

Exploring the relationship between children's rights and the practice of restorative justice.

Tim Chapman
Visiting Professor

Centre for Law, Crime & Justice, Law School, at the University of Strathclyde

A. Wolthuis & T. Chapman (Eds.) Restorative Justice from a Children's Rights Perspective. Eleven International Publishing, The Netherlands to be published in 2021.

- The book is about the relationship between restorative justice and children's rights.
- It attempts to have a global scope. It reviews international documents and describes legislation and practices in Europe, Africa, Asia, Latin America, North America, Israel and New Zealand.
- Most of the chapters demonstrate the compatibility between rights and restorative justice and the importance of a rights approach both in countries initiating restorative justice and in countries developing restorative justice beyond its origins within the criminal justice system.

Restorative practices can steal the rights of children too: the importance of value-led and evidence-based standards

My Chapter

*Restorative Justice:
connecting people to restore just relations

- *Restorative Justice is an inclusive approach of addressing harm or the risk of harm through engaging all those affected in coming to a common understanding and agreement on how the harm or wrongdoing can be repaired, relationships maintained and justice achieved.*
- European Forum for Restorative Justice

Article 2 of the UN Convention on the Rights of the Child (CRC) is designed to protect children from discrimination

- Very little research and only recently is there an emerging field of theory on race, gender, neurodiversity, LGBTQ+, disability.
- Some research has found that restorative justice has not been effective in countering the economic and social disadvantage of indigenous young people in the New Zealand and Australian youth justice systems (Maxwell and Morris 2001; Hayes and Daly 2003; Jackson and Henderson 2006; Little, Stewart & Ryan 2018). Family Group Conferences, based upon indigenous concepts and practices in New Zealand, were actually found to be less effective in meeting the needs of young Māori people (Moyle and Tauri 2016). Cunneen (2002) concluded in relation to the politics of decolonisation that changes brought about by restorative justice have at best been superficial and at worst have reinforced existing power relationships.

Article 3 of the CRC places primary consideration on the best interests of the child.

- Young people's participation in restorative justice has been criticised (Haines, 2000; Hayes and Hayes, 2008; Maruna et al., 2007; Lynch, 2010; Newbury, 2011) on the grounds that their immaturity and stage of cognitive development disadvantages them in a process which demands verbal ability, empathy and concentration.
- For some (Haines, 2000; Wood 2020), the best interests of the child is in tension with the restorative value of responsibility and the process of making oneself accountable to the person whom one has harmed.
- Wood (2020) refers to research which has found that not only does restorative justice not address the symptoms of serious trauma, but it may aggravate them through the stress of disapproval and shame (Bazemore 1998). Wood (2020) maintains that a traumatised young person reacts to triggers and, thus, is not a rational and accountable actor.

Article 12 refers to respect for the views of the child

- Barnes (2015) observed young people in Northern Ireland feeling vulnerable and ill-equipped to express their views in a 'room full of adults' (Haines 2000). Consequently, they can be intimidated, orchestrated or coerced into doing what is expected of them. Observing restorative conferences, it often seemed to Barnes that the process was scripted to lead to an apology and to agreeing to a predictable reparation plan.
- Applying the knowledge and methodology of the discipline of linguistics to the process of the restorative conference, Martin, Zappavigna, and Dwyer (2007: 230) found that The practitioner controls the communication: "The convenor initiates virtually all exchanges and introduces virtually all explicit evaluation, to which the young person responds compliantly a word or a phrase at a time." (2007: 235)

Article 12 continued

- According to Rosenblatt (2015), during youth offender panels the community panel members do most of the talking and the Youth Offending Team worker dominates the decision-making through a report that recommends what the young person must do.
- Hoyle, Young and Hill (2002) observed police officers pursuing their own preferred outcomes on many occasions rather than enabling the participants' wishes to emerge from their dialogue. Often victims were not asked what they wanted to happen.
- Doubts have been expressed about adults exerting undue influence over the child's admission of responsibility for the harm and over the child's agreement to participate in the process. Skelton and Frank (2004: 205) stated "Because most current restorative justice processes require the offender to acknowledge responsibility before referral to a restorative justice program, the rights to be presumed innocent until proven guilty and to remain silent are no longer applicable. Some argue that the offender is voluntarily relinquishing these rights in order to benefit from the restorative justice option, but the extent to which these decisions are made voluntarily is in doubt."

Article 12 continued

- Young people in restorative conferences have been observed as struggling to express themselves and to give a full account of the harm that they have caused (Beckett et al., 2005; Hayes, 2006; Bolitho, 2012;). As a consequence, their meaning may be misinterpreted, and their sincerity may be distrusted.
- Partly this may be due to language and communication problems which tend to be more prevalent among disadvantaged young people who offend (Bryan, 2004; Sanger, Moore-Brown, Magnuson and Svoboda, 2001) and partly because the process, often scripted and based on respectful conversation, empathy and taking responsibility, tends to privilege middle-class styles of communication (Willis, 2020).

Article 12

- Bazemore (2000: 48) “unless repairing harm is at the core of the definition of restorative justice, ... stakeholders and staff will often slip into the traditional and comfortable mode of simply trying to help or hurt the offender.” Hoyle et al. (2002) found in the study of the Thames Valley Police restorative justice initiative that material reparation was rarely agreed and that most reparation took the form of an apology irrespective of the victims’ wishes. As a result, victims were often unmoved by written apologies. Many had been led to expect financial compensation. Where this was agreed, there were cases in which the commitment to compensate was not kept.
- Rosenblatt (2015) found that referral orders, a restorative provision for young people in conflict with the law in England and Wales, consisted of a programme of activities designed for rehabilitation rather than for reparation. Even when reparation was part of an agreed plan, the young person was referred to a pre-existing reparation project rather than one designed to meet the victim’s or community’s needs arising from the harm. In some cases, it was decided that the referral order could be discharged even though the young person had not completed the agreed reparation.

Article 12 continued

- It is hardly surprising that many schemes report a very low level of direct victim participation in restorative processes. Newburn (2002) found 13% victim attendance, Crawford and Burden (2005) found an average of 9 per cent and Rosenblatt (2015) observed only one out of 39 panel meetings in which a victim participated. Hoyle, Young and Hill (2002) calculated that victims participated in 14 per cent of the processes in the Thames Valley Police restorative programme. This led to practitioners constructing surrogate victims or imaginatively describing the impact of the offence without any direct evidence. Such tactics can take the process away from its restorative and reintegrative principles towards shaming and stigmatising the young person.
- Research suggests that in Northern Ireland (Barnes, 2015) the Public Prosecution Service exerts a controlling role over the conference plan, regardless of stakeholder satisfaction. Facilitators were heard to say: “I need enough in this plan to get it through the Public Prosecution Service” or “at the end of the day, the Public Prosecution Service have to decide if they want to agree with the plan”.

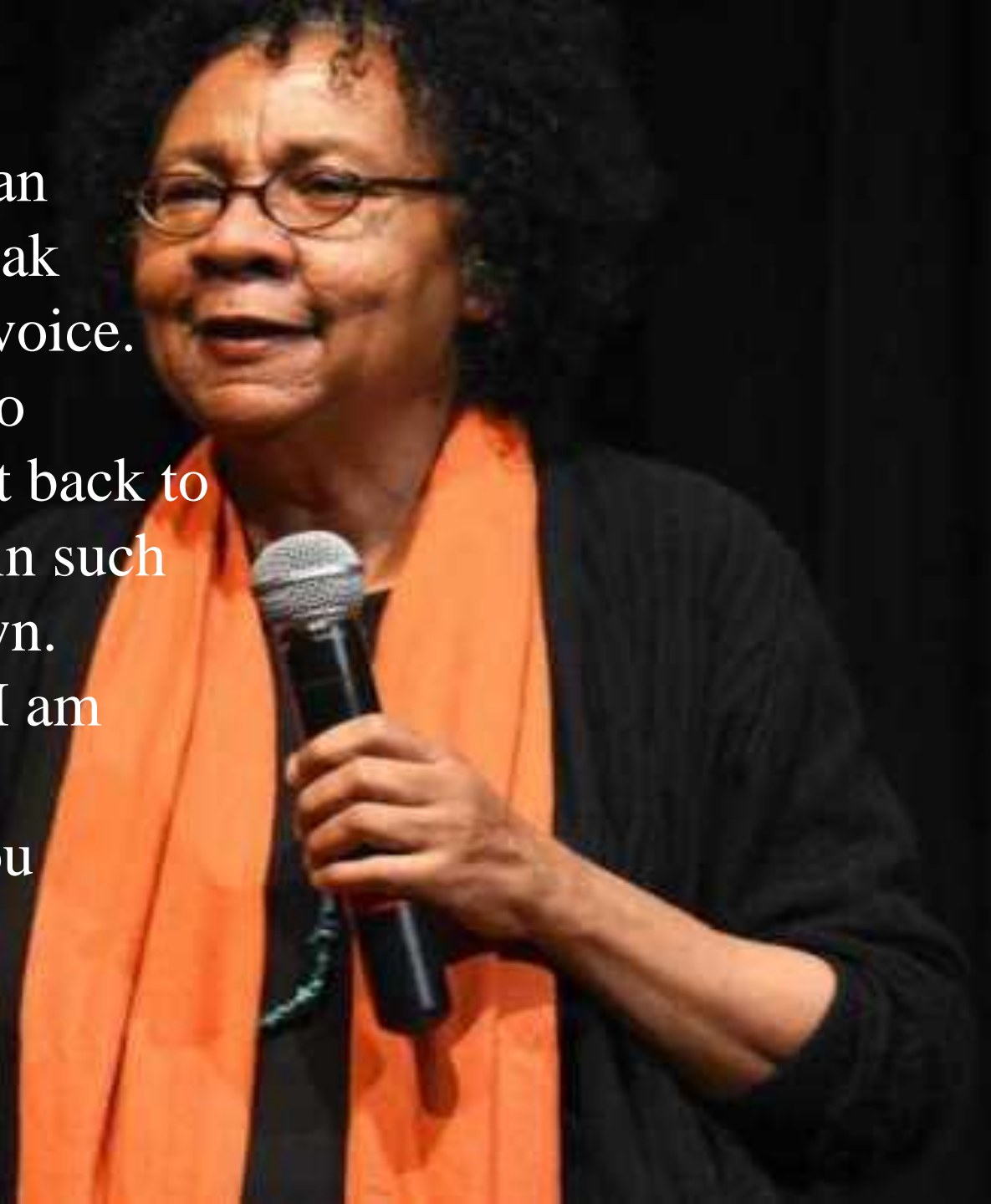
Stealing rights

- A small fish in a big pond
- Institutional colonisation
- "McDonaldisation"
- Professional culture and privilege

- The lived experience of ordinary people is subordinated to more powerful values, strategies and priorities.
- The focus on the person rather than the harm and its ripples, reoffending rather than restoration, risks and needs rather than obligations.
- The use of rights to increase the decision-making power of institutions and professionals.

bell hooks (1990)

“No need to hear your voice when I can talk about you better than you can speak about yourself. No need to hear your voice. Only tell me about your pain. I want to know your story. And then I will tell it back to you in a new way. Tell it back to you in such a way that it has become mine, my own. Re-writing you, I write myself anew. I am still author, authority. I am still the colonizer, the speaking subject and you are now at the center of my talk”.





Two problems

How to protect restorative space within powerful systems.

How to reconcile respect for individual rights and obligations towards others in the practice of restorative justice.

Accommodating rather than assimilating RJ

- Gearty (2006) distinguishes between rights which protect people from oppression and those which support human flourishing.
- Braithwaite's (2002) constraining standards which provide participants protection from domination by others.
- Two children's rights can act as filters through which children can enter the restorative space. *The principle of the best interests of the child* should ensure that children are fully informed about and prepared for the restorative process in ways that they understand so that they can make a free and informed choice whether to participate. It follows that the process must be designed and facilitated so that it is safe, avoids degrading or humiliating treatment and addresses the needs and interests of the child arising from the harmful incident. A restorative process cannot work unless the child accepts responsibility for committing the harmful act. It is critical that children, who deny responsibility, are not advised or persuaded to participate in a restorative process because it would be in their best interests. The principles of voluntary consent to participation and confidentiality are also important protections of the best interests of the child.
- *Protection from discrimination* is a right that restorative justice must pay much more attention to. It means that the restorative process should not only be inclusive, flexible and adaptable to diversity including gender, sexual orientation, race, ethnicity, religion, language, class, disability and domestic circumstances, but also should be designed to counter systemic discrimination.

Participation rather than domination

- Article 12 (respect for the views of the child), and Articles 39 and 40 which emphasise the dignity of the child and recovery from harm and reintegration promote the flourishing of the child, by animating a process of justice based upon inclusion, participation, accountability, truth telling and dialogue.
- The importance of standards of quality framed from the point of view of how RJ should be experienced by its participants.

Restorative
Justice works
through the
power of
relationships

Rights draw our
attention to
relationships of
power.





When you hit a wrong note, it's the next note that you play that determines if it is good or bad.

Miles Davis

• People, even more than things, have to be restored, renewed, revived, reclaimed, and redeemed; never throw out anyone.

Thank you

tim.chapman@strath.ac.uk

