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*RESTORATIVE JUSTICE: IS IT STILL PUNISHMENT?*

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*A mio nonno Piero,  
che ha vissuto le atrocità umane  
ma ha sempre insegnato ad amare*



## INTRODUCTION

In this thesis I will outline the main characteristics of Restorative Justice (RJ), comparing it to the retributive theory of justice. Particular attention will be given to the theme of punishment, reflecting on its value and meaning, both from a retributive and restorative point of view. The aim is to highlight the necessity of a conception of punishment different from the one expressed by retributive justice, which treats the offender exclusively as an offender and not as a human being in its entirety. Restorative Justice results to be a suitable alternative to deal with the difficulties and problems that arise from the application of the retributive theory. Moreover, I consider it important to underline the aporias in the retributive model. To do it, I will take as main reference Curi's text (2019), *Il colore dell'inferno*, in which the author analyses the origins and the principal features of the model said above.

The first chapter introduces RJ as a whole; there will be analysed the origins, the principles and the applications of it. Here, the reference to Howard Zehr's writings will be necessary. It is possible to say that Zehr is the most influent and significant author of the initial reflection about RJ. He is one of the firsts that formulizes a different way of questioning about justice. Worth mentioning the fact that, in RJ approach, is not relevant asking about which law has been broken, who is guilty for what, because the focus is on the harm, on the needs and on the obligations of those involved. The importance is given to the people effectively implicated in the harm, and not to the law broken.

The second chapter has as its focus the features of retributive justice. The aim is to point out the theoretical aporias and to reflect on the necessity of an alternative model. As said above, I will quote frequently Curi's text, to analyse the origins of retributive approach. These can be found in the ancient Greek tragedies, for example in Aeschylus' ones. Retributive justice, in fact, assumes punishment as a fundamental element and, in the tragedian's writings, punishment is a necessary and unavoidable factor that make understanding and implementing the right attitudes possible. Punishment in this horizon is meant as a necessary consequence of a bad action and, due to this, the wrongdoer has to be subject to a sufferance as hard as the one that s/he caused. Punishment in retributive justice is predominantly characterized by suffering and pain: no room for dialogue, empathy, trust nor listening of the other.

The last chapter concerns in particular the theme of punishment in Restorative Justice. Ample space will be given to the value of punishment in RJ: what it is, what are its characteristics and effects. It will be presented a relevant example offered by Zehr of the application of the RJ method. This example will try to outline the effective feedback on reality of the restorative approach, its practical characteristics and consequences. The principal idea is that punishment in retributive justice provides neither useful nor positive results on reality, whereas Restorative justice does. This, in fact, considers punishment as a mean by which the offender can effectively repair the harm committed and develop a profound awareness of her/his actions and of the community in which s/he is immersed.

The protagonists of this chapter are also the values expressed by RJ: empathy, trust, sense of belonging in the humankind, and, above all, the capacity of recognizing oneself in the other, remembering that we share the same condition as human beings.



## NOTE TO THE READER

Howard Zehr, the most influential initiator of the debate on Restorative Justice, in the text *The little book of Restorative Justice*, defines RJ as it follows:

Restorative Justice is an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations in order to heal and put things as right as possible.<sup>1</sup>

In this thesis, I will argue that the RJ application can be useful not only to people directly involved – offender and victim – but also to the whole society and community. In fact, as it will be seen next, RJ method generates consequences and relations profoundly beneficial in many ways: it promotes dignity, morality, rectitude and well-being.

Nevertheless, I consider it fundamental to present a brief premise before starting. It would be wrong to intend RJ as an approach valid for every type of harm. In fact, I will argue that RJ can be useful in the most common crimes; crimes committed by individuals who have not necessarily “chosen” evil, but they have found themselves in it. Homeless people, for example, or people who have fled wars, people with addictions, people with mental disorders, people who became offenders because they were the first victims.

On the other hand, I do not believe that RJ is sufficient to address types of harm more problematic and dangerous, as the ones committed by terroristic or mafia organizations. In these cases, in fact, the reflection and the sanctions have to be so much more complex and rigorous. Neither restorative nor retributive justice approach can demolish the structure that support organised crime and terrorist groups. Clearly, this is not the place to reflect on how is it possible to eliminate organised crime and terrorism, but it is fundamental for the reader to bear in mind that what is expressed in this text refers to crimes and violence that are not attributable to terrorist or mafia organisations. It is

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<sup>1</sup> Zehr, Howard. *The little book of restorative justice: Revised and updated*. Simon and Schuster, 2015, p. 48.

necessary to acknowledge that there are several differences among the intentions of who commits the crime.

In conclusion, I considered it important to express the idea that RJ aims to a society in which it is possible to find a balance between the parties in contrast, but RJ cannot be adopted in every circumstance: there would be the risk of falling into a dogmatism that does not take into account the differences between a crime made by a hopeless man and a shameless mafia man.

# 1. WHAT IS RESTORATIVE JUSTICE?

## 1.1 ORIGINS OF RESTORATIVE JUSTICE

The origins of the philosophy and the concept of Restorative Justice (RJ) can be found in the United States and Canada during the 1970s and '80s at the same time as the so-called Victim Offender Reconciliation Program (VORP). The application of Restorative Justice implies a mediation between the victims (those who have been harmed) and the offenders (those who have caused harm).

It seems hard to put forward a single definition of what RJ is. As Kathleen Daly (2016) suggests, those who research and practise with RJ have a settled idea of what it is, but there is a definitional problem in general because researchers and practitioners often have different views, different backgrounds, and other differences among them.

I will adopt the point of view expressed by Howard Zehr:

As a conceptual framework, restorative justice seeks to reframe the way we conventionally think about wrongdoing and justice: away from our preoccupation with lawbreaking, guilt, and punishment toward a focus on harms, needs, and obligations.<sup>2</sup>

In this text, I will give a general description of what RJ is, considering the main principles and values of it. It is not my aim to find a suitable definition for every point of view regarding RJ. However, I will try to define it in its general characteristics.

In order to understand how Restorative Justice developed, it is important to bear in mind the following questions, as Howard Zehr (2015) suggests: "Which is the best way to respond to wrongdoing? What does justice require?". The most shared approach to justice is the Western legal system, but it has several problems and limits that do not allow it to deal with certain significant issues. For this reason, a new conception of justice is necessary, a restorative one. This approach to justice is seen as a sign of hope and peace for the future: its objective is to contribute to healing and peace.

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<sup>2</sup> Zehr, Howard. *Commentary: Restorative justice: Beyond victim-offender mediation*. Conflict Resol. Q. 22 (2004): 305

Adopting the approach of Restorative Justice, an important assumption about society can be made – that we are all interconnected. This is the starting and fundamental point to understand the main features of this theory. I would argue that this is the most notable principle of the structure of RJ: this is the starting point for the general discussion about RJ. This idea is shared by many cultures and it can be found in different historical times; in fact, the principle of interconnection can also be found in many cultures around the world. As Zehr suggests, for the Maori there is the word “whakapapa”, for the Navajo “hozho” and for Tibetan Buddhists “tendrel”. All these words express the same meaning: everything is connected to everything else in a web of relationships.

Aristotle would also agree with this idea. In his book, *Politics*, he wrote that we are “political animals”. This means that every human being has, by nature, a social disposition. As previously mentioned, the system of Restorative Justice is based on this concept of interconnection and *relational bond* and I would like to explain why this is so consolidated and can be justified. It reminds us that we live in relationships, that our actions impact others, that when those actions are harmful, we have responsibilities.<sup>3</sup>

The first argument comes from the European continent culture, especially the meaning of Christian values: “Love your neighbour as yourself” is an emblematic example. The validity of this rule derives not only from a deontological dimension but has also some relevant effects from a consequentialist point of view. When someone recognises another person as a dignified subject and treats him or her as they treat themselves, unnecessary pain and suffering will surely be avoided. It is only by recognising the other person as a respectable and equal being that actions towards that person will be beneficial to the common good.<sup>4</sup>

The second argument for this thesis is the following: Hobbes in the *Leviathan* argues that each individual is animated by personal desires that differ from one person to another. The state of nature is characterised by a sort of war of all against all, which can be summarised with the phrase *homo homini lupus*. For this reason, therefore, the state of nature is a dimension in which self-interests and the quest to elevate oneself above others prevail. If we tried to universalise the selfish maxim, we would arrive at a sort of

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<sup>3</sup> Zehr, Howard. *The little book of restorative justice: Revised and updated*. Simon and Schuster, 2015, p. 79.

<sup>4</sup> Magarotto, Silvia. *Dignity as a foundation of human right to migration*. PH6012 Philosophical foundation of human rights, Department of Philosophy, University College of Cork, 2022.

destruction of ethical space and beyond. This point of view cannot be universalised and, due to this, it is necessary to adopt a different approach, i.e., the one explicated before, in which every human being is like the others and there is a sort of interconnection between humans.

To go deeper into the analysis about what Restorative Justice is and its meaning, I consider it important to show a scheme where the differences between criminal justice and Restorative Justice are highlighted.

Two different views	
Criminal Justice	Restorative Justice
<ul style="list-style-type: none"> <li>• Crime is a violation of the law and the state</li> </ul>	<ul style="list-style-type: none"> <li>• Crime is a violation of people and relationships</li> </ul>
<ul style="list-style-type: none"> <li>• Violations create guilt</li> </ul>	<ul style="list-style-type: none"> <li>• Violations create obligations</li> </ul>
<ul style="list-style-type: none"> <li>• Justice requires the state to determine blame (guilt) and impose pain (punishment)</li> </ul>	<ul style="list-style-type: none"> <li>• Justice involves victims, offenders, and community members in an effort to repair the harm, to “put things right”</li> </ul>
<ul style="list-style-type: none"> <li>• <i>Central focus: offenders getting what they deserve</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>Central focus: victim needs and offender responsibility for repairing harm</i></li> </ul>

Source: Howard Zehr (2015), p. 30

It can be noticed that there are some relevant differences between these two approaches. Restorative justice, unlike criminal justice, takes care of the people involved in the offense. RJ has as a central focus the victims’ needs and the offenders’ responsibility for compensating for the harm caused. In fact, adopting the RJ approach, the crime is not seen as a violation of the law or the state, but as a violation of people and relationships. I also consider it relevant to quote the third point in this chart: what does justice want? Criminal justice requires the state to determine the blame and impose pain. But, in this way, there is no possibility to *put things right*: an offender is an offender and a victim is a victim without anything changing. Restorative Justice has completely

different requirements. It directly involves victims, offenders and community members. It is necessary for RJ to *put things right*, trying to find a balance between the parts. Moreover, as we will see in the following points, the offender could be a victim and the victim could be an offender, so RJ seeks to find a balance, respect and the dialogue between the involved sides.

I would like to report a syllogism offered by Simone Grigoletto (2019) that summarizes this concept:

*Premise 1:* All subjects are interconnected, disclosing a *relational bond*.

*Premise 2:* According to their *relational* definition, all instances of conflict bring about a disequilibrium in the net of relationships.

*Conclusion:* Justice (restoratively intended) aims at the reestablishment of the *relational equilibrium* among the parties involved in the given conflictual event.

Next, I will introduce the principles and the values of RJ and this will explain better what has been said in this introduction.

## 1.2 PRINCIPLES OF RESTORATIVE JUSTICE

As established at the beginning, Restorative Justice is based on the idea of interconnection, to harm to one is to harm all. Howard Zehr (2015) defines the following three central concepts of Restorative Justice:

1. Restorative justice focuses on harm;
2. Wrongs or harms result in obligations;
3. Restorative justice promotes engagement or participation

The first pillar deserves a very deep reflection. Restorative Justice says that a crime is a harm done not just to the victim but to the whole society and community. This approach seeks to highlight the importance of the victims and their needs. This has to happen always, even if there is no possibility to understand who the offender is. I would say that the main core of the entire reflection about Restorative Justice is summed up in the following motto: *putting right*; i.e., RJ wants to put things right. But, what does this mean? It means that those harmed should be central to any process of justice. The main aim is to contribute to healing and general well-being. This is an important difference between RJ and criminal justice. The latter is, in fact, frequently handled by lawyers, judges, justice professionals, and not by the people directly involved. RJ wants to highlight the importance of the people really involved, not only those who represent them. RJ is about finding a balance among all the parties. “The idea of putting things right is the opportunity for those who have caused harm to do right by those they have harmed. (...) The offender has to take active steps to repair the damage to those harmed”.<sup>5</sup> First of all, the offender has this obligation, but the community has some duties as well. The community, in fact, is to be held responsible for situations that make it possible to commit that crime. The offender, above all, has duties and obligations, but the question is: why did the offender act like that? What are the situations that made the offense possible?

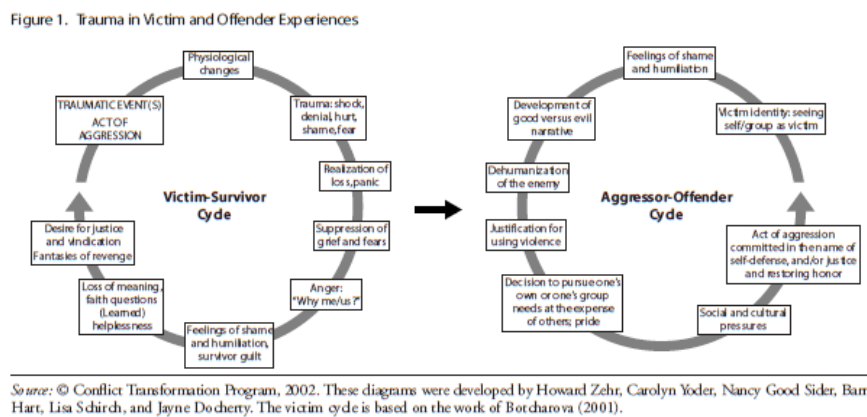
In order to provide an answer to these questions, I will refer to the arguments of James Gilligan, a Harvard professor and former prison psychiatrist.

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<sup>5</sup> Zehr, Howard. *The little book of restorative justice: Revised and updated*. Simon and Schuster, 2015, p. 38.

The main idea of Gilligan is that all violence is an effort to achieve justice or to do injustice.<sup>6</sup> The point is understanding why the offender behaved in that way. The idea is that the offender himself was, first of all, a victim and, due to this, became an offender as well, in order to overcome past traumas. Of course, this cannot be a justification for wrongdoing; it does not absolve any responsibility for bad behaviour. But this is fundamental for the punishment issue: punishment often reinforces the sense of victimization (Zehr, 2015).

Below, a diagram by Howard Zehr.<sup>7</sup>



In this diagram, there are explained both cycles of victim-survivor and aggressor-offender moments. This is an objective generalization of the behaviours of individuals that live a situation of harm, on one hand, and offense, on the other. Initially, the traumatic event / act of aggression takes place. Consequently, psychological of victim changes; the trauma causes shock, denial, hurt, shame, fear; the victim realizes a sense of loss and panic. Following, the individual develops a feeling of anger, shame and humiliation. This is the moment of loss of meaning, faith questions, and, at the end, the victim is searching for justice and vindication. This last moment can be the first one of the other, the cycle of aggressor-offender. The victim sees him/herself as victim, there

<sup>6</sup> Gilligan, James. *Violence: Reflections on a national epidemic*. New York: Vintage Books, 1996.

<sup>7</sup> Zehr, Howard. *Commentary: Restorative justice: Beyond victim-offender mediation*. *Conflict Resol. Q.* 22 (2004): 305.



are feelings of shame and humiliation as well. This leads the victim to the development of the narrative of good versus evil and to the dehumanization of the enemy and, at as last one, to the justification of using violence. Due to this, the offender decides to pursue one's own or one's group needs at the expense of others; there is – then – the act of aggression committed in the name of self-defence, and for justice and restoring honour.

The second pillar, important as well, is about obligations: wrongs or harm result in obligations. RJ establishes that offenders have to understand their responsibilities and the consequences of their actions. Therefore, they have to repair the harm, both physically and symbolically. The last pillar is the fact that RJ promotes engagement or participation. This refers to the principles expressed at the beginning: RJ considers the people who are really involved, the victim and the offender. These stakeholders have to know each other and they have to be implicated in determining what justice wants in the specific case.

Three words can summarize the values and the basis of Restorative Justice: respect, responsibility and relationship. These words are connected with the three pillars explained before. The aim of RJ is to put wrongs and harm right. This is possible by focusing on harm and needs and addressing obligations, by using inclusive collaborative processes and by involving stakeholders. This will be done if, and only if, at every moment, there is respect for all. I would say that respect is the most important element in the entire process. Respect derives from the dimension of the interconnection defined in the previous pages.



## **2. PUNISHMENT IN RETRIBUTIVE JUSTICE**

### **2.1 INTRODUCTION TO RETRIBUTIVE JUSTICE**

Before analysing the features of punishment in Restorative Justice, I will take into account the traits of retributive justice in general, its origins and meanings.

Retributive justice, in general, starts with specific questions; it first asks what law has been broken, who has broken it and what punishment to give the offender. In this horizon there is no room for the victim and the civil community; the re-education of prisoners is responsibility only of the prison system. The difference with RJ is evident from the questions it presents. Whereas in RJ the interests are focused on the purely law and offence dimension; RJ asks who the sufferer is, what the suffering is. It is clear that in this case the victim and the offender have an active role in the realisation of justice. Moreover, society is responsible for re-education, not prison. Within the RJ, the very definition of an offence is not limited to the infringement of the legal asset protected by the legal system, as if the offence were limited to the state and its laws, but it also considers first and foremost a “break in relations” among citizens.

Retributive justice, on the other hand, is based on the idea of punishment. This punishment must be proportionate and reasonable to the crime and its severity. I find it important to present a part of an interview by the psychologist Elisa Mauri for “L’in-sistente” that explicates retributive justice in a really interesting way:

The symbol of the scales can summarize very deeply the retributive logic. The evil of the crime, which is collectively chosen to be answered through the evil of punishment, is placed on the scales by the person who committed it. The evil of the punishment must be commensurate with the evil of the crime so that the scales return to a state of equilibrium. However, the most important limitation of retributive logic lies precisely in the fact that, even though centuries have passed, we remain firm in responding to the evil of the crime with the evil linked to the suffering of a punishment, changed in its

manifestation because it no longer affects the body of the condemned person as it did before prison existed.<sup>8</sup>

The symbol of the scales summarises clearly the mechanism of the retributive approach: according to the bad action done, the offender suffers an equally severe punishment. Retributive justice does not reckon the relationship between individuals, but exclusively the law that has been broken. The offender is seen only to the extent that s/he has broken the law. It is evident that, adopting this approach, there is the increase of suffering not only of individuals but also of society.

In order to understand deeply the main ideas and mechanism of retributive logic, I consider it important to set out the relevant features of the ancient Greek tragedies, particularly those written by Aeschylus. In his tragedies the investigation of the relationship between the concepts of guilt, punishment, atonement and knowledge was recurrent. The central idea of Aeschylus – which can be summed up in the expression *πάθει μάθος* – is that suffering and punishment produce knowledge. Through pain, the human being learns his own limits; the two elements already mentioned – punishment and suffering – are necessary to understand the rightness of an action.<sup>9</sup>

It is worth mentioning a brief reference to Hegel's *Elements of the Philosophy of Right*.<sup>10</sup> In the figure of Abstract Right, there are the subfigure of “contract” and “illicit”. The author argues that the illicit is the condition through which the contract is possible because it is only when the law is violated that the law is shown, that it is possible to understand how the law really works. Fundamentally, this is what Aeschylus himself expresses: it is only through punishment, following a violation of a norm, that the subject understands which is the right action, what should actually be done. It is only through guilt, and thus through punishment that results from it, that humans learn to act with moderation and wisdom.

In Aeschylus' writings, punishment is a necessary and unavoidable factor to understand and to implement the right attitudes. The main idea is that humans must – by nature – interface with the dimension of evil and suffering in order to achieve a state of

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<sup>8</sup> Alessia Lambazzi, 2022, *Restorative Justice and limits of retributive logic*, L'in-esistente, online, <https://www.linesistente.it/giustizia-riparativa-limiti-logica-retributiva/>

<sup>9</sup> Rossi, Luigi. *Greek literature. History, places, occasions*. Le Monnier Scuola, 2015.

<sup>10</sup> Hegel, Georg Wilhelm Fredrich. *Hegel: Elements of the philosophy of right*. Cambridge University Press, 1991.

wisdom. It is not possible to understand the rightness of an action without passing through pain and suffering. This is the idea that emerges in the tragedies and takes up the cornerstones of retributive justice.

The roots of retributive model can be found from ancient Greek period and probably also before; the Old Testament presents some similar ideas as well, suffice it to think about the “lex talionis” expressed in Exodus, 21, 23 – 25.

I would argue that punishment in retributive justice is “merely punitive”, meant as R. A. Duff suggests:

Punishments are *merely punitive* if they are intended or administered as mere retribution, with the sole aim of ‘making them suffer’ – regardless of the meaning of that suffering. They are *merely punitive* if they are intended or administered merely as deterrents whose sole aim is to secure the obedience of a supposedly dangerous class of potential offenders by threatening them with sanctions. They are *merely punitive* if their primary effect is further to exclude those who have already been excluded – to stigmatise offenders as enemies against whom ‘we’ must be protected, to deprive of more of the rights and benefits of citizenship those who were already excluded from a just share in those rights and benefits.<sup>11</sup>

## 2.2 REFLECTION ON THE WORD “PUNISHMENT”

The conception of punishment as suffering, the necessity of balance between the evil committed and the evil to which the offender must be subjected, has ancient roots. This is evident from the etymology of the word “punishment”. The Greek word *ποινή* (hence the Latin *poena*, Italian and Spanish *pena* and French *peine*) has different meanings that express a relevant conception of punishment. Originally this term meant “to repair”, “to compensate”, and expressed the idea of reward and sanction. “*ποινή*” means something that is given in exchange for something else. On the one hand, it refers to compensation, reparation; on the other hand, it coincides with being punished, castigation. Later, this

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<sup>11</sup> Duff, Robin Antony. “Probation, punishment and restorative justice: Should Al Turism be engaged in punishment?”, *The Howard Journal of Criminal Justice* 42.2 (2003): 181-197.

term also started to indicate that what is given is not a generic reciprocation, but it is something that involves pain, inflicted to compensate for a previous and fundamentally similar suffering.<sup>12</sup> The original meaning of ποινή is twofold and applies to two groups of terms, which indicate the punishment as penalty or castigation and punishment as suffering or pain. The idea that arises is that through pain it is possible to cancel or redeem the suffering that has been inflicted. In the Latin language also, the verb “punish” stands for “to make pure”, “to purify”. It is as if punishment were that through which the purification of something that has been soiled is possible.

I find it interesting the parallelism that Curi (2019) puts forward when reflecting on the term “punishment”. He compares the meaning of the latter word with “φάρμακον”, which indicates both *poison* and *remedy*: as it is not possible for a “medicine” to not be a “poison” at the same time, it is not acceptable to “amend” without suffering. Inflicting a punishment therefore does not mean restoring a disturbed equilibrium other than through an additional disequilibrium: a repair is not possible without the production of another injury.

### 2.3 APORIAS IN THE LOGIC OF RETRIBUTIVE THEORY OF JUSTICE

The problem that arises from this conception is easily deduced: the cycle of suffering would go on forever. If a fault in order to be expiated requires a punishment – that is a suffering as well – in this way, the last end will always be defined by the evil dimension. This perpetual continuity in suffering, of “blood calling blood”, is present in Aeschylus’ tetralogy *Oresteia*, consisting of the tragedies *Agamemnon*, *Coephoras* and *Eumenides*. This is noted very accurately by Paul Ricoeur (1958). He lists the acts of revenge that characterise this tetralogy:

The death of Iphigenia is repaid with that of Agamemnon, her father; then that of Agamemnon with that of Clytemnestra, his adulterous wife; then that of Clytemnestra, his mother, with that of Orestes, his son, until (miracle) the avenging Erinyes are transformed into Eumenides, in other words into

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<sup>12</sup> Curi, Umberto. *Il colore dell'inferno*, p. 104. Bollati Boringhieri, Milano, 2019.

benevolence.<sup>13</sup>

The list of murders just mentioned is meant not as a guilt, but as an obligation that is not avoided. Orestes, in fact, by killing Aegisthus, acts in accordance with a logic of reciprocity in as such his act appears as a necessary action in response to a loss he has suffered. Had Orestes not done so, he would have stained himself with dishonour.

The first problematic issue that arises from this model is the one already mentioned: punishment, meant as the expiation of a guilt, produces further punishments of its own that find no solution except in the suffering itself.

Regarding the retributive model, I consider it also interesting to illustrate a further aporia presented by Curi (2019) concerning the foundation of punishment.

The relationship of proportionality between guilt and punishment only endures if it is accepted that punishment can function as expiation, i.e., only on condition that it is assumed to be a conduct of annulment, capable of erasing the crime, and thus of restoring order. The conclusion of this paradox highlights the existence of an ineradicable aporia underlying criminal law. In order to acquire a fully rational statute, criminal law should rid itself of all mythological-religious assumptions, first and foremost that which attributes a purifying function to punishment. But, in this way, by eliminating the myth of expiation, it would deprive itself of the very principle on which it bases its legitimacy, namely the proportional correspondence between crime and punishment.<sup>14</sup>

The author argues that this conception of punishment is based on an unjustifiable principle because it is based on a mythological-religious conception. Punishment as expiation is valid only if it is possible to appeal to a different dimension, a non-empirical dimension. Therefore, the validity of the retributive theory, on a purely theoretical level, is lost. Curi considers the retributive logic as it was without foundations. Its foundations

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<sup>13</sup> Ricoeur, Paul. *Il diritto di punire*, ed. it. a cura di L. Alici, Morcelliana, Brescia, 2012.

<sup>14</sup> Curi, Umberto. *Il colore dell'inferno*, Bollati Boringhieri, Milano, 2019, p. 111.

derive from a religious-mythological sphere, so it is impossible to justify them. As a result, there is the need of a new type of foundation, more acceptable. The refer to the concrete dimension is required, only in this way it is possible to understand the effective implication and consequences caused by the bad actions. This idea is well expressed by Claudia Mazzucato (2010) that argues:

RJ introduced what seemed to be lost in scientific and political reflection, that is, the sensibility that comes from sharing the experience of what a crime is for those who commit it, those who suffer it, those who encounter it to be an occupant of the places that offered an unconscious scenario of it. This is possible by giving voice without too many barriers to the men and women who have experienced the crime directly, allowing access to those experiences that “make” the crime in its tragic and concrete human consistency. (...) RJ wants to show the physical dimension of commonality as well.<sup>15</sup>

The author highlights a fundamental element of RJ; it seeks to find a balance among the parties but this is possible only in an empirical dimension, not through lawyers nor general laws or mythological-religious principles. This should be made for real. If borne in mind both these ideas, Mazzucato and Curi's, it is possible to develop an interesting comparison between the retributive and the restorative models. Curi argues that retributive logic does not have a solid foundation and, due to this, is not possible to justify it. Consequently, it is irrational to intend punishment in retributive justice as justified. In RJ model, the human dimension is emphasized, the subject is a human subject, not just a subject who acts, is considered in its complexity because of the principle mentioned at the beginning: the idea that we are all interconnected. Therefore, each case is analysed and interpreted differently because each offence has its own context, its own subjects and certain actions that characterise it.

I would like to conclude this chapter with a quotation by Zehr (2015); the author argues as it follows,

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<sup>15</sup> Mazzucato, Claudia. *Appunti per una teoria “dignitosa” del diritto penale a partire dalla Restorative Justice*, 2010, pp. 104 – 107.



Both retributive and restorative theories of justice acknowledge a basic moral intuition that a balance has been thrown off by wrongdoing. (...) They differ, however, on the currency that will fulfil the obligations and right the balance. Retributive theory believes that pain will vindicate, but in practice that is often counterproductive for both the one harmed and the one causing harm. Restorative justice theory, on the other hand, argues that what truly vindicates is acknowledgment of a victim's harms and needs, combined with an active effort to encourage the offender to take responsibility, make right the wrongs, and address the causes of his or her behaviour. By addressing this need for vindication in a positive way, restorative justice has the potential to affirm all parties and to help them transform their lives.<sup>16</sup>

In this chapter I tried to highlight the main characteristics of Retributive Justice and the differences between it and Restorative Justice. The main idea of retributive theory of justice is that offences must be compensated by an equal number of punishments. Punishments are measured according to guilt; punishment, in a metaphysical way, makes the guilt erased. There is no place for the subjects involved in the harm, in fact the protagonists are the law and the law-breaking.

In the next and last chapter, the main focus will be on punishment in Restorative Justice. The reflection will concern the possibility of a different conception of punishment, a punishment that does not imply suffering and pain. Is it possible a punishment that does not imply pain and suffering? Are there possible alternatives? If yes, will it still be punishment or not? These questions will be the starting point of the third chapter reflection.

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<sup>16</sup> Zehr, Howard. *The little book of restorative justice: Revised and updated*. Simon and Schuster, 2015, p. 75.



### **3. RESTORATIVE JUSTICE: IS IT STILL PUNISHMENT?**

#### **3.1 (IN)COHERENCE IN THE DECISION-MAKING PROCESS**

Before delving into the heart of this last chapter, I consider it relevant to present a brief reflection on the philosophical foundation of punishment in retributive justice and, by extension, in Restorative Justice. In the text by Grigoletto – Grandi (2019), main reference for this chapter, Elizabeth Tiarks reflects on the following issue. The author writes about the problem of incoherence in the decision-making process, with regard to retributive and utilitarian theories. By contrast, she argues that in RJ processes the origin of philosophies of punishment and the knowledge base of the characterization of the specific – case process is well-known and clear. The incoherence problem stems from two main factors, that are the following:

1) There is no identifiable origin of philosophy of punishment expressed in sentencing decisions;

2) Decisions about which purpose of sentencing to prefer are made using a limited knowledge base.

As already mentioned, I will focus on the first point, on the philosophical foundation of punishment. The author deems that in retributive justice sentencing the philosophy of punishment is not clear; it is not possible to define where it comes from. Furthermore, there are no relevant connections between one particular purpose of sentencing over another; the criteria by which the fairness of the decision-making process can be judged are no obvious and explained.

There is no clear procedure in place for sentencers to use to determine when they should prefer one purpose over another in any instance of sentencing, which results in incoherence in the decision-making process.<sup>17</sup>

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<sup>17</sup> A. Ashworth, E. Player, Criminal Justice Act 2003: The Sentencing Provisions, “The Modern Law Review”, LXVIII (5), 2005, pp. 822-838

Unlike retributive and utilitarian processes,

RJ represents a more coherent method of sentencing decision making because the process does not prefer or predict an outcome aligned with any one theory, but allows the stakeholders to discuss and deliberate between themselves as to what outcome most accords with their notions of justice. This may require compromise, where there are opposing views, and it is particularly important in this model that no one party dominates and that the agreement reached is truly consensual. (...) It is the *process* by which purposes are selected that is more coherent here, even where the outcome contains both utilitarian and retributive elements.<sup>18</sup>

In RJ processes, the solution of the first issue expressed at the beginning is that the justification of punishment and its origin is clear because it comes from the stakeholders' personal notions of justice. The author states that RJ emphasizes the empowerment of stakeholders as key decision-makers. Philosophy of punishment in RJ is not abstract or without foundations, but it is decided by people who are really involved; in other words, punishment is justified because it is decided by those who *are* the process, the stakeholders. Consequently, it is evident that this approach can solve also the second problem, the one about the knowledge base.

The knowledge that stakeholders can bring to the RJ process enables mutually agreed upon decisions to be much more meaningfully related to the circumstances of the case than in the traditional sentencing process. RJ provides opportunities for discussion and debate, as well as enabling more information about the offence and the offender to be used in the discussion and it is a useful process for the development of individuals' moral ideas, rather than a simply forum to which they bring rigid moralities which are then applied to the context of the offence. (...) Through both who RJ processes

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<sup>18</sup> Tiarks, Elizabeth, "Restorative Justice And The Problem Of Incoherence In Sentencing", *Philosophical Insights for a Theory of Restorative Justice*. "Verifiche", 2019, n. 2, p. 63, edited by Grandi, Giovanni – Grigoletto, Simone.

entrust with the decision-making, and how this allows for those decisions to be made, RJ offers a more coherent process of sentencing.<sup>19</sup>

What has been explained until now highlights the fact that RJ processes have a more solid philosophical foundation because it does not consist of a dogma, of an absolute truth that is not justified. The RJ process brings an outcome that is reliable because it consists of the choice of the individual parts that make up each process. The author says that her approach views RJ as a decision-making process which has no objectively “right” answer, but can have a more or less fair process. Consequently, the punishment of retributive theory is itself not well-founded, whereas the consequences established by RJ are so, as they result from a kind of agreement between the parties.

Here, I am still taking into account the word “punishment” to refer to something that is the consequence of a bad action in RJ, but first I will explain the meaning and the position occupied by this word in the RJ theory.

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<sup>19</sup> *Ivi*, p. 69

### 3.2 RESTORATIVE JUSTICE: IS IT STILL PUNISHMENT?

The content of this chapter is the main core of the entire thesis; it consists in reflecting about punishment in Restorative Justice. I will try to understand the meaning and the essence of punishment in RJ.

I consider it important to put forward a quotation by Grigoletto – Grandi (2019) that introduces this theme:

Restorative justice today is becoming a sort of trendy label under which to collect very different approaches that have in common something negative, that is, the idea that punishment of the guilty is not the solution for wrongdoing.<sup>20</sup>

There are several questions concerning this reflection, first of all it is important to ask about the value of punishment in RJ: what is the value of punishment in RJ? What is the meaning, the future that punishment can assume if the RJ approach is adopted? Is it still meaningful talking about punishment or not? Moreover, does punishment disappear or does it only change?

All these questions can be summarized by the title of this thesis; *RJ: is it still punishment?*

I will argue that punishment is not cancelled or eliminated, but it changes its features and characterization, it is not meant as retributive justice does anymore. Punishment in RJ is not a consequence of a bad action, it does not include suffering and pain, but it is the mean through which it is possible to repair the harm in a more positive and constructive way. Punishment in RJ consists in the effort made by the offender to repair the victim, to repair the harm and to find a solution to this; a solution that does not include either suffering nor pain.

I would like to present a RJ application in a situation that is not, unfortunately, so uncommon. I will do it quoting Zehr in Grigoletto's and Grandi's text (2019).

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<sup>20</sup> Grandi, Giovanni – Grigoletto, Simone. "Why Theory Matters", *Philosophical Insights for a Theory of Restorative Justice*. "Verifiche", 2019, n. 2, p. VII, edited by Grandi, Giovanni – Grigoletto, Simone

In 1994, when Fred Van Liew was chief criminal prosecutor in Polk County, Iowa, he read a troubling police report. A local Jewish synagogue had been vandalized, with Neo-Nazi graffiti sprayed on it. An 18-year-old man and his 17-year-old girlfriend had been arrested and charged with the crime. Fred could have prosecuted these two people with a hate crime but instead he began to ask restorative justice questions. When Fred suggested a circle process, many were sceptical. Eventually, however, they decided to proceed. It was a difficult and moving process. The synagogue was able to talk about how it had affected them. In turn, they heard the offenders' stories of hurt, loss and alienation and of finding a sense of belonging through a white supremacy group.

Eventually the members of the synagogue and these two young people came to an agreement. The "offenders" would do 200 hours of work for the synagogue; they would study Jewish and holocaust history, led by synagogue members; they would finish their high school educations and find jobs. They did all this, got married and had child. The rabbi and others were invited to the wedding and attended, bringing gifts. Five years later, the rabbi spoke at conference of his friendship with these two, holding back tears. (...) I believe that if we embark on this journey with respect and humility, with an attitude of wonder, it can lead us toward the kind of world we want our children and grandchildren to inhabit.<sup>21</sup>

This is an example that I find striking and extremely symbolic for my reflection. Those who vandalised the synagogue could have been subjected to retributive justice model, hence imprisonment because guilty of vandalism and hate crime. But would prison have been enough to redeem the consciences of the two young vandals? Is a certain amount of time spent in jail that changes individuals' minds, that makes them understand the mistakes they have made, or not? I would answer not because the possibility of recidivism in cases like this is very high.

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<sup>21</sup> Zehr, Howard. "Restorative Justice Beyond Crime, A Vision To Guide And Sustain Our Lives", *Philosophical Insights for a Theory of Restorative Justice*. "Verifiche", 2019, n. 2, p. 15, edited by Grandi, Giovanni – Grigoletto, Simone

With the application of RJ approach, the vandals had a sort of punishment to face as well, but, in this case, it does not consist anymore in months of imprisonment and hard living, but consists of understanding the seriousness of one's actions by getting to the bottom of what has been offended and wounded; understanding the customs, traditions, the value of that. The essence of punishment is completely different compared to retributive approach. Punishment in RJ doesn't aim at suffering and pain, it would be wrong to understand punishment in this sense. It is important to give credit to Walgrave's valuable insight:

Restorative justice is clearly different from the predominant punitive apriorism in the current criminal justice response to crime. It is neither an alternative punishment nor complementary to punishment. The crucial distinction is the intentionality. Whereas punishment is an intentional infliction of pain, reparation is an action to undo harm, which may, however, be painful. (Walgrave, 2008, p. 65).

On the one hand, retributive theory implies punishment for punishment's sake, in a kind of deontological conception of justice and balance between the parties; on the other, RJ is not interested in punishment for punishment's sake, but punishment must be aimed at something else, that is, the effective reparation of the harm, the union of the parties. It may have within it suffering and pain, but that is not in its nature, the goal is not penalty and suffering per se, but reparation. On the one hand punishment as punishment, suffering, on the other hand as reparation, an internal process that does not, as a prerequisite, involve suffering. As Welgrave suggests, the intentionality in these two theories is completely different: reparation may be painful, but it does not include an intentional infliction of pain, as it happens in retributive theory.

With the retributive approach there is the possibility of ensuring that subjects involved in harm – offenders and victims – be more aware and better off than before there was harm. In the above-mentioned case, for example, vandals were living in a situation of alienation and meaninglessness, with the encounter with the rabbis they became able to overcome this negative, hopeless situation.



In order to understand very deeply this idea, it is fundamental to do not forget the main core of RJ expressed at the beginning, the fact that, as Zehr says,

The overall goal of RJ approach is to promote individual and relational wellness – to improve the health of individuals and communities. RJ changes the questions, or the emphasis, of the questions we ask about harmful behaviour. Instead of a preoccupation with what laws were broken, who did it, and what punishment the “offender” deserves, RJ asks questions like these: Who has been harmed? What are their needs? Whose obligation is to address those needs? What has caused this to happen? Who has been affected or has a stake in this? What is the process that can involve them in the resolution and prevent future harms?<sup>22</sup>

It is necessary to bear in mind the main objective of RJ: to put forward a model that intends the involved parties as human beings, not only as victim and offender – as protagonists of the harm – but they must be considered in their entirety; suffice it to know what expressed at the beginning about Gilligan’s writings: “The point is understanding why the offender behaved in that way. The idea is that the offender himself was, first of all, a victim and, due to this, became an offender as well, in order to overcome past traumas”. In the example presented above this is implicitly present: the vandals acted like that because of their “stories of hurt, loss and alienation and of finding a sense of belonging through a white supremacy group”.

The word “punishment” in RJ changes completely in meaning, but I do not find that it should be removed, as it still involves a kind of fatigue on the part of the offenders, but it is a fatigue that first and foremost involves active actions and not exclusively a passive factor, such as years to be spent in jail.

In RJ theory, punishment is not something that the offender has to be subjected to, but it consists in some actions that this person has to actively carry out. Moreover, this implies a sort of forgiveness by those harmed, especially in cases like the one explicated before, but this forgiveness should not be seen as pure supererogatory action, because it is only if the offender provides actions to repair the harm.

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<sup>22</sup> *Ivi*, p. 9.

Undoubtedly to the question “Is there still punishment in RJ?” the answer would be negative if punishment is meant as retributive justice does, so intended as pure pain and sufferance. Contrarily, if it is adopted the notion of retributive punishment understood as a pure *mean* through which it is possible to resolve and balance the parties, then in this case there is also in Restorative Justice. Restorative approach does not intend to establish what needs to be done, but both retributive and restorative share the idea that there is a medium through which the situation has to be settled – whether it is years in prison or whether it is 200 hours in a synagogue and learning about Jewish culture. It is the intention, the values, the ideas, the conceptions that change completely.

Punishment in RJ consists in a kind of path to redemption that may involve pain and suffering but these are not a necessary factor, because the necessity is the fact that the harm will be fixed.

Underlying the restorative approach is a trust in humanity, a trust in the fact that the offender is aware of what has been done, trust in a possibility of empathy on both sides, because both – to forgive and to be forgiven – requires trust. Punishment is no longer seen as a factor that disadvantage the offender, but rather as a mean by which to support the harmed.

## CONCLUSION

As Mannozi and Lodigiani (2015) suggest, RJ embraces some values and ideas that are not anymore so common. I do not want to present a reflection that may seem trivial, about the “nowadays lack of values”, but my aim is to highlight the positive and hopeful values that characterise the RJ model. The text by Mannozi and Lodigiani “La giustizia riparativa. Formati, parole, metodi” is divided into six parts, and I would like to focus on the second one, “Five words to understand Restorative Justice”. These words are the following:

- 1) Listening;
- 2) Empathy;
- 3) Recognition of “the other”;
- 4) Shame;
- 5) Trust

During the exposition of this thesis, I have indirectly tried to explain the meaning that the word “shame” and “trust” assume in the RJ model. Now, I would like to express a brief reflection about the first three concepts.

*Listening, Empathy, Recognition of “the other”*, have a particular element in common: all of these require the subject to be in strict connection to the other. This idea brings to mind the essential condition and prerequisite expressed at the very beginning, the principle from which the RJ structure is developed: the fact that all human beings are connected to each other in a web of relationships.

I think that the RJ approach can genuinely respect two kinds of moral theories, deontology and consequentialism; these models are really different between them. Consequentialism affirms that the rightness of actions is determined by their consequences, while the deontological ethic assumes that the rightness of actions is determined by their conformance to moral rules or laws. From a consequentialist point of view, RJ is acceptable because the consequences derived by this kind of process are useful and better for the whole people involved: offender, victim and community. On the other hand, RJ observes and respects some fundamental values and moral rules, first of all the one that we can find in the Kantian deontology and also in the Bible: “love your neighbour as yourself”. This should be respected by the offender for sure, but also from the victim.

I absolutely agree with Zehr: the implementation of RJ values, process and structure can lead us toward the kind of world we want our children and grandchildren to inhabit.

I do like to think of the whole RJ process as a tree in spring. The roots represent the principle that support the whole structure, therefore the idea that we are all interconnected. The fruits that spring from this tree are the positive elements deriving from this process: a fairer, more supportive, less vicious, less harsh reality. The lifeblood from which the fruits of this tree grow are the values enunciated above: the capacity of empathy, of listening, of forgiveness towards the other and of shame towards oneself, of recognising one's own action as negative, the capacity therefore of being deeply human.

## BIBLIOGRAPHY

- A. Ashworth, E. Player, Criminal Justice Act 2003: The Sentencing Provisions, “The Modern Law Review”, LXVIII (5), 2005
- Curi, U., *Il colore dell’inferno*, Bollati Boringhieri, Milano, 2019.
- Daly, K., *What is Restorative Justice? Fresh Answers to a Vexed Question*, *Victims & Offenders*, 11:1, 9-29, 2016.
- Duff, R., “Probation, punishment and restorative justice: Should Al Turism be engaged in punishment?” *The Howard Journal of Criminal Justice* 42.2, 2003.
- Gilligan, J. *Violence: Reflections on a national epidemic*. New York: Vintage Books, 1996.
- Grandi, G. – Grigoletto, S., *Philosophical Insights for a Theory of Restorative Justice*. “Verifiche”, n. 2, 2019.
- Hegel, F., *Hegel: Elements of the philosophy of right*. Cambridge University Press, 1991.
- Lambazzi, A., *La giustizia riparativa e i limiti della logica retributiva*, L’insistente, online, 2022.
- Magarotto, S., *Dignity as a foundation of human right to migration*. PH6012 Philosophical foundation of human rights, Department of Philosophy, University College of Cork, 2022.
- Mannozi, G. – Lodigiani, G. A., *La Giustizia riparativa: Formanti, parole e metodi*. G. Giappichelli Editore, 2017.

- Marshall, T. F., *The evolution of restorative justice in Britain*. Eur. J. on Crim. Pol’y and Rsch. 4, 1996.
- Mazzucato, C., “Appunti per una teoria *dignitosa* del diritto penale a partire dalla restorative justice”, *Dignità e diritto: prospettive interdisciplinari*. “Quaderni Dipartimento di scienze giuridiche, Università Cattolica del Sacro Cuore”, n. 2, 2010.
- Ricoeur, P., *Il diritto di punire*, ed. it a cura di L. Alici, Morcelliana, Brescia 2012.
- Rossi, L., *Greek literature. History, places, occasions*. Le Monnier Scuola, 2015.
- Tiarks, E., “Restorative Justice and the Problem of Incoherence in Sentencing”, *Philosophical Insights for a Theory of Restorative Justice*. “Verifiche”, pp. 43 – 70, 2019, n. 2, edited by Grandi, Giovanni – Grigoletto, Simone.
- Zehr, H., *Commentary: Restorative justice: Beyond victim-offender mediation*. Conflict Resol, 2004.
- Zehr, H., *The little book of restorative justice: Revised and updated*. Simon and Schuster, 2015.
- Zehr, H., “Restorative Justice Beyond Crime, A Vision to Guide and Sustain Our Lives”, *Philosophical Insights for a Theory of Restorative Justice*. “Verifiche”, pp. 1 – 16, 2019, n. 2, edited by Grandi, Giovanni – Grigoletto, Simone.

## ITALIAN SUMMARY

L'obiettivo di questo lavoro è stato quello di presentare gli elementi caratterizzanti della Restorative Justice; particolare importanza è stata data al tema della pena e al valore che essa assume adottando il modello riparativo.

Howard Zehr è ritenuto uno dei principali esponenti della riflessione sulla giustizia riparativa ed è egli che ci fornisce una definizione della stessa molto forte e diromponente: la restorative justice è un modo di approcciarsi alla vita. La giustizia riparativa, infatti, esprime una visione comprensiva e umana di come gli uomini debbano vivere insieme e relazionarsi tra di loro. I valori di cui la giustizia riparativa vuole evidenziare l'importanza sono l'umiltà, ossia un riconoscimento dei limiti che caratterizzano il soggetto umano; la capacità di provare curiosità e di andare oltre le proprie sicurezze e garanzie, cercando di abbracciare una dimensione in cui l'arroganza è sostituita dall'umiltà e il prossimo non è visto come nemico da evitare ma come possibilità da cogliere.

La giustizia riparativa non deve essere intesa come pura necessità di perdono e riconciliazione, né come mediazione, né come alternativa alla prigione. La giustizia riparativa riguarda principalmente i bisogni e i ruoli che caratterizzano una situazione di disagio in cui da un lato c'è la vittima, cioè chi è stato danneggiato, e, dall'altro, colui che ha danneggiato.

Nello sviluppo della tesi si riprende spesso il principio dal quale la riflessione della giustizia riparativa si sviluppa, principio secondo il quale ciascun individuo è legato agli altri attraverso una rete di relazioni: *io sono perché noi siamo*. Ho ritenuto importante inserire diverse volte questo concetto perché è il punto di partenza per l'intera riflessione: ogni soggetto è necessariamente e inevitabilmente legato agli altri. Da ciò ne consegue che ogni azione ha ripercussioni sugli altri individui e, quando queste azioni risultano dannose, è fondamentale assumersi le proprie responsabilità e *to put things right*, cioè riparare la situazione di disagio che si è venuta a creare.

Per avvalorare questa tesi mi sono servita della concezione opposta, cioè quella hobbesiana. Thomas Hobbes sostiene che gli individui, nello stato di natura, vivano in una sorta di guerra di tutti contro tutti. Questa visione, se universalizzata, non farebbe che annullare non solo lo spazio etico, ma anche lo spazio fisico in sé e per sé. È per questo motivo che – assunto che l'umanità intesa come tale voglia sussistere – non è possibile

ritenere la massima egoistica il principio di relazione tra individui, ma è dunque necessario adottare e considerare plausibile la concezione opposta, l'idea secondo la quale ciascun individuo è inevitabilmente legato agli altri.

Nel proseguo dell'elaborato, ho ritenuto interessante presentare delle riflessioni in merito alla giustizia retributiva, in particolar modo rispetto al significato e al valore che la pena assume adottando questo approccio. La pena nel modello retributivo, infatti, può essere sintetizzata in quelle che sono le caratteristiche della *lex talionis*: occhio per occhio, dente per dente. La giustizia retributiva considera la vittima e il reo esclusivamente come tali; capiamo subito che la soggettività nel suo insieme non viene considerata. Ne consegue che la pena è caratterizzata dalla necessità di infierire dolore e sofferenze. Il reo è reo e la vittima è vittima. Ma se la vittima fosse, a sua volta, reo? E se il reo fosse reo proprio perché precedentemente vittima? Ciò che la giustizia riparativa evidenzia – contrariamente a quella retributiva – è la possibilità che anche il reo sia soggetto a ingiustizie e sofferenze. Nella concezione retributiva non c'è spazio per tutto ciò; il reo può e deve riparare la sua colpa solo attraverso ulteriori dolori. In questo modo, però, c'è il rischio che si crei una sorta di circolo vizioso, in cui colui che compie un'azione malvagia debba necessariamente a sua volta subire azioni malvage.

In merito a ciò, è rilevante il pensiero di Curi che, personalmente, trovo illuminante. L'autore, infatti, sostiene che il principio che sorregge la giustizia retributiva non ha alcuna giustificazione attendibile e plausibile, in quanto poggia esclusivamente su un'idea derivante da credenze e religioni antiche.

L'approccio riparativo, invece, propone una concezione di giustizia completamente innovativa rispetto al modello retributivo. La teoria della giustizia riparativa, infatti, si focalizza principalmente sui danni subiti e compiuti, sulle necessità e sugli obblighi che i coinvolti nell'azione hanno. È per questo, dunque, che la RJ implica una necessaria mediazione tra vittima e reo. Trovo fondamentale riportare brevemente un esempio di applicazione di modello riparativo, lo stesso esempio esposto a cap. 3.2. A partire da questa vicenda, saranno evidenti i principi che caratterizzano la giustizia riparativa, il fatto che:

1. La giustizia riparativa ha come interesse principale il danno;
2. I danni comportano degli obblighi;
3. La giustizia riparativa promuove l'impegno e la partecipazione.



I protagonisti di questa vicenda sono due giovani che hanno imbrattato una sinagoga ebraica con simboli e immagini neonaziste. Una volta individuati i due vandali, il procuratore capo penale avrebbe potuto arrestarli e incarcerarli, ma ha optato per adottare un approccio riparativo. I giovani vandali hanno dunque lavorato per la sinagoga, imparato la cultura e le tradizioni ebraiche, hanno completato il percorso di studio e colmato il vuoto interiore che li ha portati ad aderire a un gruppo di suprematisti bianchi. L'esito della vicenda è che sia coloro che hanno subito il danno che coloro che l'hanno provocato hanno percorso un cammino di miglioramento e di profonda umanità: gli uni imparando a perdonare, gli altri entrando nel cuore della parte lesa.

Capiamo dunque che il senso e il valore della pena muta completamente di forma nel modello riparativo. Se nel modello retributivo la pena altro non era che l'inferire ulteriore dolore e sofferenza a chi l'ha provocata inizialmente, giungendo a una sorta di circolo vizioso del patire, la pena nella giustizia riparativa si pone su un fronte completamente diverso.

Ho sostenuto in questa tesi che la pena non viene eliminata, ma muta nei contenuti e nelle modalità. La pena diviene dunque il mezzo tramite il quale risulta possibile riparare effettivamente il danno. Essa può probabilmente comportare a sua volta aspetti negativi e che causano dolore, ma non è questo l'obiettivo principale. L'obiettivo è quello di ritornare a una situazione originaria dei fatti, e forse anche migliore, come nel caso sopra esposto. I giovani vandali hanno compiuto un'azione così grave e oscena, come imbrattare con segni neonazisti una sinagoga, perché loro stessi vivevano una situazione di disagio interiore. Il percorso riparativo gli ha permesso di vivere in una situazione decisamente più positiva e propositiva di quella iniziale, non certo senza difficoltà.

Concludo questo breve riassunto con un'immagine presentata in precedenza. Trovo molto emblematico il riconoscere la struttura della giustizia riparativa nell'immagine di un albero in primavera. Le radici rappresentano il principio che sostiene l'intera struttura, cioè l'idea secondo la quale gli esseri umani sono tutti inevitabilmente connessi tra di loro. I fiori che sbocciano da questo albero sono gli elementi positivi derivanti da questo processo: una realtà più giusta, più solidale, meno feroce, meno dura. La linfa vitale che permette la crescita dei fiori è costituita dai seguenti valori: la capacità di empatia, di ascolto, di perdono verso l'altro e di messa in discussione di sé, la capacità, perciò, di essere profondamente umani.