

Con-texting restorative justice and abolitionism: exploring the potential and limits of restorative justice as an alternative discourse to criminal justice

Brunilda Pali and Christa Pelikan

Brunilda Pali, PhD researcher, Leuven Institute of Criminology (LINC), University of Leuven (Belgium), brunilda.pali@law.kuleuven.be; Christa Pelikan, Senior Researcher, Institute for the Sociology of Law and Criminology (IRKS) (Austria), christa.pelikan@irks.at.

This paper revisits the symposium published in the very first issue of Restorative Justice: An International Journal: Nils Christie's 'Words on words' and the ten reactions it provoked. The core question that has surfaced from that 'provocation' and the reactions to it, and the one that guides our reflection—and the field of restorative justice (RJ) in general—is whether RJ can be seen today to constitute a viable alternative 'discursive practice' to the current criminal justice system (CJS). The aim of this paper is twofold: first, to re-emphasise the abolitionist roots of RJ; and second, to explore the potential and limits of RJ as an alternative discourse to the CJS. Through a discourse analysis we stress the importance of retaining the alternative spirit of RJ, defined through three core principles: lifeworld, participation and reparation, while remaining involved with the CJS. We hope through this theoretical reflection to stimulate further discussions among scholars in the RJ field.

Introduction

The first issue of *Restorative Justice: An International Journal* featured a symposium which started with an essay by Nils Christie entitled 'Words on words', followed by ten contributions commenting on that essay (RJII, 2013). This way of establishing a journal through an interaction and a conversation made clear that restorative justice (RJ) is a discourse in the making, and as such it has steered our imagination. Launching the journal with a provocation issued to the field¹ by Nils Christie is a truly self-reflective exercise, trying to answer where are we more than three decades after 'Conflicts as prop-

¹ Field is one of the core concepts used by French social scientist Pierre Bourdieu (1993). A field is a setting, a network, a structure or a set of relationships in which agents and their social positions are located.

erty', a founding text for the entire RJ field (Christie, 1977). Asking Christie himself to make that retrospective reflection shows that the field is courageous indeed. Christie has bit by bit deconstructed and challenged the whole body of RJ terminology.

In this paper, we try to go beyond Christie's anti-terminology exercise and read between his lines and those of the authors responding to his essay. The core question that has surfaced from the whole provocation, and the one that guides our reflection (and the field of RJ in general), is whether RJ can be seen today to constitute a viable alternative 'discursive practice' to the current criminal justice system (CJS). Christie's 'Words on words' and the reactions it has provoked offer fertile ground for thinking and theorising about this.

In this paper we employ a Foucauldian understanding of the concept of *discourse*. First of all, this understanding is useful and fruitful because it encompasses both disciplines and institutions, or in other words both systematised bodies of socially constructed knowledge and social practices. It is important to understand RJ both as a scholarly field and as a practice field, i.e. what we may call a discursive practice, to make clear that we do not focus on textual analysis in our paper. Second, by speaking and thinking of RJ as a 'discourse in the making', we avoid reified debates about what RJ 'really' is or is not, showing instead how the RJ field is grappling over how and what RJ might or ought to be, instead of what it is. This approach to discourse is clearly different from a formal approach which considers discourse in terms of text (e.g. a document, a news piece or a poem), and from empirical approaches which intend to describe what is 'out there'.

This paper is structured in five parts. In the first part we read Nils Christie's provocation to the RJ field as standing within the tradition of abolitionism.² This exercise serves to re-establish the 'forgotten' roots of RJ. We think that—in terms of policy—this bond needs constantly to be made stronger and re-emphasised. In the second part we will read the reactions to Christie's essay as attempts to find a place for RJ within/without, or as an alternative to, the CJS. In the third part we will discuss what constitutes according to us the true alternative to RJ by explicating Christa Pelikan's characterisation of RJ as the core elements of lifeworld, participation and reparation. In the fourth part we will discuss a few dilemmas encountered in every field when alternatives are created, and we will do this through the theoretical positions of Michel Foucault and Thomas Mathiesen. We conclude in the fifth part with a discussion of how to preserve the alternative spirit of RJ while still staying involved with the CJS. The question, according to us, is not whether RJ should be integrated into the CJS, but instead under what conditions it can cooperate with the CJS while retaining its unique character and defining principles. We hope that this theoretical reflection will stimulate further discussions among scholars in the RJ field.

² We mainly speak here of penal abolitionism, while abolitionism in general has its roots in the anti-slavery movement. Despite this difference in focus, there are scholars today who argue that slavery abolitionism and penal abolitionism are interrelated. See, for example, the arguments of Angela Davis in *Masked racism: reflections on the prison industrial complex* (1988).

1. Reading 'Words on words' from an abolitionist perspective

Common abolitionist roots

We would like to read the 'provocation' of Nils Christie under the theoretical framework of abolitionism. The writings of abolitionist scholars (like Herman Bianchi, Louk Hulsman, Thomas Mathiesen, Heinz Steinert, Nils Christie and others) are certainly diverse, but the aim of this paper is not to address these divergences. Rather we ask: where is the voice of Christie coming from, what is it reminiscent of, and what is he trying to communicate to the RJ field?

His voice is certainly grounded in abolitionism. We have to admit that we will probably read Christie's voice within abolitionism against himself, given that Christie himself has been reluctant to call himself an abolitionist. For example, in the course of the 'Email exchange among abolitionists' initiated by Johannes Feest and Bettina Paul from the University of Hamburg for the *Kriminologisches Journal* in 2007,³ Christie said:

I have never understood if I am a purified abolitionist,—or not. And I am not highly interested in knowing. Abolitionism is to me a cluster of ideas I like. And persons I like, much because they have these ideas. Now and then I disagree,—think this goes too far. But these disagreements are as nothing compared to the general agreement. So, maybe I am no abolitionist, only a minimalist in cooperation with all those others who share the general goal of reducing intended delivery of pain in society. (Feest & Paul, 2007)

Abolitionism can be thought of as a discourse, a method, an approach, a perspective, a stance, even a worldview. At its core it argues against the reification⁴ of the concept of crime, and in this respect Christie's 'Words on words' is indeed a manifesto of abolitionism. More prominently, abolitionism argues against the use of punishment, especially in the form of imprisonment, as the main way to react to it. Most abolitionists prefer alternatives to state-organised punishment: conflict solution and reconciliation (Bianchi), replacing criminal with civil procedure (Hulsman), creating social conditions for pain reduction (Christie). But some insist that only the abolition of institutions before creating alternatives (negative reforms) can achieve the desired result (Mathiesen) (cf. Feest & Paul, 2007).

Christie refers to himself as a minimalist mainly when it comes to the use of prison, which he considers is minimally needed. For example, in the conversations around abolitionism he writes:

There are limits to my abolitionistic urge. Some people might be absolutely impossible to prevent from burning Mosques or Synagogues or Churches, or from beating their wives or

³ www.sozialwiss.uni-hamburg.de/publish/IKS/KrimInstituteVereinigungenZs/Zusatzmaterial_print.html.

⁴ Reification means an that interpretation of reality, a human construction, is transformed into a reality of its own, independent of the reality constituting activity of man.

parents. If we have tried all, from conversation to mediation, we might as a last resort be forced to use physical restrictions. In some of these cases, I think imprisonment gives better protection to the wrongdoer than euphemistic terms like treatment or cure. If we overload the system of mediation, we risk converting boards of mediation to penal courts in disguise. (Feest & Paul, 2007)

Going back to the 'reification' issue, according to many abolitionists we ought to do away with the notion of crime altogether (or apply it only to extreme behaviour) and find new ways to tackle undesired or problematic situations. Hulsman (1986, 1991), for example, proposes the notion of 'problematic situations' as a starting point, and argues that the use of this notion paves the way for other responses which are different from the criminal justice response. According to Hulsman, criminalisation is nothing else than throwing a garment of ideas over problematic situations, and the criminalising approach is only one option for comprehending and acting upon it. Bianchi (1986, 1994) has proposed the notion of tort. For Christie (1977, 1982, 1986, 1993, 2004), it is always conflict.⁵ Hulsman, and others, also argue that other crime-related concepts should be fully abolished, like 'seriousness of crime' and 'dangerousness' of the criminal. In other words, the whole vocabulary we use today to speak about crime has to be completely reviewed. It is among the contentions of abolitionists that an entirely different system of crime control, including RJ, necessitates entirely new linguistic terms, in order to prevent the reasoning of the conventional system from creeping in (Ruggiero, 2011). In other words, dismantling old concepts does not mean the conservation of old categories under new terms, but requires another logic, another grammar.

Abolitionists propose that we go back to the things, the events and occurrences themselves, back to the lifeworld, or the world of the directly lived experience. According to them, the starting point for analysis should not be the totalising, objectifying and abstract categories of the CJS, but those concrete situations in the lifeworld which are experienced as problematic by those directly involved. In their view, CJS has 'stolen the conflict from its owners,' and this conflict should be given back to them (Christie, 1977). Abolitionists believe in the potential of parties to find solutions through deliberation, favouring procedures in which participants in conflicts are not constrained by the requirements of organisations and professionals. Only if necessary and as a last resort should a restricted state power interfere in conflicts where deliberation among citizens does not result in an agreement. This intervention should be based on civil law procedures according to the 'civilisation thesis' of Louk Hulsman (Hulsman & Bernat De Célis, 1982). The new system would not be called criminal law but reparative law (Bianchi, 1994).

This is the context in which Christie (2013), mostly in the tradition of abolitionist thinking, is making a call for a new language and a new grammar for RJ. Moreover,

⁵ For a conflict-oriented approach to crime, see also Hanak, Stehr & Steinert (1989); Kuhn (1987); Steinert (1988).

behind the language-centred argument, and between the lines of Christie's reflection, we can read Christie's worry—that of the co-option of RJ into the CJS, a concern that has in fact been with the RJ movement since its early days (see Aertsen, Daems & Robert, 2006; Blad, 2006; [Trenczek, 2002](#)). This co-option becomes manifest mainly in increased professionalisation, institutionalisation and bureaucratisation of mediation services, its increasing net-widening effects, and its pronounced offender orientation.

On 'Words on words': Christie's approach

And names are important.
Names influence action.
Names create expectations.
Names can function as a cover up—hide some realities in what happens.
(Christie, 2013: 15)

Typically for Nils Christie, and typically for an abolitionist project, he started the journal's journey with an 'abolition exercise'. It focuses on language, it is simple and contradictory, it is sober and utopian at the same time. The main points of critique forwarded by Christie to the field of RJ are to do with terminology, terminology which according to him has brought RJ closer to the CJS.

'Restorative justice': it sounds beautiful. Getting matters right and in a just way. Offenders learn a lesson and victims obtain their rights. It sounds acceptable, no matter where one is positioned on the political spectrum. So close to punishment but without some of the bad side effects. No wonder that the system receives so warm a welcome ... But there are dangers in words. Those words I have criticised are very close to those used within penal law. (Christie, 2013: 18)

First, Christie demolishes the term which according to him has brought RJ closer to the system, and that is the claim to 'justice'. Here he equates 'justice' with the (penal) law. It remains unclear, though, whether Christie believes this himself or whether the critique is directed first at the CJS, for equating 'justice' with (penal) law, and second at RJ for not making that difference in a decisive way. Being familiar with the work of Christie in other contexts, we assume that the bitterness towards 'justice' has nothing to do with the way he understands justice, but with the reality of a system in which justice has become equal to pain and punishment.

He is less severe with the term 'restorative', but critical towards it nevertheless, because it entails a failed promise to 'bring[] things back to old forms', a promise he thinks is neither possible nor desirable. 'Mediation' seems to him a suitable term in many situations, except for certain situations where 'mediating' a conflict could do more harm than good. 'Reconciliation' is for him a suitable term because it has a more resigned tone, but the way he understands reconciliation (reconciliation with oneself, reconciliation with what

has happened) is completely different from the way it is generally understood in RJ (reconciliation between parties), and that is the reason why the term is more acceptable to him. In RJ discourse, reconciliation is not often used due to the high demands it places on the parties—in other words it has anything but a ‘resigned’ tone.

The terms ‘offender’ and ‘victim’ are the ones he resents most and attacks hardest, but that comes as no surprise. He considers them dangerous and regards them as the terminology that brings RJ as close as possible to the CJS:

Offender—to use this concept is to conclude and close the process where we ought to start. The central task in handling a conflict is to reveal what happened, find out about the details, create understanding, give the phenomenon meaning, maybe several meanings. The opening remark in a face-to-face meeting would be: What happened? ... And then the other side of the conflict: victim. Again the conclusion comes before description and analysis. Penal law is forced to think in black and white. Guilty, not guilty—a life in dichotomies. (Christie, 2013: 17–18)

Christie’s proposal is not new, but fully consistent with his original ideas and abolitionist project: ‘Let us go back to basics: Conflicts handling.’ The term ‘conflict’ continues to be central to his analysis, just as it was in 1977. It is the very idea that served as the main source of inspiration for the RJ movement some 35 years ago.

We work with conflicts and in organisations which handle conflicts. A less heroic terminology, but also one less open to abuse and misleading expectations. (Christie, 2013: 19)

His ‘provocation’ is to send the RJ field three implicit and tightly interwoven warnings: mind co-opted (labelling) language, mind institutionalised and professionalised practices, and mind self-aggrandising language.

2. Finding RJ’s place vis-à-vis the CJS

There is a mixed but impressively concerted reaction to ‘Words on words’ by the various scholars—a clear illustration, first, of the existence of a common discursive RJ field, and second, of the distance this field has come from the abolitionist discourse. While Christie’s provocation is nothing new, it is a reminder of what has been gained and lost during these three decades. The reactions are characterised by disagreement about his proposal and defensiveness of the status quo in the terminology of the field. It becomes clear how, while balancing losses and gains, scholars in the field estimate that more has been gained than lost. The resistance to changing terminology is centred on the relationship of RJ to the CJS and moves around three main topics: replacing crime with conflict, keeping the terms *victim* and *offender*, and defending RJ terminology. As a somewhat radical perspective we will read the contribution on the Zwelethamba model, a restorative justice practice established in some South African communities and presented in the

comment by Jan Froestad and Clifford Shearing ([Froestad & Shearing, 2013](#); [Shearing & Froestad, 2010](#)).

Replacing crime with conflict?

Resistance to replacing the concept of crime with the concept of conflict is strong and concerted. On a rather opposite trajectory from Christie, some scholars argue that we need more ‘problematic situations’ to fall under the umbrella of crime rather than fewer. John Braithwaite argued that crime can be a valid concept, especially for some actions which should ideally be criminalised but are not. The examples given are ‘tax cheating’ and ‘war waging’, especially by the ‘Western’ world. Another example he gives to illustrate this argument is rape. He argues that ‘times and places in human history where rape is not constituted as shameful by the criminal law are space-time contexts that endure high rates of rape’ (Braithwaite, 2013: 21; cf. Ahmed, Harris, Braithwaite & Braithwaite, 2001: 28–30; [Braithwaite, 1995](#); Pinker, 2011: 196–200).

According to Braithwaite, ‘theoretically, what delivers practical value to the crime concept is not that it tracks us to punishment. On the contrary, we might seek to uncouple crime and justice from any necessary connection to punishment. The concept has most use when crime is constituted as distinctively serious and shameful wrongdoing’ (2013: 21). So what Braithwaite would challenge is not crime, but punishment, and this argument is fully consistent with his theory of ‘reintegrative shaming’. The crime concept and its usefulness as espoused by Braithwaite reflect the main function of criminal law: it is there to mark as wrong (as shameful and/or constituting guilt) through societal consensus (based on democratic deliberation) those instances of behaviour where society will insist that wrongdoing has occurred and will set a reaction. This reaction need not necessarily be a punitive reaction—but it ought to be one that expresses society’s condemnation. This is in line with Niklas Luhmann’s understanding of the core function of criminal law—and of law in general: confirming the norms that society has set up as legal (Luhmann, 1972, 1993).

Lode Walgrave is forcefully against the replacement of ‘crime’ with ‘conflict’. According to him, speaking of ‘a conflict’ suggest that there is simply a difference in meaning, a misunderstanding between two parties, or two different legitimate interests. He argues that this is not really the case in the light of an offence. To make his arguments clear, he asks the question, ‘What shall happen if a lonely homeless person is murdered?’ According to Walgrave,

the settlement of this event cannot be reduced to deliberation among individual citizens, because one of the crucial stakeholders in ‘the conflict’ remains absent for ever. Yet, a disapproving and norm enforcing response to the murder of this person is indispensable. Obviously, committing private violence is more than just a conflict between two (or more) citizens. (Walgrave, 2013: 80)

Quite a number of the respondents argue along these lines, namely Kathleen Daly, Josep Tamarit Sumalla and Martin Wright. Nevertheless, the nature and direction of their argument is different from the arguments of Braithwaite and Walgrave. The latter defend the retention of the concept of crime based on the function of the CJS, albeit they understand this function in a different way. Braithwaite argues for the boundary setting and norm confirmation element, while Walgrave emphasises law's function—or rather mission—as the preservation of the good life. Both aim at decoupling the punitive reaction from using the coercive power of the system of law. The other authors take issue mainly with the replacement of the term crime with conflict. The main point in their resistance is not the defence of the concept of crime though. They do not perceive the term 'conflict' as a useful sociological concept but only in its everyday meaning as struggle, dispute, misunderstanding, etc. Therefore they regard the term as belittling and as not adequate to catch the essence of wrongdoing. They appeal to the state's responsibility to react to crime for the sake of society and the quality of social life. According to this perception, the CJS is the right place and the right system to address the phenomenon of occurrences of wrongdoing.

Keeping the terms 'victim' and 'offender'?

Reactions to Christie's proposal to replace the terms 'victim' and 'offender' are also quite negative, although the scholars recognise and share his concern as to the labelling language. As Shadd Maruna puts it, 'I certainly share some of these reservations—most definitely about the 'victim'/'offender' labels that fundamentally corrupt the dynamics of the restorative process' (Maruna, 2013: 47–48). According to Daly, the problem is first of all a practical one, thus "'offender" and "victim" are problematic terms', but she does not 'know how they can be easily replaced' (Daly, 2013: 27).

The second argument is that it can be problematic to minimise, question or deny people's experience of being a victim of crime. According to Daly's research, denying or minimising a person's experience of harm can promote re-victimisation. The same argument is put forward by Joanna Shapland on the communication taking place in the restorative process: 'Words which deny respect produce anger, both in the meeting and afterwards ... The point is that the particular conflict is one which the state has defined as a "crime" ... Calling the victim the person who "complains" ... would I fear compound the anger' (Shapland, 2013: 66–67). Similarly, according to Tamarit Sumalla, 'it is clear that these social and legal labels (victim and offender) cannot capture the full complexity of the social reality underlying many criminal acts, but there is often a demand for victims to receive recognition and for a social and institutional response that reproaches the crime and reaffirms the position of the victim' (Tamarit Sumalla, 2013: 74)

The main difficulty the RJ field has with dispensing of the terms ‘victim’ and ‘offender’ originates also from the causes that make for its resistance to relinquish the notion of crime. The field, by opting through policy decisions to be deliberately connected to the CJS, depends fully on the latter for cases. When acting on an event that has already been defined by the system as a crime, dealing with a victim and an offender becomes inevitable. As emphasised in the reactions, the starting point of any restorative intervention is acceptance of the main facts of the incident and responsibility towards the victim.

Defending the terminology of ‘restorative justice’

The arguments defending RJ terminology are more varied. In general, it seems that there are fewer problems with the ‘restorative’ term, and scholars regard it as useful and prefer to keep it. For example, Walgrave reflects on the fact that the term has somehow subsisted since it was coined despite the fact that its meaning has changed. Daly reflects that we should not understand the term too literally or narrowly, but rather nominally. Wright says, ‘perhaps we should continue to use “restorative”, and re-define it, if we cannot find another word’ (Wright, 2013: 87–88). The general attitude can be summarised in Gabrielle Maxwell’s words:

... at this point in time we need to acknowledge that the concept ‘restorative justice’ has a currency and a special meaning different from its constituent parts ... I think the time has now come where the key issue is no longer constructing new meanings for ‘restorative’ and ‘justice’ but rather is in shaping and refining the ways in which we can conceptualise ‘restorative justice’. (Maxwell, 2013: 52–54)

Resistance to getting rid of or replacing the concept of ‘justice’ is even greater. The message that all the scholars try to give is that ‘justice does not equal law’, and more specifically penal law, and should be regarded first as a holistic and second as a utopian concept worth keeping and defending. Walgrave writes that ‘besides justice as the system, justice also means a moral good’ (Walgrave, 2013: 78). Braithwaite notes that ‘properly conceived, justice is a holistic concept that includes procedural justice, distributive justice, social justice, restorative justice, alongside last resort to punitive justice’ (Braithwaite, 2013: 21). According to Pelikan, ‘Christie equates “justice” and “law”. In German ‘justice’ is both ‘*Recht*’ and ‘*Gerechtigkeit*’ and, I am sure, Nils knows that ‘*Recht*’ and ‘*Gerechtigkeit*’ are far from identical’ (Pelikan, 2013: 60). Tamarit Sumalla argues that ‘renouncing certain vocabulary carries with it the risk of losing part of what has previously been won ... In contrast, in my opinion, the reference to the ideal of justice constitutes an essential part of the concept of restorative justice’ (Tamarit Sumalla, 2013: 70–71).

The defence of justice is especially strongly voiced with regard to Christie’s call for ‘less heroic terminology’. Pelikan concludes her arguments by saying, ‘However, does

“justice” not also carry a promise? Is there not some yearning for the unreachable star of justice—and is that not also expressed when we are talking about a different justice, a restorative or transformative justice?’ (Pelikan, 2013: 60). Maruna dedicates his entire (what he calls tragically optimistic) reflection to this point: ‘I am not overly persuaded by Christie’s alternative language about ‘boards for handling conflicts in civil ways’ or ‘councils for handling conflicts’ ... If I am here to deliver “justice”, I will approach my work with more purpose and passion than if I am here only to “manage” the troublesome or “handle” conflict’ (Maruna, 2013: 48, 49).

On the one hand, what seems to be clear from the comments is that the term has indeed stuck to the field, and the moment for changing it has passed. The term is able to embrace different practices, and suggests and points to the ambition of an alternative justice system, keeping the utopia of justice still burning. On the other hand, what Christie is suggesting between the lines with his emphasis on modesty is to fight what the term has led to: its co-option, institutionalisation, bureaucratisation and professionalisation.

Zwelethemba—the radical difference

There is clearly one reaction to Christie that is different, one that is more in line with his thinking, although it does not constitute a central and defining practice of RJ. This reaction comes from Froestad and Shearing (2013), and relates to the Zwelethemba model.

Slightly different from Christie’s proposal, but nevertheless closer to him than anyone else, they discuss how in Zwelethemba they speak of ‘disputes’, rather than conflicts. According to the Zwelethemba model, individuals directly involved in a conflict are understood as participants or ‘parties’ rather than ‘victims’ and ‘offenders’. The victim/offender binary is viewed within the model as serving to separate, exclude and pre-judge. Central to the model is the argument/thinking that the language of ‘victim’ and ‘offender’ structures the meaning of what happened in the past in ways that make it difficult for the parties involved to understand and articulate their own reality or lived experience—for example, the fact that today’s offender may well have been yesterday’s victim and vice versa. As a consequence, the model discourages and even bans the use of these categories in favour of the more equivocal category ‘disputants’.

A distinguishing feature of the Zwelethemba model compared to all other models in RJ, and even different from Christie’s approach (Christie suggests that the conversation should begin by asking the question ‘what happened?’), is that disputes are not addressed through a backward-looking process that seeks to balance wrongs with reprisals and burdens, but through a forward-looking one that seeks to guarantee that the disputants’ goods (both moral and material) will be respected in the future. What is required, the model developers concluded, is a shift in focus from ‘repairing the past’ to ‘repairing the future’. Thus the processes involved in the Zwelethemba model aim not simply to restore, but to create, and are therefore closer to a transformative model than a restorative one. In

line with Christie's assumption, as RJ becomes embedded within CJS there is a tendency for the logic of system to infuse its processes. The Zwelethemba model instead seeks to respond to these concerns by eschewing blame and remaining distant from the processes of CJS. Within the model, justice as 'just deserts' is given no place. What Shearing and Johnston (2005) identify as an alternative sense of justice is something quite different—the sense that justice has been done because a better tomorrow has been created.

Similarly, the model resists the idea of a solution being crafted by an impartial outsider. The authority for sorting things out in this model is not an outside authority, who impartially decides what is right and what should be done. Rather, the model insists that resolution comes from inside the community and that it arises as a consequence of deliberation. This is very different from other models in general, where impartiality and neutrality are heavily emphasised. We want to point out, though, that mediators in other RJ practices contend that they aim not to bring resolution, but to let the parties find their own. Ownership of the conflicts in RJ is always and heavily emphasised as belonging to the parties. Nevertheless, the Zwelethemba model is the closest one can get to Christie's idea (and generally the abolitionist idea) of having local mediators who live in proximity to the communities rather than professionals dealing with conflicts.

Another particular strength of the Zwelethemba model, as Roche (2004) claims, is that it seeks to systematically combine peace-making interventions with peace-building ones. This idea of building systematic knowledge about social issues locally and using it for policy reforms has considerable potential for enabling poor and marginalised people to express a voice that is heard in 'higher politics'. The key to this is for those who are poor and marginalised to gather knowledge and capacity within nodes with governance capacity—like the Peace Committees—over which they exercise substantial control. A lesson from the Zwelethemba model has been that, as the Peace Committees built up knowledge about conflicts and a capacity for solving them locally, they became nodes of interest for many other actors, both public and private ([Shearing & Froestad, 2010](#)). This macro analysis and nodal perspective, which would be warmly welcomed in an abolitionist perspective, is mostly missing in other RJ models that take no issue with structural problems, but focus on the conflict as it unfolds within the four walls in the given timeframe. In this sense, RJ remains a more individualising and psychologising approach to crime and conflict.

To conclude this part, the debate in 'Words on words', as we tried to read it, shows that in the RJ field we have to come to grips with the CJS, and, despite the importance of the (forgotten) abolitionist roots of RJ, which we have attempted to re-emphasise here, a radical abolitionist stance (the request to do away completely with the CJS) is not espoused—not even by Christie himself. Autonomous regulation of the conflict after a crime is clearly based on the fact and awareness that there are coercive measures ready to be activated in the background for the protection the law has to offer, and this is certainly important. But what remains crucial is the fact that 'the law is effective through its

shadow rather than through the actual execution of force' (Frehsee, 1991: 59). In light of this understanding, we have tried to emphasise the importance of finding a place for RJ vis-à-vis (against, along with, or alternative to) the CJS.

3. The alternative of restorative justice

In order to obtain a further orientation for analysing and validating the different positions that we have discerned within 'Words on words' and the reactions to it, we will turn to a piece of theoretical work by Christa Pelikan that attempts a characterisation of RJ (Pelikan, 2003, 2007). Pelikan has identified *three core elements* of RJ conceived of as different to the CJS. These differences in terms of characterisation of RJ on the one hand and the CJS on the other are: lifeworld versus system-oriented, participation versus delegation, and reparation versus retribution/punishment.⁶ In what follows we explain these core elements.

- (a) *The 'lifeworld' element (the who of justice).*⁷ In RJ discourse, crime is considered a disruption to or disturbance of human relations, and therefore a response to crime means starting from and attending to the immediate experience of the persons involved and the concrete needs originating from the experience of hurting or harming somebody and the experience of being harmed or being hurt.
- (b) *The participatory element (the how of justice).* This implies the active participation of those concerned and affected by the conflict to become part of the effort to achieve reparation and reconciliation, and promotes 'taking responsibility', especially on the part of the offender.
- (c) *The reparative element (the what of justice).* Concentrating on the conflict, understood as a disruption of social relations, will lead the search for ways of making good, for reparation and for transformation. The active involvement of victim and offender in this process makes it possible to meet the 'real' needs of both of them.

We believe that this characterisation of RJ is pertinent and theoretically consistent as it goes beyond a mere enumeration of features and 'underlying values'. It is sufficiently abstract to allow the whole field to be captured, and it also fulfils the requirement of parsimony. In what follows, the theoretical and practical value of each of the three elements will be considered step by step. We will argue that this approach is comprehensive

⁶ These are ideal-type characterisations—both of the CJS and of RJ; they are marked by contractions and generalisations that are essential features of the ideal-type (Weber, 1968).

⁷ We make an implicit parallel reading here of these core elements with the core elements in theories of social justice, more specifically of Nancy Fraser's (1996, 2005) three-dimensional theory of justice, which includes the elements of recognition (the who of justice), participation (the how of justice), and redistribution (the what of justice).

and broad enough without being ‘totalitarian’ or ‘finished’. At the same time, the model is not simply a reflection of what exists in the RJ field; to the contrary, mostly what exists will be a somewhat ‘messier’ combination of various degrees of these elements and probably other elements, some even contradictory to these. But we would like to keep it here and insist on the ‘ideal’ difference of RJ in order to propose a sustainable and normative potential.

First of all, the emphasis on the element of the ‘*lifeworld*’ (*the ‘who’ of justice*) is very much in line with one important aspect of an abolitionist critique. Lifeworld orientation is the opposite of system orientation. In historical perspective we have to understand the emergence of the CJS as part of the formation of the modern state. This state postulates an absolute equality between people as citizens and this postulate is embodied in the formal equality of citizens before the law. Criminal procedure has to refrain from arguments *ad hoc et ad hominem*, as Niklas Luhmann points out (Luhmann, 1993: 262). In other words, the law does not deal with the specific circumstances of an event or act, nor does it consider the specific qualities and especially the social status of the persons involved. It is the abstract quality of the act, considered solely according to the definitions of the code of law and established according to the rules of legal procedure, that concerns the professionals applying the law.

The truly important achievement of equality through a high level of abstractness in criminal procedural law nevertheless has its emotional costs and creates dissatisfaction. This dissatisfaction is one source of the motivation to seek alternatives. It appears as an attempt to reintroduce a perception of events labelled ‘criminal’ as connected to concrete people in specific circumstances, as events touching upon their lives and their relationships. Justice is more closely approached because an alternative process of deliberation like RJ recognises the perpetrator and victim in their individuality and in their social context rather than subsuming crime in a general and reductionist legal category. According to this argument (reminiscent of Hulsman’s abolitionist argument), the starting point for analysis is not the totalising, objectifying and abstract categories of CJS, but those concrete situations in the lifeworld which are experienced as problematic by directly involved people and which precede the abstract world of the penal system. An emphasis on lifeworld decentres and contextualises the concept of crime, by turning it from a perception of law-breaking into conflict, dispute, harm, injury, wrongdoing, violence, depending on the context. This open and deliberative approach can enable RJ to avoid lumping together all that happens into one category (or lock the debate within two categories, either crime or conflict).

Secondly, an emphasis on *participation* (*the ‘how’ of justice*) brings RJ closer to political theory. Scholars emphasising the participatory element of RJ claim that to activate people, to bring them together in the effort to resolve conflicts in a constructive way, contributes to grassroots democracy. RJ promotes participation, thus calling for a shift in the ‘essential role of the citizen from service recipient to decision-maker with a stake in

what services are provided and how they are delivered' (Bazemore, 1998: 334), by giving the community 'a forum through which it can exercise its responsibility for its members rather than suffer crime passively and depend entirely upon the coercive power of the state for protection and order' (Schweigert, 1999: 33). In Braithwaite's words, 'disputing over daily injustices is where we learn to become democratic citizens' (1999: 78). Parkinson and Roche (2004) argue that RJ may be considered an example of small-scale exercises of deliberative democracy since it fulfils the requirements of inclusiveness, equality, transformative power, decisiveness and accountability.

The relationship between RJ and democracy has been mentioned by, among others, Christie (1977), Braithwaite (1999, 2000), Pali and Pelikan (2010), Parkinson and Roche (2004), and Kurki and Pranis (2000). This way of considering participation leads to the understanding that RJ helps to enact and enhance what Hannah Arendt in 'The Human Condition' (1958) called our 'place in the world', a position that allows people to hold the ground that gives them the freedom to become active members of a body politic. Coming together and acting 'politically' is, according to her, the very essence and the highest expression of our human condition. If we view restorative processes as being essentially about talking and acting together, the essential element of active participation makes RJ a clear manifestation of political action (Pali & Pelikan, 2010).

While participation in RJ certainly contributes to the achievement of procedural justice, at the same time it offers fertile ground for normative discussions (see Christie 1977), becoming a framework for ethical considerations of justice. By relying at the same time on the procedural and substantive elements of justice, RJ becomes a reflexive discourse of justice able to stand up to the demands of our time and to critique. At the same time, participation leaves open the potential for incomprehensibility, for radical 'otherness' in the process. This can counteract the tendency of RJ to sanitise and contain a conflict, domesticate and discipline it. It can challenge the supposition that all individuals are volitional, purposeful and rational, and accept instead that contradictions, spontaneities and inconsistencies are part of any conflict.

The third element emphasised in Pelikan's model is *reparation* (the 'what' of justice). The idea of reparation is more sober, more modest and thus doable; by emphasising reparation, victims' 'real' needs are more likely to be met. Moreover, Detlev Frehsee (1987) sees reparation as a concept and activity that is capable of transcending a narrow and dogmatic concept of guilt. Reparation has a tendency to de-mystify the concept of guilt and to enrich it with elements of an ethic of responsibility. Responsibility is not passive; one takes responsibility not by enduring and suffering an evil but through an (autonomous) taking on of duties (Trenczek, 2002). Criminal liability thus conceptualised emerges from the social fabric of mutual claims to respect the freedoms of others (which we also find in the concept of dominion by Braithwaite and Pettit, 1990). It substitutes subjugation under punishment for the requirement to make an effort, to become active and render goods and services on behalf of the person that has been harmed. It

becomes future-oriented instead of past-oriented, despite its acknowledgment of the importance of the past. The principle of social responsibility, says Frehsee, derives its productive power from recognising the fact that the damage done cannot be undone, but that in the present and for the future the actors do have the freedom to exert influence over things to come—namely the future development of social relations (Frehsee, 1987). By emphasising the importance of reparation as one of its major tenets, RJ thus becomes reconcilable with the ‘repairing the future’ maxim of the Zwelethemba model.

We want to emphasise once more that this is not a portrait of the whole gamut of RJ models and practices. Rather it points to the potential of RJ, providing orientation and thus serving as a guiding star for its further development.⁸

4. The dilemma of radical alternative approaches

George Pavlich, along with other scholars within RJ, has voiced similar concerns to those of Christie—that this approach, in spite of its many acknowledged and valuable contributions, tends to remain disciplined by the logic of the system it has sought to oppose. His main argument is that despite proponents’ visions of ‘restorative practices’ as constituting an alternative paradigm of justice, RJ is reliant upon the existing CJS for its discursive legitimacy: ‘it is presented as a separate and autonomous entity; yet its foundational concepts derive from the very system it claims to substitute’ (Pavlich, 2005: 14). Of concern is what he calls the ‘impossible structure of restorative justice’, and the notion that RJ advocates a process radically different from the traditional CJS, while remaining rather attached to various institutions, relying upon referrals and at least nominal cooperation. Pavlich argues that ‘restorative justice as an alternative in this sense is unattainable because it constitutes its identity largely by deferring to the very institutions it seeks to replace, reform or alter’ (p. 111). Thus this paradoxical identity crisis ironically entrenches RJ’s dependence on the very system it aims to challenge.

These concerns are not specific to the RJ field, but apply to all fields which try to create, offer or propose alternatives (feminism, socialism, postcolonialism, etc.). A constant issue within critical criminology is the concern that the very act of engaging with the categories of criminal law as defined by the state reaffirms and, therefore, reproduces the forms of power to which critical criminologists are opposed. As abolitionists

⁸ This was exemplified in the course of a conference in connection with the project ‘Restorative justice and mediation in penal matters in Europe’ (Greifswald, Germany, May 2012), where the RJ models of European countries were presented. The participants entered into a discussion as to whether a certain Lithuanian model belonged to the realm of RJ. Looking more closely into it, it became clear that the participatory element was missing; it was a model of compensation ordered from above. While this was in itself regarded as an important achievement, it was stated that Lithuania would have to make further efforts in order to establish RJ models that also exhibit the participatory element—and this has now happened. See www.rsf.uni-greifswald.de/duenkel/forschung/forschungsprojekte/restorative-justice-2011-2013/print.html (accessed March 2014).

have pointed out, the introduction of ‘alternatives’ to imprisonment has failed to reduce the reliance upon the use of confinement and other punishments. The ‘alternatives’ and their objectives were often absorbed and transformed to meet the expansionary and punitive demands of carceral institutions (Mathiesen, 1990). In many ways, then, the challenges that face us today in the RJ field are similar to those faced by earlier proponents of abolitionism.

According to Mathiesen (1974), abolition takes place ‘when we break with the established order and at the same time face unbuilt ground’. Establishing the unfinished and facing unbuilt ground means that we do not just substitute the established order with another one. Mathiesen argues that it is a well-known strategy of the established system to obstruct any abolitionist movement by introducing a new order which somewhat softens criticisms of the old order without structurally changing it. Before we know it, we become enclosed by the system we want to combat. He argues that there are two ways for an alternative: either to be ‘defined in’, or to be ‘defined out’. ‘Defining in’ is the process by which the abolishing alternative, through the many absorbent features of social formation, is transformed slowly into the system itself. ‘Defining out’ is the process by which the alternatives are simply set outside society. There thus seems to be no alternative left between absorption (being ‘defined in’) and open antagonism (being ‘defined out’). Mathiesen came to the view that the real alternative to being either ‘defined in’ or ‘defined out’—in other words ‘to finishing’ in one of those directions—lies in the ‘unfinished’, that is to say in the process of becoming. This strategy of *establishing the unfinished* is the only possibility for an abolitionist political movement wishing to remain a vital and expanding movement. The maintenance of an abolitionary stance implies that there is constantly more to abolish, that one moves in a wider circle to new fields for abolition. This is in line with the idea of permanent critique.

A more extensive and more general treatise on the problem of radical political change, and one that is highly pertinent to the fate of RJ vis-à-vis the CJS, is to be found in Michel Foucault’s writings (Foucault, 1970, 1972, 1980). Different from Mathiesen,⁹ Foucault rejects the dilemma ‘for or against’. This dilemma, he would argue, is rooted in a dualistic world picture (repressive vs. non-repressive systems, and system vs. alternatives), built around the conception of power as a repressive kind of power.¹⁰ There need not be the distinction of system and alternative, because there is no power resid-

⁹ For a very interesting and extensive discussion on the theoretical and methodological differences between various abolitionists, see Folter (1986).

¹⁰ The concept of power in Foucault deviates from the ‘commonsensical’ understanding of power. He goes beyond a description (and denunciation) of power structures and the surface mechanisms of domination (Foucault, 1980). He wants to invert the traditional analysis of power formulated in terms of the juridical-political theory of ‘sovereignty’, a power centred on the law and the taboos. This is an inadequate analysis to understand the function of power in society. The power is productive rather than only repressive. Its is omnipresent, based on disciplinary mechanisms, normalisation and control. It is never localised here or there, never in anybody’s hands, never appropriated as a commodity or piece of wealth.

ing on one side and not on the other. Foucault proposes a kind of oppositional and struggle model based on an idea of a co-constitutive 'battlefield'. Thus Foucault's model emphasises the fact that all kinds of action presuppose a fundamental relationship with opponents. This relationship can alter in many ways and there is no *a priori* need to be always contradictory, as sometimes it will be more profitable to cooperate with the party you combat. According to him, the problem of becoming encompassed by the mechanisms you want to combat is inherent in all battle situations, but this for him presents grounds for optimism rather than for pessimism. According to Foucault, abolitionist activities must take their starting point in the concrete situation and develop their strategies and tactics according to what is required by the actual situation of conflicting forces. For him, one can be opposed and still stay involved.

5. Preserving the alternative spirit and staying involved

Here we will try to thread together the three core elements characterisation of RJ by Christa Pelikan and Foucault's thinking on radical alternatives with our analysis of the 'Words on words' symposium. As we have argued, the central question that has surfaced from that symposium, and the one that has led our own inquiry here, is whether RJ can be seen to constitute a viable alternative 'discursive practice' to the current CJS. An analysis of the reactions to Christie's provocation has shown three different understandings and 'projects' in the RJ field (see Figure 1).

First of all, the majority of contributions assume a tight relationship with this CJS that comes in different forms—as a diversionary reaction, or an added-on reaction—and that leaves the CJS in place. While we argue that this is a fully legitimate and 'realistic' assumption, it refutes the Foucauldian task of oppositional involvement, a kind of engagement with the opponent while nevertheless preserving the differences, thus resisting suffocation by the logic of the system. This tendency of enclosure and suffocation—as we have already said in many words—is a strong one and it often seems irresistible. The mighty and greedy arms of the CJS are out to swallow the core elements and the essential logic of RJ simply because they represent the established way of doing justice. In fact, that is also the essence of Christie's enraged onslaught: Keep it different! Do not use the wrong words!

The three core elements of RJ as we have presented them do serve as a constant reminder of what RJ ought to look like, and how it ought to look different from the CJS. It requires continuous counter-efforts to resist, to negotiate and to defend RJ practices. We can see this within a well-established programme such as the Austrian 'Tatausgleich'. On the one hand, there is an ongoing process of juridification, an ever-increasing enclosure of RJ by the language and the rationale of the CJS. Parties have to submit and sign legal statements meant for their protection to allow further processing. It becomes increasingly difficult to preserve the lifeworld perspective, remaining

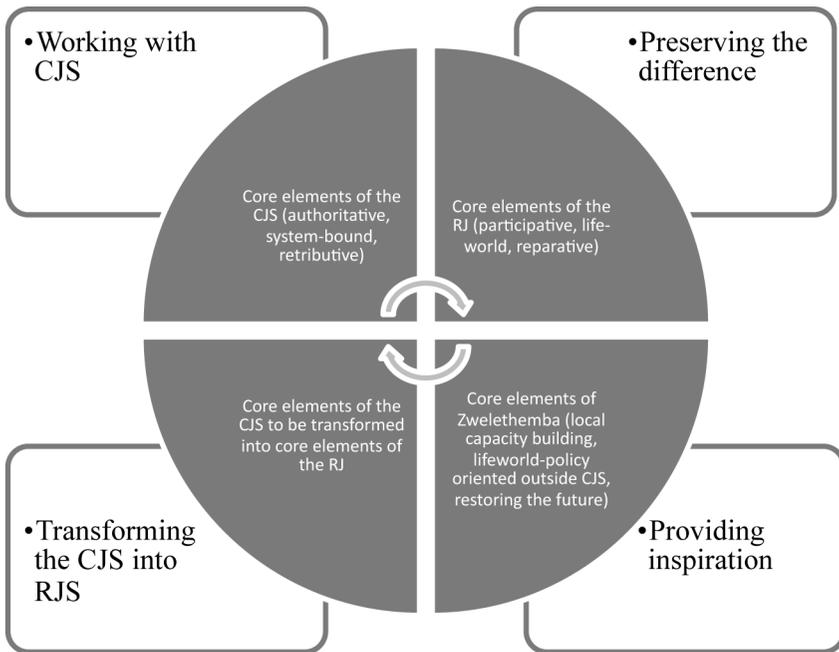


Figure 1. The discursive ‘projects’ in the RJ field

plausible and understandable for the parties who once more get caught in a system that appears remote from their concrete experiences. On the other hand, there are impressive examples of these core elements flourishing and being brought to bear upon the interaction taking place in RJ and on the future lives of women and men, as happens in cases of partnership violence (Pelikan, 2002, 2010, 2012).

Secondly, we do have amongst the contributions two that aim at an even more ‘radical’ task, namely the transformation of the CJS—turning it into a restorative justice system (RJS). There is, for example, Lode Walgrave’s proposal, which is fully in line with his theoretical position: creating a restorative CJS. He argues that we need a fundamental reorientation of the CJS, from being based on the premise that an offence must be punished, towards pursuing maximum possible restoration and reparation of the crime-caused harm. The challenge is to find a combination of maximum space for deliberation among the direct stakeholders with the possibility to exert coercion as a last resort, and also to put coercive interventions in the service of reparation, within the limits of civil and human rights (Walgrave, 2002, 2008). Thus according to this proposal we would use CJS’s coercive power but transform its mission—preserving the good life by decoupling it from the retributive reaction. Then there is John Braithwaite’s proposal. He wants to expand the CJS’s boundary-setting societal function by putting more events under its hat—but at the same time decouple it from the retributive (punitive) reaction. He pro-

poses that we look for a model in which RJ concerns ‘bubble up ... into legal discourse and procedures’ and the rules of law ‘percolate down into restorative justice’ (Braithwaite & Parker, 1999: 116). According to this vision, fusion could in the long run be expected to produce a pervasive RJ practice influencing the CJS. But in something like 30 years of existence we see rather that the opposite has happened: the CJS is swallowing RJ up (rather than RJ bubbling up into the CJS).¹¹ These transformative proposals remain very utopian insofar as this transformation demands political action, rallying political power and forging political alliances on a national and/or global scale. But, in fact, this is what utopias are about.

Then we have the alternative put forward by Zwelethemba—a kind of thorn in the flesh of our thinking, offering inspiration for our work. It presents a truly radical alternative regarding the three elements of RJ, especially as concerns the participative and the reparative elements. According to our analysis, the Zwelethemba model is more optimistically Foucauldian, based on ‘nodes of governance’ rather than the dichotomy of system and alternative. The propositions to work within the system are also reminiscent of Foucault, who argues that sometimes we have to work with the system, and sometimes against it, and these decisions cannot be made *a priori* but will depend on the tactics and strategies needed at a particular moment. As it starts from the nodal governance perception, it does not take a clear stance as concerns the CJS (but it does not take an abolitionist position—rather it talks about the potential role of the police to use force that is to be left with the police).

But is ‘preserving the alternative spirit’ more easily said than done? To bridge the theoretical arguments with concrete practices, we would like to further highlight the core of our arguments through a concrete project (ALTERNATIVE¹²), coordinated by the University of Leuven (KU Leuven), in which we are both involved. The name is neither coincidental nor accidental. The idea for the project arose in light of the awareness of the limitations of research in the field of RJ pertaining to intercultural settings, and at the same time its potential application to such settings. The project is designed as action research. The action research takes place in four different types and on four scales of intercultural settings.¹³ The project seeks to propose the principles and methods for

11 This is clearly an overly pessimistic assessment, and while making it, one should be careful not to deny the fact that many jurisdictions and individual judges have been influenced by RJ principles and practices, and we think that their impact is growing. But we would like to remain alert to the risk of co-optation instead of being too celebratory.

12 ALTERNATIVE is funded by the European Commission as part of the Seventh Framework Programme (FP7). For more information on the project, see www.alternativeproject.eu.

13 The conflicts that characterise the four selected intercultural contexts are: (1) conflicts between residents with and without migrant backgrounds in public/social housing in Vienna; (2) conflicts between Roma and non-Roma inhabitants in a small town in Hungary; (3) conflicts within three multi-ethnic and multicultural regions in Serbia: between Serbs and Albanians, Serbs and Muslims, and Serbs and Croats; and (4) conflicts at three different sites in Northern Ireland: between a local community and gangs of youths, between long-term residents and recent immigrants, and inter-community sectarian conflicts.

promoting an alternative understanding of justice and security in intercultural Europe. This alternative understanding moves beyond the traditional understanding of justice and security built on surveillance and repressive control. At the same time, the project aims to explore the potential of RJ to engage with macro societal conflicts and move literally beyond the CJS.

Each of the research sites prepares an intervention which attends to the core elements of RJ as set out above. This implies that the lifeworld context of conflicts is the starting point, the active participation of the citizens involved is of prime importance, and the aim is to overcome control and repressive containment of these conflicts by establishing practices of dialogue and ongoing cooperation—transformative RJ practices, one could say.

We would like to propose this project as an example of how to transcend the restrictions and dangers of co-option in RJ; it is a project inspired by Zwelethemba. Especially as concerns the element of active participation, which is to be realised in its more ‘radical’ form, it is about local capacity building and the active involvement of people and organisations in an effort to deal with conflicts in these intercultural settings. There is also a broader lifeworld orientation, realised through the creation of interactive settings, which allow for spaces between informal and formal justice, and between justice mechanisms at the individual and at the societal level (Aertsen, 2008). And finally, it is marked by an understanding of the reparative element that aims at ‘restoring the future’—making arrangements for better living together—in the wider sense in which it is understood in Zwelethemba.

What we aim to achieve in ALTERNATIVE cannot be a replacement for the CJS, nor can it transform that system, but if alternatives are established everywhere they cannot but become everyday practices in our societies, including as a primary reaction to crime. To conclude, we would argue both with Mathiesen for a strategy of permanent critique to the CJS or proposing RJ as *establishing the unfinished*, and at the same time with Foucault for *oppositional involvement* with the CJS whilst retaining an alternative. By characterising RJ through the three core elements as proposed by Christa Pelikan, we have argued that they constitute a crucial and clear difference to the characteristics of the CJS. To insist on this difference, we argue, is vital for the movement in order to resist co-option and preserve a true alternative spirit.

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