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Beyond Restorative Justice to Restorative Practice

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Crime as Conflict

Victim-offender-mediation (VOM) is usually defined as a process which is offered to the parties of a dispute arising from the commission of a crime. VOM refers to a communicative process in which the harm done is addressed, facts and feelings are ventilated, and — in ideal, successful cases — an apology and compensation/restitution are part of a holistic redemption which may lead to some understanding and psychological closure. With the assistance of a neutral mediator the parties identify the disputed issues of the harm done, develop options, consider alternatives and endeavour to reach an agreement about reparation.¹ The goal is to get the act out of the system of both victim and defendant; sometimes VOM may even lead to reconciliation.

Victim-offender mediation is just one model of restorative justice but in the present European context the most important one (Pelikan and Trenczek, 2006). Restorative justice (RJ) is seen as a broad approach oriented on repairing as far as possible the harm caused by crime (Zehr, 1985; Wright and Galaway, 1989; Zehr, 1990; Wright, 1996; Cornwell, 2006; Wright, 2008: 199-200; Trenczek 2012). In 'modern', 'Western' societies the criminal justice system defines crime in terms of a violation of the laws of the state. Therefore, the state alone becomes responsible for determining punishment and, therefore, the accused is protected from the personal revenge or retribution

1. Reparation (German: *Wiedergutmachung*) is different from restitution which is a narrower concept, replacing or repairing what was damaged; reparation addresses also non-material damages and can also include symbolic actions.

which might be exacted upon him or her by a victim or victim supporters. The function of the criminal justice system is to protect rights, to determine guilt and to decide punishment. Therefore, the focus is on due process and a fair trial. However, victims often feel that they are left out or even used by the system rather than having their needs attended to. When victims are included in the procedure it is usually to act as witnesses in the contest between the accused and the state. In this role their story of victimisation is often questioned, and consequently victims often report feeling re-victimised by the court procedures.

RJ places the victim with the offender at the centre of the process. Instead of defining crime in terms of breaking the law, the restorative justice approach defines it in terms of the harm done by one person to another. The focus of interest is not on the abstract violation of the peace under the law, but rather the problems of the persons directly involved: victim and offender. In general, a bad deed is not committed against the state (except in so-called victimless crimes such as consumption of illegal drugs, violation of immigration rules, tax fraud, etc.) but first and foremost crime is a physical and emotional violation of the integrity of a human being. This is true not only for personal, violent crime but for property offences as well (Maguire, 1980). In Europe we owe to Nils Christie the revival of the understanding of *crime as* a cause, expression and consequence of a *conflict*, of difficulties and problems of and between victim and offender (Christie, 1977:5; cf. Hanak, *et al.*, 1989; *Figure 1*).

With regard to relevant criminal offences and the relationship of the victim and the defendant we distinguish at least *two levels of conflict*. The first relates to the act committed itself. Anger, rage and frustration may come over a victim after being attacked and violated. The victim has an interest in the whereabouts of stolen goods or may want compensation for the material loss, obviously contrary to the interest of the perpetrator. Within our mediation practice we call these cases 'situational conflicts,' in which there was no prior contact between the victim and the defendant. But now there is emotional stress as well as financial damage:

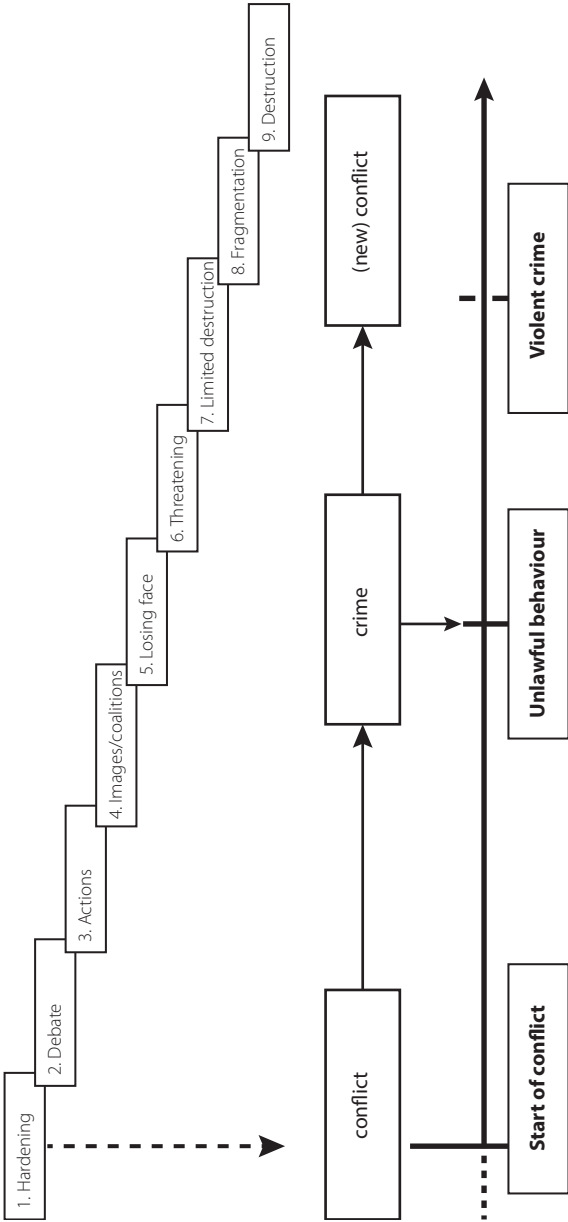


Figure 1: Crime as Conflict

One evening, the apartment of a lady was burgled by a young, unemployed man. At this time she was living under quite stressful circumstances. Just divorced, with financial problems, she took the crime as just another piece in the chain of her unfortunate fate for which she could not blame anybody other than herself. On the other hand, the perpetrator also had a huge number of problems, no work, addiction, facing criminal charges, and no future ...

Both the victim's and the offender's lives have been disrupted. Both have been distressed and are looking for ways to restore equity but these may contradict the attempts of the other. The victim may try to achieve material or psychological compensation; the defendant may use techniques of neutralisation to justify the wrongdoing.

The second level of conflict relates to the problems the parties have had prior to the offence. In more than two thirds of the 600 cases referred annually to *Die Waage* ('The Scales') Dispute Resolution Centre in Hanover, both victim and offender have known each other prior to the offence and the offence was the result and expression of unresolved conflicts. In the case of long-lasting conflicts between two people the boundary line between the role of the offender and the role of the victim is sometimes nebulous and dependent on the fact of who files a charge first or whose act is defined as unlawful because of the involvement of law enforcement officials.

Two men quarrelled for a long time about some neighbourhood issues and the ownership of some borrowed material until the one who was labelled the offender broke into the dwelling of the other and took the things he claimed to be his own.

According to Friedrich Glasl conflicts tend to develop in (nine) *escalation steps* (Figure 1), from an initial hardening of arguments to a dispute followed by early actions (instead of words) to threatening strategies and total destruction (Glasl, 2011: 33). On each level of conflict escalation the dispute gets more and more polarised, the parties manoeuvre themselves into negative roles and fight each other until an established concept of enemies fosters strategies of limited damage and, finally, the destruction and downfall of the hostile party are pursued intensively. Highly escalated conflicts tend to turn into violence; Kathleen Turner and Michael Douglas have shown a

copybook example in the black comedy ‘The War of the Roses’, directed by Danny DeVito in 1989, a movie which is used intensively in family mediation training in Germany. As you may know, Oliver and Barbara’s quarrel culminated in a horrific bloodbath as the two crashed from the ceiling together with the chandelier.

In reality *domestic violence* is not a comedy and violence in relationships is not a rare experience. According to a survey of the German Government about every fourth woman is (at least) once beaten or abused physically or emotionally by her (ex-)spouse (Müller and Schöttle, 2005).² Domestic violence is widespread but in public perception a mostly taboo problem which does not occur only in ‘antisocial’ problem families or in ‘macho-cultures’ but is a phenomenon of society in general. Violence very often occurs in highly escalated partner conflicts, when couples break up, especially when there is a fight about the custody of the children or access rights. In these cases violent people act dreadfully and unjustifiably because they are swamped and unable to cope with the conflict situation in a decent way (Trenczek and Petzold, 2011; Dietrich and Paul, 2006: 13; Krabbe, 2008: 49). Violence in relationships often expresses intricate and complex fabrics of power and love, of dependency and sexuality (Pelikan, 2002). Violence is mostly a sign of weakness; violent persons want to establish power but are actually weak in person. This is not said to remove the taboo from violence but rather to understand the mechanics and the circle of the violence to prevent further aggression. Violence happens often at the end of highly escalated conflicts. Hence, any process which supports the parties in de-escalating the conflict, and is empowering to the parties in conflict, will prevent violence.

From the beginnings of restorative justice the theme of domestic violence and the use of criminal law interventions have sparked controversy (Pelikan, 2002: 1; Krieger, 2002). The core of this critique and even rejection was whether mediation is an instrument that should and could be applied to cases of domestic violence at all; particular criticisms are the supposedly defective consideration of structural power imbalances in the mediation procedure and inadequate training of mediators

2. In our daily practice most victims are female, about 5% to 10% are male.

to look behind the culprit's justifications, and to recognise the true power relations and relations of violence behind the women's non-genuine readiness to agree to an arrangement (Pelikan, 2002: 3).

Meanwhile the refusal has changed to a differentiated perception and a willingness to co-operate (Pelikan, 2010: 17ff.). This is especially true with the Hanover Intervention Programme Against Violence in Families (HaIP), described below, a network of women's support groups, the equal opportunities office, the woman and child crisis intervention shelter, the police and prosecutor's office, immigrant organizations, *Die Waage* Dispute Resolution Centre and others (<http://www.waage-hannover.de/html/haip.html>). The specific approach of intensive counselling with elements of mediation

is likely to work in complicated conflict situations taking into account the individual living conditions and needs of the parties involved, regardless of the juridical facts of the matter. In this respect the suitability of mediation particularly for special relations and life situations is especially great (Glässer, 2008: 157).

However, it is necessary that

the perception of the woman is taken seriously in the procedure, further the perpetrator needs to be led in separate one-to-one counselling to an understanding of the grief which he has caused to the woman and, finally that these perspectives can be communicated in a professional setting ... (Pelikan, 2010, 26).

Restorative justice, including victim-offender-mediation, is different from the legal way of dealing with crime, it is victim-oriented but not predominantly against the offender. This is especially the case in family disputes. *Family mediation* deals quite often with violence and crime, despite the terminological resemblance, even more than the so-called victim-offender-mediation approach. By definition restorative justice is not a process that aims for punishment. It is not 'penal mediation' (as the French say), but *mediation in penal matters*, which means conflicts that have become relevant within the criminal justice system (cf Europe Committee of Ministers, 1999; Trenzcek, 2003). Regardless of whether or not the act is defined as criminal,

or prosecuted, mediation is a systematic approach which aims at autonomous and consensual conflict resolution. VOM is not a completely new or unique process but finds its roots in the way many indigenous cultures have traditionally dealt with deviant, disruptive or victimising behaviour within their communities. In New Zealand, Maori and Pacific Island communities, when dealing with offending within their own communities in family group conferences, are able to follow their own protocols for the conduct of meetings, use their own language, and produce outcomes that are culturally appropriate (Maxwell and Morris, 1993; McElrea, 2011). On the other side of the world victim offender mediation as part of the restorative justice movement in Europe stands on a theoretical foundation very close to the work of the Norwegian criminologist Nils Christie who stated as early as 1977 that conflicts are important elements in society:

It is the *conflict itself* that represents the most interesting property taken away, not the goods originally taken away from the victim (Christie, 1977: 5, emphasis in original).

Justice as Fairness — Justice as Participation

‘Justice as Fairness’ is the title of an article by John Rawls (1921–2002) published in 1958 on which his main work *A Theory of Justice* (1971) is based, one of the most important works of legal theory (Rawls, 1958). According to Rawls fairness is the basis of justice. In this view fairness is very much linked to a fair procedure, an approach on which the Anglo-Saxon common law is based. Different from the German (continental) statutory law, the common law system is founded mainly not on material legal positions, but is traditionally process-oriented and develops its legal orientations to a great extent from the case-law of precedents. Hence, it is not surprising that mediation was rediscovered in the USA, after the end of the 1960s. If the conflict is dealt with in courts the litigants fight to win, but they do not solve the conflict. Once the verdict is decided by the court the parties very seldom know why they have won or lost. Lawyers and other experts who have taken over tell them that they have fought intensively; if the case was lost, this is unfortunate, but the court is to blame. Lawyers are trained