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Victims' Rights and Restorative Justice: Piecemeal Reform of the Criminal Justice System or a Change of Paradigm?

1. Introduction

During the past two decades, nearly all modern criminal justice systems have been reformed on behalf of victims of crime. In most jurisdictions change has been achieved by introducing new procedural rights for individual victims. It is striking to observe the similarities of victims' rights which have been introduced or expanded in criminal justice systems which are otherwise hardly comparable. In this way, the Anglo-American adversarial systems on the one hand and the more inquisitorial systems on the European continent on the other have come to harbor nearly identical provisions with respect to the interests of crime victims. In countries of both legal families law enforcement officers are now required by law to treat victims with respect for their dignity. Nowadays, the police and the prosecutors' office must supply the victim with information and explanation about the progress of the case. And in many jurisdictions the victim has acquired a right to provide information to officials responsible for making decisions relating to the offender. Victims furthermore have often been granted the right to have legal advice available, regardless of their means. Attention has also been paid to the right to protection, both for their privacy and for their physical safety. Finally, many nations have improved systems in order to promote reparation to be paid by the offender or - in cases where this proves to be impossible - State compensation.¹

¹It is no coincidence that these are the legal rights which have most frequently been introduced in various national criminal justice systems. The examples mentioned reflect the standards set by documents adopted by the

A number of years after the widespread introduction of these reform measures, at least two general problems remain unsolved. The first one is about implementation.² As has been asserted many times before, it is relatively easy to pass legislation but it is infinitely more difficult to actually make the new provisions work as intended. This point has been proven by experience in almost every jurisdiction involved.³ The second issue which remains to be addressed concerns the precise theoretical nature of the reform efforts on behalf of crime victims. Are the recently introduced victims' rights mere refinements of the currently existing criminal justice systems, or should they be considered as expressions of a new way of thinking

which is incompatible with the basic structure of the traditional model of administering criminal justice? This question is also triggered by the fact that the introduction of new victims' rights is quite often presented as being part of the wider movement under the umbrella label of *restorative justice*.⁴

In this paper it will be argued that the two remaining problems I have referred to are interconnected. The question of effective implementation can not be fruitfully tackled without developing a well reasoned notion of the

international community. See, e.g., the United Nations Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power (1985); the Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure (1985); and the Statement of Victims' Rights in the Process of Criminal Justice (by the European Forum for Victim Services, 1996).

²Marion Brienen, Marc Groenhuijsen, Ernestine Hoegen, 'Evaluation and Meta-Evaluation of the Effectiveness of Victim-Oriented Legal Reform in Europe', *Criminologie*, vol. 33, no. 1 (2000), p. 121-144.

³To acknowledge and remedy this deficit, many tools have been designed. On a global level I point to the *Handbook on Justice for Victims. On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (United Nations Office for Drug Control and Crime Prevention, Centre for International Crime Prevention, New York 1999); and its corollary, the *Guide for Policy Makers. On the Implementation of the United Nations Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power* (United Nations Office for Drug Control and Crime Prevention, Centre for International Crime Prevention, New York 1999).

⁴A wealth of material is collated and commented on by David Miers, *An International Review of Restorative Justice*, (Crime Reduction Research Series Paper 10), London 2001.

precise theoretical status of reform efforts in this area. In the final analyses, the question about the epistemological status of modern type victims' rights is tantamount to a dispute about whether or not *restorative justice* is to be considered as a new paradigm in the technical (Kuhnian) meaning of the word.⁵ In the subsequent section, the position of those who do feel this is the case will be outlined. Section 3 then moves on to critically assess this view. It will be argued that the main properties of restorative justice can to a large extent be incorporated in modernised features of traditional criminal justice systems. And finally, in section 4, it will be demonstrated that a strategy aiming at piecemeal reform of the current system offers a strategy which is superior to the competing one with the objective of replacing the existing paradigm of criminal justice by the brand new paradigm of restorative justice.

2. Analyses of what hampers effective implementation of modern victims' rights in traditional systems of criminal justice

According to a powerful school of thought, it is the paradigm underlying the present criminal justice system which is responsible for its fatal flaws. This paradigm - the *retributive paradigm* - is condemned as being counterproductive. It is accused of serving neither the best interests of the State (because it does not effectively stop or reduce crime) nor those of its primary 'clients', the perpetrators of crime and their victims. From a victimological point of view it is contended that adopting new victims' rights in a system based on the retributive paradigm can never be regarded as more than paying lip-service to the ideals of restorative justice. The

⁵One of the compelling reasons for phrasing the question this way is that many advocates of restorative justice actually claim they propose this kind of new paradigm. A different (for other purposes equally useful) 'typology of models' is presented by James Dignan & Michael Cavadino, 'Towards a framework for conceptualising and evaluating models of criminal justice from a victims' perspective', *International Review of Victimology* 1996, p. 153-182.

existing legislative policy is criticised as ‘going through the motions’ of victim-care, while at the same time neglecting the underlying interests which are really at stake. Introducing victims’ rights in the traditional repressive system of criminal law is considered to be a *contradictio in terminus* because the system itself does not allow any additional perspective to be taken seriously outside the scope of the battle between the prosecutor and the defendant.

Ezzat Fattah is one of the most prominent leaders of this school of thought.⁶ His profound criticism of the current model of criminal justice - and its underlying paradigm - is remorseless, even devastating. He claims that the conventional system is “in a state of crises” because the retributive paradigm is “obsolete”, it relies on “inadequate old concepts” and hence it is in “a state of Anachronism”. These defects are beyond repair, so Fattah concludes: “All this points to the urgent need for the western nations to rethink, reassess, and modernize the archaic and antiquated criminal codes of the 19th century to bring them to the standards and requirements of the space age and to prepare them for the challenges of the 21st century”.⁷ Real progress can only be achieved by abandoning the retributive paradigm of criminal justice. Victims’ rights can only be effectively implemented within the framework of a comprehensive new paradigm. Indeed, Fattah announces that the stage seems to be set for a scientific revolution or a paradigm shift in the sense proposed by Thomas Kuhn.⁸

⁶Ezzat Fattah, ‘From a Guilt Orientation to a Consequence Orientation. A Proposed New Paradigm for the Criminal Law in the 21st Century’, in: Wilfried Küper & Jürgen Welp (eds.), *Beiträge zur Rechtswissenschaft* (Festschrift für Walter Stree und Johannes Wessels zum 70. Geburtstag), Heidelberg 1993 p. 771-792. Ezzat Fattah, ‘Some reflections on the paradigm of restorative justice and its viability for juvenile justice’, in: Lode Walgrave (ed.), *Restorative Justice for Juveniles. Potentialities, Risks and Problems*, Leuven University Press 1998, p. 389-401. Another leading representative of this approach is R.E. Barnett, ‘Restitution: A new Paradigm of Criminal Justice’, *Ethics. An International Journal of Social, Political and Legal Philosophy*, Vol. 87 (1977), no. 1, p. 279-301.

⁷*Op.cit.* p. 773.

⁸Thomas Kuhn, *The Structure of Scientific Revolutions*, (1962), 2nd edition, Chicago 1970.

A paradigm shift involves a complete and total overthrow of concepts, values, objectives and principles within an academic discipline. Fattah confirms this by outlining the stark contrast between the current system and the model he envisages for the future. His sketch of some basic elements of the proposed new paradigm comprises several compartments.⁹

The first one is about different conceptualisations of crime. In the traditional paradigm of criminal justice, crime is viewed as a wrongful, sinful, immoral wicked behavior that must be punished. An essential element of crime also resides in the fact that it is considered to be an offence against the State; crime is a violation of the public order, affecting society at large. Because crime is defined as an offence against the State, it is obvious that there is no room for interference by the victim in the aftermath of crime: the victim is by definition an outsider who could never be accepted as a serious player during the course of a criminal procedure.¹⁰ Crime is furthermore perceived as a unique, exceptional category of behavior which is qualitatively different from civil torts and other uncriminalized types of behavior. In other words: there is an ontological reality of crime. Alternatively, in the proposed new paradigm crime is viewed as a harmful, injurious behavior that needs to be redressed in the present and prevented in the future. Crime is not seen as a manifestation of the wickedness of an individual fellow citizen, but as a social risk, one of the many hazards of life in modern, industrial, technological society. Crime is no longer seen as an offence against the State, but as a human conflict, a dispute between two parties. If this is the case, then it makes sense to also involve both parties on an equal basis in subsequent legal proceedings. And there is no recognition of the ontological reality of crime: it is exemplified by behavior which is neither exceptional nor unique; it is not qualitatively different from tort; it

⁹See the summarising tables, *op.cit.* p. 791-792.

¹⁰Likewise: Howard Zehr, *Changing Lenses. A New Focus for Crime and Justice*, Scottsdale, Pennsylvania/Waterloo, Ontario 1990, p. 82: "Since the state is defined as victim, it is not surprising that victims are so consistently left out of the process and that their needs and wishes are so little heeded. Why should their needs be recognized? They are not even part of the equation of crime."

can well be less serious, less injurious and less dangerous than many other types of behavior outside the scope of criminal law.

The second part is about fundamental concepts and principles. This touches on the core essence of the difference between the old *guilt oriented paradigm* and the proposed new *consequence oriented paradigm*. According to Fattah, the conventional system is based on theological and metaphysical, abstract concepts, whereas the new model is founded on concepts of a sociological, positivist and secular nature. Among the former category he ranks moral guilt, mens rea (intent and negligence), malice and wickedness. The latter category is about harm, injury, loss and endangerment. In the traditional paradigm moral responsibility is the key concept, which is based on the presumption of the free will of the actor. Conversely, the consequence oriented paradigm focuses on social responsibility which goes hand in hand with the principle of strict liability.

The definition of crime and the fundamental concepts and principles have farreaching implications for the characteristics and the goals of criminal law and procedure: the third and final analytical compartment. According to Fattah, the current system is moralistic and stigmatizing. In the new model, this should be replaced by a neutral, objective approach. The presently existing system is idealistic in nature (i.e. its presumptions and vocabulary does not always correspond to sociological realities) whereas its alternative is based on realism. Traditional criminal law is repressive, retributive and punitive. In the new paradigm, these properties should be replaced by characteristics such as being regulatory, distributive, utilitarian, restitutive, restorative and preventive. In stead of a depersonalized, authoritarian and adversarial attitude, a personalized and concilliatory approach should be installed. It is wrong to always look backward, to be oriented to the past; instead, the system should be oriented to the present and the future and thus ought to look forward. And finally, there is a huge difference in the role of - and the connection between - those who have been directly involved in the criminal act. Criminal law as we know it places the discretion in the hands of third parties and distances the feuding parties, and

in doing so widening the gap that separates them.¹¹ In the proposed alternative model the discretion is left in the hands of the parties involved, which brings them together in order to effect reconciliation.

3. The capacity of the criminal justice system to be responsive to new demands and changing circumstances

I happen to agree with most of the critical observations made by Fattah and his intellectual companions. There is no doubt that the traditional system of criminal law, as we have known it for a long time in most western jurisdictions, has serious shortcomings. It is highly questionable whether it has served society well; and it is undeniable that it has not served the best interests of the principal parties, the offender and the victim. The system has unduly focused on the past and has been insufficiently oriented to the future. And it has equally undisputably been preoccupied with allocating blame and inflicting pain instead of aiming at providing amends for the harm that was done to the victim.

So, the need for reform is obvious and this has been the case for quite a long time. The real question, then, is about strategy. What appears to be the most effective way to bring about the changes we are aiming for? This issue of strategy cannot be disconnected from a reflection on the epistemological nature of the process in which change needs to be brought about. Do the proposed new objectives really call for a new paradigm of criminal justice? If restorative justice promises to be the answer to many of the defects of the current system, does that automatically require that we abandon all basic concepts, values and objectives of the criminal justice system that we grew up with? I am unconvinced. I feel that the goals and methods of restorative justice can to a large extent be pursued by gradually adapting the traditional system of administering criminal justice. I will argue

¹¹The most famous criticism of this aspect was expressed by Nils Christie, 'Conflicts as property', *British Journal of Criminology* 1977, p. 1-15.

that for methodological reasons they can even be *more effectively* attained by adopting a piecemeal approach. In short, it will be argued that the prevailing system of criminal justice is much more flexible - much more responsive¹² - than writers like Fattah assume.

Before moving on to answer the question whether it is desirable or even inevitable to opt for a new paradigm of criminal justice, it is useful to make some preliminary remarks on the nature of a paradigm. In this paper the concept of a paradigm is used in the technical sense of the word.¹³ That means a paradigm is more than just a sweeping new idea and it is different from just any 'grand design', blueprint or masterplan. The concept is used here with the content as elucidated by Thomas Kuhn, from the perspective of the history of science.¹⁴

It has been pointed out that an initial difficulty is caused by Kuhn's multiple definitions of a paradigm. Margaret Masterman, for instance, counted no less than twenty-one different descriptions.¹⁵ For the sake of brevity, I quote only a few significant examples:

- "[Paradigms are] universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners"

- "...some accepted examples of actual scientific practice - examples which include law, theory, application, and instrumentation together - provide models from which spring particular coherent traditions of scientific

¹²The concept of responsive law is used as elaborated by Ph. Nonet & Ph. Selznick, *Law and Society in Transition: Toward Responsive Law*, New York/Hagerstown/San Francisco/London 1978.

¹³Hence the present discussion does not pertain to the views expressed by writers who use the word 'paradigm' in a more casual way (like, among many others, Marlene Young, 'Restorative community justice in the United States: a new paradigm', *International Review of Victimology* 1999, p. 265-277).

¹⁴See footnote 2 *supra*.

¹⁵Margaret Masterman, 'The Nature of a Paradigm', in: Imre Lakatos & Alan Musgrave (eds.), *Criticism and the Growth of Knowledge*, Cambridge 1970, p. 59-89.

research. The study of paradigms (...) is what mainly prepares the student for membership in the particular scientific community with which he will later practice”

- “To be accepted as a paradigm, a theory must seem better than its competitors, but it need not, and in fact never does, explain all the facts with which it can be confronted”

- “So long as the tools a paradigm supplies continue to prove capable of solving the problems it defines, science moves fastest and penetrates most deeply through confident employment of those tools. The reason is clear. As in manufacture so in science - retooling is an extravagance to be reserved for the occasion that demands it”.

And so on, and so forth. The bottom line of these descriptions - in the sociological sense - is that a paradigm is the sum total of the sources of problem-solving methods and standards which are at a given point in time generally accepted by a given scientific community. Being a general epistemological viewpoint, a paradigm is also an organising principle which can govern perception itself.¹⁶ It is important to notice that this concept of a paradigm can not be fully understood apart from the way it works in various stages of development of science.¹⁷ To this end two stages must be distinguished: a period of ‘normal science’ and the revolutionary stage.

During a period of normal science, the paradigm both generates problems and serves as a source of tools and devices to solve these problems. Problems are inescapable. There are always new and unexpected situations which are - at first sight - inconsistent with the theoretical

¹⁶In Popperian language this would be called “the searchlight theory of science”; Karl Popper, *The Open Society and its Enemies. Part II, The High Tide of Prophecy: Hegel, Marx and the Aftermath*, London 1966 (5th edition), p. 260; and *Conjectures and Refutations*, London 1972 (4th edition), p. 45 ff.

¹⁷Margaret Masterman, *op.cit.* p. 70: “” (If we ask what a Kuhnian paradigm *is*, Kuhn’s habit of multiple definition poses a problem. If we ask, however, what a paradigm *does*, it becomes clear at once (assuming always the existence of normal science) that the construct sense of ‘paradigm’, and not the metaphysical sense or metaparadigm, is the fundamental one.”

framework provided by the obtaining paradigm (in technical jargon they are called ‘anomalies’). It is then considered to be the task of the scientific community to reconcile the prevalent theory with the apparently contradicting data. This is what Kuhn refers to as finding a way out of a ‘puzzle’. It is important to note that the existing paradigm determines which puzzles are worth looking into. On top of that, a normal-scientific puzzle always has a solution, which is guaranteed by the paradigm, but it takes ingenuity and resourcefulness on the part of researchers to find it.¹⁸ Another part of the period of ‘normal science’ consists of elaborating the paradigmatic theories and generating answers to questions which have up to then only been raised by the paradigm.¹⁹ The key-insight which we need to keep in mind is that the mere fact that there are anomalies - discrepancies between theory and observed facts - is in itself neither unusual nor disturbing. Quite often it turns out that after a while an explanation is discovered or the paradigmatic theory can be adapted in a way which reconciles it with the problematic empirical findings. And even persistent and generally acknowledged anomalies do not always lead to a crises in the cycle of normal science.

The picture only changes when the paradigm starts to show a continuous inability to solve normal-scientific puzzles. And even then, the deep commitment to tradition will inhibit many members of the scientific community to abandon their previously held beliefs and values. It is only when an alternative paradigm has surfaced, that fundamental change can be contemplated. And the intellectual competition between a dominant paradigm and its potential successor is not completely governed by rational considerations. For the most part, Kuhn describes the eventual transition process in near-religious terms. Transferring allegiance to a new paradigm is like an act of faith; it comes close to being converted to a different denomination. An existing paradigm never loses its prominence because it clashes with a single anomaly. It can only perish - over time - in competition

¹⁸Thomas Kuhn, *op.cit.* p. 36, p. 60, p.131.

¹⁹Thomas Kuhn, *op.cit.* pp. 46-50.

with a succeeding paradigm.²⁰ Yet the alternative paradigm has to meet at least two standards in order to be acceptable for the community of professional researchers. First, the new candidate must hold a promise to provide a solution for a vitally important and generally acknowledged problem²¹ which cannot be tackled in any different way. And secondly the emerging new paradigm must retain a substantial part of the problem-solving-capacity of the competing old paradigm. Only if and when these conditions are met, a paradigm shift may be in the air. When successful transition has been completed, Kuhn speaks of a scientific revolution.

For the purposes of the present contribution, it is important to keep in mind that the battle between competing paradigms is a struggle for life. There can only be one winner. Because of the ‘incommensurability’ of the theoretical frameworks, there is no room for compromise. One cannot have it both ways by picking preferred bits and pieces from two competing paradigms. Against this background we can now turn our attention again to the epistemological status of restorative justice.

So, back to restorative justice. The basic question to be addressed in this section is whether it is desirable - or even necessary - to pursue the objectives of restorative justice within the framework of a completely new legal paradigm. Taking into account the information collated in the preceding paragraphs, the first step towards an answer could be that it is

²⁰J.O. Wisdom, ‘The Nature of “Normal” Science’, in: Paul Arthur Schilpp (ed.), *The Philosophy of Karl Popper*, Volume 14 in *The Library of Living Philosophers*, La Salle, Illinois 1974, (p. 820-842) p. 829 : “Such facts give a sociological basis for the idea that scientific theories do not get refuted; like old soldiers, they only fade away. This is the sort of impression Kuhn conveys.”

²¹Margaret Masterman, *op.cit.* p. 82: “not just an incidental counter-argument to the theory, or an awkward fact, which Kuhn correctly characterizes as merely an ‘irritant’. Neither is it an extra-paradigmatic novelty, nor a problem which used to exist within the field at an earlier stage, but which the developers of the paradigm have now suppressed and rendered invisible, because it is incompatible with the paradigm’s ‘basic

most certainly *possible* to position restorative justice as a new paradigm in the technical sense of the word. The exposition by Fattah *cum suis* makes it abundantly clear that the quest for restorative justice can be shaped in a way which is 100% incompatible with the traditional criminal justice system. The next question then appears to be: is this *the only* viable way of looking at restorative efforts in the aftermath of crime? And: would this be *the most fruitful approach* when we try to balance expected advantages and unexpected drawbacks of such a move? As I have already announced in the introductory lines of this section, I do not feel this is the case. When restorative justice is positioned as a brand new comprehensive paradigm, the capacity of the currently prevailing paradigm of criminal justice to adapt to new circumstances is seriously underestimated. The potential of our traditional system to meet new standards and additional demands is more impressive than the system is given credit for by its critics. *Quot erat demonstrandum.*

On a conceptual level, Fattah contends that the first obstacle to change resides in the definition of crime. According to conventional wisdom, crime is defined as an offence against the State, a breach of the public order. This explains why the prosecutor acts as the representative of society in a criminal trial, and it has also led to the expulsion of the victim from these proceedings. In my view, however, this line of reasoning rests upon a dysfunctional reading of the definition of crime. From the undisputable starting point that the state is indeed affected by criminal acts - because crime is a disruption of the *public* order - some writers incorrectly infer that the state is *the real victim*²² or even *the only victim*. There is no compelling logic supporting this inference. Crime is clearly *more* than just an offence against the State, or against society. In quite a few modern jurisdictions it is explicitly being recognised that although the State is actually affected by criminal acts, the crime still is first and foremost a violation of the

commitment'. The anomaly, to be a true anomaly, has to be produced from within the paradigm."

individual victim's rights. There is no single dogmatic obstacle to acknowledge this basic fact. And if and when the definition of crime is expanded (or interpreted more broadly) in this way, then it opens up new avenues to take the victims' interests into account in the aftermath of the victimizing incident. It offers a dogmatic justification for additional victims' rights in criminal procedure, and it provides a solid basis for taking victims' interests into account when determining which punitive response can be regarded as adequate.²³

And there is more than just that. We have to be cautious not to take things upside down. When Fattah and Zehr criticize the one-sidedness of the definition of crime, they tend to overstate their case. They substitute the victim by the State as *the sole* entity affected by crime. In my view, this is clearly a bridge too far. Crime is still more than just a dispute between two private parties; it involves more than a quarrel between two individuals.²⁴ Because of the nature of the infraction, the victim has a legitimate right to claim the full support of the legal order in the aftermath of crime. He is entitled to solidarity by society, precisely because the violation of his private interests also constitutes a breach of the public order. From this perspective it is only appropriate - as well as beneficial for victims - that the State acts as a representative of society in general and of the victim in

²²Howard Zehr, *op.cit.* p. 82.

²³Bernd-Dieter Meier, 'Restorative Justice - A New Paradigm in Criminal Law?', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 6/2, 1998, (p. 125-139) p. 127: "... historically the necessary abstraction and institutionalization has led to a diminution of the role of the victim in the criminal justice process, a reduction of the real-life person stricken with injury, loss and fear to that of the bearer of a specific function in an abstract, institutionalized and depersonalized procedure. The objective of the idea of restorative justice, therefore, is to bring the personal and individual levels of the offence, the experience of the harm and the consequences of the offence for the lives of the victim and others, back to light and reintegrate these aspects into the process of criminal justice. The aim of restorative justice is not (...) the abolishment of criminal justice, but an amendment to and perhaps the completion of the criminal justice system by drawing the attention to elements which have for a long time been rather neglected."

²⁴I am not particularly referring to petty crime; the following comments are basically about more serious instances of crime.

particular when it prosecutes crime. This point is particularly well articulated in a policy-document issued by the European Forum for Victim Services: “Throughout Europe, the State has assumed responsibility for prosecuting offenders and has removed from the victim the burden of responsibility for determining any action to be taken in respect of the offender. The acceptance of responsibility by the State should be recognised as a fundamental right of victims of crime, and no attempts should be made to erode this by returning the responsibility for decision making to victims.”²⁵

The point may be underscored by a few remarks on the relevance of the particular institutional framework in which restitution is being awarded to a crime victim. Empirical evidence confirms that reparation paid by an offender to the victim in the framework of a *criminal* trial has more impact than the same amount of money being transferred as a result of a claim for damages - based on tort - in *civil* court.²⁶ The moral support for this kind of financial amends by the constitutional authority of institutions like the public prosecutor and the trial judge enhances justice. It fortifies the conviction that financial compensation for victims is not only a private affair but is also to be regarded as serving demands of public interest.

Fattah further argues that criminal law is by nature moralistic, stigmatizing, oriented to the past and backward looking. It would require a completely new system to be realistic, utilitarian, oriented to the present and the future. In my view, however, the dogmatic separation of punishment on the one hand and financial reparation or restitution on the other, is a historical contingency. The fundamental distinction between punishment and

²⁵European Forum for Victim Services, *Statement of Victims' Rights in the Process of Criminal Justice*, London 1996, p. 5 (under the heading ‘Principles for the establishment of victims’ rights’).

²⁶Cfr. Jan J.M. van Dijk, ‘Strafrechtshervormingen ten behoeve van het slachtoffer in internationaal perspectief’, in: *Justitiële Verkenningen* 1988/9, p. 7-27; J. Shapland et al., *Victims in the criminal justice system*, Cambridge 1985.

reparation is a dogmatic aberration; it clearly constitutes a conceptual misunderstanding which can and should be remedied within the current paradigm of criminal justice.

Quite a few jurisdictions have already proven that it is feasible as well as fruitful to transcend the distinction between punishment and court ordered restitution. The most obvious example of this is the successful introduction of the *compensation order*.²⁷ The rationale behind the compensation order - and similar penal sanctions which have surfaced in other jurisdictions under different names - is that forcing an offender to pay restitution to the victim will serve all of the well established goals of traditional types of punishment.²⁸ A very brief clarification of this point has to suffice.²⁹ In a way, this type of restitution can be considered as the most literal form of *retribution*. With regard to special prevention or *rehabilitation*, it is likely that the awareness that one has to pay for the damages one has inflicted will at least have the same dissuasive effect on future reoffending as the imposition of a fine to be payed to the government. The same is true - *mutatis mutandis* - for general prevention, or *deterrence*. And finally, the goal of *conflict resolution* is only on a very high level of abstraction promoted by traditional forms of punishment; the compensation order probably has more tangible effects in this respect.

²⁷D. Moxon, J.M. Corkery, C. Hedderman, *Developments in the use of compensation orders in magistrates' courts since October 1988*, London: HMSO 1992; and the general overview in M.E.I. Brienen & E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, Nijmegen 2000, Chapter 26 (p.1057-1101). This study clearly shows that the compensation order-model (restitution as *penal* sanction) is much more beneficial to victims than the *partie civile*-model (restitution following a *civil* claim for damages during the criminal trial).

²⁸Cfr. Jan W. De Keijser, *Punishment and Purpose. From Moral Theory to Punishment in Action*, Leiden 2000.

²⁹More on this is provided by Bernd-Dieter Meier, *op.cit.* p. 130 ff; H.-J. Albrecht, 'Kriminologische Perspektiven der Wiedergutmachung. Theoretische Ansätze und empirische Befunde', in: A. Eser et.al. (eds.), *Neue Wege der Wiedergutmachung im Strafrecht*, Freiburg i.Br. 1990, p. 43-72; and Michael Cavadino & James Dignan, 'Reparation, Retribution and Rights', *International Review of Victimology* 1997, p. 233-253.

The counter-argument, of course, has always been that punishment must be strictly understood as intentionally inflicting pain. In the traditional retributive paradigm, the occurrence of a crime is supposed to trigger an automatic response. The guilty state of mind of the offender (*'mens rea'*) calls for a *just desert*. This is regarded as a basic principle of justice, irrespective of the anticipated beneficial or detrimental effects of the imposition of such a penalty. Within the framework of this perspective, forced reparation to the victim could never count as real punishment. There are supposed to be two main reasons why a compensation order could not be accepted as punishment *per se*. One is that there is a pre-existing obligation (emanating from civil law) to reimburse the victim for damages, so that forced reparation does not add anything in terms of adverse consequences of the crime. And the second reason is that even when the compensation order would be accepted in the framework of a criminal trial, it could never be imposed with the intention of inflicting pain on the perpetrator and hence it would still have to be excluded from the list of available punitive sanctions.

In my view, these objections reveal a remarkable lack of sociological or empirical consciousness. Valid as they may look from a narrow conception of legal doctrine, they completely ignore the reality as experienced by the principal clients of the system: the victim and the offender. For the offender, there is no difference in the imposition of a fine on the one hand and an obligation to pay (the same amount of) restitution on the other. The proceeds of the crime have usually been spent a long time before, so the financial burden is equal in both situations. For the offender, the hardship - the pain - is neither affected by the recipient of the financial offer he has to make (the state or the victim) nor by its legal origin (tort/civil law vs crime/punishment). This is the main justification for a steadily increasing number of jurisdictions to elevate compensation orders to the same legal status as the more traditional types of financial punitive sanctions.

And even when this is persistently rejected on dogmatic grounds, as it is the case in many German speaking environments, it does not

automatically follow that reparation is beyond the scope of criminal law. Löschnig-Gspandl, for instance, holds the opinion that there remains a fundamental gap between the goals of punishment and the goals of restitution. In a carefully reasoned argument, though, she further stipulates that efforts to promote reparation by the offender to the victim do coincide with the objectives of the criminal justice system and hence can and must be incorporated in the penal process.³⁰

Quite a few advocates of restorative justice complain about the theological and metaphysical nature of the basic concepts of criminal law. The moral type of guilt is a case in point. However, this type of criticism begs the question what damage could be done - and to whom - by entering a moral aspect in the equation. If I see correctly, the moral dimension of the decision on guilt (*mens rea*) is one of the key-parts of the justification of state interference in the aftermath of crime. And this is not entirely without reason. When the state has failed to protect its citizens against criminal victimization, the least it can do is to show solidarity with the victim in the aftermath of crime. This acknowledgement of victimization includes the allocation of moral blame: part of the process is about determining to what extent the offender is responsible for the criminal act and for the damage it has caused. The public display of disapproval of the criminal act helps restore the victim's sense of order. It contributes to the victim's belief in a just society. And it assists victims in the process of coping with the effects of crime.

So, from the perspective of the victim I can see very little wrong with some of the fundamental moral elements in the dogmatic superstructure of crime and punishment. On the contrary, experience shows that it is quite often the narrow legal definitions of tort law which prove to be beyond understanding for the victim of crime. The pioneering study of Brienens and Hoegen concludes that the "first technical impediment that commonly frustrates the general realisation of compensation for the victim through the

³⁰Marianne Löschnig-Gspandl, *Die Wiedergutmachung im österreichischen Strafrecht. Auf dem Weg zu einem neuen Kriminalrecht?*, Vienna 1996, p.

adhesion model is the *strict adherence to the principle of civil liability*”.³¹ Civil law is not a promising solution for crime victims, it is one of the historical roots of their problems.

Back to the main question of this section: the capacity of the criminal justice system to be responsive to new demands and changing circumstances. Zehr is ruthless in his final judgement: “Over time dysfunctions begin to develop as more and more phenomena do not fit the paradigm. However, we keep trying to rescue the model by inventing epicycles, reforms, which piece it together. Eventually, though, the sense of dysfunction becomes so great that the model breaks down and is replaced by another.”³² According to Zehr, victim compensation and assistance may be viewed as another such epicycle. In vain. As Zehr puts it, this approach seeks to remedy a problem in the existing paradigm but it doesn’t question basic assumptions about the state’s and the victim’s role in justice: “They recognize a legitimate problem but not the root source of the problem.”³³ I respectfully disagree. In the preceding paragraphs I have tried to demonstrate that the criminal justice system - and its underlying conceptual framework - can be reformed step by step to better serve the needs of all individuals involved.³⁴ In the terminology used by Thomas Kuhn: those who argue for restorative justice as a new paradigm apparently underestimate the problem solving capacity of the currently prevailing paradigm.

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³¹Brienen & Hoegen, *op.cit.* p. 1069 ff.; p. 1070: “The strict adherence to the principle of civil liability should be slackened to allow the criminal court to (a) estimate, rather than establish accurately, the level of damages, and (b) take the means of the offender into consideration so that a realistically enforceable amount is awarded rather than a castle in the air.”

³²Howard Zehr, *op.cit.* p. 92.

³³Howard Zehr, *op.cit.* p. 93.

³⁴Perhaps this is the best moment to emphasize that ‘piecemeal’ reform and acting ‘step by step’ does include the possibility of *fundamental reform*, and can easily go hand in hand with remarkable boldness, as may have become evident in the preceding exposition on the changing concepts of crime and punishment. The word ‘piecemeal’ is to be understood in the limited meaning of referring to ‘non-paradigmatic’.

4. Two strategies for effecting change

The result of the preceding sections is that there appear to be two strategies available for improving the status of victims' rights within the legal system. One is to aim for a change in paradigm; the other is to opt for piecemeal reform of the current paradigm of criminal justice. These strategies are mutually exclusive. So we are compelled to determine which one looks most promising from the point of view of effectively promoting victims' interests. My own preference is for the piecemeal approach. There are two sets of arguments supporting this position.

The first cluster of arguments is derived from the nature of a paradigm, as explained in the previous section. A paradigm refers to a complete 'world view'. It comprises all convictions, concepts, values, priorities and principles prevalent in a given academic discipline. It also entails objectives, goals, and standards of success. The comprehensive - all encompassing - nature of a paradigm has farreaching theoretical and practical implications. The most striking one is that competing paradigms are, in Kuhn's words, 'incommensurable'. The incommensurability of different paradigms means there is an 'incomplete logical contact' between them. In ordinary language this means that advocates of different paradigms can hardly engage in a productive dialogue. Success and improvements within the framework of one paradigm is regarded as irrelevant or futile in another. So, arguing for a new paradigm manifestly limits room for rational debate. There is no common ground to serve as a basis for communication, let alone for persuasion.

The features of the theoretical concept of a paradigm yield two concrete arguments against the strategy which obtains for a battle for restorative justice as a new paradigm. First, the absence of any room for

compromise leads to a final choice between either criminal justice or restorative justice. If the inevitable decision is presented in this binary way, it looks extremely unlikely that a general sentiment will swing in the latter direction. I do not consider it realistic to expect that a majority in the academic community will be prepared to completely abandon all the existing basic propositions of criminal law and procedure. On top of that, we have to keep in mind that there are many other different stakeholders in connection with the operation of the criminal justice system.³⁵ Legislators, politicians, professionals like judges, prosecutors and defence attorneys, as well as the public at large, they all have ideas, opinions and quite often even strong feelings about crime and the best ways to respond to crime. My point here is that academic discourse in this area does not prosper in a social vacuum. It is - by contrast - strongly interconnected with cultural circumstances prevailing in society at a given period in time. Taking this kind of socio-cultural intangibles into account, it looks all the more unlikely that there will be a radical - indeed: a revolutionary - shift in world-view leading to the overthrow of all previously held convictions surrounding the concepts of crime and punishment. In this sense, legal doctrine is different from, for instance, the domain of theoretical physics.

The second argument is closely linked to the first one. It points to the problem that there is *no way of managing the transition process* from one paradigm to another. The transition process is described as a semi religious experience, a collective conversion to a new belief. Since there is no opportunity for rational debate between the converted and the not-yet-converted (see above), there are no guidelines on how to effectively advocate a dominant status for the new paradigm. This only compounds my reservations concerning the possibility that restorative justice could ever prevail at the expense of the traditional system of administering criminal

³⁵Specific attention to the various constituencies of restorative justice is also given by Kent Roach, 'Changing punishment at the turn of the century: Restorative justice on the rise', *Canadian Journal of Criminology* 2000, p. 249-280.

justice.³⁶ In this light, aiming for a new paradigm does not even come close to a potentially successful strategy for promoting victims' rights.

The second set of considerations supporting my preference for a strategy of piecemeal reform is also based on the alleged comprehensive nature of the alternative model of restorative justice. Let me first recall the basic conditions which have to be met in order for a potential new paradigm to be acceptable to the scientific community. According to Kuhn, the new paradigm must hold a promise to leave a major part of the problem solving capacity of the old paradigm intact. And on top of that it should offer a solution for a major and generally acknowledged problem which can not be overcome in any other way.

In my view, it is highly questionable whether these standards are met by restorative justice as a candidate paradigm. During the 9th international symposium on victimology, Weitekamp correctly observed: "Even if we would come close to [a system of restorative justice] we still need parts of the current system in order to guarantee the rights of offenders and foremost of victims who do not want to participate in programs of restorative justice. Further on we will have offenders for whom this approach will not work and who have to be incarcerated in order to protect citizens, communities and societies."³⁷ I think it is undisputable that his point can be generalised. We need a punitive criminal justice system for the large number of cases where restorative justice just does not work. The existing system of criminal justice is for instance indispensable in cases of 'victimless crime', such as

³⁶It must be noted that when restorative justice is presented as a new paradigm, it can only succeed by eliminating criminal law as we have known it for centuries. In this sense, it can not be denied that the movement pressing for a new paradigm is essentially abolitionist in nature.

³⁷Elmar G.M. Weitekamp, 'The Paradigm of Restorative Justice: Potentials, Possibilities and Pitfalls', in: Jan J.M. van Dijk et.al. (eds.), *Caring for Crime Victims: Selected Proceedings of the Ninth International Symposium on Victimology*, Monsey, New York 1999, p. 122-123.

trafficking illicit narcotics.³⁸ And we could not do without traditional criminal law in instances where a larger group of citizens is victimised, but where individuals are not affected to an extent that justifies mediation or other types of restorative interventions: environmental crime or economic crime are the obvious examples in this respect. And last but not least, some cases of hard core crime are so serious that it would - for the time being - be inconceivable to consider them as a private affair between the offender and the victim. The examples of murder and rape quickly come to mind.³⁹ On top of that there is the problem that in a majority of cases the perpetrator is never found or arrested. In all of these instances the concept of restorative justice as advocated in a new paradigm loses much of its meaning. Yet even when the offender is not apprehended, the victim is still in need of some assistance and support by law enforcement agencies. His interests must be taken care of; he needs (e.g. informational) rights vis-a-vis the government during the investigation.

It is important to be aware of the fact that these limitations can not be presented or interpreted as exceptions to the rule. Restorative justice is not a promising new paradigm which is - because of its infant stage of development - confronted with some challenging anomalies (in the examples just referred to) which will disappear in due time. Quite the opposite appears to be the case. Criminal law in its traditional structural form will *at least* remain *part of* our conception of justice in the extended future. To recognise this inevitable fact is by definition incompatible with the claim that restorative justice is a new paradigm in the true sense of the word.

³⁸This point has been made before by, among others, L. Zedner, 'Victims', in: M. Maguire et.al. (eds.), *The Oxford Handbook of Criminology*, Oxford 1994, p. 1239.

³⁹Bernd-Dieter Meier, *op.cit.* p. 131: "There are good reasons to assume that somewhere there is a border beyond which the general public is not willing to accept restorative justice as the only form of reaction to the offence but calls for retribution and punishment", with additional references.

5. Concluding remarks

My conclusion is that restorative justice is a great idea, a convincing philosophy and a wonderful inspiration, but it is not a new paradigm. The idea is being used - as it ought to be - to reform and improve the criminal justice system step by step. These steps need not to be small or insignificant ones. Quite the contrary: piecemeal reform can actually take the form of the proverbial giant leap.⁴⁰ Like Martin Wright has written before, it is better to think not of alternatives but of a continuum, and to work to move the centre of gravity from the repressive towards the restorative.⁴¹ In this sense, restorative justice can be a guiding principle.⁴² The concepts and objectives it has yielded can lead to carefully planned and evaluated experiments aimed at improving the position of victims in the criminal justice system. This is the most responsible - and effective - way of shaping reform.

Just a final remark on the practical relevance of the basic question addressed in the present exposition. It may look a little academic to explore the technical meaning of the concept of a paradigm and to see how restorative justice fits into that concept. Why not allow a more casual use of the word paradigm? After all, it can hardly be contested that restorative justice is a relatively new, broad, appealing idea.

⁴⁰Examples of this have been outlined in the preceding sections, where redefinitions of the concepts of crime and punishment have been discussed *within* the framework of the currently existing system.

⁴¹Martin Wright, 'Can Mediation be an Alternative to Criminal Justice?', in: Burt Galaway & Joe Hudson (eds.), *Restorative Justice: International Perspectives*, Monsey, NY/Amsterdam 1996, p. 227-237. Idem: Christa Pelikan, 'UN draft resolution on restorative justice programmes in criminal matters', in: *Newsletter of the European Forum for Victim-Offender Mediation and Restorative Justice*, Vol. 3, Issue 1 (February 2002), p. 7: "Great emphasis was put on the fact that RJ programmes are complementary to the CJS, not an alternative and not at all intended to replace the conventional system."

⁴²The same conclusion was reached by Bernd-Dieter Meier, *op.cit.* p. 139: "the assessment that the idea of restorative justice stands for a 'paradigm shift' in the criminal law system is certainly too euphoric. Instead, it seems more appropriate to describe restorative justice as a new perspective in the criminal law system."

In my view it is important to understand the exact epistemological status of restorative justice, because this also has significant practical implications. When university students are educated on the virtues of restorative justice, they are usually interested and perceptive. The same is true for law enforcement officials like the police and prosecutors. They only turn apprehensive when they are being told that the only way to take restorative justice seriously is to abandon all beliefs, concepts and objectives attached to the traditional system of criminal law. For most people, this is just a bridge too far. So in order to promote interest in the potential of restorative justice it is important to state the exact nature and extent of the proposed reform efforts. Victims' rights are about improving a system, not about abolishing a system and then starting from scratch.

Thomas Kuhn's book on scientific revolutions has been extraordinarily influential. It has also been misinterpreted. After the book was published, some thinkers felt that the only way to really contribute to academic discourse is to propose or conduce to a scientific revolution. Kuhn means differently. Progress is usually achieved during periods of 'normal science'.