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The Restorative Approach to Juvenile Justice

Contents

Introduction.....	3
I – Reparation as a Learning Process.....	5
A. The Contribution of Neuroscience: Restorative Justice and Child Development.....	5
1) The links between justice, neuroscience and their possible origins	5
2) The contribution of neuroscience to juvenile justice	6
B. Implication of the Different Procedural Aspects of Reparation	7
1) The child at the heart of the restorative process.....	9
2) The different paths leading to reparation.....	12
II – Reparation in the Judicial System: A Matter of Effectiveness ?.....	12
A. Effectiveness proved but still controversial.....	12
1) The effectiveness of restorative juvenile justice in numbers	12
2) The critics of restorative justice	13
B. The Role of Restorative Justice in the Administration of Juvenile Justice.....	15
1) The restorative approach: a fringe model of juvenile justice	15
2) Incorporating reparation into complex models	17
Conclusion	19
References	20

Introduction

Everyone can imagine a teacher asking one of his or her pupils to say sorry after having broken a friend's toy. If so, then we could even imagine the child being asked to glue the broken object back together again to hear him say, with a sigh, that he or she didn't mean to break it. Proceeding in this manner, many adults establish a simplistic process of reparation when teaching children.

Where child justice is concerned, we cannot mention reparation without thinking of restorative justice¹. In its 'purest' form, restorative justice is different from 'conventional' justice in that it does not consider delinquency as a transgression from an established norm, but as social harm coming from conflicts between individuals, whether they are patrimonial (theft), physical (injury) or psychological (trauma) (Walgrave, 2002). Justice is more an affair of the community than one of the State. The aim therefore becomes finding a solution to the causes of the problem, rather than imposing suffering proportional to the crime as is the case with a simplistic, repressive form of justice. This solution of reparation is the result of an informal process favouring the expression of feelings and emotions rather than following pre-established legal procedures.

The process of reparation is at the heart of restorative justice as postulated by its 'inventors' in the 70s, 80s and 90s. Restorative practices however have not appeared alongside its theory, but written traces do exist before its appearance and have been present since and in other forms throughout the centuries (Gavrielides, 2011). Furthermore, this practice has been observed in all cultures and in all parts of the world (Commission for Crime Prevention and Criminal Justice CCPCJ, 2002). Today, restorative justice delivered by the community outside of conventional forms of justice proposed by the State is widespread in low or middle income countries, particularly in the Middle East, Africa, Latin America and Asia (Harper, 2011).

If the majority of authors agree that restorative justice resolves *conflicts* between individuals, not all are agreed on its definition, boundaries and scope of this approach to justice. While Nils Christie and Howard Zehr, and the international treaties², agree on the fact that restorative justice is based on the re-appropriation of the *process* of justice by the victim and the offender, authors such as Lode Walgrave have expanded the concept of restorative justice to its *goals*, thus including all judicial processes which seek reparation without actively involving the victim or offender (Perrier, 2010).

This difference between the two schools of thought on restorative justice is essential since it questions the definition of restorative justice, which is not the focus here, but is of interest since it affects the aims, modalities and results of juvenile justice. The debate on the definition of restorative justice is not over however and ultimately, the relevance of confining this approach to a dogmatic definition is questionable (Zehr & Gohar, 2003). It still remains that the distinction between these two schools of thought leads to the conceptualisation of pure restorative justice – that of Howard Zehr – which seeks to involve, as much as possible, the offender and the victim, and potentially, all other members of the community, and in an *maximalist* sense – that of Lode

¹ We will use the term 'restorative justice' throughout this article, despite other related terms

² The United Nations Economic and Social Council (ECOSOC), Resolution 2002/12: *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, 24th July 2002, E/RES/2002/12, consulted 03/04/2016: <http://www.refworld.org/docid/46c455820.html>

Walgrave – which considers restorative justice to include every approach to justice that seeks to redress the suffering and damage inflicted on the victim, whatever the process used.

This distinction is essential as we shall explore the literature and real-world examples which confirm that it is the process of participation of the child in the mechanisms of reparation which is fundamental to achieving the goals of juvenile justice. These goals could also be discussed at length, but we will retain the concepts proposed by international treaties which consider the end goal of a system of juvenile justice as a system to "prevent and control juvenile delinquency whilst respecting human rights and children's rights³", which means ensuring that the children receive "treatment of a nature that fosters their dignity and personal sense of worth, which strengthens their respect for human rights and the fundamental liberties of their fellow man, and which takes age into consideration as well as the need to facilitate their reintegration into society, encouraging them to take on a constructive role within it⁴."

Ultimately, the interest in reparation in juvenile justice comes back to the question of how reparation contributes to reaching the goals of juvenile justice. Is it efficient at doing so? What devices should be used? And in its broadest sense, what role does restorative justice play in a model of juvenile justice? We cannot provide exhaustive answers to all these questions but we will seek to establish avenues of thought with the support of the most recent contemporary science, experience and reflection.

In order to do this, we will first look at (I) the latest developments in hard science which reinforce the idea that the process of elaboration of face to face reparation with the victim and the follow up of its establishment constitutes the core of the criminal child's *learning* process. The effects that these processes can have on the child vary according to the different methods of restorative justice used and we will tackle certain procedural aspects of them. We will see that these restorative processes are empowered by the attention given, in the first instance, to the actors involved, the offender and the victim, and by the dynamic by which they reach an agreed form of reparation, through dialogue based on how they feel and on an exchange of points of view. We will then consider the relative lack of recognition of restorative justice in contemporary juvenile justice systems, despite the convergence of criminological studies which prove their effectiveness (II). We will see that the process of reparation can be found at the heart of potentially complex judicial systems (adapted to children), recognising, for example, the mechanics of traditional justice.

³ General comment no. 10 of the Committee on the Rights of the Child.

⁴ Article 40 of the Convention on the Rights of the Child.

I – Reparation as a Learning Process

In this section, we will consider (A) how the restorative process impacts the child in conflict with the law in a learning process, which reflects a more effective method as compared to a prison sentence, and how neuroscience has confirmed this hypothesis which has already been evaluated in the field of criminal science. We will then see how the different restorative processes involve the child and the process of reparation (B).

A. The Contribution of Neuroscience: Restorative Justice and Child Development

1) The links between justice, neuroscience and their possible origins

Many disciplines in the human sciences have sought to explain the link between justice and child development, whether in legal sociology or in psychology. In psychology for example, the theory of attachment has proved that there is a link between a lack of parental interest in the early years of a child's life and delinquency in adolescence (Bowlby, 1969). In legal sociology, the theory of re-integrative shaming only supports disapproval of delinquent acts, whilst respecting the offender, and submitting him or her to the rites of forgiveness and reparation prevents delinquency more than stigmatisation could ever do (Braithewaite, 2002). However, these disciplines have been confirmed by 'hard' science, and recent developments in medical imaging of the brain have brought neuroscience into the debate on the prevention of juvenile delinquency.

If we look at children in conflict with the law with mental problems and illnesses, the link between juvenile justice and neuroscience has already been established. Without this implying a causal link between the fact that children affected by mental health issues are more prone to commit crime than others, studies have shown that child in conflict with the laws display more symptoms of mental health issues than children from the general population (Perler, 2015). These results have therefore influenced criminal policy by giving targeted therapy to these young people, and where this has been the case, diminishing their criminal responsibility.

However, it appears important here to exercise caution against the use of medical science in juvenile justice aiming to cure young persons 'sick with delinquency' by an approach promoting all things therapeutic. As put by the former French Minister of Justice, Robert Badinter, "Delinquency is not an illness" (Le Monde, 8th September 2007).

At best, supporters of the *therapeutic* approach to juvenile justice tend to think that this should be carried out in conjunction with a process of socialisation. On the other hand, supporters of restorative justice accept that a uniquely restorative approach can have limits if it is not accompanied by a therapeutic process in certain cases (Johnstone, 2002).

It would be interesting to study the latest discoveries in this field. The progressive development of MRI medical imaging in the last 20 years has indeed shed light on existing links between the biological functions of the brain and behaviour, without the need for intrusive operations on the body (Walsh, 2011). These scientific innovations are only beginning to influence the administration of juvenile justice, and should be doing so more and more in years to come.

2) The contribution of neuroscience to juvenile justice

Criminal Science has for a long time observed that age is directly linked to unlawful acts corresponding to an overrepresentation of children in conflict with the laws between the ages of 15 and 25 (Gottfredson & Hirschi, 1990). The reason why remains unknown.

The latest discoveries in neuroscience have shed light on this question by proving that a child's brain can be considered 'under-developed' compared to that of an adult, and that the maturing process of the young brain involves permanent readjustment and fine-tuning of the structures involved in cognitive, social and emotional processes, notably those in the prefrontal cortex (Walsh, 2011). Neuroscience has also shown the weakness of the processes of *judgement* in young people, comparing them to someone wishing to experience life at full throttle with no brakes. Some young people literally behave as if there were no limits since their experience of life up to now has not forced them to confront them.

Should this absolve children in conflict with the laws from the responsibility for their actions? From the developments in neuroscience, it appears that such responsibility in the eyes of the criminal law should be diminished, or at least partially and with respect to their maturity, as stated in Article 40 of the Convention on the Rights of the Child. The question of age and the importance of this diminished responsibility is open to debate and should be answered on a case by case basis, however, it is a given that punishment via prison sentences certainly should not be found among any of the solutions first considered for the majority of children. Some authors have actually highlighted the harmful and counter-productive role that custodial sentences play on the psychosocial development of young people by marginalising them and sabotaging their chances of reinsertion into society (Scott & Steinberg, 2008, quoted by Walsh 2011). On the contrary, the penal system should give them the opportunity to recognise and learn from their mistakes in order to build a solid future for themselves.

This is all the more defensible if we consider petty crime as "a modern rite of passage", as supported by Dr. Christian Perler, clinical practitioner in juvenile justice, in particular when crimes are committed as a group or in front of onlookers (Perler, 2015). These rites in a post-industrial society, which are not rites since they are not accompanied by adults in a community in which the child would have just become integrated, would bridge the gap left by the disinvestment of religious figures and communities surrounding the child historically.

Moreover, the lengthening of coming of age after adolescence in some societies would contribute to a breaking down of the barriers between these ages and so it becomes a legitimate quest (although expressed unlawfully) for signs of belonging. Beyond violations committed purely out of necessity, delinquency would then become the symptom of a need for recognition by the adult world expressed in the shape of provocation towards established rules. It would be "one of the rites of the transition phase between the world of children and that of adults and juvenile justice would constitute the symbolic envelope whose task would be to enable the transmission of the limits of individual freedom in a society advocating autonomy and the personal realisation and the excitement of exploring one's own limits" (Perler, 2015). In other words, one could consider that in breaking free from one's partners or family, young people learn to refine their own sense of judgement, and that this process is carried out in an empirical fashion making mistakes, sometimes to the detriment of others, and correcting them.

We could argue then, that restorative justice could bring solutions to this problem in that the mechanisms of empathy are put to the test. Recent studies have in fact shown that there is a link between the development of the areas of the brain involved in empathy and anti-social behaviour (Reisel, 2014). These studies have shown that it is possible, even among subjects considered the least able to be rehabilitated – namely psychopaths (who by definition are not capable of empathy) - to modify their neural connections by specific mechanisms to recreate the mechanisms of empathy which limit antisocial behaviour. Such stimulation is at play during the restorative justice processes during which the offender cannot remain indifferent to the history and experience of the victim. It is a question of a remarkable promise for restorative justice which would thus make rehabilitation of children possible using what experts call *cerebral plasticity*.

In these conditions, we can understand the need for youths who are actively pushing the limits established by the law, to be involved in a process by inviting them, in a learning stage, to redress the consequences that their actions may have had on the victims and on society, much more than the need to be submitted to a form of suffering to make up for their actions.

In practice, this translates as the *cathartic* process which belongs to the restorative approach. According to Gérard Demierre, a penal mediator for children in Fribourg (Switzerland) who facilitates dozens of penal mediations for children every year, penal mediation gives people a trusted space in which they can relive what happened, in a framework which privileges listening and expressing oneself with the aim of reaching an agreed conclusion. The recognition of the victim as such by the offender is one of the keys to success of this process. The parties' verbalisation of their experience and the mutual recognition of their feelings by the other party enable the *catharsis* whose hallmark is the feeling of relief by the victim and the feeling of responsibility by the offender. This result could be credited to the theory based on "empathy of shared values emanating from rites of effective interaction" (Strang, Sherman, Mayo-Wilson, Woods, Ariel, 2013), a theory which should be contrasted with conventional justice, often based on the theory of sentence-based justice which favours the suffering of the delinquent – through a prison sentence - to balance the suffering of the victim, without seeking to diminish it. Ultimately, for M. Demierre, "favouring access to restorative justice gives people the possibility to do better"⁵.

We will now consider how the restorative process can play this role according to the mechanisms which govern them.

B. Implication of the different procedural aspects of reparation

1) The child at the heart of the restorative process

The issues surrounding the restorative process between the child-offender and the victim go beyond simply redressing the harm suffered by the latter. In actual fact, it would not be possible to

⁵ Interviewed 08/03/2016.

be satisfied with thinking that all restorative processes are able to exert an influence over the behaviour of child in conflict with the laws.

In the restorative process, the mechanisms leading to agreement over reparation are important in order to break the cycle of repeat-offending. An event reaching what could be termed a 'mental threshold' is required. It is essential that this process is felt sufficiently intensely so that the child in conflict with the laws' brains are left marked by these alternative behavioural mechanisms in order to activate empathic neural pathways (Reseil, 2014). Further, it appears obvious that the mechanisms governing these physiological processes have a major impact on reaching the goal of behavioural change. In other words, the way in which the child is involved in the restorative process is the key to the learning process of restorative justice.

There are numerous alternative methods of solving disputes which never cease to hybridise and diversify (McCold, 2001). These can be categorised according to various *parameters* which allow their 'restorative' character to be measured. The main parameters are the level of participation of the parties involved in the process, the way in which the dispute is settled, the identity of the person who facilitates or decides on the solution to the dispute and the content of the agreement. Here we are only analysing the main parameters.

As we have seen, within the framework of restorative justice, we can differentiate between the processes that *actively* and *directly* involve the child and the victim and those in which other actors are at the heart of the decision-making process, all the while seeking reparation of any harm caused. In the first category, termed '*pure*' restorative justice, we find *penal mediation*, *family conferences*⁶ and *restorative groups* (McCold, 2001).

In the second category, *maximalist* restorative justice, we find processes in which other actors decide the result of the dispute. Processes within this category aim is to seek reparation or compensation of the injury suffered by the victim, but are imposed, more or less, with the agreement of the child, by a judicial authority (a judge, for example). This will be the case for the judicial processes during which a judge can decide on the form of compensation that will have to be accepted by the child offender. Here, for example, we can think of *community service* (France, Australia, Switzerland). In *sentencing circles*, an indigenous restorative justice practice in Canada, for example, the parties are represented by lawyers and the members of the community, a judge and a lawyer can be called upon to participate in the final decision (Perrier, 2011).

Contrary to the position of many advocates of *pure* restorative justice, we think that this maximalist integration of reparation does not necessarily remove its restorative qualities. Whether the child is part of the decision or not can actually affect his/her acknowledgement and experience of the process. This remains more the recommended approach, beyond measures such as a simple custodial sentence as punishment.

⁶Also called *Family Group Conferences*.

However, as we have seen above, the processes in which the parties decide at all as to the result of the dispute seem to offer a greater chance of “bearing fruit” than those in which they are mere receivers of a decision. Firstly, the satisfaction that the victims can gain from the process and its results is fundamental. The victims therefore are seen to be more satisfied in the case of reparation enabling them to express themselves and receive an apology from the young offender than those in which they get a simple financial settlement or compensation (Strang & Sherman, 2007).

This is also applicable to the child, for whom the fact of being an active party in the process and at the heart of the decisions and actions linked to the reparation, will create more opportunities to learn, to understand the social imperative of respect for the law and develop a sense of responsibility. Following this logic, making the child responsible becomes an approach, where s/he absorbs guilt for the wrongdoing, and in this sense he or she makes the decision alone rather than under the threat of authority.

2) The different paths leading to reparation

Reparation is thus a more complex process than simple compensation for damages caused. Other important aspects can also affect the child's acceptance of the process of reparation. Whilst not exhaustive, we could mention, for example, the different stages in the procedure, the place and role given to the other members of the community and the possibility of resorting to socio-educative support. There are many other options which can be added to a mechanism of reparation to answer in a more or less specific manner the needs of the child.

The different procedural stages which help to build the *reparation agreement* play an essential role in reaching the desired change in behaviour. These stages can be long and repetitive in the case of *penal mediation* which is played out over several stages and over the long term (up to several months) or quite short or practically non-existent in the case of *sentencing circles* which only require a single session, but which involve several members of the community.

Before the meeting, the child's preparation phase, whether it is in a process of direct (mediation) or indirect (community service) reparation, is essential. This phase ensures that the child remains attached to the process, that his or her psychosocial situation is evaluated and his capacity to carry out the compensation is determined (Milburn, 2002). The psychosocial evaluation is the tool that explains the deep causes linked to the child's environment which led him or her to the offence. It then shifts towards the child's therapeutic or social support requirements. The psychosocial evaluation is not always formalised in the same way according to the restorative mechanisms, but can be seen to be interesting when documenting the evolution of the child and the results of the process.

The place and role given to the other members of the community are essential factors since there exists the power to exert social pressure on the child, but also to guarantee his or her successful reintegration. Although it is not essential in the case of *penal mediation*, the presence of the community is essential in *sentencing circles* or *family conferences*. In the same way, the participation of the parents or guardians, when it is considered by the restorative process, allows

for the 'moderation of the parents' reaction from excessive dramatization, avoiding their indifference or correcting their complacency" (Milburn, 2002).

Moreover, we know that some children are more difficult than others in giving up⁷ delinquent behaviour. Some judicial systems have therefore decided to give a graduated response to answer their specific needs, all the while attempting to include a restorative character. *Group conferences* are thus used in New Zealand as a stronger response which takes place after a simple penal mediation in order to answer the more specific needs of repeat offenders and to increase the social control exerted by the surrounding community actively participating during the process and after it.

Another interesting example is that of *Criminal Reparation* in France, set out in the Act of 4th January, 1993⁸ which presents a hybrid response in which a socio-educative framework is even more formalised. This mechanism is specific in that it includes both a meeting between the child and the victim and socio-educative support. The involvement of the child in the compensation agreement is comprised of several stages: recognition of guilt, realisation of the harmfulness of the criminal act and reflection on the value of what is prohibited. Through this process, the child, who recognises the negatives consequences of his or her actions, engages in a reflection in which s/he progressively admits to the fact that s/he has to compensate for the harm caused to the victim (Morand, 2014). Once this first stage has been accomplished, the educator helps the child to get motivated, taking into account his/her difficulties and resources, to determine how reparation is to be achieved and the modalities of the socio-educative follow-up assured by the educators.

Philip Milburn has described the contribution of this restorative process for the child from a sociological point of view. He considers that "from the educative point of view, such as it is presented by professionals in charge of the reparation process, the pedagogical work inherent in this approach relies on the orders of significance which associate the child to society and that result in not only his words but also his deeds, from which comes the need for a compensatory activity constituting a real experience of these social significances" (Milburn, 2002). This work on social significance will therefore take into consideration the fundamentals of that which is forbidden by criminal law, based on the concept of harm experienced by the victim or society, but also the restoring of the social link, as a value, between the child and the victim, or by default, between the child and his environment. The child thus finds his or her place once again in a society of which s/he was not necessarily aware while increasing the value of his/her skills and potential in the framework of the restorative activity. The restorative process thus becomes the trigger for the abandonment of the child's delinquent behaviour.

Ultimately, if the mechanisms of restorative justice can have enormous potential for juvenile justice, they must also ensure that guarantees exist when confronted with bad practices which could stem from processes bringing the offender and victim together without supervision from the judicial apparatus.

⁷ Phenomenon according to which a person turns away, more or less progressively, from criminal behaviour.

⁸ Amendment of Ordinance of 2nd February 1945 on Juvenile Justice.

Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, adopted by the Economic and Social Council of the United Nations in its 2002/14 resolution of 24th July, 2002, plays this role. They establish important principles such as the balance of the forces between the parties in the choice of the use of restorative justice, the agreement reached by the parties for participation in the process, or even the use of conventional justice in the case of failure of the agreement or the reparation process itself. These principles are important since they can affect the child's perception of the correct character of the process, which we know will have an impact on the rate of repeat-offending (Walgrave, 2007).

In the framework of these standards, the themes discussed above would remain an ideal, even utopic, if their effectiveness had not been measured according to the standards of scientific research in criminology.

II – Reparation in the Judicial System: A Matter of Effectiveness?

In practice, restorative processes are characterised by their diversity and complexity (Gailly, 2011). Despite some limitations, restorative processes have proven their effectiveness particularly with approaches based on punishment and simple custodial sentences, whether based on 'pure' or 'maximalist' restorative justice (A). We will see that the incorporation of restorative processes in systems of juvenile justice is not a given and that it comes up against a number of obstacles (B).

A. Effectiveness Proved but still Controversial

1) The effectiveness of restorative juvenile justice in numbers

Evaluating the effectiveness of restorative justice processes is about evaluating their results when faced with the goals of criminal policy. Yet the finality of the penal response is still debated within the doctrine and the response is not at all the same from one country to another or even within one country⁹. We have to make clear above all that the bulk of studies devoted to these results are tainted by methodological bias and that it is impossible to draw conclusions beyond the programmes studied. This said, the fact that the results of these studies converge strengthens the credibility of the concept.

The effectiveness of the mechanisms of juvenile justice can be analysed first and foremost according to the capacity of these actions to limit repeat-offending. In this area, criminological research conducted by industrialised nations¹⁰ has shown that the approaches considered therapeutic, consisting of restorative approaches focussed on the strengthening of skills and advice – have more chance of success than approaches based on punishment or supervision (Lipsey, 2009).

The aims of restorative justice are wider since they are aimed at the reparation of the harm caused to the victim or society. Restorative justice also provides the possibility of putting the most affected parties of the dispute at the heart of the process by giving them an active role, which conventional justice handed down by a judge does not necessarily do. Measuring the *effectiveness* of restorative justice is distinguished then by the measure of the *restorative aspect* of the processes which takes place on a number of typological levels, measuring in particular the different levels of participation of the victim and the offender, the extent of the compensation to the victim and the state of the relations between the parties at the end of the process (Weitekamp & Kerner, 2002).

Many studies exist, again in industrialised nations, which answer the question of the level of satisfaction of the victims and the rate of repeat-offending in the restorative processes in relation to conventional processes based on punishment and custodial sentences for children in conflict with the law. However, between the different studies, there are various potential biases (pre-selection of cases sent to restorative justice and the choice of the victims to take part in the process, for example) which can affect the validity of the results (Walgrave, 2008). It should also

⁹ See, for example: Robert, Kellerhals, Languin, Widmer, 2001.

¹⁰ Particularly in North America, Western Europe and Australasia.

be noted that there is a lack of studies in low or middle income countries and that the transferability of the results should be challenged by specific evaluation in these contexts.

The fairest conclusion is certainly that there is no ultimate model of restorative justice which can be applied in any case, but rather that "*restorative justice works differently on different people*" (Strang & Sherman, 2007). In practice, it does not work on adults in the same way as on children. It works differently according to gender, the type of crime, the procedures used, the program concerned (context, training of the facilitators), the actors involved and the way in which reparation is brought about (coercion versus voluntary involvement). However, it can be considered that, contrary to justice based on punishment, restorative justice, when well implemented, has no negative side-effects (Walgrave, 2008), which is already noteworthy.

The most recognised meta-evaluation campaigns on the effectiveness of restorative justice, such as those of Strang and Sherman (2007) covering both adults and children, suggest a clear reduction in the rate of repeat-offending for violent crime or crime against personal property compared to conventional justice. The same study has, moreover, proved that restorative justice gives better results in terms of repeat offenders for the most *serious* crimes and those involving *multiple repeat offences* than for simple criminal acts. These last two results could shake up many received ideas in the field of criminal justice. Finally, the study shows that victims are much more satisfied when victim and offender are brought face to face and that these experiences can reduce the rate of post-traumatic symptoms.

Meta-analyses on juvenile restorative justice programmes carried out in the USA and Canada have calculated that *victim-offender mediation* would give a victim satisfaction rate of 80% to 97% compared to less than 60% in classic processes (Umbreit, Coates, Vos, 2003). In some of these studies, the victims have said that, for them, even more than the financial compensation (reparation), it was the willingness of the offender to atone which brought them the appeasement they were looking for.

Another meta-analysis comprised seven evaluation campaigns of programmes in England on *restorative conferences*, in which victims and offenders had consented to the process, and showed that perhaps more than the effectiveness in terms of reduced repeat-offending, it was the satisfaction of the victim and the much reduced cost of the restorative processes compared to conventional justice, which was striking. In these programmes, the cost is reduced by a factor of between 8 and 14 compared to when matters are handled entirely by conventional justice (Strang, Sherman, Mayo-Wilson, Woods, Ariel, 2013).

The effectiveness of restorative justice in terms of repeat-offending, satisfaction for the victims and the cost for society does not prevent it from being disputed by some parties who challenge its logic and the way it works.

2) The critics of restorative justice

Despite these firm results, it is not always necessary to adopt a partisan point of view of what restorative justice could bring. Critical writing actually shows that supporters of restorative justice

can sometimes fall into the trap of generalising its positive effects (Daly, 2002). A critical analysis of the results of restorative justice must therefore be made in light of its potential limits, largely developed by its critics (see, for example, Johnstone, 2002), the more recent of which we will address here.

One of the strongest criticisms of restorative justice is that a part of the population and some of the decision-makers are attached to the concept of *retribution* which communicates the idea that crime is something bad, thus taking part implicitly in the prevention of delinquency. It has been put forward that the role of retribution in collective culture is not at risk of disappearing, which is confirmed by opinion polls even in societies where justice is not particularly punitive, such as in Switzerland (Robert, Kellerhals, Languin, Widmer, 2001). However, if this logic were effective, countries in which justice is very repressive should experience lower rates of delinquency, which is not the case, and in some cases has been shown to increase delinquency¹¹.

Supporters of criminal punishment continue to develop theories which for some people luckily do not exclude reparation as punishment (Duff, 2002). This might raise the expectation of a possible convergence of punitive and restorative theories in favour of mechanisms involving reparation.

These same critics claim that restorative processes would be advantageous for offenders who would then be tempted to take part in them in order to avoid punitive punishment. However, research in this area has shown that these processes are not at all easy for offenders who then have to answer for their crimes directly to the victims without intermediaries and commit to a process of reparation (Lilles, 2001).

Another potential risk of restorative justice is that of heterogeneity of penal processes for similar acts, violating the principle of the punishment fitting the crime. The culture of habit in certain communities could then end in results that are potentially difficult for other people to accept. Sexual assaults, for example, could be considered child disputes in certain male-dominated communities where reparation is thus not on offer, where it would be different in other communities more protective of their female population. This argument is counter-balanced by the fact that in restorative justice, it is the restoration of social links that is sought, and not punishment, which does not have to be equal in similar cases. Some writers therefore talk of "*judicial creativity*" (Johnstone, 2007). Abandoning the idea of commutative justice for the sake of distributive justice is not new and is founded in the individualisation of criminal sentences widely found in contemporary criminal justice. Moreover, restorative justice should respect all human rights including women's and children's rights.

A further danger of restorative justice is that of widening the criminal population to people who would not have been in the conventional justice system in the first place, since restorative justice could be applied to cases that would have been considered as otherwise too soft. This phenomenon is also called "net-widening" (Johnstone, 2002). If this risk is real, it shows the usefulness of managing restorative justice in a clear, normative framework that equally respects the human rights of both the offender and victim.

¹¹ See, for example, Centre on Juvenile and Criminal Justice, *Does more imprisonment lead to less crime?*, 2008, available online at <http://www.cjcj.org>.

It is therefore essential to ensure that other applicable regional and international treaties in the criminal justice process, in particular the recommendations of the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (ECOSOC 2002/14), are respected¹². The latter reminds us that, for example, restorative justice should only be used when there is sufficient evidence of guilt on the part of the offender and that his participation and that of the victim in the reparation process itself is voluntary. The reparation agreements should be freely consented to and involve proportional and reasonable obligations. Where there is no agreement between the offender and the victim, the matter should be brought to court which should pass judgement as soon as possible. The process should be facilitated by trained professionals who are regularly evaluated. Finally, the mechanics of restorative justice should be evaluated and public policy should be shaped by its results.

This tension between the effectiveness of restorative justice and a certain part of the population's need for a repressive aspect to juvenile criminal justice creates an environment of uncertainty which questions its place in judicial systems.

B. The Role of Restorative Justice in the Administration of Juvenile Justice

1) The restorative approach: a fringe model of juvenile justice

Among the various models of criminal juvenile justice, the most representative are certainly of the *proportional punishment* type (repressive approach); the *protectionist* approach which seeks to rehabilitate the child through social community-based actions; *restorative justice* and *actuarialism* based on social control by risk management (McCara, 2010, p. 287). The existence of these various judicial models remains however largely theoretical and the complexity of aligning these established models in criminal policy and its implementation in practice is sometimes problematic, particularly when this alignment is viewed from a historical perspective and when influenced by political, cultural and socio-economic forces that are sometime opposing.

We have seen that restorative justice is particularly suited to children, since it allows for proximity, an appropriation of justice by the actors involved and ultimately the recognition of the concept of justice. Despite this and its effectiveness and its compatibility with the rule of law, it is regrettable to see that the place it occupies is too often on the margins of juvenile justice systems whereas it could certainly be at the heart of the system and be of use in the majority of cases.

One should bear in mind that restorative justice as an approach, vision and methodology for resolving criminal disputes is not subject to binding international treaties. This is understandable if we consider that there is no universal moral order which would be able to demonstrate the importance of one judicial model over another in binding international treaties. The proof is that the Convention on the Rights of the Child, a binding treaty for its signatories, makes no clear

¹² One could also quote the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights of 1966, among others.

reference to restorative justice, nor any other judicial model. The Convention however bears the hallmarks of protectionist and repressive models (McCara, 2010).

Top-level discussions on the necessity of establishing a binding international treaty for nation states made no mention of restorative justice. Expert panel discussions from the Commission on Crime Prevention and Criminal Justice at the beginning of the millennium reported that "several nations states expressed their support for a (international) treaty as long as it is not binding, a position consistent with the opinions expressed by several experts during the preliminary discussions" (CCPCJ, 2002). This work was then directed towards the elaboration of the, non-binding, Fundamental Principles on the Use of restorative Justice Programmes in Criminal Matters (ECOSOC, 2002/14). This first step illustrates the fact that the recognition of the restorative approach is still not universal. We can see however the recent elaboration of documents in the political arena on the international and regional levels which would go in this direction¹³. Several people and international human rights protection organisations have also expressed their preference for restorative juvenile justice such as the Secretary General of the United Nations and the Special Rapporteur on Violence against Children¹⁴.

It should be pointed out that restorative practices are characterised by their diversity, and even within a single population, perceptions of justice and the way in which it should be administered vary enormously. Moreover, international treaties recognise that "*in practice, components of restorative justice can vary significantly according to the principles and philosophy which underpin national criminal justice systems in which they are applied*" (CCPCJ, 2002). This diversity could explain the lack of points of reference as to the shape that restorative justice in a certain context should take.

The lack of political will in favour of this model of juvenile justice could also be explained by the fact that restorative justice represents a kind of potential threat to the *establishment* and the justice administered by state organs. In actual fact, there is competition between the different models of juvenile justice and the different actors that are in charge of them, between the mechanisms of conventional justice controlled by state organs (judges, lawyers) and the supporters of restorative justice: mediators, offenders, victims and the community. This competition was suggested by Christie in 1977 when he denounced the *usurpation* by the state of the disputes between individuals in the framework of conventional justice. He even accuses those who hold power of taking for themselves, knowingly or unknowingly, the material gains of reparation at the expense of the victim who would have benefitted from them in the framework of restorative justice (Christie, 1977). Beyond this material appropriation of reparation, it is the symbolic usurpation of the victim's dispute that he condemns, since, as he puts it, the State takes away one's opportunity to speak, to condemn the offender and to take part in the dispute. If these accusations seem far-fetched, they would not be left indifferent to the reality of the role that restorative justice plays in contemporary juvenile justice systems.

¹³ For example, the Latin American Declaration on Restorative Juvenile Justice by the Latin-American Conference of Justice Ministers. Consulted 4th April, 2016:

http://www.comjib.org/sites/default/files/ACTA%20I%20ENC%20JJR_Cartagena%20de%20Indias_abril14_0.pdf

¹⁴ Special Representative of the Secretary General on Violence against Children (2014). Annual report. Human Rights Council, 25th Session, A/HRC/25/47.

We strongly believe that it would be important to grant restorative justice a greater role in juvenile justice systems whilst keeping solutions adaptable to the variety of situations culturally acceptable to the societies involved.

2) Incorporating reparation into complex models

If we acknowledge, as it was suggested above, that more room should be made for restorative justice in juvenile justice systems, the question arises as to how to incorporate these benefits consistent with its nature. It would in fact be illusory to believe that every form of restorative justice could work globally. The integration of restorative processes is certainly a fastidious task which goes through cycles of failure and improvement validated by scientific evaluation methodologies.

One of the possible outcomes of incorporating the restorative approach in juvenile justice is that the goals of this approach disappear or become diluted. If the mechanisms of 'maximalist' restorative justice are a lesser evil with respect to an approach based solely on punishment (since it gives the offender the chance to atone for his actions) they also present the risk of forcing the victim out of the process and so the opportunity for the offender to learn by the process of confrontation is lost. The spirit of restorative justice is thus lost when the criminal justice system focuses on violations of legislation rather than on the suffering and harm caused to the victim.

When incorporating restorative justice, one should face the other recognised limits of the restorative approach. Some young people for example will have specific therapeutic requirements which go beyond a normal reparation process (addiction, psychological problems, lack of family support, dropping out of school) and who would deserve the inclusion of solutions from the protectionist model. The victims would also need greater support than what only a reparative process could provide. They could for example display the need for support, the need for distance from the offender or for specific therapy (Pahud, 2011). Ultimately, we think that the recognition of the mechanisms of traditional justice can be demonstrated when they are based on processes that are compatible with restorative justice, all the while ensuring that they respect general human rights and children's rights in particular.

In a complex juvenile justice system, it should be kept in mind that a group of penal solutions are imposed in which reparation should be central. These responses should not necessarily be the only ones and should be accompanied by respect for the principles of proportionality and a proportional reaction (Braithwaite, 2002), a choice of options available to the judge, but also to the lawyers and police (such as diversion). The solution that works takes into consideration the different risk factors with which the child is faced and his personal means (motivation, skills, learning method) to suggest a fitting solution. This can include the strengthening of skills, advice and restorative justice (Alder & al., 2016). The chance for the competent authority to offer several solutions or replace them according to the reaction of the child is also advantageous.

Sanctions in juvenile justice should thus discriminate in favour of restorative justice, preferably in its pure form for most cases (Walgrave, 2007). Rehabilitation, thanks to maximalist restorative justice could be considered when the interaction between offender and victim is not possible or not desired. Therapeutic solutions supported by further diminished criminal responsibility should

exist for children suffering from psychological problems or immaturity. The methods that have proven effective in this respect include, among others, behavioural cognitive therapy, motivational sessions and mentoring (Alder et al., 2016). As a last resort, and for a minority of 'untreatable' cases, when the child represents too great a risk for society, incapacitation could be considered.

To complete these complex models, the inter-disciplinary nature and specialist training of the professionals involved should also be the guarantee of the quality of the process. Child protection social services should also play a major role, for example, when overseeing the reparation process and therapy of the most difficult cases.

Finally, the process of incorporating restorative justice should be flexible and adaptable and any change should not be expected overnight (CCPCJ, 2002). The incorporation process cannot actually take place without acceptance by the legislature and even the public, of the aims, principles and mechanisms of restorative justice. We do in fact know that these law-making mechanisms are often dependent on the whims of the agendas of various political movements. These take a contrary position to that of popular opinion or stigmas linked to insecurity or to certain social strata (migrants, young people etc.) and are carried by sensationalist media or fringe political parties, rather than by rational or moral logic surrounding criminal punishment. This phenomenon, often termed *penal populism* (Walgrave, 2007), only guarantees that certain specific efforts are made to ensure that the public are informed and participate in the incorporation of the restorative approach to juvenile justice.

Conclusion

To conclude, the role of reparation in child development leads one to think that restorative justice should be at the heart of juvenile justice systems and that, in so doing, it represents the future. In pursuit of this goal, we favour *pure* restorative justice, notwithstanding *maximalist* restorative justice which also has a role to play in the rehabilitation of children and their reinsertion into society. There are numerous examples of how restorative justice has been successfully incorporated into justice systems and these are worthy of further elaboration¹⁵. Efforts must also continue in order that the mechanisms of conventional justice using this restorative approach are recognised and strengthened, whilst ensuring that they respect human rights. Finally, it would be desirable that restorative juvenile justice is evaluated in low or middle-income countries to document and measure its effect.

It would not do justice to the restorative approach to forget its role in mechanisms which do not strictly speaking have anything to do with juvenile justice but which contribute to reducing violence and tension between children and those with whom they come into contact. As an example, *Dialogue Circles* are used in several countries particularly in some communities in Brazil to break down relationship tensions between its members. Of further note are the *Victim/Offender Meetings*, organised in several countries particularly in Canada in the side-lines of criminal proceedings, which bring together offenders and victims of similar crimes but in different circumstances, to satisfy their need for mutual understanding (Rossi, 2012). Further, restorative justice has been used for children in the framework of transitional justice processes, for example, in the Truth and Reconciliation Commission in South Africa (CCPCJ, 2002).

¹⁵ In non-comprehensive and anecdotal fashion, one could quote examples of the incorporation of restorative justice in the juvenile justice systems of certain countries. Reparation was reintroduced in France by the Act of 4th January 1993, the introduction of the Reparation Bill in the Crime and Disorder Act 1998, and the introduction of Youth Offender Panels in the Youth Justice and Criminal Evidence Act 1999, England, the incorporation of Penal Mediation in the Act of May 2014 on the Protection of the Child in Burkina Faso and the Act of 6th April 2004 on Community Service, Community Service in the Act of 20th June 2003 on Juvenile Criminal Law in Switzerland.

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