

Advancing Rights of Nature through Restorative Justice

by Femke Wijdekop

Introduction

The Scottish law firm Living Law recently published an excellent report analyzing legal developments to recognize rights of nature in the jurisdictions of New Zealand, Colombia, Ecuador, Bolivia and India.¹ The report among others describes how rights of nature developments in one country can stimulate recognition of these rights in other jurisdictions, as was the case with New Zealand and India.² It analyses rights of nature-developments against the backdrop of the Sustainable Development Goals, climate change and the Earth's Planetary Boundaries.

The growing momentum for rights of nature is hope giving, but the report also signals recurring challenges in the enforcement of rights of nature-provisions in legislation and judicial rulings. Enforcement of rights of nature is often problematic, especially when rights of nature have to be upheld against well-entrenched property rights.³ I think that if we strive for rights of nature-provisions and rulings to become the 'living law' of the land, rather than symbolic law or sporadic victories, it ultimately comes down to us internalizing the worldview inherent in rights of nature: the realization that we are interconnected with the natural world, that *nature is a community we belong to, not a commodity to exploit*. This worldview is native to indigenous peoples who have been the prime advocates for rights of nature-legislation and is gaining ground globally partly thanks to grass root movement such as the Global Alliance for the Rights of Nature,⁴ institutional support by the UN Harmony with Nature-initiative,⁵ scholarship⁶ and movies.⁷

This article looks at the possibility for restorative justice to play a role in this promising development. As says the 'Giving Nature a Voice'-report, creative thinking is required to ensure our laws are

¹ The report, titled "Giving Nature a Voice – Granting Nature Legal Rights", can be read here: <https://www.livinglaw.co.uk/single-post/2018/07/06/Giving-Nature-a-Voice---Granting-Nature-Legal-Rights-a-progressive-path-to-balance-between-people-and-the-nature-world>.

² In the Indian Ganges/Yamuna-case, the judges cited the example of the Whanganui river, which was declared a living entity with full legal rights by the New Zealand government only a week earlier. See <https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings>.

³ The 2015 ruling of the Ecuadorian Constitutional Court in a case about a shrimp farm located inside a protected natural area is a welcome exemption to this; see <http://vjel.vermontlaw.edu/courts-meet-nature-real-case-rights-nature>.

⁴ <https://therightsofnature.org/>.

⁵ <http://harmonywithnatureun.org/>. Harmony with Nature recently submitted its 2018 report on rights of nature-developments to the General Assembly of the UN.

⁶ See the work of among others Cormac Cullinan, Michelle Maloney, Mumta Ito, Linda Sheehan, Polly Higgins and Valerie Cabanes.

⁷ For example the movie *United Natures: a United Nations of all Species*; <http://therightsofnature.org/united-natures-movie/>.

correctly oriented towards living within planetary boundaries and to prevent environmental and social conflict. Could restorative justice become another avenue to advance the rights of nature?

What is restorative Justice?

Restorative justice is a fast-growing social movement and set of practices that aim to redirect society's retributive (punishment-oriented) response to crime. It emerged in North America during the 1970s when alternative approaches to the criminal justice system, such as alternative dispute resolution, were becoming a trend. It rose alongside the victims' rights movement, which argued for greater involvement of crime victims in the criminal justice process, as well as for the use of restitution as compensation for losses. A 1974 case in Kitchener, Ontario, Canada, is considered the beginning point of today's restorative justice movement. This "Kitchener experiment" required two teenagers to meet with and pay restitution to every one of the twenty-two people whose property they had vandalized.⁸ The Mennonite Church played a role of importance in rolling out the first Victim-Offender Reconciliation processes in Canada and the USA. At the same time, many of the values, principles, and practices of restorative justice reflect those of indigenous cultures such as the Maori in New-Zealand and the First Nations People of Canada and the USA. In these indigenous cultures, community-members, led by an elder, collectively participate in finding a solution for conflict. Restorative justice views crime not as a depersonalized breaking of the law but as a wrong against other members of the community. It involves community-based processes, which offer an inclusive way of dealing with offenders and victims of crime through facilitated meetings. These meetings provide a forum in which offenders can take responsibility for their offending. Restorative processes empower victims by inviting them into the heart of the criminal justice process. Victims are given a positive, safe environment in which key questions can be answered, emotional and material needs can be expressed and healing can begin. Restorative processes focus on accountability and seek to repair the damage done by crime by applying a practical response and, where fitting, appropriate sanctions. They also create the possibility of reconciliation through the practice of compassion, healing, mercy and forgiveness.⁹

⁸ <https://charterforcompassion.org/restorative-justice/restorative-justice-some-facts-and-history>.

⁹ McElrea, F. (2004) 'The Use of Restorative Justice in RMA Prosecutions', Salmon Lecture 2004 to the Resource Management Law Association, 27 July 2004, see also Resource Management Journal No.1, p. 2.

There are four main types of restorative processes:¹⁰

- 1) Victim-offender conferences: a process which provides victims of crime the opportunity to meet the offender in a safe and structured setting, with the goal of holding the offender directly accountable for their behavior while providing assistance and compensation to the victim.
- 2) Community and family group conferences: a meeting between victims, offenders and their respective families and communities, led by a trained facilitator, in which the affected parties discuss how they have been harmed by the offence and how the offender might best repair the harm.
- 3) Sentencing circles: a community-directed process, conducted in partnership with the criminal justice system, to develop consensus on an appropriate sentencing plan that addresses the concerns of all interested parties. These circles, which are sometimes called peacemaking circles, use traditional (indigenous) circle ritual and structures.
- 4) Community reparative boards, an alternative to the criminal justice system.

Restorative processes can be applied alongside retributive sanctions (fines/imprisonment), as part of a convicts' rehabilitation process, or, if the prosecution or judge so decides, instead of retributive sanctions. Restorative justice has seen worldwide growth since the 1990s and most academic studies suggest it makes offenders less likely to reoffend. A 2007 study also found that it had the highest rate of victim satisfaction and offender accountability of any method of justice.¹¹ It is applied to individual criminal cases and to system-wide offences, of which the South African Truth and Reconciliation Commission is the most famous example.

In New Zealand and Australia restorative justice is applied to environmental crimes, which I will shortly discuss in the next paragraph

¹⁰ https://en.wikipedia.org/wiki/Restorative_justice.

¹¹ https://en.wikipedia.org/wiki/Restorative_justice.

Applying Restorative Justice to Environmental Crimes

Restorative justice can be applied to environmental crimes and the defendants' commitment to make amends can involve restoration of the natural environment. There are several possible restorative outcomes in the case of environmental crimes: apologies, restoration of environmental harm and prevention of future harm, compensatory restoration of environments elsewhere if the affected environment cannot be restored to its former condition, payment of compensation to the victims and community service work. Measures addressing future behavior, such as an environmental audit of the activities of the offending company, or environmental training and education of the company's employees, are also possible outcomes.¹²

Restorative Justice has been an important element in New Zealand sentencing since 2002. According to a 2012 report of the Ministry for the Environment, between 1 July 2001 and 30 September 2012, a restorative justice process was used in 33 prosecutions under the Resource Management Act in New Zealand.¹³ In Australia, the New South Wales Land and Environment Court also uses restorative processes in addressing environmental offences. The Australian Victorian Environmental Protection Agency uses restorative justice conferences in communities afflicted with environmental damage.

Representing Nature in Restorative Conferences

Nature is sometimes recognized as a victim of environmental crime in its own right, and represented in the restorative process. As writes Justice Brian Preston:

"Humans are not the only victims of environmental crime. The biosphere and nonhuman biota have intrinsic value independent of their utilitarian or instrumental value for humans. When harmed by environmental crime, the biosphere and non-human biota also are victims. The harm is able to be assessed from an ecological perspective; it need not be anthropocentric (...) If the environment is recognised as being a victim of environmental crime and is represented in the restorative justice process, it becomes empowered. The environment is given a voice, validity and respect. This itself is a transformative act as it recognises the intrinsic value of the environment. Restorative outcomes that involve prevention of future environmental harm and restoration and

¹² Hon. Justice Brian J. Preston, *The use of restorative justice for environmental crime*, *Criminal Law Journal*, 2011, 35(3):136-153, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1831822 on p. 17.

¹³ Justice Nicola Pain, Justice Rachel Pepper, Millicent McCreath, John Zorzetto, *Restorative Justice for environmental crime: an antipodean experience*, International Union for Conservation of Nature Academy of Environmental Law Colloquium 2016 Oslo Norway 22 June 2016, p. 15.

*reparation of past environmental harm are also transformative. By give the environment a voice and recognising and healing it as a victim, humanity's relationship with the environment is also transformed."*¹⁴

With respect to the appropriate representative of elements of nature harmed by environmental crime, judge Preston writes:

*"The choice of representative will be influenced by the crime and the harm caused. For example, for a water pollution offence which affects river quality, the community that uses and benefits from the river, and the river itself which is also a victim, could be represented by a governmental or non-governmental organisation responsible for or engaged in protection of riverine ecosystems. Similarly for offences involving harm to harbours and bays, the community and the harbours could be represented by government or non government organisations responsible for or engaged in protection of the harbours. For offences involving the cutting of trees or native vegetation without consent, the trees and the vegetation community of which the trees were part could be represented by governmental and non-governmental organisations responsible for or engaged in protection, restoration or regeneration of native vegetation. (...) Where the environment and non-human biota are the victims, the surrogate victim needs to be able to bring to the restorative process an ecocentric and not anthropocentric perspective. As with future generations, the fact that the environment and non-human biota are not able to vocalise their claims and concerns is not an insuperable problem. A representative can be appointed to speak on their behalf."*¹⁵

Trees and rivers have been represented by a surrogate victim in a few New Zealand restorative justice conferences:

In **Auckland City Council v 12 Carlton Gore Road Ltd and Mary-Anne Catherine McKay Lowe**,¹⁶ and in **Rodney District Council and Sam Josh Tupou**,¹⁷ the environment affected by destruction and cutting of trees without resource consent was represented by the local council which was responsible for administering the laws protecting vegetation in the area. In these cases, the trees were considered a victim in their own right and represented as such at the conference.

¹⁴ Hon. Justice Brian J. Preston, *The use of restorative justice for environmental crime*, p. 12, 14, 22 and 23.

¹⁵ Ibidem, p. 14.

¹⁶ Auckland District Court (McElrea DCJ), 11 April 2005.

¹⁷ Auckland District Court (Judge JP Doogue), 28 February 2005.

In the **Waikato Regional Council vs. Huntly Quarries Ltd-case**,¹⁸ a river was represented at a restorative justice conference as a victim in its own right. In this case, sediment laden stormwater was illegally discharged from the offender's quarry affecting the river quality of the Waikato River, a river of particular cultural significance for the local Maori Taiui people. The river was represented at the restorative justice conference by the chairperson of the Lower Waikato River Enhancement Society. The outcome of the restorative conference was that the offender had to make a donation to the Lower Waikato River Enhancement Society in lieu of a fine. The offender complied and was then discharged without conviction.

In **Auckland City Council v G B Shaw and B & C Shaw Limited**,¹⁹ the restorative outcome of the conference involved restoration of the physical environment. A developer felled a protected pohutukawa tree for gain. At the conference where the defendant apologised publicly, it was agreed that the defendant would plant a new pohutukawa tree on the property, pay for an arborist to maintain it for five years under an enforcement order, make a donation of \$20,000 to the community for the purchase of 200 trees for planting in the neighbourhood and contribute to Council's costs. At sentencing the outcome plan was accepted by the judge as a starting point and the recidivist defendant avoided three months imprisonment (in part because of the restorative justice process) but was fined \$80,000.²⁰

This case-overview is concise but it shows the potential of restorative justice to advance the recognition of nature as a victim and to vindicate nature's rights. Will these early New Zealand examples of representing nature at restorative justice conferences stimulate similar practices in other countries, as was the case with the recognition of the rights of the Whanganui-river?²¹ With the growing support for rights of nature, the time seems ripe for ecocentric-perspectives to become integrated in restorative responses to environmental crimes.

¹⁸ Waikato Regional Council v Huntly Quarries Ltd and Ian Harrold Wedding, Auckland District Court (McElrea DCJ), 30 July 2003 and 28 October 2003.

¹⁹ DC Auckland, CRN 20050040131612, 2 March 2006, Judge McElrea.

²⁰ Deborah Clapshaw, *Restorative Justice in Resource Management Prosecutions – a Facilitator's Perspective*, p. 4 and 5, available at <http://www.deborahclapshaw.co.nz>.

²¹ Perhaps such cases already exist and have escaped my attention; I am most interested to learn about them. If you know of such cases, please email me at fwijdekop@gmail.com, thank you.

Conclusion

Could a community and connection-oriented method of addressing environmental damage such as restorative justice, with human guardians representing the natural elements victimized by pollution, advance the rights of nature and the ecocentric worldview which underpins it? Restorative justice is a more systemic way of addressing the harm cause by crime. Rights of Nature equally looks at environmental harm from a system-perspective; the system being the wider Earth community. Both restorative justice and rights of nature, to some degree, have indigenous roots.²²

The fact that restorative justice uses indigenous processes such as (peacemaking) circles can create a conducive environment for rights-of-nature approaches to gain strength. To repeat the words of Justice Brian Preston, *'If the environment is recognised as being a victim of environmental crime and is represented in the restorative justice process, it becomes empowered. The environment is given a voice, validity and respect. This itself is a transformative act as it recognises the intrinsic value of the environment.'*

Restorative Justice allows a wide range of values, including spiritual and emotional values, and needs to be expressed and culturally appropriate procedures to be followed.²³ Thanks to this 'open' character, it could be well suited to give space for rights of nature-approaches to what constitutes an environmental violation, who can be a victim of such a violation, and what 'restoration' could look like. Offender's confrontation with the harmful effect of his/her actions on the natural world, in the ideal case, might contribute to his/her ecological awakening. This confrontation can help the offender to start to relate differently to the natural world and to begin to internalize the values inherent in rights of nature. In the words of Judge Preston, *'By giving the environment a voice and recognising and healing it as a victim, humanity's relationship with the environment can be transformed.'*²⁴ As such, restorative justice seems to hold great potential as an avenue to advance the rights of nature.

²² In decision-making processes of for example the Moluccan indigenous people, the Earth and future generations are represented.

²³ McElrea, F. (2004) 'The Use of Restorative Justice in RMA Prosecutions', Salmon Lecture 2004 to the Resource Management Law Association, 27 July 2004, see also Resource Management Journal No.1, p. 6.

²⁴ Hon. Justice Brian J. Preston, *The use of restorative justice for environmental crime*, p. 12, 14, 22 and 23.