardless of the wholeness of creation. While the Anglo-American court system still retains, at least until recently, Christian references, such as swearing on the Bible or saying "so help me God," it is not centered in a spiritual world. The Peacemaker Court is an integral part of the Navajo's ontology of the ongoing re-creation of the world through words (prayers) and the reestablishment of balance, harmony and equality between people (Austin 2009; Ross and Gould 2006).

Van Ness (2007, p. 320) shows that restorative justice supports the community and the reestablishment of order after a crime by emphasizing the central role of "the feelings and humanity of both the victim and the offender." These are shared goals of restorative justice and peacemaking, yet the latter goes beyond such goals and differs from them in marked ways. Under the horizontal paradigm, the primary goal of which is to restore peace, harmony and ongoing relationships, all participants are equal (Nielsen and Zion 2005, p. 4). In fact, the European concept of "crime" is referred to in Navajo as "disharmony" (Yazzi 1994; Meyer 1998). Winfree (2002) discusses the specific native values in regard to the Navajo that facilitate the return to harmony in the community: "Vision and respect influence the following eight primary Aboriginal values, most of which play roles in Aboriginal conceptions of restorative justice: honesty, sharing, strength, kindness, humility, wisdom, honour, and bravery" (p. 291).

The peacemaking approach reflects these different values and this different understanding of crime as explained by Nielsen and Zion (2005, p. 148): “In a more fundamental way, according to Navajo justice thinking, when an individual acts out, thereby demonstrating an imbalance in body, mind, and spirit, he or she is asking for community help and invoking community responsibility and obligations [...] to them. An individual, therefore, is willing to take part in the process by definition.”

Therefore, they emphasize more the underlying cause of the problem rather than a search for truth: “Navajo peacemaking [...] views truth as irrelevant because the focus would then move from problem solving to laying blame, which is inappropriate under the Navajo system of justice” (Meyer 1998, p. 50; Yazzi 1994). Traditional Navajo knowledge, in regard to law violation, acknowledges *nayee* or the monster as a frequent cause. “What is the essence of the cycle of violence, in which children who are abused or neglected become offenders themselves? *Nayee*. Antisocial personality disorder? *Nayee*” (Yazzi 2000). So, the Navajo do have their own concept of post-traumatic stress disorder. The main difference between restorative justice and peacemaking is that the former includes the victim and the offender. In the latter, all people affected by the crime are included in the meeting as well as the family members of the offender. The relatives of those who have hurt somebody else help in providing restitution and in the healing process and they are involved in preventing any repetitions of the offense. Consequently, the outcome focuses more directly on healing. It may include ceremonial practices to deal with the monster, the *Nayee*. The restitution may be symbolic rather than a material value. “Does the item used for restitution say ‘I am sorry?’ Does it say ‘I honour your worth and dignity with this thing that we Navajo prize?’” Does it say ‘Let this be a symbol and something tangible to remind us that we have talked this hurt out and entered into good relations with each other?’” (Yazzi 2000).

Voluntary participation of the victim and the offender ensures both have a stable support group. Peacemaking differs from Restorative Justice in that it is also seen as a way to reduce social problems that underlie crime, problems which result from a history of colonization, such as alcohol and drug abuse, gang activities, domestic violence. The goal is not punishment or blaming, but the restoration of right relationships between people and bringing back into balance of the whole community. Consequently, any offense is eligible as long

as the participants desire this approach, including drug, alcohol or violent offenses. In contrast to peacemaking, such healing is not the explicit goal of restorative justice, which focuses on the individuals involved and which is still largely part of a criminal justice system dominated by the state and its inherent interest in restoring existing hierarchies.

While the Navajo Peacemaking Court is the most documented approach to indigenous forms of restorative justice, it is by far not the only one. For instance, the criminal justice system in Baltimore, Maryland is collaborating with the Maori of New Zealand to learn and implement their tribal approaches, especially in juvenile justice (PBS 2013). Native communities in Canada have successfully petitioned their federal government to reform their justice system to make it more consistent with indigenous approaches (Criminal Code of Canada, § 718.2 (4)). The literature on this topic has become extensive (Gray and Lauderdale 2007) and a Native American publishing house, Living Justice Press, was founded just to address publications on indigenous forms of justice. These restorative justice approaches became well-known for the Talking Circle, where all participants sit in a circle and a talking stick (or feather or stone) is passed around. The person holding the stick can talk without interruptions, so everybody gets an equal chance to be listened to.

The success of the return of these traditional forms of justice is so influential that a retired Wisconsin Supreme Court judge and current faculty member of the Marquette Law School in Milwaukee, Janine Geske (2013), has become involved herself. She conducts restorative justice sessions with violent offenders in that state's prisons and reports on the impact of these Talking Circles. In her own experience, "One person talks at a time and it leads to a sense of sacredness in the room. It is amazing what can happen, it is amazing the transformation that can occur." In three days of such circles, the victims can tell in intimate detail how they felt and continue to experience the trigger of continued PTSD from the crime. Even as a judge, she did not know about these kinds of detailed impacts. At the same time, the offenders think differently and see the ripple effects of their crime, they begin to sympathize with the victim and reveal how they themselves also were victims.

Geske (2013) showed that the court system turns the conflict into an "us versus them" constellation and both sides remain frozen in a moment in time, the victim's family as victims and the offender as evil. In such a system, the

traumatized, especially the children, remain voiceless. This potential for creating movement for the traumatized and allowing for healing led to the use of these approaches in truth and reconciliation commissions (Bennett et al. 2012). The willingness to look beyond our Western society for models and possibilities can make restorative justice approaches more fluid and allow for adaptations and expansions, ultimately making it stronger. In this process, indigenous people's approaches to justice may have much to offer.

In considering such experiences with restorative justice, the question if the interests of the state have to necessarily dominate the principle of punishment has to be reexamined (Frühauf 1988, p. 60; Henham 2014). This must be done in particular on the basis of the changes that have occurred in the structure of contemporary postindustrial societies. The missing component of a broader use of restitution and the lack of attention to the victims have to be seen as disadvantages of modern penal law. Besides incarceration, a broad network of treatment and diversion measures has been established in most countries; in Germany, for instance, fines have become the primary form of sanctions but without special benefits to the victims of crime. Modern discussions of victimology are only slowly beginning to create other, more effective ways of thinking about crime control (Frühauf 1988).

RESTORATIVE JUSTICE IN ISLAMIC LAW

Another non-Western legal tradition that has interesting perspectives to offer to the emerging field of restorative justice, but one which has been neglected, is Islamic law. Especially since the attacks on 9/11 in the US and even more so with the atrocities committed in the Middle East and Africa in the name of radical Islam, westerners often regard Islamic law with suspicion and hostility. It is predominantly seen as irrational and cruel, violating the basic tenants of Western legal values, such as human rights, especially the rights of women and the minorities. Yet Islamic law has a long tradition and many diverse strands within it. It is a religion practiced in a large number of different countries, the diverse traditions of which shaped it into its multiple variations. In many Muslim communities, ambivalences toward the West predominate. Some want to adopt Western economic and political structures, while oth-

ers view the West as imperialistic and a threat to their culture and tradition (Barber 1996; Schweizer 2016). Amidst emotions surrounding these views, a mutual understanding becomes difficult.

The relationship between jurisprudence and religion has been suspect for most westerners. It is, for instance, one problematic issue surrounding the use of restorative justice among indigenous peoples today and other, new Western forms of restorative justice, such as the Talking Circles described above. The controversy centres on the argument that religion is divisive and undermines or stifles political communication. In describing the proponents of this view, Philpott (2012, p. 106) writes: "Because religious claims are irresolvable and irreconcilable, they tend only to undermine a stable consensus on principles of liberal democracy." Erickson speaks of another perspective on this subject, saying that "[c]hristian organizations using the court system to intimidate academics in this country because they separate science and research from religion and religious interpretations are examples closer to home" (Erickson 2015).

But like other scholars interested in the restorative justice tradition within Islamic law, Philpott (2012) argues that we would be ignoring important insights or even sources of inspiration if we exclude an exploration of the Islamic legal system (Pakzad and Alipour 2016; Asli and Amrollahi Byouki 2016). In regard to the relationship between jurisprudence and religion in general, Mackay (2002), in a particularly in-depth exploration of this general issue, shows the history of restorative justice as inextricably intertwined with religious systems, be they a God, gods, spirits, ghosts or witchcraft: "[C]an we in good conscience borrow mediatory practices without their spiritual framework, and simultaneously claim that this will suffice for the requirement of a modern criminal justice system?" (Mackay 2002, p. 263). From a historical and anthropological perspective, he challenges us to look at restorative justice in its respective cultural contexts of punishment, guilt and restoration of peace when he asks: "However, can restorative justice alone bear the psychological and spiritual pressures created by infraction and harm which are so powerfully expressed in ancient practices and early modern codes of punishment?" (Mackay 2002, p. 253).

Classic Islamic law or *fiqh* developed between 7th to 11th C.E. and had spread as far as Nigeria by the 9th century, where it was firmly established by the 15th century, integrating many practices of the pre-Islamic Bedouin cul-

tures. The main focus in Islamic jurisprudence is on human dignity and the community of believers, with central values, such as forgiveness, mercy, repentance and respect for the person punished, which have their analogues in restorative justice. Like in many other traditional societies, crime is defined as an abrogation of the individual's responsibility toward the community as well as toward God, so the judicial response has to appease both dimensions (Ammar 2001; Hascall 2011; Philpott 2012).

Islam contains several different traditions of law, *Hanafi*, *Shafi'i*, *Maliki*, and *Hanbali* in Sunni Islam and the three schools among Shi'ites, including *Jaafari*. Yet these diverse traditions share a division of crime and punishment into three categories, *Hudud*, *Qisas*, and *T'azir*. *Hudud* crimes involve theft, adultery, slander, drinking alcohol, robbery, rebellion and apostasy but not murder. They are considered most serious because they harm not only the individuals involved, but also the religious community, God and the social order. Therefore, specific punishments for these deeds are prescribed in religious texts, such as death through stoning for adultery or amputation for theft, and must be carried out without delay. Clearly defined procedural conditions in regard to evidence have to be met. The voices of victims are silenced in this category of crimes (Ammar 2001). Among scholars in this field, there is a consensus that *Qisas* and *T'azir* hold a long tradition of practices that correspond to restorative justice principles (Braithwaite 2013; Ergene 2013; Hascall 2011; Philpott 2012; Rahami 2007).

Restorative justice's main criticism of the existing criminal justice system is the neglected role of victims. *Qisas* is the legal process applied in cases of murder or physical assault if certain procedural and sustentative requirements are satisfied. For an offense to be classified as *Qisas*, it has to be an intended assault that can be proven through, for instance, eye witnesses. In contrast to *Hudud*, it does not prescribe specific punishments. Although Islamic law varies based on the many different countries where it is practiced, victims and their families are at the center of the process – they have to initiate it. Rahami (2007), for instance, reports that the Islamic Penal Code of Iran devotes a whole chapter for *Qisas*, which it does not do for other crimes. In that country, a judge is not permitted to issue a verdict in *Qisas* without consultation with the victims. Ammar's (2001) description of the role of *wali amr* in this context is not quite clear; she characterizes it as an appointed guardian

but also as a mediator, an arbitrator and a judge who is, in any case, appointed by a democratically elected ruler (2001, p. 170, 172). There are several options available to the victims or their families. They may offer complete forgiveness without any punishment in accordance with the central values in the *Qur'an* of forgiveness and reconciliation, which it advocates. Yet in such cases of the victim's unreserved forgiveness, the state may still play a punitive role by punishing, i.e., incarcerating, the offender (Ammar 2001; Hascall 2011).

More common is the negotiation of *diyya*, which refers to compensation. It can be considered an analogue to restorative justice insofar that it is a form of restitution to the victim and punishment of the offenders, representing also their remorse. Ammar (2001) describes a central responsibility of the *wali amr* in this context as guaranteeing a fair punishment of the crime and its transformation: "The judge/arbitrator in *Quisas* crimes is the one who sets the stage for moving the punishment from retributive to restorative by advising the victim of his/her 'forgiveness obligation' and hence the right to *Diyya*; he sets the reparation amounts and conditions, and finally attempts to bring about reconciliation among the parties" (Ammar 2001, p. 172).

Yet the *diyya* is also reminiscent of "blood money" paid to avoid family feuds (Hascall 2011, p. 60). If the offender is unable to pay, his immediate blood relatives are responsible to do so unless the offender is a woman or a juvenile. In cases where the offender does not have any immediate relatives, the state will pay the *diyya*. Ammar emphasizes, though, that *diyya* cannot be equated with victim compensation in civil damages, because it has a decisive element of punitive damages but with the intent of leading to reconciliation (2001, p. 171). Finally, the victim may also demand retaliation as in an *eye for an eye* or a *life for a life*. This may include physical punishment and even execution, thereby weakening the argument for *Quisas* as an early Islamic form of restorative justice (Hascall 2011; Philpott 2012).

T'azir crimes are described in the *Qur'an* as breaches of trust, embezzlements, perjuries, briberies or abuses, so they are considered sins. Yet their punishments are not prescribed but left to the discretion of the authorities, also providing possibilities for input from the victims. *T'azir* refers to crimes that constitute a violation of private rights and of trust with the mildest forms of punishment. The judge/arbitrator has a variety of options including incarceration, which the victim may accept or reject (Ammar 2001).

Islamic law has a long tradition of elements of restorative justice, especially the inclusion of victims in certain aspects, compensation, respect for the offender and reconciliation. Over the last twenty-five years, Islamic law has become more punitive under various undemocratic institutions and military controls over the justice system. It has become more retributive, especially through the use of prisons. Parallel to the restorative elements in this tradition, punitive practices continue to frame *fiqh*. Both Zehr (2003) and Mackey (2002) find that retribution and restoration are not as mutually exclusive as they are often portrayed, and their relationship may be an impulse for further explorations. But to fully understand these traditions, a more detailed discussion of the practices of the restorative justice elements in Islamic law and their contexts is necessary, especially regarding the role of the *wali amir* and the community, the scope of decision options for the victims and the approaches to reintegration. Finally, Ammar expresses an important word of caution regarding the role of women in Islamic law and writes that “[c]learly, Restorative Justice in Islam requires a feminization” (2001, p. 178).

A FINAL DISCUSSION

This overview of international publications on mediation and restorative justice has shown that the body of literature has grown exponentially, especially for Western industrial societies. Since the end of WWII and through the 1960s and 1970s, the legitimate discussion about more comprehensive ways to include the interests of victims in penal prosecution promoted the rediscovered and fast-growing importance of victimology.

Henham (2014, p. 2) argues that “that citizens should feel that their interests and values are recognized and respected by the penal system, thus promoting greater attachment and reinforcement of its values and outcomes.” In the traditional, state-regulated penal procedure, the victims’ role is limited to that of witnesses; compensation for the damage they had incurred is seen as their personal problem. Considering the fact that a majority of offenders have no property and a low, if any, income, the probability for restitution is small or non-existent; the victims then receive nothing, unless they are insured. Traditional penal law is not concerned with the victims’ needs and instead focuses only on the sanctioning of offenders. In cases where the offender is punished

with a fine, this money is paid by him to the state or to non-profit organizations, not to the victim. On this background, it is not surprising that many victims are not satisfied with the results of the penal procedure. They only have the “satisfaction” that the offender is punished – more or less severely. This also promotes the desire for a harsh punishment.

The emergent practices of restorative justice acknowledge and address emotions of guilt and harm among victims, offenders and the community as essential to restore peace, but can we do so without an in-depth understanding of its historical and cultural contexts? A contemplation of indigenous systems of restorative justice can help us appreciate the depth to which violation of law and social order harm individuals, their families and their communities from a different angle. Mackay (2002, p. 248) argues: “We cannot simply speak of restorative justice replacing retributive justice, unless we bind into our theory an understanding of the powerful dynamics represented by punishment, guilt, and spirit.”

Modern penal policy is predominantly focused on the restoration of “penal peace” (*Rechtsfrieden*), which does not automatically recreate social peace (Sessar 1992, p. 21). The penal peace is primarily concerned with control, the prestige of penal law, and the authority of the state, so social peace has been promoted separately. This includes the effort to halt the shifting of these problems to the penal law level and instead of addressing them where they began, namely in the social community, and to look there for solutions (*ibid.*). The regulation of the interpersonal dimension of crime has positive effects on socialization and peace in a society and, if the public is aware of these effects, the role of penal law is reduced.

The criminal justice system, as a state-centered system, has a long history of shoring up systems of inequality and domination, such the slave patrols, one of the antecedents of the US law enforcement system. Recent controversies surrounding the police shootings of African Americans in the US and the disproportionately high incarceration rate of this minority group are examples of a social problem that has not only entered the criminal justice system and threatens to overwhelm it, but of this system maintaining and enhancing systems of stratification (Alexander 2012; Stevenson 2014; Goffman 2014). The resulting social movement of Black Lives Matter demands social justice. The imposition of the Western, retributive criminal justice system on the native population was a central approach in the colonialization of North America

with corresponding social problems, such as drug and alcohol abuse, widespread poverty and domestic conflicts. The assertion of traditional forms of justice, such as peacemaking, created not only more satisfactory conflict resolutions but also revitalized the communities. The sense of justice derives from the experience that the needs and voices of all participants are heard, respected and attended to for the purpose of the well-being of the whole community. Such a needs-based, in contrast to a rights-based, approach acknowledges the depth of the emotional as well as the material harm that had occurred. This type of response strengthens the communities and thereby has preventative impact. The urgency of these needs beyond the native communities has become palpable in the recent popularity of a novel by the Native American author Louise Erdrich *The Round House*, which won the National Book Award for Fiction in 2012.

Another debate focuses on the possibility of combining restoration and retribution. Henham (2014, p. 44) points out: “The crucial issue is how to make penal ideology more sensitive to the changing values, expectations and needs of individuals and social groups whilst securing principles of consistency and fairness in sentencing that are practically meaningful.” London (2011, p. 180) makes an important argument when he emphasizes that “restoration” has to be combined with “retribution” for the public to accept it:

Neither deterrence, incapacitation, nor retribution offer a strategy for reintegration. Even rehabilitation, by itself, is a poor vehicle for genuine reintegration because it neglects the needs of victims and of society for the satisfaction of justice as a precondition for social acceptance. By subsuming each of these traditional goals to the overall goal of restoring trust, however, criminal sentences can be fashioned that attempt to achieve deterrence, incapacitation, restitution, rehabilitation, as well as retribution not as ends in themselves, but as part of an overall strategy for repairing the harm of crime (London 2011, p. 183).

The discussion of restorative elements within Islamic law shows the uneasy coexistence of both principles.

Tränkle (2007, p. 340) makes an interesting observation that the nature of penal law and the principles of mediation are standing in a contradictory relationship from the point of view of the members of penal procedures; participants in mediation have to act within this field of tension. The structural

binding to the penal procedure and its context hinders mediation specialists in developing their own distinct logic. At this time, mediation is subordinated to the dominance of penal law. The implementation of mediation is thereby made significantly more difficult. To bring about an effective resolution to a conflict, it may be necessary to transcend the definition of penal law; that is, to see the conflict in a broader sense, not only as a norm-conflict but a social conflict, which can often be done successfully (p. 341).

A successful conflict reduction requires a personal component that cannot be demanded; therefore, mediation inherently has an idealistic component. Mediation is structured by the penal procedure, but to solve the conflict, this approach has to transcend the legal definition of the conflict; it has to expand the understanding of the conflict between offender and victim to one of a social conflict. But this step might not be accepted by the parties. The “real” conflict may be situated outside the victim-offender dimension, yet the conflict has to be “solved” inside the penal procedure (Tränkle 2007, p. 341).

The procedure is thereby institutionalized in paradoxical ways. There is the offer for participation in mediation, yet if the offer is accepted, it would transgress the penal procedure. The solution has to be seen in the role of support institutions outside the penal system, for example, counselling centers or treatment organizations. This shows also the limitations of mediation, especially concerning the reintegration of offenders into the community. Mediation re-integrates emotions as part of the solution of penal problems, but this stands in contradiction to the penal procedure, which does not promote emotions. Nevertheless, the role of emotions is increasingly becoming a topic of debate in criminology (Karstedt 2002; 2006; 2011; Karstedt et al. 2011).

London (2011, p. 315) makes a similar argument through a larger lens when he writes: “Restorative justice is a bold and thought-provoking innovation that has engaged the energies and excited the hopes of criminal justice reformers throughout the world. And yet, while it has achieved outstanding results in thousands of programs, it has remained a marginal development because it has failed to articulate a theory and set of practice applicable to serious crimes and adult offenders.”

He addresses several issues that have to be addressed as a precondition for successful mediation (Ittner 2013, p. 98). This author (2011, p. 320) emphasizes that all parties benefit from a successful mediation:

For the victim, the restoration of trust approach offers the prospect of genuine repair for the material and emotional harm [...] For the community, the restoration of trust offers the prospect of involvement in problem solving toward the goal of achieving safety and resolving ongoing conflicts. For the offender, the restoration of trust approach enhances the likelihood of regaining acceptance into the moral community of law-abiding people by the demonstration of accountability both for the material losses and the moral transgressions involved in the crime.

On the background of the positive and encouraging results of victim-offender restitution/mediation today, we have to take these alternatives to punishment after law-breaking behavior seriously. All modern penal law systems are confronted with the question of how to relate to victim-offender restitution within their systems (Rössner 1998, p. 881). The international comparison by Rössner (*ibid.*, p. 894) shows clearly the benefits of including restitution in all systems of penal law control. As discussed above, in most cases, especially the victims reported positive results. So, mediation is not about using victims to heal offenders, as sometimes criticized; it is a measure that benefits both parties – the offenders and the victims (Kury 2015).

At the outset, mediation was established to help victims; it was intended to offer them a possibility for some resolution after the experiences of victimization and opportunities for restitution of the damages. The meanwhile broad research results show clearly that this aim can be reached if this measure is practiced professionally. Most victims find that they benefit from participation in mediation; they have a better chance to overcome the emotional and material damage caused by the crime than in traditional penal procedures.

Concerning the impact of mediation on offenders, especially on resocialization, the results are more complex, which is not surprising. Mediation is commonly practiced in short meetings of a few hours, so lasting impacts on offenders with usually strong long lasting social deficits, especially in cases of incarcerated offenders, cannot be expected in all cases. But mediation can play an important role as one element in a comprehensive resocialization program that includes other measures. On this background, including the effective resocialization of offenders, a broader use and an extension of this method has to be supported. The traditional penal procedure has clear disadvantages concerning the reintegration of offenders, which can be at least partly reduced through professional mediation.

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Keli pasvarstymai apie atkuriamąjį teisingumą prieš šiuolaikines Vakarų valstybes ir už jų ribų

ANNETTE KUHLMANN

HELMUT KURY

S a n t r a u k a

Straipsnyje apžvelgiamos pagrindinės atkuriamojo teisingumo diskusijų temos bei prieštaros Europos ir Jungtinių Amerikos Valstijų kontekstuose, pagrindinį dėmesį skiriant aukų bei tarpininkų vaidmenims. Ši diskusija yra kontekstualizuojama trumpai apibūdinant tiek valstybinį, tiek bendruomeninį atkuriamuosius teisingumus kaip atsakus į įstatymų pažeidimą. Čiaabuvių ir ikivalstybinių bendruomenių atsakai į nusikaltimus daugiausia buvo atkuriamojo pobūdžio ir pasižymėjo siekiu atitaisyti žalą, kurią buvo patyrę visi dalyviai. Tai buvo daroma siekiant atkreipti dėmesį į socialines problemas ir sustiprinti visą bendruomenę.

Raktiniai žodžiai: atkuriamasis teisingumas, tarpininkavimas, baudžiamumas, čiaabuvių teisingumas, islamo teisė.