

## **Overcoming Violence and Pursuing Justice**

*An Introduction to Restorative Justice Procedures*

by Guillermo Kerber

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As part of its contribution to the Decade to Overcome Violence: Churches Seeking Reconciliation and Peace (DOV), the World Council of Churches has identified four thematic foci. One of these four foci is related to “issues of justice”. The present article does not seek to unfold all the implications of this focus but to reflect on one dimension of justice. It brings together some of the presentations I have made on DOV and restorative justice in different meetings since 2001. It tries to show the links between violence and justice and to develop some reflections on the background of restorative justice, a theoretical framework of the work of truth and reconciliation commissions all over the world.

### **From Ayacucho, Peru, to Bomaru, Sierra Leone**

Ayacucho, Peru, April 2002: The testimonies of the victims of political violence in Peru are heard in the amphitheatre of the university. In this university, Abimael Guzman, also known as Comandante Gonzalo, convoked students and professors to create the *Sendero Luminoso* (Shining Path), one of the main actors in the violence that racked Peru for years. For the very first time, the general public was now able to listen “live” to the voices of peasants, students, professors, storekeepers who themselves suffered the violence that caused thousands to die or disappear. All of us who were in this room were able to see how these persons were transformed as they talked. They started with a very low, almost inaudible voice. Little by little, they felt more sure and they raised their voices as the posture of their bodies changed significantly. The stories (some of them in *Quechua*, the language of some indigenous groups in Peru) were heard attentively by ten commissioners and by two to three hundred persons who filled the room. The public hearing demonstrated a process wherein the victims recognized themselves as persons, as citizens with rights and with a historic responsibility to try and prevent their experience being repeated, in Peru, in Latin America or anywhere in the world - “never again”(1). This was the beginning of the public hearings of the Peruvian truth and reconciliation commission.

Let us travel some ten thousand kilometers to the east, about eight months later. After a day and a half trip on dusty roads, we arrived at the little village of Bomaru, Sierra Leone, less than twenty kilometers from the Liberian border. Here, twenty years ago, the violent conflict began that killed thousands of people and brought forth unthinkable atrocities among this peaceful and friendly people. It is not a day like any other. As the chief received us, he told us that the official testimony-taking ceremony would start in a few hours. Commissioners from the Sierra Leonean truth and reconciliation commission, political figures and military authorities would be there, as well as diplomatic representatives from neighbouring countries, the United Nations Mission for Sierra Leone (UNAMSIL) and Christian and Muslim clergy. Speeches during the ceremony showed the profound wish of the people to overcome violence definitively and to build peace with justice.

Far apart geographically, historically and culturally, Peru and Sierra Leone experienced decades of political violence that left thousands of dead, disappeared and mutilated people, as well as orphans and widows. In seeking means of overcoming violence and strengthening democracy, both nations chose truth and reconciliation commissions as an instrument that could help them in this process.

### **Truth and reconciliation commissions (TRCs)**

The history of TRCs can be traced to the beginnings of the 1980s. They were particularly important in Latin America where, in countries like Argentina and Chile, they were established after military dictatorships.

In the following years, TRCs expanded all over the world with some common elements: the investigative role or gathering of information; the kind of issues investigated: crimes against humanity, with more or less specificity (some TRCs investigated only the cases of disappearance, for instance); the precise time-frame and the responsibility of the state in the investigations. Other elements have differed in the various commissions: the presence of international experts; the granting of amnesty to perpetrators who voluntarily attend the commission public hearings, as was the case of the South African TRC; the relationships with ordinary criminal procedures.

This article will not offer an in-depth examination of the implications of these commissions, as several authors already have done this (2). What I would like to do is to find the basis of the implementation of justice as a method of overcoming violent conflict situations. To do so, we turn to one of the well-known stories near the beginning of the Bible.

### **Back to the beginnings: an interpretation of Cain's story**

Violent conflict is placed at the beginning of the history of human beings, in the first chapters of the Bible. Immediately after the first sin, the Original Sin, which is a sin against God and which is not violent, comes the story of Cain. Let me quote it, as I shall be referring to different parts of it:

*Now Adam slept with his wife, Eve, and she became pregnant. When the time came, she gave birth to Cain, and she said, "With the Lord's help, I have brought forth a man!" Later, she gave birth to a second son and named him Abel. When they grew up, Abel became a shepherd, while Cain was a farmer.*

*At harvest time, Cain brought to the Lord a gift of his farm produce, while Abel brought several choice lambs from the best of his flock. The Lord accepted Abel and his offering, but he did not accept Cain and his offering. This made Cain very angry and dejected. "Why are you so angry?" the Lord asked him. "Why do you look so dejected? You will be accepted if you respond in the right way. But if you refuse to respond correctly, then watch out! Sin is waiting to attack and destroy you, and you must subdue it."*

*Later, Cain suggested to his brother, Abel, "Let's go out into the fields." And while they were there, Cain attacked and killed his brother.*

*Afterward the Lord asked Cain, "Where is your brother? Where is Abel?" "I don't know!" Cain retorted. "Am I supposed to keep track of him wherever he goes?" But the Lord said, "What have you done? Listen – your brother's blood cries out to me from the ground! You are hereby banished from the ground you have defiled with your brother's blood. No longer will it yield abundant crops for you, no matter how hard you work! From now on you will be a homeless fugitive on the earth, constantly wandering from place to place."*

*Cain replied to the Lord, "My punishment is too great for me to bear! You have banished me from my land and from your presence; you have made me a wandering fugitive. All who see me will try to kill me!" The Lord replied, "They will not kill you, for I will give seven times your punishment to anyone who does." Then the Lord put a mark on Cain to warn anyone who might try to kill him.*

Cain's story shows some of the basics of violent conflict. A man kills his brother. He denies it. He is punished for his murder. What else can we find in this well-known story? We find a crime, a victim and an offender, the institution of proceedings, a verdict, the punishment, a plea, an appeal, the definitive sentence.

As the reader will have realized, I have intentionally tried to read, to interpret, Cain's story from a legal perspective. I probably did the opposite of what the author of this chapter of Genesis did. From his own experience of trials or administration of justice, he drew this picture of how evil, and specifically violence

between human beings, was present from the beginning of history.

A direct offence to God (the first, original sin) is followed by an indirect offence to God through violence against the brother. The latter appears immediately after the former. And in the New Testament, as a correlate to this, when Jesus is asked by the Pharisees, “Which is the greatest commandment in the Law?”, he answered, “Love the Lord. Love your neighbour” (Matt. 22:34–40).

### **Current criminal procedures**

Though thousands of years have passed since this story was recorded in Genesis, the proceedings at the fundamental level are still the same. The history of legal development (where Hammurabi’s code or Talion’s Law played a key role) traces the attempt to guarantee correct proceedings in order to achieve justice.

If we schematize the process, we would have the following:

OFFENDER ▷ TRIAL ▷ SENTENCE ▷ PUNISHMENT (IMPRISONMENT)▷ JUSTICE?

CRIME √

▷

VICTIM

In the framework of the current criminal system, attention is placed on the crime that has been committed. Punishment is related to the crime and imprisonment or confinement is the most common way to punish the criminal. The goal of confinement is to protect society from the danger of the criminal whom society expects will commit new crimes if he/she is free. The means of punishment is also depicted as pedagogical: to prevent other citizens from breaking the law.

Let me underline that almost immediately after the crime is committed, the victim is forgotten and the central issues become “what”, “how”, “how many times”, etc., that the law was infringed. And in the biblical story, Abel too is almost forgotten while Cain remains at centre stage as protagonist of the story.

Several lawyers and judges have roundly criticized this system, although it is current nowadays throughout the whole world, and critical criminology has become an important trend in criminal law theories. It also has been criticized by philosophers like Michel Foucault, whose *Surveiller et punir* (1975) and related writings offer a deep, serious condemnation of prisons as closed and totalitarian institutions. Other opponents of the system have focused on the processes themselves, and the failure to rehabilitate the criminal after serving his/her sentence. This is why, in the schema above, “justice” is followed by a question mark. Is justice really achieved through this process?

The current criminal system stresses punishment, the protection and education of society through isolation of the criminal. Little or no attention is given to those victims who have suffered the aggression, and who during the trial may suffer again from the intervention of judges, prosecutors or lawyers who ask questions and make affirmations. Some victims come to feel guilty for the complaint they have lodged.

Why do I concentrate on criminal and legal procedures? Because nowadays, at least in Westerners’ minds, justice has connotations mainly associated with law rather than ethics. If we ask people on the street what justice is, they will probably refer to legal justice and related components (court, law, judges), and not to good and evil. Only at a more intellectual level will we find other approaches to justice. And in many cases at this level, the justice referred to is economic justice. But this association of justice and legal procedures does not only come from public opinion. The etymology of justice tells us justice comes from *ius*, and from *ius* we also have juridical, judge, etc. because in Latin *ius* means law or right.

## Changing the focus: the restorative justice perspective

As a follow-up and an attempt to benefit in practice from the works of former critics, the principle of restorative justice has been developed. What is restorative justice? For John Braithwaite, an Australian criminal lawyer, it means restoring victims; that is, a more victim-centred criminal justice system that is also committed to restoring offenders and restoring community(3). Restorative justice is an attempt to make a holistic approach to crime, bringing together offender, victim and community through a process of dialogue aimed at restoring relationships within the community. Although punishment is not forgotten, it is not the central part of the process.

Different models of restorative justice have been applied in the last twenty years: mediation, conferencing, community and circle models are some of the ways in which the central intuitions of restorative justice have developed.

However, we may still ask: Restore what? Restore implies *back to*. But back to what, if the previous situation was not just? Let's take the South African example, because the truth and reconciliation commission system there used restorative justice as the theoretical framework of its procedures. The previous condition in that nation had been far from just. Therefore, restorative justice should mean not only "back to" a previous just condition (a reference to the paradisiacal situation is not misleading as Braithwaite wrote about "ideal society") but "*pro-storative*"; that is, building new and just relationships in the community.

## Background of the theory

Let me underline some key elements of restorative justice models and relate them to theological and ethical reflections.

### *Victim-centred process*

As I have tried to show in explaining the current criminal procedure, victims have been left aside in the process: put in the margins, if not excluded. A victim-centred process tries to bring the marginalized, the excluded, into the scene. The different models implemented are concrete attempts to bring to the legal system or to active participation in the community those who have been marginalized, excluded. The concept of "exclusion" probably reflects more accurately than "marginalization" the present situation of these persons in modern societies. And when we talk about them as victims, we underline the suffering they have experienced.

This concern to include those who are not able to participate with all their rights in the society is not only a guiding principle of critical sociology but one of the principles of a theory of justice developed by one of today's most well-known liberal ethicists. John Rawls(4) introduces two principles of justice by which, if adopted, we would be assured an ethically acceptable society, a just society. The first two principles state that:

*Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity. (5)*

The first principle, called the "liberal principle", refers to basic liberties such as political liberty, freedom of speech and assembly, liberty of conscience and freedom of thought, among others. The second principle, which in fact has been much more discussed, is called the "difference principle".

For Rawls, a just society is one that puts together both principles. In the majority of our societies, there is a strong demand to fulfill the first principle. But what

about the second? Are inequalities arranged so that they benefit the least advantaged?

While developing victim-centred processes, we are trying to work towards inclusion (and against exclusion) and at the same time to benefit the least advantaged.

### *Community, dialogue, responsibility and solidarity*

Community plays a key role in restorative justice models. Crime is no longer considered in isolation but in the context of other relationships and links within the society. The victim is not only the individual but also his/her relatives, friends, community, the society as a whole. But something similar is also the case with the offender. He/she is seen not only as an individual but also in relation to his/her relatives, friends, community, the society as a whole. So, as part of the whole society, we are each victims as well as offenders, and therefore jointly responsible both for overcoming the violent conflict and for restoring relationships. We are not able to say, as Cain did, "Am I my brother's keeper?" We should realize that we are not only innocent victims; we share some level of responsibility for the violence we have suffered as members of the whole.

Theological and ethical reflections underlie this conclusion. From the Christian perspective, there is solidarity in sin but also solidarity in redemption. Paul wrote in Romans 3:23–24: "Since all have sinned and fall short of the glory of God; they are now justified by his grace as a gift, through the redemption that is in Christ Jesus." And in First Corinthians 15:22 we read: "For all die in Adam, so all will be made alive in Christ." Doctrines of original sin, justification, grace and redemption have been built reflecting on these perspectives regarding solidarity and responsibility. The scene of Jesus' meeting with the adulterous woman (John 8) may be taken as an example of Jesus' practice of restorative justice.

Community, solidarity and responsibility also play key roles in the writing on contemporary ethics of another author. Let me refer briefly to the philosophical position of Karl Otto Apel(6).

Apel's ethics brings together the two parts of Weberian ethics(7). Max Weber reflected on human action, and wrote that either you act on your principles, norms and values, or you act thinking of the consequences of your action. You are following what he defined in the first case as "principle ethics", and in the second as "responsibility ethics". Though at the beginning of his argument he stated that these two ethics are not reconcilable, he finally called for an ethics that combines the two. Apel's ethics is called "post-Weberian" because he tries to underline both approaches to human action. The cornerstone of Apel's ethics is solidarity. Whenever you act, you should realize that you are participating in two different communities, the "ideal communication community" and "the real communication community". Through discourse that is not monological but dialogical, one should seek consensus among the communities. Some of the key elements of Apel's "responsible solidarity ethics" are dialogue engaging all parties involved in an issue, and the fostering of a sense of co-responsibility.

As can be seen, many components of Apel's ethics may be employed as foundational to restorative justice procedures.

### *Shifting from community level to national and international levels, and the role of the churches*

As we move from the community level, where different methods of restorative justice have been applied, to national and international levels of engagement, many questions arise. The practice of restorative justice has been restricted primarily to "minor" crimes, and especially to the areas of youth justice or family procedures. Can restorative justice as a practice go beyond the community level to national or international levels? Can it deal with economic crimes, for example swindling, embezzlement, and so on? Can it be used as a comprehensive approach to all kind of crimes and therefore as an alternative to current

forms of criminal justice?

Many authors on this subject are reluctant to admit that the “restorative justice paradigm”, to use this term in its broadest meaning, can be used successfully in political and economic proceedings at the national or international levels. However, the South African Truth and Reconciliation Commission saw its work as a form of building restorative justice instead of retributive justice. At this level, issues such as impunity, reconciliation and reparation continue to be part of the whole picture.

Here is where I think churches have a unique role to play. Many times, they are hesitant to get involved in what they see as purely juridical or political issues, and only a few church leaders have had an important role in peace and healing processes. There are notable exceptions; for instance, the participation of Archbishop Desmond Tutu in South Africa, Cardinal Evaristo Arns in Brazil and Bishop Juan Gerardi in Guatemala. But not only the ecclesiastical hierarchy should be involved. The church as community can commit itself to this important task, building reconciliation, offering spaces for symbolic reparation, accompanying victims and perpetrators in their search for reconciliation with justice. Both in Peru and Sierra Leone, church communities are tackling these difficult matters related to violence and reconciliation, and they are developing strategies to achieve lasting peace. A seminar in Peru in 2001 was the first time Catholics and Protestants sat together to discuss these kinds of issues from a Christian perspective, going beyond the political analysis they were used to. In a workshop in Sierra Leone in December 2002, Christian and Muslim leaders together with traditional chiefs searched for symbolic ways of reconciliation and reparation, according to the heritages of their cultures. Churches’ involvement in these processes may contribute to a holistic approach to the overcoming of violent conflict and to building reconciliation with justice, at the same time stressing the spiritual dimension of the conflict and of the reconciliation processes themselves.

## NOTES

1. “Never again”, “¡Nunca más!”, was the title of the report of several truth commissions and other investigative bodies in Latin America in the last three decades, proclaiming their position in relationship to human-rights violations.
2. As far as I know, the most complete and interesting publication presenting the work of twenty TRCs is Priscilla Hayner, *Unspeakable Truths*, London, Routledge, 2001. The bibliography on specific cases is enormous, especially on the South African one, e.g. Alex Boraine, *A Country Unmasked*, Cape Town, Oxford UP, 2000. A more comprehensive study that includes TRCs among other issues dealing with political transitions is Neil J. Kritz ed., *Transitional Justice*, Washington DC, US Institute of Peace Press, 1995.
3. John Braithwaite, *Restorative Justice and a Better Future*, D.J. Killam Memorial Lecture, Dalhousie University, 1996. This and other articles published on the Internet have been collected in Guillermo Kerber, *Restorative Justice: Selected Readings* (mimeo), used in several workshops organized by the WCC.
4. John Rawls, *A Theory of Justice*, Oxford, Oxford UP, 2000. A professor emeritus at Harvard University, Rawls wrote *A Theory of Justice* in 1971 and since then his book has become a classic of contemporary ethics and political theory. Developing some ideas he had previously written in *Justice as Fairness* (1957), in *Theory*, Rawls presents his two principles of justice, pp.53ff.
5. This is the final statement of the two principles of justice for institutions as Rawls called them, p.266.
6. Apel, Frankfurt Goethe professor emeritus, together with Jürgen Habermas, both contemporary German philosophers, propose what they call “communicative ethics” or “discourse ethics” (Apel prefers the latter, “Diskursethik”).
7. Max Weber (1864-1920), one of the parents of modern sociology, developed his two ways of understanding ethics in his conference on “Politics as Vocation” (1918).

Guillermo Kerber is Programme Executive for Impunity, Truth and Reconciliation at the International Affairs, Peace and Human Security team of the WCC.