

# Restorative Justice: a suitable response to environmental crime?

by Femke Wijdekop

## Introduction

*What if a wall of a dam containing highly toxic mining waste collapses, polluting the surrounding waterways and drinking water, decimating fish stocks and devastating the social and economic lives of the villages dependent on these waterways? Even if the State upholds environmental law and charges the mining company with environmental offences, how will the imposition of a fine – the usual sanction for environmental offences - assist the individuals and communities whose lives have been shattered by the criminal negligence of the company? And while some victims, such as the fisherman whose livelihood is destroyed, may be readily identifiable, what about the polluted river, or the landscape whose vegetation has been polluted by the toxic waste?<sup>1</sup>*

This example demonstrates how the traditional way of addressing environmental violations can be inadequate to satisfy victims' needs for justice and restoration. In this article, I will explore if a restorative justice approach to environmental crime could lead to more satisfying results.

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<sup>1</sup> Example borrowed from 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. 1.

## **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. Restorative justice views crime not as a depersonalized breaking of the law but as a wrong against other members of the community. It attends to the broken relationships between three players: the offender, the victim, and the community. This means that restorative justice holds offenders directly accountable to the people they have harmed and that it restores, to the extent possible, the emotional and material losses of victims by providing a range of opportunities for dialogue, negotiation, and problem solving.<sup>2</sup> Moreover it views criminal acts more comprehensively than our traditional judicial system because it recognizes how offenders harm victims, communities, and even themselves by their actions. It looks at the needs and obligations that result from those harms. It uses inclusive, collaborative processes in which those with a stake in the situation (victims, offenders, community members; representatives of the criminal justice system) come together to collectively resolve how to deal with the aftermath of the offence and its implications for the future. Next to the goal of repairing the harm done, restorative justice has an aspiration for the future: to prevent recidivism by confronting the offender with its victim, which can lead to repentance and behavioral change.<sup>3</sup>

Restorative justice processes have the following general objectives:

- To give victims a voice; to encourage them to express their needs and enable and assist them to participate in the resolution process;
- To repair relationships damaged by crime, in part by arriving at a consensus on how best to respond to it;

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<sup>2</sup> <https://charterforcompassion.org/restorative-justice/restorative-justice-some-facts-and-history>, visited 14 July 2018 at 22:35.

<sup>3</sup> Ibidem.

- To renounce criminal behavior as unacceptable and to reaffirm community values;
- To reduce recidivism by encouraging change in individual offenders and facilitating their integration into the community;
- To identify factors that lead to crime and to inform authorities responsible for crime reduction strategies about these factors.<sup>4</sup>

There are four main types of restorative processes:<sup>5</sup>

- 1) Victim-offender conferencing: 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 conferencing: 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.

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<sup>4</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1831822) on p. 3.

<sup>5</sup> [https://en.wikipedia.org/wiki/Restorative\\_justice](https://en.wikipedia.org/wiki/Restorative_justice), visited 14 July 2018 at 23:00.

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.

## **Roots**

Restorative justice is a young field that 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 emerged alongside the victims' rights movement, which advocated 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.<sup>6</sup> The Mennonite Church played a role of importance in rolling out these 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. Until the Middle Ages such participatory forms of conflict resolution were also used in Europe, but they were lost when the government took over the role of conflict-solver in the late Middle Ages,<sup>7</sup>

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<sup>6</sup> <https://charterforcompassion.org/restorative-justice/restorative-justice-some-facts-and-history>, visited 14 July 2018 at 22:35.

<sup>7</sup> H. Zehr, *Changing Lenses. A New Focus for Crime and Justice*, Scottdale: Herald Press 2005, pp. 108-110.

leaving little room for the victim (or the affected community) to play a part in the resolution of the conflict.

Restorative justice has seen worldwide growth since the 1990s. 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.<sup>8</sup> 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 the Australian states of New South Wales and Victoria restorative justice is applied to environmental crimes, which I will discuss in the next paragraph.

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<sup>8</sup> [https://en.wikipedia.org/wiki/Restorative\\_justice](https://en.wikipedia.org/wiki/Restorative_justice), visited 14 July 2018 at 23:30.

## **Application to environmental crime**

Restorative justice can be applied to environmental crimes and the defendants' commitment to make amends can involve restoration of the natural environment.

Environmental crime can result in the following violations of rights:

- Violations of the human right to health, of the right to clean air, water, and land, and of the quality of life.
- Violations of the right to property and amenity
- Violation of natural and cultural heritage. In these cases, often aboriginal or indigenous people are the victim. An example is the **Australian case Garrett vs. Williams**,<sup>9</sup> which concerned the destruction of Aboriginal artefacts during construction and exploration activities undertaken by a mining company. As part of the settlement of the case, a restorative justice conference was facilitated by the prosecutor and funded by the defendant. The Aboriginal people nominated a representative of the relevant local Aboriginal Land Council to represent them in the process. The Court appointed an independent facilitator who conducted interviews with representatives of the Broken Hill Local Aboriginal Land Council, archaeologists, representatives of mining company Pinnacle Hills and representatives of the prosecutor in preparation for the conference. The conference itself provided the opportunity for the chairperson of the Broken Hill Aboriginal Land Council and the defendant to meet, and for the defendant to apologize for the harm caused. The parties produced a document outlining the agreement that was reached at the conference, which included financial contributions to be made to the victims, future training and employment opportunities for the local community, and a guarantee that the

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<sup>9</sup> Garrett vs. Williams (2007) 151 LGERA 92; [2007] NSWLEC 96.

traditional owners would be involved in any salvage operations of Aboriginal artefacts. These results of the restorative justice intervention were taken into account by the judge in the sentencing process, but the restorative justice intervention did not substitute the court sentence for the offences committed by the defendant.<sup>10</sup>

- Violation of the commons held in trust by the government.<sup>11</sup>
- The rights of the environment itself are violated; the environment as a victim. Increasingly, the rights of the natural world are recognized in court decisions and legislation.<sup>12</sup> In restorative justice conferences, trees and rivers can be represented by surrogate victims, which happened in the **Waikato vs. Huntly case**.<sup>13</sup> In this case, sediment laden stormwater was the illegally discharged from the offender's quarry affecting the river quality of the New Zealand Waikato River. The river was represented at the restorative justice conference by the chairperson of the Waikato River Enhancement Society. The conference outcome included payment of costs of the facilitator and a donation to the Lower Waikato River Enhancement Society instead of a fine.
- The rights of future generations, who can be represented 'by proxy' in restorative processes, for example by NGOs who protect the interest of future generations in their statutes.<sup>14</sup>

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<sup>10</sup> Ibidem.

<sup>11</sup> This can result in a public trust action, such as the Atmospheric Trust Litigation in the United States: the government holds the atmosphere in trust for the public, and should take action to combat climate change. See <https://law.stanford.edu/2017/07/05/atmospheric-trust-litigation-paving-the-way-for-a-fossil-fuel-free-world/>.

<sup>12</sup> Please visit [www.harmonywithnatureun.org](http://www.harmonywithnatureun.org) for an overview of Rights of Nature legislation and jurisprudence around the world.

<sup>13</sup> In Waikato Regional Council vs. Huntly Quarries Ltd and Ian Harrold Wedding, Auckland District Court (McElrea DCJ), 30 July 2003 and 28 October 2003.

<sup>14</sup> The idea that a person or body can represent future generations has been accepted by courts in different contexts. The most famous case is *Minors Oposa vs. Secretary of the Department of Environment and Natural Resources*, in which the Supreme Court of Philippines upheld the standing of children (represented in court by their parents) to challenge the legal validity of the governmental action of issuing timber licenses, which resulted in deforestation

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.<sup>15</sup>

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.<sup>16</sup> 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.

Finally, in the context of transitional justice, environmental restoration and conservation activities after (civil) war can help processes of reconciliation and peacemaking. Such processes took place in Mozambique in 1994, in Afghanistan in 2003 and in Nepal in 2006. Currently, the Colombian government wants former FARC-members to assist with the environmental restoration of landscapes that suffered from the Colombian civil war.

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and environmental degradation. See *Minors Oposa vs. Secretary of the Department of Environment and Natural Resources* 33 ILM 173 (1994) at 185.

<sup>15</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1831822) on p. 17.

<sup>16</sup> 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.



## **PART II**

### **Letting the offender – and systematic injustices - off the hook?**

Restorative justice has eye for the victim's emotional and material needs in the wake of crime. But does it let offenders off the hook by allowing them to take part in processes of reconciliation and rehabilitation?

This is a reasonable question to ask. What is important to realize is that restorative justice does not necessarily replace retributive responses to crime. It is a tool which can be applied alongside traditional responses, such as fines and imprisonment. In that case, a positive outcome of a restorative justice process can make the judge decide to reduce the punishment. Also, restorative justice is only applied when both victim and offender are willing to participate. It requires that the offender takes responsibility for committing the offense. Confronting the victims and committing to time consuming projects, such as re-planting trees, doing community work or attending environmental training, may be more of a deterrent for the offender than a non-restorative sentence such as a fine. Paying a fine may hurt financially, but it probably does not impact the offender on an emotional level, or challenge his/her assumptions about right and wrong behavior. Meeting the victims and the community face-to-face and learning about the harm caused by the offence is more likely to leave a lasting effect on the offender.<sup>17</sup> Of course, this presumes that the offender has a conscience and is not partaking in restorative justice processes purely for selfish and tactical reasons ('faking' remorse in order to get a lower sentence). Discernment will be important when selecting cases and offenders that are suitable for a restorative justice intervention.

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<sup>17</sup> 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. 17

Another possible point of criticism is that restorative justice legitimizes existing economic and power relations by working towards reconciliation between victims and offenders. Is not a more assertive and confrontational approach, such as the recently launched climate case against Shell,<sup>18</sup> more appropriate to challenge the systemic way in which environmental pollution is allowed – and even rewarded – by our economic system?

This is a valid point. But restorative justice can be part of an approach to environmental crime which is oriented to system-change, such as the campaign to make Ecocide a crime against peace. Polly Higgins proposes to add restorative justice processes to the sanction arsenal of a judge who decides in Ecocide-cases.<sup>19</sup> She proposes to offer it as an alternative sentencing option when the victim and offender consent, and when the offender – probably a company, bank or state official - accepts responsibility for restoring territories adversely impacted by ecocide.

Another angle is that restorative justice actually empowers change from the bottom up, because it is a way for communities to develop social capital, social networks and civic interconnectedness. Participation in restorative process offers citizens the chance to mobilize their community to challenge systemic socio-economic injustice. It can encourage citizen to challenge norms and stimulate political debate. It also gives space for rights of nature-approaches to what constitutes an environmental violation and who can be a victim of such a violation. As happened in the Waikato vs. Huntly-case described above, nature itself can be represented in restorative justice conferences as a victim in its own right, and the outcome of such conferences can include the obligation to restore the harm done to the environment. The fact that restorative justice uses indigenous processes such as (peacemaking) circles

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<sup>18</sup> See <https://en.milieudefensie.nl/climate-case-shell>, visited 22 July 2018 at 12:30.

<sup>19</sup> See <https://www.theguardian.com/law/2012/jun/04/ecocide-earth-business-extract>, visited 22 July 2018 at 13:00.

can create a conducive environment for rights-of-nature approaches, which lean towards indigenous worldviews, to gain strength.

## **Conclusion**

Restorative justice holds promise as an alternative response to environmental crime. Studies show that offenders are less likely to reoffend, and that restorative justice produces a high rate of victim satisfaction and offender accountability. The question if restorative justice is a suitable response to environmental crime has to be answer on a case-by-case basis, however. There will be cases which will not qualify for a restorative approach, for example because the offender does not take responsibility for the offense, or when victims do not feel safe to take part in restorative processes because they fear the offender might retaliate behind the scenes if they raise their voices publicly. In such cases the environmental offense is embedded in a broader culture of impunity and intimidation, or lack of rule of law. If the culture is more conducive to upholding environmental law and to restoration of broken relationships, restorative justice seems to have a lot to offer.

If we consider the example used in the introduction of the pollution caused by toxic mining waste, engaging in a restorative justice process can give a voice to those victims who are impacted by the crime of pollution but who would normally been excluded from its resolution. Proxies can be appointed who represent the polluted river and land. A conference offers the opportunity for the offender to directly apologize to victims, to first-hand understand how the crime has affected the victims and harmed the social fabric of the community. It can diminish the chances of recidivism and educate the offender in the norms and values of environmental law. If anything, applying restorative justice to environmental disputes that have come to a standstill might proof to be worth the try. This is what a small group of Quakers is committed to do

regarding the 1984 Bhopal disaster, in which no justice has yet been achieved three decades after the disaster which killed ten thousands of people. The Quakers started a 'Restorative Action for Bhopal' and are currently trying to engage the offending company in a restorative process.<sup>20</sup> It will be interesting to keep an eye on this bold initiative to hold a multinational accountable for environmental and human rights violations in a restorative way.

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<sup>20</sup> For more information, see <https://www.prospectmagazine.co.uk/world/three-decades-after-the-bhopal-disaster-a-new-approach-offers-hope>. Visited 22 July 2018 at 14:00.