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### **Standards for Restorative Justice**

Braithwaite discusses the benefits and the pitfalls of regulating restorative justice practices. One main concern is power imbalance and control by a governmental regulatory body.

It is good that we are now having national and international debates on standards for restorative justice. Yet it is a dangerous debate. I worry about accreditation for mediators that raises the spectre of a Western accreditation agency telling an Indigenous elder that a centuries-old restorative practice does not comply with the accreditation standards. Accreditation that crushes indigenous empowerment.

I worry about standards that are so prescriptive that they inhibit restorative justice innovation. We are still learning how to do restorative justice well. I believe that the healing edge programs today involve real advances over those of the 90s and the best programs of the 90s made important advances over those of the 80s.

We must be careful in how we regulate restorative justice now so that in another decade we will be able to say again that the healing edge programs are more profoundly restorative than those of today. Unthinking enforcement of standards is a new threat to innovating with better ways of doing restorative justice. It is a threat because evaluation research on restorative justice is at such a rudimentary stage that our claims about what is good practice and what is bad practice can rarely be evidence-based.

At the same time, there is such a thing as practice masquerading as restorative justice that is outrageously poor -- practice that would generate little controversy in this room that it was unconscionable. This is an even greater threat to the future of restorative justice. So we have no option but to do something about it through a prudent standards debate.

We can craft open-textured restorative justice standards that allow a lot of space for cultural difference and innovation while giving us a language for denouncing uncontroversially bad practice. My contribution to the standards debate today will be a modest one that will not seek to be exhaustive in defining some of the issues standards must address.

Some of you will know that I approach such questions from a civic republican perspective. This means that a fundamental standard is that restorative processes must seek to avoid domination. We do see a lot of domination in restorative processes, as we do in all spheres of social interaction. But a program is not restorative if it fails to be active in preventing domination. What does this mean in practice? It means that if a stakeholder wants to attend a conference or circle and have a say, they must not be prevented from attending. If they have a stake in the outcome, they must be helped to attend and speak. Any attempt by a participant at a conference to silence or dominate another participant must be countered. This does not mean the conference convenor has to intervene. On the contrary, it is better if other stakeholders are given the space to speak up against dominating speech. But if domination persists and the stakeholders are afraid to confront it, then the convenor must confront it. Preferably gently: "I think some of us would like to hear what Jane has to say in her own words. Jane?"

Often it is rather late for confronting domination once the restorative process is under way. Power imbalance is a structural phenomenon. It follows that restorative processes must be structured so as to minimize power imbalance. Young offenders must not be led into a situation where they are upbraided by a "roomful of adults". There must be adults who see themselves as having a responsibility to be advocates for the child, adults who will speak up. If this is not accomplished, a conference or circle can

always be adjourned and reconvened with effective supporters of the child in the room. Similarly, we cannot tolerate the scenario of a dominating group of family violence offenders and their patriarchal defenders intimidating women and children who are victims into frightened silence. When risks of power imbalance are most acute our standards should expect of us a lot of preparatory work to restore balance both backstage and frontstage during the process. Organized advocacy groups have a particularly important role when power imbalances are most acute. These include women's and children's advocacy groups when family violence is at issue, environmental advocacy groups when crimes against the environment by powerful corporations are at issue.

What the Americans call due process is perhaps the major domain where there have been calls for standards. It seems reasonable as an international standard that offenders put into restorative justice programs be advised of their right to seek the advice of a lawyer on whether they should participate in the program. Perhaps this would be an empty standard in poorer nations where lawyers are not in practical terms affordable or available for most criminal defendants. But wealthier nations can afford higher standards on this issue. There, arresting police officers who refer cases to restorative justice processes should be required to provide a telephone number of a free legal advice line on whether agreeing to the restorative justice process is prudent.

In no nation does it seem appropriate for defendants to have a right for their lawyer to represent them during a restorative justice process. Part of the point of restorative justice is to transcend adversarial legalism, to empower stakeholders to speak in their own voice rather than through legal mouthpieces who might have an interest in polarising a conflict. A standard that says defendants or victims have a right to have legal counsel present during a restorative justice process seems fine. But a standard that gives legal counsel a right to speak at the conference or circle seems an unwarranted threat from the dominant legal discourse to the integrity of a restorative justice process.

The most important way that the criminal justice system must be constrained against being a source of domination over the lives of citizens is that it must be constrained against ever imposing a punishment beyond the maximum allowed by law for that kind of offence. It is therefore critical that restorative justice never be allowed to undermine this constraint. Restorative justice processes must be prohibited from ever imposing punishments which exceed the maximum punishment the courts would impose for that offence.

As someone who believes that restorative justice processes should be about reintegrative shaming and should reject stigmatization, it seems important to prohibit any degrading or humiliating form of treatment. We had a conference in Canberra where all the stakeholders agreed it was a good idea for a young offender to wear a T-shirt stating "I am a thief". This sort of outcome should be banned.

Another critical, albeit vague, standard is that restorative justice programs must be concerned with the needs and with the empowerment not only of offenders, but also of victims and affected communities. Programs where victims are exploited as props for programs that are oriented only to the rehabilitation of offenders are morally unacceptable. Deals that are win-win for victims and offenders but where certain other members of the community are serious losers, worse losers whose perspective is not even heard, are morally unacceptable.

The right to appeal must be safeguarded. Whenever the criminal law is a basis for imposing sanctions in a restorative justice process, offenders must have a right of appeal against those sanctions to a court of law. That said, not all of the accountability mechanisms of criminal trials seem appropriate to the philosophy of restorative justice. For example, if we are concerned about averting stigmatization and assuring undominated dialogue, we may not want conferences or circles to be normally open to the public. But if that is our policy, it seems especially important for researchers, critics, journalists, political leaders, judges, colleagues from restorative justice programs in other places, to be able to sit in on conferences or circles (with the permission of the participants) so there can be informed public debate and exposure of inappropriate practices. Most importantly from the

perspective of our topic here today, it is critical that restorative justice processes can be observed by peer reviewers whose job it is to report on compliance with the kinds of standards we discuss.

In general, I think UN Human Rights instruments give quite good guidance on the foundational values and rights restorative justice processes ought to observe. The first clause of the Preamble of the Universal Declaration that most states have ratified is:

"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

Obviously freedom, justice and peace have a lot of appeal to someone who values republican freedom to frame the pursuit of justice and peacemaking in restorative justice.

In its 30 Articles the Universal Declaration defines a considerable number of slightly more specific values and rights that seem to cover many of the things we look to restore and protect in restorative justice processes. These include a right to protection from having one's property arbitrarily taken (Article 17), a right to life, liberty and security of the person (Article 3), a right to health and medical care (Article 25) and a right to democratic participation (Article 21).

From the restorative justice advocate's point of view, the most interesting Article is 5: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Of course, all states have interpreted Article 5 in a most permissive and unsatisfactory way from a restorative justice point of view. The challenge for restorative justice advocates is to take the tiny anti-punitive space this Article creates in global human rights discourse and expand its meaning over time so that it increasingly acquires a more restorative interpretation. This is precisely how successful NGO activists have globalized progressive agendas in many other arenas -- starting with a platitudinous initial rights and values framework and injecting progressively less conservative and more specific meanings into that framework agreement over time.

We can already move to slightly more specific and transformative aspirations within human rights discourse by moving from the Universal Declaration of 1948 to the less widely ratified International Covenant on Economic, Social and Cultural Rights of 1976 and the International Covenant on Civil and Political Rights of 1966. The former, for example, involves a deeper commitment to "self-determination" and allows in a commitment to emotional well-being under the limited rubric of a right to mental health. The 1989 Second Optional Protocol of the Covenant on Civil and Political Rights includes a commitment of parties to abolish the death penalty, something most restorative justice advocates would regard an essential specific commitment. Equally most restorative justice advocates would agree with all the values and rights in the United Nations Declaration on the Elimination of Violence Against Women of 1993 and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly in 1985. The latter includes some relevant values not so well traversed in other human rights instruments such as "restoration of the environment" (Article 10), "compassion" (Article 4), "restitution" (various Articles), "redress" (Article 5) and includes specific reference to "restoration of rights" (Article 8) and "Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices" which "should be utilized where appropriate to facilitate conciliation and redress for victims." (Article 7).

A Proposal

So my proposal for a starting framework for a debate on the content of restorative justice standards is as follows.

1. Restorative justice programs should be evaluated according to how effectively they deliver restorative values which include:

Respect for the fundamental human rights specified in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Second Optional Protocol, the United Nations Declaration on the Elimination of Violence Against Women and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

2. Restorative values include the following values to be found in the above international human rights agreements:

- Restoration of human dignity
- Restoration of property loss
- Restoration of injury to the person or health
- Restoration of damaged human relationships
- Restoration of communities
- Restoration of the environment
- Emotional restoration
- Restoration of freedom
- Restoration of compassion or caring
- Restoration of peace
- Restoration of empowerment or self-determination
- Restoration of a sense of duty as a citizen

As a list of specific restorative values this is unsatisfactorily incomplete, for example in the non-inclusion of mercy, forgiveness, which are nowhere to be found as values in these UN documents.

Many will find these values vague, lacking specificity of guidance on how decent restorative practices should be run. Yet standards must be broad if we are to avert legalistic regulation of restorative justice which is at odds with the philosophy of restorative justice. What we need is deliberative regulation where we are clear about the values we expect restorative justice to realise. Whether a restorative justice program is up to standard is best settled in a series of regulatory conversations with peers and stakeholders rather than by rote application of a rulebook. That said, certain highly specific standards are so fundamental to justice that they must always be guaranteed -- such as a right to appeal.

Yet some conventional rights, such as the right to a speedy trial as specified in the Beijing Rules for Juvenile Justice, can be questioned from a restorative perspective. One thing we have learnt from the victims movement in recent years is that when victims have been badly traumatized by a criminal offence, they often need a lot of time before they are ready to countenance healing. They should be given the right to that time so long as it is not used as an excuse for the arbitrary detention of a defendant who has not been proven guilty.

I use this as a final illustration of why at this point in history we need a framework agreement on standards for restorative justice that is mainly a set of values for framing quality assurance processes and accountability in our pursuit of continuous improvement in attaining restorative justice values.

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