
Restorative Justice to Contrast Gender-Based Violence against Women in Transitional Contexts

di

Sofia Marini

Abstract: This contribution analyses the possibility of the applicability (or not) of restorative practices to face sexual and gendered violence in transitional contexts. The position it maintains is that it is, for all intents and purposes, possible. I argue that the restorative model is a better way of confronting international crime, and an effort should be made at replacing its retributive and distributive components. Indeed, restorative justice offers a feminist approach to community building by stressing women's participation in reconstruction processes and re-affirmation of social values. This is conditioned on addressal of the structural and cultural complexities characterizing gender-based violence. Ultimately, the challenges facing post-conflict societies - truth-seeking efforts, community building, and transition to democracy in the legacy of war crimes - are not a deterrent to the application of restorative justice, but rather an incentive to integrate restorative mechanisms into transitional justice.

Introduction

Restorative justice is “a growing social movement to institutionalize peaceful approaches to harm, problem-solving and violations of legal and human rights” ([Boyes-Watson, 2014](#)). While retributive and distributive justice are based on punishment and therapeutic treatment to offenders, respectively, restorative justice centers restitution with [inputs from victims and offenders](#). Proto-practices of restorative justice have been implemented at a grassroot level by Indigenous groups in the United States, New Zealand, Australia, and Canada, while a systematization of restoration as a judicial response to crime was prompted by the publication of Howard Zehr's book *Changing Lenses—A New Focus for Crime and Justice* (1990). Since then, normative discussions on restorative justice have intensified, reaching an all-time high, counterposed by empirical evaluations on its effectiveness.

Cases of violence against women are invoked as paradigmatic against the use of restorative justice practices, whose implementation risks re-enacting a victimisation of the offended party by exposing her to further harm. Such view is corroborated by Art. 48 of the [Istanbul Convention Action against violence against women and domestic violence](#), which prohibits mandatory alternative dispute resolution practices such as mediation and reconciliation. Connotations of a privatistic nature generate further suspicion on the application of restorative justice to contrast the physical and sexual abuse of women. Major objections on restorative justice con-

textually to gendered violence hold that it is inappropriate to circumscribe a systemic phenomenon to singular instances of violence. [Bene \(2023\)](#) notes that “the crux of the matter is [...] the presupposition that the parties are in a position of parity, which discards the working of violence, in particular, of domestic violence.”

This contribution centres its analysis on the applicability of restorative practices to face sexual and gendered violence in post-conflict societies.

Crimes against women

Crimes against women are crimes against humanity. It is relevant to assess the possibilities and limitations of privileging restorative paradigms with respect to alternative judicial practices to deal with international crimes in transitional contexts. [Yalincak \(2012\)](#) argues that criminal law is ill-suited to serve the end of justice in post conflict societies. First, criminal law implies a binary opposition: offender and victim, accuser and accused. While an adversarial framework must be acknowledged in the context of sexual and physical abuse, it is also important to expose wider patterns of behaviour that underlie human rights violations. Prosecutors are often limited in their ability to condemn such conducts because “there are morally culpable parties that are culpable in ways that liberal jurisprudence does not recognize.” [\(Yalincak, 2012\)](#). [War crimes against women](#), which include but are not limited to rape, sexual slavery, forced prostitution, forced abortion, enforced sterilization, enforced marriage, and trafficking, as well as other forms of sexual violence and exploitation, are the culmination of a pattern of systemic discrimination. However, there are other expressions, that, while penally irrelevant, contribute to feeding the power structure subjugating women. In rectifying the negative externalities of conflicts, transitional justice aims to identify theories, approaches, and methods to build healthy communities and reduce antisocial behaviour. In this optic, [justice is not just simply designed to punish, but rather to change behaviour](#). This might be a task best undertaken by mechanisms other than retribution.

Second, [Yalincak \(2012\)](#) argues that criminal prosecutions are inherently selective, thus resulting in a *de facto* amnesty for the majority of perpetrators, “coupled with an emphasis on the personal guilt of a few lead actors.” The International Criminal Tribunal for the Former Yugoslavia (ICTY), during its twenty-four years of activity in Bosnia and Herzegovina, has focused on high-profile cases (notably, Republika Srpska Army leader [Dragoljub Kuranak](#) was the first individual convicted of using rape as a weapon of war, and sub-commanders [Radomir Kovac and Zoran Vukovic](#) were charged alongside him for their involvement in sexual violence in the city of Foca), [while overlooking low-ranking perpetrators](#). [Clark \(2009\)](#), who grounds her research on qualitative interview data, notes that this is a dissatisfying issue among Bosnians: victims prefer to know which individuals were directly responsible for acts of genocide or violence committed against their loved ones. For example, a female interviewee in Kozarac stated that the arrest of Radovan Karadzic (former President of the Republic of Serbia, convicted for his role in the Srebrenica massacre of July 1995, which involved the killing of over 8,000 Bosniak Muslim men and boys perpetrated by units of the Bosnian Serbs Army) did not mean much to her, [but rather she wanted to know who killed her brother in Trnopolje](#). We can assume that women victimized by physical and sexual violence

in cities other than Foca are prompted by analogous feelings. Thus, if the goal is to condemn the widespread, systemic violence of many, criminal prosecutions may not be the most effective means.

Questions concerning the possibilities and limitations of different justice mechanisms in criminal law should be answered by looking at the specificity of the contexts in which they are used. Post-conflict societies are called to [“address the dark burden of their past”](#), and, consequentially, acquire the attributes of a viable democracy. Recognizing the systemic and institutionalized dimension of violence, which is rooted in the social plane, is crucial to address the instruments of [“systemic savagery”](#) prompting international crimes such as war crimes, genocide, and crimes against humanity. Granted that crimes against women are crimes against humanity, identifying a new nature and purpose for justice in international crimes implicates rethinking justice for victims of gendered crimes. Thus, the scope of international criminal law should be wider than currently acknowledged. Specifically, I argue for the expansion of transitional justice to include a gender dimension which gives voice to women’s positioning. [De Vido \(2017\)](#) cites women’s tribunals (the Women’s International War Crime Tribunals set in Tokyo in 2000, and the Women’s Court in Sarajevo of 2015, amongst others) as virtuous examples of a feminist approach to democracy, which embraces issues of effective participation in decision making. Far from claiming legitimacy under international law, women’s tribunals do not seek to supplement, but rather complement official systems. Practically, they are a form of political practice aimed at “building solidarity” by centering “victims of abuses which have often not been investigated and prosecuted by the competent (national) authorities” [\(De Vido, 2017\)](#). While the word ‘tribunal’ implies a judicial body (or quasi-judicial body), and, thus, retribution, I argue that women’s tribunals relational, participatory, and transformative claims draw on principles of restorative justice. This is a powerful point to the idea of restorative justice as inherently feminist.

Restorative justice in transitional processes

The limitations of retributive mechanisms in administering justice in post-conflict societies make room for the application of restorative justice in transitional processes. With its [fourfold commitment](#) of affirming and restoring human-rights abuses; holding perpetrators accountable; creating social conditions in which human rights will be respected; and reconciliation, restorative mechanisms align more closely with the positive notion of peace predicated by transitional justice. [Negative peace is the absence of fear or violence](#). By contrast, positive peace aims at fostering the attitudes, institutions, and structures that sustain peaceful societies. This involves contrasting the power asymmetries that underpin patriarchal structures. Negative peace is typically achieved by means of retribution in international criminal law. I grant that, in societies that are torn apart by conflict, the absence of violence may be a more viable aim in the short run. In light of this, I am not arguing for the discarding of retributive mechanisms as a whole to deal with gendered violence. However, as argued by [Maculan and Gil Gil \(2020\)](#), “the work of *ad hoc* war crime tribunals must abandon the idea of criminal law as *ius puniendi*, as a right of the state, and instead seeing it as a state obligation, *officium puniendi*.”

This is especially relevant to women who have been victimized by physical and sexual abuse. As ethical perspectives on sexual abuse have shifted, and sexual violence is no longer considered an offense to customs, but rather [an exploitative and abusive violation of the victims' bodily integrity](#), legal frameworks have changed as well. Notably, in 1996, Italian legislation ruled rape a crime against personhood in lieu of a crime against public morality and decency (Legge 15 febbraio 1996, n. 66). At the international level, [“retribution must shift from a tool of social control, designed to protect the legal interests of the state, to one for the reparation of victims' rights”](#) to re-affirm this newfound social outlook. This entails the integration of restorative mechanisms with specific formation to deal with gendered crimes.

Steering away from the absolutization of examples, the compatibility of restoration and action against violence against women on a theoretical plane is, for all intents and purposes, possible. The [“irreducible tension”](#) between the two is practical. Thus, the successful application of restorative mechanism to contrast systemic violence against women is conditioned on the use of mediation models “that are able to go beyond the goal usually expected from mediation, namely the resolution of the conflict, in order to give back to the human [the woman] [her] space” ([Lorenzetti and Ribon, 2017](#)). This includes challenging gendered presumptions which “are infused into the very fabric of the processes of the law” ([Dorn, 2018](#)). Ultimately, the complex, structural characteristics of gender-based violence are not a deterrent to the application of restoration, but rather an incentive to integrate restorative mechanisms into transitional justice. Post-conflict societies are tasked with community building and reconstruction processes. While [the vulnerability of victims of sexual violence raises valid concerns about when and how to approach the topic](#), I argue that these preoccupations should not cast doubt about if to approach restorative justice. Indeed, [“failing to discuss the possibilities of restorative justice with the victims may deprive them of the possibility to heal”](#) and their communities the chance to affirm a basis of shared values that embraces women's effective participation in democracy.

Sofia Marini, Ca' Foscari University of Venice, and student of the course in Global Governance, Peace, Security, Cooperation and Development taught by Prof. Sara De Vido at Venice International University, Spring 2023