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Pregledni rad

## **Restorative practices & hate crime: Opening up the debate**

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*Despite recent academic and policy interest worldwide, the concepts of restorative justice and hate crime are relatively new, and the full extent of their implications unknown. This paper aims to encourage further dialogue that will allow a more in-depth understanding of both notions. A review of international case studies was attempted by looking at examples where restorative approaches were successfully applied to address hate incidents. Further research and evaluation is warranted in this grey area before further policies and legislation are reviewed.*

**Keywords:** *Hate crime, restorative justice, mediation, restoration.*

### **Introducing restorative justice for hate crime**

#### *Understanding Hate Crime*

Hate crime is any criminal offence committed against a person or property that is motivated by an offender's hatred of someone because of their: race, colour, ethnic origin, nationality or national origins, religion, gender identity, sexual orientation, or disability (Sibbitt, 1997). Arguably, this is a progressive definition, as many jurisdictions, including Serbia, do not extend it to equality strands other than race and faith (see Gavrielides 2007; Chakraborti 2010).

In fact, "hate crime" is not written anywhere in the law. When an offender has pleaded guilty or been found guilty of an offence and the

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court is deciding on the sentence to be imposed, the law requires the judge to treat evidence of hostility based on the aforementioned characteristics as something that makes the offence more serious (i.e. hate crime).

Admittedly, hate crime is a relative new area of criminological interest and although the literature has recently risen to the challenge of analysing it, there are still many gaps for both academia and practice (Iganski, 2008). One of the most thorough studies on hate crimes and the profiling of hate perpetrators was carried out by McDevitt and Levin (1993; 2002; 2010). They argued that there are four types of hate crime offenders:

1. "Thrill offenders" i.e., those who commit their crimes for the excitement or the thrill;
2. "Defensive offenders" i.e., those who view themselves as defending their turf;
3. "Mission offenders" i.e., those whose life's mission is to rid the world of groups they consider evil or inferior;
4. "Retaliatory offenders" i.e., those who engage in retaliatory violence in the belief that by doing so just deserts is served (McDevitt et al: 2002; 2010).

### *Understanding Restorative Justice*

Moving on to RJ, the term was not coined until the 1970s when Eglash (1977) distinguished three types of criminal justice: *retributive*, *distributive* and *restorative*. He claimed that the first two types focus on the criminal act, deny victim participation in the justice process, and require merely passive participation by offenders. The third type focuses on restoring the harmful effects of these actions, and actively involves all parties in the criminal justice process. RJ, he said, provides: "a deliberate opportunity for offender and victim to restore their relationship, along with a chance for the offender to come up with a means to repair the harm done to the victim..." (p. 2).

A number of definitions have since been developed for RJ. For instance, Gavrielides defines it as "an ethos with practical goals, among which is to restore harm by including affected parties in a (direct or indirect) encounter and a process of understanding through voluntary and honest dialogue (2007: 139). Gavrielides argues that RJ "adopts a fresh approach to conflicts and their control, retaining at the same time certain rehabilitative goals" (p. 139).

Depending on the structure of the criminal justice system, RJ can appear in various forms and at different stages of the criminal process. This is also

dependant on public tolerance and the given cultural and historical context. In the literature, there is consensus that RJ practices consist of: direct and indirect mediation, family group conferences, healing/sentencing circles and community restorative boards (Walgrave, Bazemore 1998; Crawford, Newburn 2003).

When introduced into the criminal process, RJ practices can be 'independent,' 'relatively independent' and 'dependent'. They are 'independent', when they divert the criminal case out of the formal process. This occurs at a very early stage of the case, replacing any penal response to crime. The outcome usually precludes re-entrance of the case in the criminal justice system. Practices can be 'relatively independent', when they are offered as part of the regular criminal procedure. This can take place at any stage of the case, which is diverted and referred to a mediator charged with reaching an agreement between victim and offender. If this is accomplished successfully, it will have an impact on the outcome of the criminal proceedings. Its most common effect is to reduce sentencing, although there have been cases where charges were dropped altogether. RJ practices are 'dependent', when they are situated adjacent to the conventional system. This model is used after the criminal trial has run its course, and is mainly employed in instances of the most serious crime or in the prison context (Groenhuijsen, 2000).

#### *Understanding restorative justice for hate crimes*

Once hate crime cases are diverted into the RJ route, there are four typical steps to restoration. The first step is the referral of the case to the RJ programme. These referrals usually come from people within the justice or social system, such as police, prosecutors, judges, probation officers, social workers or housing officers. They take place at any time from the date of the offence to the period of parole. The second step is the preparation of the case. The victim and the offender are contacted separately by the RJ practitioner (e.g. mediator) who gathers information about the offence and answers questions from both parties. Home visits by the mediator are also common.

The third step is the actual meeting (direct or indirect) between the victim and the offender – and in the case of family group conferences and circles – of their families, friends and relatives. The meeting usually starts with a statement from the victim, explaining what it felt to be harmed and posing

their questions to the offender – the most common one being “Why me?.” Some practices, however, may choose to start with the offender’s apology.

The offender is then invited to give their detailed story of what happened. This introduction is expected to be followed by a constructive and honest dialogue that is facilitated by a neutral practitioner. This focuses on how the offender may repair the harm done and what can be done to reintegrate them back into the community. The dialogue is concluded with an agreement between the victim and the offender which may vary from a written apology to community punishment and compensation, the completion of an education programme, getting a job and holding it down, or making commitment to stay out of trouble. Depending on the programme, agreements and penalties may vary from being strongly retributive to solely rehabilitative. The fourth step involves preparing the file and returning it to the referral source.

A precondition for any restorative meeting is that the hate offender has admitted the offence and that all discussions remain confidential and unusable in the formal criminal justice process. Another key principle is that of voluntariness meaning that both parties willingly take part in all stages of the RJ process, which can be interrupted if any party changes their minds.

### **Restorative justice for hate crimes: a knowledge gap**

Chakraborti (2010) and Walters (2012) have argued that the relationship of RJ with hate crimes has traditionally been treated with suspicion by policy makers, politicians and the public. The research and investment in this area is also underdeveloped for at least two reasons.

First, hate crime has traditionally been treated as a ‘grey area’ for RJ practices mainly due to the power imbalances that are created in the victim-offender relationship. Some claim that perpetrators of hate crime fall within a special category of criminological interest, where criminal behaviour is examined as a phenomenon that is attributed to deep-rooted causes (McDevitt et al, 2002). Racist perpetrators, for instance, might not be easily susceptible to rehabilitative and community-based approaches, while victims may be exposed to further victimisation if brought in contact with them – irrespective of how remorseful the perpetrator may seem to be. While most hate crimes involve relatively minor offences (e.g. graffiti, egg throwing,

name-calling, intimidation and vandalism), their impact can be much greater and long lasting depending on how the victim and the community perceives them. Hate crimes tend to target our humanity and dignity, and often involve patterns of repeat victimisation evoking a large amount of fear.

The second reason relates to a slightly more abstract challenge. The concept of restoration of the *status quo ante* initially seems to be at odds with the impact that hate crime has on victims and the community. For instance, Pavlich (2004) warns against fixed or absolute ideas of community and is sceptical about what RJ can and cannot do to restore the *status quo* for the community. Like tort law, RJ is concerned with restoring the parties to the *status quo ante* through restitution i.e. the position the parties would have been in, had the crime not occurred. For instance, in cases that deal with property crime – or even some crimes against the person – this is attainable. But when hate crime is concerned, this may be more difficult. Some claimed that in most cases, RJ would meet an arrangement that may suit the vengeful victim and a middle-class mediator that will lead to ganging up on the offender, exact the expected apology, and negotiate an agreement that suits everyone (Smith, 1995). Arguably, little social transformation is likely to arise from utilitarian transactions of this sort.

However, from the 1990s and especially after the 2001, September 11<sup>th</sup> tragic events, hate crime has become a significant area of concern for public policy internationally. For example, only one year after September 11<sup>th</sup>, Human Rights Watch warned the US government that its officials should have been better prepared for the hate crime wave that followed the terrorist attacks. An increase of 1700% was recorded for anti-Muslim bias crime<sup>1</sup>. This violence was directed at people solely because they shared – or were perceived as sharing – the national background, or religion, of the hijackers and al-Qaeda members deemed responsible for attacking the World Trade Centre and the Pentagon.

Consequently, in the search for practices and policies that could bring balance to community tensions, and address integration questions, RJ principles and practices started to appear appealing. According to Tiemessen (2004), the use of RJ in resolving international tensions such as those that followed the Rwanda genocide – otherwise called *gacaca justice* – make RJ topical for Western democracies. Further research and investment are now debated.

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<sup>1</sup> Human Rights Watch (accessed 2003) <http://www.hrw.org/campaigns/september11/>

## Contextualising restorative justice and hate crime

One of the challenges in starting a thorough debate on the relationship between RJ and hate crime is the ability to contextualise them. Unless present in the mediation room, it is indeed hard to imagine the dynamics and the context that RJ takes when applied for hate offences. To help contextualise RJ for hate crimes and without any ambition to compare or reach any conclusive arguments, our research reviewed international case studies that were extracted from the extant, limited literature. The case studies involve conflicts at both the inter-personal and inter-community level (see Table 1). They stretch from low level hate incidents in schools to serious hate crimes in the community. Their selection and basis of success relied on the limited information that was made available through the literature and is measured by the cases' outcome, their promptness, cost effectiveness, and the extent of the restoration they have achieved for all parties including the community. The case studies are not meant to be conclusive but indicative of the breadth and context that RJ can take when dealing with hate incidents whether punishable or not.

**Table 1:** *Case studies of RJ practices for hate offences*

LOCATION	INCIDENT	PRACTICE INVOLVED	PARTIES INVOLVED	OUTCOME
Minnesota, US	Racist incidents within a school	Direct/ indirect mediation, RJ letters, conferences	150 students, their families, teachers, school personnel	Avoided litigation, encouraged school cohesion, updated school policy
Israel and the occupied territories	Hate crime and act of terrorism	Direct victim offender mediation	Two Arab hate crime offenders, Jewish victim, Probation Service	Settlement of the case in lieu of penal conviction, victim and their family satisfaction achieved
Southwark, London, England	Hate offences (mostly racist violence and homophobia)	Direct and indirect mediation, letters of apology	Juvenile and adult perpetrators of hate incidents and victims, community	Case diversion, settlement in lieu of penal conviction, victim satisfaction, reduction in recidivism
Oregon, US	Racism and xenophobia following September 11 <sup>th</sup> 2001	Direct mediation and follow up healing circle	Muslim victim and White male offender, the community and families	Case diversion, settlement in lieu of penal conviction, reintegration, victim satisfaction

LOCATION	INCIDENT	PRACTICE INVOLVED	PARTIES INVOLVED	OUTCOME
Rwanda	Genocide	Direct and indirect mediation, reconciliation committees	Genocide and hate crimes involving Tutsis and Hutus	Reviving the collapsed criminal justice system by diverting criminal cases to RJ, some reconciliation
Slough, England	Inter-racial tensions between Sikh and Muslim communities	Direct and indirect peer mediation	Groups of young people among whom conflict was identified as a problem	Prevention, community cohesion, integration, restoration of conflict
Lambeth, London, England	Bullying in schools (racist, homophobia, disablism)	Peer mediation, staff mediation and restorative conferences	Pupils, school personnel, the police	Prevention, community cohesion, change of school policy

#### *Minnesota, US case study*

This case involved racial tensions that occurred between White and Black/ Asian pupils while in school. After several unsuccessful interventions, the school used mediation and restorative conferences/ letters between the students, their families and school personnel. Victims gave their testimonies and everyone shared their experiences and fears. Serious cases were concluded without the need for litigation, a stronger community spirit was encouraged within school, which subsequently adopted mediation as the first official step in dealing with racial conflicts (Coates et al, 2006).

#### *Israel and the occupied territories case study*

The case involved two young Arab offenders who committed an armed robbery against a Jewish victim who experienced the offence as hate crime and an act of terrorism. The parties agreed to attend direct mediation. This allowed the victim to explain her fears and understand the reasons behind the actions. The offenders' families were involved in the process by providing support to their children and the victim. The meeting ended with a settlement by the participants, which was later accepted by the juvenile court in lieu of a conviction. All parties expressed feelings of satisfaction and relief and the families were able to move on with their lives (Umbreit, Ritter, 2006).

*Southwark, London, England case study*

Since 2002, a community-based mediation centre in Southwark has been dealing with over 60 hate offences per year. These are deemed to have the potential of developing to serious punishable crimes. One typical case involved a Turkish and a White British family living in local social housing estate. Crimes had been committed by both families against one another. The police was about to prosecute when face-to-face mediation was employed. The White British family had committed racist offences against members of the Turkish family whose son had committed property offences against the White British family. After a successful process, the police dropped the charges and reconciliation was achieved between the parties.

*Oregon, US case study*

This case involved face-to-face mediation between a White male who was arrested for causing terror through prank telephone calls, and a victim from a minority community who answered the calls. These took place after the 2001 September 11<sup>th</sup> attacks and were made to the Islamic Cultural Centre in Eugene, Oregon. The person who answered the phone was a practising Muslim who received the act as hate crime against him and his family. The mediation led to an apology and the adoption of reparatory measures, which diverted the case from the formal criminal process. It was also followed up by a separate healing circle that was attended by community members, who through this process supported both parties (Coates et al, 2006).

*Rwanda case study*

After the 1994 genocide in Rwanda where some 800,000 people were systematically slaughtered (about 10% of the total population), the international community responded with the creation of the *ad hoc* 'International Criminal Tribunal for Rwanda' (ICTR). In the recitals of the UN Resolution 955/94 establishing the Court, RJ is evidently prominent. For instance, it uses the words "national reconciliation and...the restoration and maintenance of peace...". However, in the political and societal environment of post-genocide Rwanda, it was easier for the retributive penal response to prevail (Tiemessen, 2004).

But alas, the Rwandan criminal justice system was hopelessly ill equipped to detain, prosecute and try the 200,000 suspects who were held on remand for over seven years. Drumble said: "At the present rate of progress, it will take hundreds of years to clear the backlog of cases" (2000: 1221).

In November 2002, an indigenous system of local tribunals called *Gacaca* was used as the raw material for institutional adaptation in furtherance of a holistic RJ orientated response to genocide. *Gacaca* led to the development of a communal judicial system, which aimed to aid reconciliation and speed up the trials.

*Gacaca*'s success is measured by the level of participation by the Rwandan people, who are being called upon to confess to crimes committed, elect judges and give testimony to what they experienced during the genocide. According to Tiemessen (2004), "*Gacaca* justice is meant to be as intimate as the genocide itself" (57). The *Gacaca* strategy is planned in four phases. The first focuses on raising awareness about *Gacaca* and increasing knowledge about the law. The second is concerned with the election of *Gacaca* judges, while the third deals with confession, testimony, and reconciliation. The fourth phase focuses on re-integration of prisoners back into society through a work programme. "*Gacaca* represents a model of RJ because it focuses on the healing of victims and perpetrators, confessions, plea-bargains, and reintegration" (Tiemessen, 2004: 58).

Consolata Mukanyiligira, coordinator with the Avaga 'Association of Genocide Widows', told to the 'Integrated Regional Information Networks' (IRIN) that Rwandans were firstly concerned with finding who killed their loved-ones and where they were buried, so they could lay them to rest with dignity. After that, she said: "We are obliged to reconcile, because we are neighbours". The pilot *Gacaca* trials had gone "very well" so far, Deogratias Kayumba, of the 'National Human Rights Commission', told IRIN. However, as with every pilot programme, one can easily identify various flaws in the system. These included cases of people being paid to desist from giving evidence, threats against those giving evidence, and politicians in some rural areas advising people to keep quiet.

### *Slough, England case study*

This is a slightly different case in the sense that it did not involve a crime per se, but focused on the preventative and community cohesion side of inter-

racial conflicts within a locality. These tensions involved the settled Sikh and Muslim populations in Slough who in the mid 1990s experienced antagonism and disintegration. Through peer mediation, young people from these two communities, learned to co-exist and support each other. Community leaders encourage community cohesion through face-to-face mediation of the conflicts that occurred and could have been processed through more formal criminal justice processes.

*Lambeth, London, England case study*

Although not always considered hate crime in the narrow sense, bullying due to racism, homophobia, disablism or sexism can either develop to a more serious offence or have equal if not more detrimental effect on the victim than hate crime per se. Instead of dealing with bullying incidents in the formal way by calling the police or formal structures, schools in the London Borough of Lambeth divert these cases to peer mediation programmes. Through direct meetings and follow up conferences with the parents, community cohesion within the school context and ad hoc re-dress is achieved. The local authority evaluates these practices annually and provides the funding and a dedicated worker to develop them across the borough (Select Committee on Education and Skills, 2006).

## **Concluding Reflections**

RJ and hate crimes are relatively new phenomena. This presents challenges for policy makers and researchers. This paper set off to explore the applicability of RJ with hate crimes by looking at existing practices from around the world. This paper has taken the first step in contextualising RJ for hate crimes. The case studies presented suggest that it is a mistake to safely promise that all restorative programmes can reduce hate crime, enhance community relationships, prevent further offending or build better societies. However, RJ should not be dismissed as an appropriate option for hate incidents. Nevertheless, to make its application more widely available, the objectives of restorative practices will need to convince the public, the community and victims and offenders of hate crime.

To win the battle against hate crime and its consequences – whether at a local, national or international level – there must be a breakdown of the stereotypes, attitudes and worldviews that foster it in the first place. As illustrated by the case studies, this battle is being fought on a daily basis not only by criminal justice agencies, but also within schools, places of workshop, families, person-to-person relationships and community based organisations. The criminal justice system has set up mechanisms to facilitate this battle, but its limited retributive and punitive approach does not always encourage a process of dialogue, which appears to be one of the means for combating prejudice and fear. RJ is one form of this dialogue.

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## **Restorativna praksa i zločini mržnje: Otvaranje debate**

Uprkos povećanom akademskom i političkom interesu u poslednje vreme, koncepti restorativne pravde i zločina mržnje su relativno novi, a pun obim njihovih implikacija ostaje nepoznat. Ovaj rad ima za cilj da podstakne dalji dijalog koji će omogućiti bolje razumevanje oba pojma. U ovom radu je načinjen pokušaj da se da pregled studija slučajeva iz više država u kojima je restorativni pristup uspešno primenjen kao reakcija na zločine mržnje. Dalja istraživanja i evaluacije su poželjne u ovoj sivoj zoni pre bilo kakvih daljih razmatranja prakse i zakonskih rešenja.

**Ključne reči:** zločini mržnje, restorativna pravda, medijacija, restoracija.