Restorative Processes from Oslo to Havana and Back

In loving memory of Nils Christie (1928–2015)

Edited by Ida Nafstad and Knut Papendorf

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Discussions on Implementing and Strengthening Restorative Justice Processes in Cuba and Norway

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Introduction

"We have to organise social systems so that conflicts are both nurtured and made visible and also see to it that professionals do not monopolise the handling of them" (Christie 1977, p. 1). The monopolization to which Christie refers is a characteristic of traditional criminal justice systems; they steal our conflicts, they steal our ability - and possibility - to solve our own conflicts. This does not come without consequences, and, as Christie writes, with such a criminal justice system "the big loser is us—to the extent that society is us. This loss is first and foremost a loss in *opportunities for norm-clarification.* It is a loss of pedagogical possibilities. It is a loss of opportunities for a continuous discussion of what represents the law of the land" (*ibid.*, p. 8). A variety of alternatives to traditional criminal justice is practiced throughout the world, and has been for centuries in, for example, customary law systems. In contemporary countries in the Global North, the most widespread institutionalized alternative to handling conflict in traditional criminal justice systems are various forms of restorative justice institutions. Still, the traditional way of handling conflicts - through courts, fines and prison sentences - is the dominant form. The present edited volume is a contribution to discussions of alternatives, alternatives that have the possibilities of being in the better interest of victims, offenders and communities as a whole. This alternative, restorative justice or restorative processes, which is often defined along the lines of "a process whereby all the parties with a stake in a particular offence

come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future" (Marshall 1999, p. 5), will be thoroughly discussed throughout the chapters.

This book is born from an educational collaborative project between the Faculty of Law at the University of Havana and the Department of Criminology and Sociology of Law at the University of Oslo, with a history dating back to the beginning of our new century. In May 2016, this collaboration resulted in an international conference at the University of Havana entitled *Contemporary Trends in Justice, Criminology and Sociology of Law*, with its main focus on restorative justice. The chapters of this compilation are based on the conference proceedings.

The collaboration between our two institutions was started in 2002 by Professor of Criminology Nils Christie in Oslo and Professor of Law and former Attorney General Ramon de la Cruz Ochoa in Havana, arising from a shared interest in prison studies. Since 2007, faculty from the Department of Criminology and Sociology of Law at the University of Oslo have been part of a continuing education master's program in criminology for jurists at the Faculty of Law at the University of Havana, where they have held a one-week program for the students once a year. Topics have focused on alternative conflict resolution, prison sociology and a critical perspective on criminalization of vulnerable groups and actions, such as prostitution and drugs. Cuban educators have spent one week in Norway annually for training, seminars and mutual knowledge exchange. This collaboration has now been solid for several years.

The collaboration has also gradually evolved and deepened, in terms of common interests, institutional foundation and scope. The teaching has in recent years focused on restorative justice, the initiative for which came from the Cuban partners. Their aim is to spread knowledge about restorative justice in Cuba in order

to be able to implement restorative justice mechanisms in the Cuban criminal justice system. From the Norwegian side, there has also been a great interest in studies on, and practices of, alternative conflict resolution for decades. To mention one major achievement, Professor Nils Christie was one of the driving forces behind establishing the Norwegian Mediation Services (NMS), which to this date has Christie's (1977) thinking about conflict and its solutions adopted as part of their core principles. Christie also played a major role, together with the NMS, in establishing mediation services in Albania. Senior advisor at the NMS, Karen Kristin Paus, who has played an important role in the present collaboration over the last few years, was also central in the development of mediation services in Albania.

We see this book as part of reaching our main goal of the cooperation, which is a humanization of criminal justice systems and a strengthening of restorative justice processes by reinforcing the Norwegian and Cuban restorative justice education at the university level and to enhance the general knowledge of restorative justice in our societies. Education on restorative justice is something that so far is weak in both Cuba and Norway. Conflict resolution and its alternatives on the local, national and international levels are important parts of the sociology of law, criminology and law itself, both empirically, practically and theoretically. Knowledge about restorative justice has the potential of enabling restorative justice mechanisms and, through this, contributing to a humanization of the criminal justice system.

This book comes at a pertinent time for both Cuba and Norway in regards to discussions on alternative conflict resolution. The Cuban criminal justice system is under reform. It has become too costly, and has also received international criticism. In the transitional period currently emerging in Cuba, the reforms of the criminal justice system will take center stage. The criminal

justice system consists today of an unstructured array of laws on different levels. The criminal code is supplemented with numerous presidential decrees. Additionally, sentencing levels are disproportionately high, something which has garnered national and international criticism. The Faculty of Law at the University of Havana plays a central role with their expertise when it comes to work on legal reform. They have seen the necessity of finding alternatives to the high rates of sentencing and the long prison sentences even for minor crimes, particularly regarding youth. Such alternatives, however, are not well known by the general population in Cuba. Developing expertise in, and knowledge about, restorative justice will be immensely important for the future. While Norway has one of the oldest and most developed institutionalized restorative justice programs in the world, the NMS, the education on restorative justice in Norway at the university level is scarce. This is particularly remarkable in regards to the Faculty of Law at the University of Oslo, where such an important part of the private and criminal justice systems is not taught (more than 3000 cases are resolved annually by the NMS). This might lead to a lack of theoretical and empirical understanding and further development of restorative justice in Norway. This is exceptionally striking with the new mediation act where youth punishment is placed as a part of the NMS, thus confusing the aims of the restorative justice services. There is a need to strengthen the discussions, teaching and future research on restorative justice in Norway.

We are proud to present this book, and to be able to present it in both English and Spanish.

The unusual decision to publish a book in two languages has several reasons. We want to reach out to both the English and Spanish speaking audience, particularly in Cuba and other parts of South America; we want this to be truly an international pub-

lication. It is further a goal that this compilation can be used as part of the curriculum at the Faculty of Law at the University of Havana, as well as at other universities throughout both English and Spanish speaking parts of the world. We hope this book will be of interest to both scholars and students in sociology of law, in criminology and in law, in addition to legal practitioners and policy makers.

This publication would not have been possible without support and funding from the Norwegian Ministry of Foreign Affairs, through the Norwegian Embassy at Cuba. We are grateful for their contributions. We are also grateful for the generous support from both the Department of Criminology and Sociology of Law at the University of Oslo and from the University of Havana. A special thank you for rapid and excellent work goes to Jesús Bran Suárez for English-to-Spanish and Spanish-to-English translations, and to Karl Nafstad for copyediting the English part of the book.

The compilation consists of twelve contributions, seven from Havana and five from Oslo, divided into five main chapters mirroring the research collaboration's main discussions. We start out with the first chapter's introductions and discussions of the main values, goals and challenges, and, as part of that, also the victimological aspects of restorative justice. As a senior advisor at the NMS in Norway, **Karen Kristin Paus** has firsthand knowledge of the theories, values, workings and practices of an implemented restorative justice system, but also of its challenges and main discussions. Paus discusses several aspects of this, dwelling on the challenges to traditional values imposed on the NMS by the new law on mediation of 2014, where new types of punishment for young offenders were introduced. The new law places the NMS at a crossroad between its traditional assignment of being an arena for open dialogue and the handling of conflicts, to an en-

forcer and a control agency of a punishment decided by criminal courts. Paus asks whether this can be possible while at the same time keeping the traditional values of a restorative justice system intact, and addresses the fundamental question; can restorative processes as (part of) a punishment be an arena for open dialogue?

Main problems imbedded in the traditional justice system are its consequences of victimizing both the victim and the perpetrator, and the effect of imprisonment being nothing more than retribution. **Angela Gómez Peréz** discusses the penal system as a place of victimization and introduces restorative practices as a way of providing justice by paying attention to both the victim and the perpetrator in the aftermath of a crime. In order to do that, Peréz takes the reader with her through the foundational theoretical perspectives and principles of restorative justice and of victimology. She reasons the importance of seeing these perspectives in combination, and shows how this can offer a new way of thinking about justice to the benefit of the victim, the perpetrator and their communities at large. On this basis, Peréz argues for the importance of introducing restorative practices to the Cuban criminal justice system.

Lazaro Enrique Ramos Portal is also concerned with victimological issues, and discusses traditional justice and restorative justice as complementary approaches in a humanization process of criminal justice. If the aim is to generate safety, one needs more than repressive methods, which often will be incapable of addressing society´s problems. Traditional justice as the answer to new forms of law-breaking only results in more prisons, convicts and expenses. So the question is whether or not all offenders deserve repressive treatment. Or, to put it another way, from which perspective should the reaction to a crime be decided; a judicial, public or security perspective? In this context, the victim and the

victimization process have to be given a strong focus. All crimes of an interpersonal nature, related to the violation of individual rights, can be solved by restorative justice, according to Portal. To some extent, restorative justice relies on customs. Unfortunately, Portal argues, this tradition in Cuba is broken down by 400 years of Spanish domination. With a minimal criminal law mainly focusing on more effective ways of compensating the victim, reducing victimization and making the offender aware of the consequences of wrongdoing, the traditional justice model can again be used to protect basic legal assets like health, honor or the patrimony.

As is clarified by the first chapter, restorative justice processes can be used in parallel with, instead of and after a criminal justice procedure. The articles in chapter two discuss how restorative justice can also be viewed as part of, and woven into, the traditional criminal justice system. **Tania de Armas Fonticoba** and **Arlín Pérez Duharte**'s starting-point is the discrepancy between the promises of law to handle society's conflicts by harsh penal sanctions on one side and the failure of satisfactory answers to wrongdoings and its consequences on the other side. Punitive law fails to hamper crime at the societal level, it fails to re-socialize prisoners, and it fails to support and meet the needs of victims who instead risk a re-victimization by the criminal justice system. By realizing that societies are not free from social conflicts, Fonticoba and Duharte introduce criminal mediation as an answer to the failures of punitive law. Instead of constructing two opposing sides, between the victim and the offender, facilitating dialogue and consensus through mediation as a conflict solving process might more readily provide answers meeting the needs of the victim, the offender and the community. Fonticoba and Duharte show how conciliation and mediation can be achieved in practice, along with the principles and benefits of this

form of conflict resolution. Through this, they puncture some criminological and criminal justice myths. There are already signs of mediation present in Cuban penal legislation. Fonticoba and Duharte argue that these can be built on to achieve a fuller restorative justice practice in the Cuban criminal justice system by a gradual incorporation and through raising public awareness of this alternative.

Iracema Gálvez Puebla and **Maria Carla de la Guardia Oriol** provide concrete examples of how Cuban legislation, the police, judiciary and the executive already show signs of restorative justice. These could be strengthened by directing Cuba's penal policy toward alternative criminal conflict-solving based on restorative justice, mediation and through the inclusion of a greater involvement of victims. In this context, the authors present a number of key elements for the protection of victims, which could lead to higher levels of social satisfaction and welfare without detracting from the State´s legitimacy to intervene. Puebla and Oriol bring in a historical perspective with a broad definition of criminal policy. As traditional justice has failed to achieve its goals in Cuba and other countries, the authors are arguing for alternative justice models, such as restorative justice, where the roles of the victim and the offender are strengthened. This has the potential to lead to a more comprehensive strategy, whereby crime is understood as a social problem. To handle crime in Cuba, criminal law has been used in an excessive way with the result of overcrowded prisons without an effective reduction in crime. A new model of justice could be found in restorative justice; based on dialogue and oriented toward social peace, reducing the State´s violent responses and giving civil society a leading role in the process.

In the third chapter, *Visions for Alternative Legal Procedures*, the authors discuss how one may view different parts of the crim-

inal justice system in a critical perspective, offering suggestions for alternatives that can more readily cater to the victim, offender and community, while also enabling us to address core societal reasons for conflicts and deviance rather than merely addressing the symptoms.

While Norwegian prisons might be seen as a hybrid of punishment and welfare, one must not forget that prisons deliberately inflict pain on those sentenced to imprisonment. This leads to the crucial question of whether prisons can indeed be justified. **Hedda Giertsen** identifies and addresses the peculiar relations between crime and punishment, and sets out to discuss this from different perspectives; penal code, sociological and moral. Giertsen challenges the idea and doxa of an immediate link between crime and punishment, showing how this idea makes it demanding for a society to see crime and punishment in relation to other social situations and thereby proposing other perspectives on crime and punishment. Challenging this doxa will enable us not only to view crime and punishment in different ways, but also to find different societal answers to it, proposing other answers to crime than punishment. One way of doing this, Giertsen suggests, is to bring the conflict back to the parties to the conflict and their community, offering restorative processes.

Emma Calderón Arias outlines the main ideas at the center of the relationship between restorative justice and the chain of custody as a legal safeguard. In this context, she starts with a historical and theoretical outline of the concept of chain of custody. Next, the contribution of this concept to the fulfilment of restorative justice is presented. Together with the indictment system, the mixed justice administration system emerged, placing restrictions, such as guidelines on people's fundamental rights, on the investigation process. The chain of custody is here seen as both a procedural perspective and a procedural safeguard. The

position of the victim in traditional criminal proceedings must be strengthened in such a way that the essential elements of restorative justice can be applied. Finally, the concepts of the chain of custody and restorative justice are presented as two current institutions both working for justice and toward the ideal of due process in criminal law.

Engaging a lawyer is expensive in Norway. There is a state-system of free legal aid for persons who cannot afford to pay for a lawyer, but this system is limited to civil cases. This has created a gap between legal needs and legal access, which, to some extent, has been bridged by voluntary not-for-profit legal aid agencies like, for instance, students' law clinics. **Kristian Andenæs** presents the legal aid situation for disadvantaged groups in Norway. The problems of uncovered needs for legal aid, structural discrimination in the context of ethnicity, the dysfunction of legislation in practice, a lack of resources and the competence to claim rights are some examples of a dysfunctional traditional legal system hampering access to justice. The outcome of legal aid in the long run, also as a methodological problem, is discussed, and the importance of working for legal reform, research and international cooperation is emphasized.

Societal circumstances leading to conflict and deviance should also be seen at the global level, related to social inequality and avoiding methodological nationalism. Questions of how we may approach global injustices resulting in crime and a fear of risks with alternative thinking and measures are addressed in the fourth chapter, *Alternatives in a Global Justice Context***.**

States have an obligation to protect citizens from the most harmful of human acts while, at the same time, not using its punitive powers excessively. This is regulated by, for instance, national constitutions and international human rights regimes. In the aftermath of 9/11, however, there has been a trend in exceed-

ing these restrictions in the so-called war on terror. **Mayda Goite Pierre** shows how this compromises the principles of minimum level penal interventions, the granting of human rights, alternatives to imprisonment, proportionality and resocialization. Globalization has added to this by an increase in global social inequality promoting various and new forms of crime and sources of risk. A central question raised by Pierre is how states can react to this; increased penal intervention might not be the answer. Modernizing and redefining some of the criminal policy institutions, promoting reactions in accordance with founding principles of state interventions and human rights, might be more productive responses. We cannot solve global social inequality by excessive penal interventions.

Globalization, risk society and the increase in new types of criminality, and whether the answer to these developments should be an expansion of criminal law, are also important topics in **Arnel Medina Cuenca**'s contribution. Neoliberal globalization fosters social and economic inequality, marginalization, social exclusion and widespread corruption. The focus of attention in international legal documents has gradually shifted from a human rights approach to dealing with the fight against drugs, terrorism and transnational organized crime. Prison in this context, in the words of Zaffaroni (2007), is characterized as an institution with elements of prisonization, or a damaging machine. Cuenca suggests that the solution must therefore be found in a decrease of the use of prison sentences, along with a streamlining of criminal justice policies on the essential basis of respect for the human rights of all citizens, including prison inmates. Only then will criminal sanctions have some degree of legitimacy in the social and democratic state based on the rule of law.

The concluding chapter, *Socio-legal Perspectives on Alternatives to Traditional Justice Rationales,* draws on theoretical discussions

in sociology of law in order to recognize how such discussions can widen our thinking about alternatives to the traditional criminal justice system, implementing and strengthening them.

The main aim of **Knut Papendorf**'s article is to cross the boundaries of one's own disciplines, here law, opening up for a wider perspective based on sociology of law and legal philosophy. Papendorf starts out with a discussion of statutory law in the Nazi regime, which led to open injustice, and how it was handled after the end of the Third Reich. In this context, the so-called Radbruch Formula, with the term "unbearably unjust," was a key factor in handling unjust statutory laws. Papendorf draws on ideas from famous legal sociologists Eugen Ehrlich and Gunther Teubner to interpret the handling of unjust laws, both of whom have a more skeptical view of the boundaries of statutory law. This view invites an investigation into how people are actually solving their conflicts and daily life problems in the local practice of law, by living law. Finally, this leads to a critical discussion of how legal pluralism can be seen both as a conservative capitalistic and an emancipatory practice from a Latin-American perspective.

Continuing the discussion on living law, **Ida Nafstad**'s starting point is the normative claim that no matter how one conceptualizes law it should provide substantive equality, and it should be practiced in such a way that it is experienced as just in access, process and result. Using theories of the classics in sociology of law and social jurisprudence, Eugen Ehrlich and Roscoe Pound, Nafstad discusses how restorative justice can be conceptualized as a meeting point between living law and law in the books. Drawing on resources from both, Nafstad suggests that the possible benefits of equality before the law and the experience of justice might result. Restorative justice is, however, a field of its own, where equality and experiences of justice can be reached

through the core idea of restorative justice as a meeting place, an arena that, in the words of Christie, attempts to provide the foundation for those affected to "see each other, to understand what happened, and to find ways to live with what happened" (2015, p. 111).

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