

# Restorative justice: a legally binding instrument to implement our ecological duties

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## Introduction

Whilst an ever-increasing cycle of environmental disasters, degradation, loss of ecological integrity and environmental pollution caused by human beings seems to be the general rule for a world gone astray, at the same time there are emerging signs that many individuals and groups are trying to find a 'way out' from the environmentally unfriendly manner in which we live and use Planet Earth.

Research on ecological duties, on their implementation and on how to construct an ecological society are examples of this emerging effort. This article suggests that, despite the fact that restorative justice has been used only occasionally by national and international courts to deal with environmental crimes, this new mechanism might be a tool to implement our ecological duties, helping to upgrade them from a level of mere moral obligation to legally binding obligations and, as a consequence, orienting people towards more environmentally friendly behaviours.<sup>1</sup>

The first part of this article provides an overview of ecological duties, with a brief analysis of the concept of the 'ecological citizen'. The second part explores the background of restorative justice, paying close attention to the origin of the term, its nature, aims and players. The final part of the article seeks to open up new discussions of restorative justice by showing how it could be deployed in the environmental crime process to implement our ecological duties.

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1 For more in-depth analysis see G Parola *Environmental Democracy at the Global Level: Rights and Duties for a New Citizenship* (Versita 2013).

## Ecological citizens

The original meaning of the term 'ecological citizen'<sup>2</sup> is 'citizen of the world', rather than with regard to a particular polis, nation, or bio-region.<sup>3</sup> Several theorists have considered the role of obligations in citizenship in an attempt to identify agents for the transformation of existing socio-ecological orders.<sup>4</sup> Sáiz asserts that 'ecological citizenship is still "under construction", but it can already be seen that this has its own architectural inflections that break with traditional notions of citizenship'. As such, the ecological citizen must be constituted in a new political space that overflows the boundaries of discrete nation states.<sup>5</sup>

This citizenship can be also a non-territorial form of citizenship, owing to the fact that it extends beyond territorial boundaries and, secondly, because it embraces both the private and public sphere.<sup>6</sup> Concerning the first characteristic, it is worth noting that the dimension inside

2 D R Bell 'Liberal environmental citizenship' (2005) 14(2) *Environmental Politics* 179; P Christoff, Ecological citizens and ecologically guided democracy' in B Doherty, M De Geus (eds) *Democracy and Green Political Thought: Sustainability, Rights and Citizenship* (Routledge 1996) 151; P B Clarke *Deep Citizenship* (Pluto Press 1999); H Dean 'Green citizenship' (2001) 35 *Social Policy and Administration* 490; M Drevensek 'Negotiation as the driving force of environmental citizenship' (2005) 14(2) *Environmental Politics* 226; E Luque 'Researching environmental citizenship and its publics' (2005) 14(2) *Environmental Politics* 211; A V Sáiz 'Globalisation, cosmopolitanism and ecological citizenship' (2005) 14(2) *Environmental Politics* 163.

3 The first conceptualisation of this citizenship is from an article by A Dobson 'Ecological citizenship: a disruptive influence?' (2000) [www.vedegylet.hu/okopolitika/Dobson%20-%20Ecological%20Citizenship.pdf](http://www.vedegylet.hu/okopolitika/Dobson%20-%20Ecological%20Citizenship.pdf); see also A Dobson *Citizenship and the Environment* (OUP 2003); J Barry 'Resistance is fertile: from environmental to sustainability citizenship' in A Dobson, D Bell (eds) *Environmental Citizens* (MIT Press 2006) 21.

4 J Barry 'Vulnerability and virtue: democracy, dependency, and ecological stewardship' in B A Minteer and B Pepperman Taylor (eds) *Democracy and the Claims of Nature: Critical Perspectives for a New Century* (Rowman & Littlefield 2002) 133.

5 P A Latta 'Locating democratic politics in ecological citizenship' (2007) 16 *Environmental Politics* 381.

6 Dobson *Citizenship and the Environment* (n 3) 82.

which citizens operate is the planet as a whole and not just at the national level. This is attributable especially to the circumstance that numerous environmental problems are transnational or international in scale.<sup>7</sup>

The second characteristic of environmental citizenship is the emphasis on ecological obligations and responsibilities rather than on environmental rights<sup>8</sup> in the private and public sphere. Moreover, an ecological citizen aspires to the promotion of global and environmental justice<sup>9</sup> and, in fact, foresees a different society that is not only sustainable but also one where the fulfilment of duties is a way of assuring justice.<sup>10</sup>

It has also been underlined by Christoff that the role of the ecological citizen, defined as *homo ecologicus*, is 'to defend the rights of future generations and other species just as we are morally obliged'.<sup>11</sup> This means that humans 'must assume responsibility for the future humans and other species and "represent" their interest and potential choices according to the duties of environmental stewardship'.<sup>12</sup>

## Ecological duties

Ecological duties have their theoretical background in the principle of ecological responsibility. Jonas, in 1979, was one of the first to propose this principle as a way to cope with the ecological problems generated by technological

society. In his book, *The Imperative of Responsibility*, he revives the earlier ethics of virtue from ancient Greek philosophy, criticises human interactions with nature for being based solely on *techné*, observes that ethical principles have not kept up with technological changes and proposes a new imperative: 'Act in such a way that the consequences of your action are compatible with the permanence of genuine human life on Earth'.<sup>13</sup> Therefore, the indispensable element of the new categorical imperative is *responsibility for the community of life*.<sup>14</sup>

Indeed, it is increasingly being pointed out that, in Western society, the duty-based approach has a subordinated perspective to the rights-based approach, whereas in many traditional cultures, as in the indigenous populations, individuals have duties and responsibilities towards others and the wider community, which also includes nature. In effect, each person should have the right to have his or her environment protected, but also the obligation to contribute to the common effort to protect and restore the environment.

Furthermore, based on this approach, if an individual has committed an environmental crime, he cannot stay in a prison or pay a fine but first of all must understand that the damage he has committed brings negative consequences for the environment and to present and future generations; thereafter, he must actively repair and restore the harm done.

Concerning the first ecological duty to *protect* and *restore* the environment for present and future generations, also called *intra-inter-generational equity*,<sup>15</sup> philosophy, religion, green political thought and some legal traditions from diverse cultural traditions have already held that man is trustee or steward of the natural environment and from this arise these duties.<sup>16</sup>

Moreover, from a legal point of view, such ecological duties emerge as an obligation to correct the injustices inherent in the material relationships encompassed by the notion of an *ecological footprint*. The impact we have on our environment is related to the quantity of nature that we use to sustain our consumption patterns.<sup>17</sup> Individuals who

7 Dobson and Bell *Environmental Citizens* (n 3) 5–6.

8 See Earth Charter Principles 4–5 (March 2000) [www.earthcharter.org/files/charter/charter](http://www.earthcharter.org/files/charter/charter) (encouraging the protection and restoration of ecological systems and taking action to prevent future environmental harm). Many proponents of this approach posit ecological rights or rights of nature as a construct to balance human rights, attempting to introduce ecological limitations on human rights: 'The objective of these limitations is to implement an eco-centric ethic in a manner which imposes responsibilities and duties upon humankind to take intrinsic values and the interests of the natural community into account when exercising its human rights'. See P Taylor 'From environmental to ecological human rights, a new dynamic in international law' (1998) 10 *Geographical International Environmental Law Review* 309; B Mank 'Protecting the environment for future generations: a proposal for a republican superagency' (1996) 5 *New York University Environmental Law Journal* 445.

9 Environmental justice is defined as the 'fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies. The environment justice framework rests on developing tools and strategies to eliminate unfair, unjust, and inequitable conditions and decisions' See R D Bullard *Unequal Protection: Environmental Justice and Communities of Color* (Sierra Club Books 1996).

10 C Melo-Escrihuela 'Promoting ecological citizenship: rights, duties and political agency' (2008) *An International E-Journal for Critical Geographies* 113.

11 Christoff (n 2) 159.

12 Hay, P. A *Companion to Environmental Thought*. Edinburgh, Edinburgh University Press. 2002.

13 H Jonas *Das Prinzip Verantwortung* (Königshausen & Neumann 1979) 36.

14 K Bosselmann *The Principle of Sustainability* (Ashgate 2008).

15 L Beckman 'Democracy, future generations and global climate change' in 'Democracy on the day after tomorrow' (ECPR Joint Sessions 2007).

16 E B Weiss *In Fairness to Future Generations: International Law, Common Patrimony and Intergeneration Equity* (Transnational Publishers Inc 1989).

17 In Dobson's words: 'the nature of the obligation is to reduce the occupation of ecological space, where appropriate, and the source of this obligation lies in remedying the potential and actual injustice of appropriating an unjust share of ecological space'. See Dobson and Bell *Environmental Citizens* (n 3).

currently leave inordinately large ecological footprints are obliged to act by decreasing their consumption of the earth's resources.<sup>18</sup> It is worth noting that the general principle which provides that an obligation arises only upon a correlative right cannot serve here, inasmuch as a huge part of humanity does not have an ecological footprint and therefore only has environmental rights. Consequently, a fundamental characteristic of ecological obligations is that they are owed asymmetrically: such duty is borne only by those who occupy ecological space in an unsustainable way so as to compromise the ability of others in present and future generations.<sup>19</sup>

Furthermore, the ecological footprint increases exponentially in cases where environmental damage is caused by crime: a person who has committed this kind of crime has left large footprints and therefore leaves less space for others to inhabit, thereby excluding them from their rightful share of the basic ecological necessities that make it possible to live a dignified life. One way of reducing the footprint made by an individual who has committed an environmental crime is to provide binding tools to implement the obligation to restore the environmental damage, which could include the restorative justice process.

The second obligation is the *duty to protect the environment*, eg to living and non-living creatures. This duty is reflected in the principle of sustainability and responsibility for the community of life, which should not be confused with shallower versions of sustainable development.

The key definition of sustainable development set out in the Brundtland Report to the United Nations in 1987 argued that development and growth were compatible with ecological demands, provided that such development is 'sustainable'. Moreover, the document states that 'sustainable development meets the needs of the present without compromising the ability of future generations to meet their own needs'.<sup>20</sup>

However, the Brundtland Report also includes an argument about future situations and generations where 'sustainable development' still seems to be a contradiction in terms;<sup>21</sup> indeed, it neglects other environmental aspects including the fundamental idea that the environment has a value in itself without association with any human aspect. The UNEP report, *Caring for the Earth*, adds that sustainable development aims at 'improving the quality of life while living within the carrying capacity of supporting

ecosystems'.<sup>22</sup> This last definition leads to an emphasis on 'sustainability' and on the principle behind sustainability; in other words, in the idea that the environment has a value in itself and that there is a human responsibility to protect, restore or repair nature.

Consequently, it is necessary to recognise binding instruments to enforce this second obligation by following the restorative justice process.

## Implementation of ecological duties

Ecological obligations are even more difficult to implement than environmental human rights. The main reason is that they are almost always recognised only at the level of moral obligations, despite the fact that they have progressed a few steps towards a transformation into legal duties.

Some strategies already exist and encompass the following legal instruments: first, codification of obligations and drafting of rules to sanction the violations;<sup>23</sup> next, representation of future generations in decision-making processes;<sup>24</sup> giving a voice to nature, in other words, also giving nature the right to representation for future generations;<sup>25</sup> and, finally, implementation through ecological limitations.<sup>26</sup>

To the above-mentioned list of legal tools needed to implement ecological duties, it is possible to add restorative justice for two main reasons: first of all, because restorative justice can create legally binding obligations that can help to repair the damaged environment effectively and, secondly, because it can be a way to push the offender away from ecologically unfriendly criminal behaviour and to persuade him to become an environmentally responsible citizen.

## The origin and definition of restorative justice

Restorative justice became an official legal instrument only in 2002 under United Nations Resolution 2002/12 of the Economic and Social Council (ECOSOC) entitled 'United

18 Latta (n 5) 377.

19 Dobson *Citizenship and the Environment* (n 3) 82.

20 World Commission on Environment and Development *Our Common Future* (OUP 1987) (Brundtland Report).

21 R Attfield *Environmental Ethics, Polity* (Wiley 2003) 181.

22 UNEP *Caring for the Earth: A Strategy for Sustainable Living* (Switzerland 1991); IUCN, UNEP and WWF.

23 J Davis 'Conceptual change: emerging perspectives on learning, teaching and technology' University of Georgia (3 October 2007) [www.projects.coe.uga.edu/epltt/index.php?title=Conceptual\\_Change](http://www.projects.coe.uga.edu/epltt/index.php?title=Conceptual_Change); A Geisinger 'Expressive environmental regulation: how law influences beliefs about how to live sustainably' 8th Global Conference on Environmental Justice and Global Citizenship (Oxford 10–12 July 2009). See also Parola (n 1).

24 This tool will be explored in the following section.

25 *ibid.*

26 See Parola (n 1).

Nations basic principles on the use of restorative justice programmes in criminal matters'. However, restorative justice has roots that extend far back in history:<sup>27</sup> the use of this model of justice has been the dominating form of criminal justice for most of human existence<sup>28</sup> and the modern 'retributive justice' has been the dominating criminal justice paradigm only in recent centuries.<sup>29</sup>

Moreover, it is worth noting that indigenous practices of justice are often described as examples of the restorative justice process and such traditional mechanisms of justice can be found in the practices of indigenous people across the globe, from Africa to New Zealand.<sup>30</sup> Indigenous societies, indeed, have long used such processes to resolve disputes between their own people, with other tribes and with newer settlers, and they have largely continued to maintain their own distinct legal systems.<sup>31</sup> It is interesting

to note that there is also an emerging field of study known as indigenous dispute resolution (IDR), which catalogues and analyses these culturally relevant approaches.<sup>32</sup> The ECOSOC has also remarked on this genealogy: '[t]here is worldwide, a significant growth of restorative justice initiatives, and that those initiatives often draw upon traditional and indigenous forms of justice which view crime as fundamentally harmful to people'.

Concerning the analysis of the origin of the term restorative justice itself, Christopher Marshall has emphasised that the expression 'was coined in the 1970s to describe a way to respond to crime that focuses primarily on repairing the damage caused by the criminal act and restoring, insofar as possible, the dignity and well-being of all those involved'.<sup>33</sup> However, more recently, in 2013, Christian Gade was more concrete in terms of the origin of this expression and stated that the name 'restorative justice' was not coined during the second half of the twentieth century, and that he had found the term in six texts from the pre-1950 period.<sup>34</sup> In these texts, such expression is used without its meaning being elucidated but 'taking the contexts where the term appears into consideration, it is plausible that the authors simply understood an act of restorative justice as an act that restores, or aims to restore, a state of justice'.<sup>35</sup>

In recent years a large number of authors have been writing about the meaning and today the concept restorative justice has a more detailed definition and it is used to describe a way of answering to criminal behaviour by balancing the needs of the community, the victims and the offenders<sup>36</sup>: restorative justice brings together the victims, the offenders and the community 'to resolve collectively how to deal with matters arising from the crime, including the harm caused, and the implications for

27 J Braithwaite 'Restorative justice' in M Tonry (ed) *The Oxford Handbook of Crime and Punishment* (Oxford University Press 2000): 'Restorative justice has been the dominant model of criminal justice throughout most of human history for all the world's people'.

28 E G M Weitekamp 'The history of restorative justice' in G Balzmore, L Walgrave (eds) *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Criminal Justice Press 1999): '[h]umans have used forms of restorative justice for the larger part of their existence'.

29 See H Zehr 'Retributive justice, restorative justice' (1985) 4 *New Perspectives on Crime and Justice* [http://www.antonioacasella.eu/restorative/Zehr\\_1985.pdf](http://www.antonioacasella.eu/restorative/Zehr_1985.pdf), who claimed: 'It is difficult to realise sometimes that the paradigm which we consider so natural, so logical, has in fact governed our understanding of crime and justice only for a few centuries'.

30 For example in Alaska, B Jarre and P Hyslop 'Justice for all: an indigenous community-based approach to restorative justice in Alaska' (2014) 38 *The Northern Review* 239: 'The Native peoples of Alaska had their own traditional conflict resolution methods and practices, which were part of everyday practice in the community. For example, in the villages of the Upper Tanana, if someone hurt another's feelings or did something to create discord with a member of the opposite clan, that person had to make amends in public by giving gifts to the aggrieved. If the amends were ever made in private for some exceptional reason, a third person served as mediator. are resolved based on the Indigenous community's culture and custom'; in Africa, S Gade 'Restorative justice and the South African truth and reconciliation process' (2013) 1 *African Journal of Philosophy* 32: 'It has frequently been argued that the post-apartheid Truth and Reconciliation Commission (TRC) was committed to restorative justice (RJ), and that RJ has deep historical roots in African indigenous cultures by virtue of its congruence both with ubuntu and with African indigenous justice systems (AIJS)'; in New Zealand, S Vieille 'Frenemies: restorative justice and customary mechanisms of justice' (2013) 16(2) *Contemporary Justice Review* 174: 'the government equates the Māori approach to doing justice with family group conferences (FGC); a restorative justice mechanism which it claims embodies Māori values and preferences'; in Australia, S Ciftci, D Howard-Wagner 'Integrating indigenous justice into alternative dispute resolution practices: a case study of the aboriginal care circle pilot program in Nowra' (2012) 16(2) *Australian Indigenous Law Review* 81.

31 L Short 'Tradition versus power: when indigenous customs and state laws conflict' (2014) 15 *Chicago Journal of International Law* 376.

32 See eg the programme on dispute resolution in the

Department of Communication at the University of Alaska for its course and associated materials on IDR <http://www.uaf.edu/com>.

33 C Marshall 'Justice, restorative' in J B Green (ed) *Dictionary of Scripture and Ethics* (Baker Academics 2011): dictionary entry 'Justice, restorative'.

34 Members of the Church of Ireland 'View of public affairs for the year 1834' (1834) 3(27) *Christian Examiner and Church of Ireland Magazine* 1; L Armstrong *The Signs of the Times; Comprised in Ten Lectures, Designed to Show the Origin, Nature, Tendency, and Alliances of the Present Popular Efforts for the Abolition of Capital Punishment* (Robert Carter 1848); J Stow *Thoughts on a Continuation of the Book of Common Prayer Used in the Church of England* (Printed at the School-Press 1856); B Abbotts *A Woman's Story, Vol 2* (T Cautley Newby 1863); F R Mechem 'An inquiry concerning justice' (1916) 14(5) *Michigan Law Review* 361; M Fourcade 'Address of Mr. Manuel Fourcade, Bâtonnier of the Order of Advocates, Etc' (1924) 11 *American Bar Association Journal* 768. See Gade (n 31) 14.

35 Gade (n 31) 14.

36 United Nations Office on Drugs and Crime (UNODC) *Handbook on Restorative Justice Programmes* (United Nations 2006) 6.

37 Brian J Preston 'The use of restorative justice for environmental

the future'.<sup>37</sup> Also, Fisher adopted this concept underlining that restorative justice 'is a systematic response to wrongdoing that emphasises healing the wounds of victims, offenders and communities caused or revealed by the criminal behaviour'.<sup>38</sup>

Moreover, as has been stated above, restorative justice became a legal instrument in 2002 when it was supported by the UN. Today, therefore, not only do we have a definition provided by the doctrine but also an official definition of the term.

The UN Resolution offers us the meaning of two expressions 'Restorative process' and 'Restorative outcome'. The first one 'means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles'.<sup>39</sup>

The second expression 'Restorative outcome', in the world of the resolution, is 'an agreement reached as a result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender'.<sup>40</sup>

To sum up from all the above descriptions and definitions, the restorative justice process can be studied using three main angles: first of all its legal *nature*, then its *aims* and, finally, its *players*.

## The nature, the aims and the players of restorative justice

### The nature

Concerning the nature of restorative justice, it can be affirmed that restorative justice is a 'process' that includes two aspects: the first one, a technical and practical aspect, being one which involves the idea that restorative justice should follow procedural rules, for example the rule that all the parties affected by a crime must come together and actively participate 'to resolve collectively how to deal with

the aftermath of the offence and its implications for the future'.<sup>41</sup> However, the 'process' also has a second aspect, an ethical one: in other words, it contains the idea that restorative justice is a way, a process, of changing the consciousness of all of the stakeholders. In this last sense, such a model of justice has a relevant link to the aim of the ecological duties and the *principle of responsibility*; and it also has a smaller link to the general justice process, which does not care about addressing harms, needs, and obligations, in order to heal all the participants to the process and try to put 'things as right as possible'.<sup>42</sup>

### The aims

The aims of restorative justice are strictly linked to its nature; there are essentially two of them. The first purpose is to modify the negative approach that all people affected by the crime have, using the tool of active participation, to find the most positive solutions possible. This approach enables all the participants to share their feelings openly, as well as their experiences, and aims at addressing their needs.

The second aim is to reach the moral healing of the players<sup>43</sup> and the peace in communities by reconciling the parties and repairing the injuries caused by the crime.<sup>44</sup> Consequently, the crime is viewed primarily as a conflict between individuals that results in injuries to victims, communities, and the offenders themselves, and only secondarily as a violation against the state.<sup>45</sup> Also, the UN Resolution has recognised such a point: 'restorative justice is an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities'.<sup>46</sup>

(1996) 4(4) *European Journal of Criminal Policy and Research* 21; T F Marshall *Restorative Justice: An Overview* (Home Office Research Development and Statistics Directorate 1999).

42 H Zehr *The Little Book of Restorative Justice* (Good Books 2002) 37.

43 F W M McElrea 'The role of restorative justice in RMA prosecutions' Salmon Lecture 2004 to the Resource Management Law Association (27 July 2004) [http://www.rmla.org.nz/upload/files/rmla\\_nov04\\_journal.pdf](http://www.rmla.org.nz/upload/files/rmla_nov04_journal.pdf): 'They also create the possibility of reconciliation through the practice of compassion, healing, mercy and forgiveness'. The Select Committee's commentary to the Sentencing and Parole Reform Bill included a description of restorative justice provided by the Restorative Justice Network (a New Zealand association); see also C Lawrence, M Lovell and J Helfgott 'The moral discourse of healing: victims and offenders for restorative justice' (2004) 3(2) *Journal of Societal & Social Policy* 49.

44 B Galaway and J Hudson *Restorative Justice: International Perspectives* (Criminal Justice Press 1996) 2.

45 *ibid.*

46 T L Dorpat *Crimes of Punishment: America's Culture of Violence* (Algora Publishing 2007) 236. Restorative justice is a process of bringing together all the stakeholders (offenders, victims, communities) in pursuit of 'a justice that heals the hurt of crime, instead of responding to the hurt of the crime by using punishment to hurt the offender'.

47 See M D Burkhead *A Life for a Life: The American Debate over the*

crime' EPA Victoria Seminar on 'Restorative Environmental Justice' (Melbourne, 22 March 2011) <http://ssrn.com/abstract=1831822>.

38 R M Fisher, J F Verry 'Use of restorative justice as an alternative approach in prosecution and diversion policy for environmental offences' (2005) 11 *LGLJ* 48.

39 ECOSOC Resolution 2002/12 'Basic principles on the use of restorative justice programmes in criminal matters'.

40 *ibid.*

41 T F Marshall 'The evolution of restorative justice in Britain'

## The players

The best way to achieve restoration is accomplished through a cooperative process that includes all of the stakeholders.<sup>47</sup> In order to accomplish this goal, there are three players that must be involved in any form of restorative justice process: the victim(s), the offender(s) and the community or communities in which each lives.<sup>48</sup>

### Victim(s)

Restorative justice focuses on the victim and allows him or her a more active role by inviting him or her into the heart of the criminal justice process. This process provides an occasion for victims to obtain reparation, and gives them a positive, safe environment in which key questions can be answered and healing can begin. Then restorative justice is also a procedure designed to bring out the best in the victim, 'instead of seeking revenge', and the purpose is that the victim accepts 'the offender's apology and/or restitution'.<sup>49</sup> Indeed, this model of justice can put 'a human face on the offender' and give to 'the victim some appreciation of how the circumstances may have brought the offender to commit the offence'.<sup>50</sup>

### Offender(s)

As happens in all of the traditional indigenous systems of justice,<sup>51</sup> restorative justice also believes that instead of a society punishing criminals by putting them in 'prison', the criminal should have the chance to correct the wrong that he or she has done.<sup>52</sup> This approach allows the offender to gain insight into the causes and provide a forum in which the offender can take personal responsibility for his or her offence in a meaningful way.<sup>53</sup>

The goal of the restorative justice process is also to bring out the best in the offender and to allow change in the

offender's consciousness, to make him or her fully appreciate the human side of the harm that s/he has done and to modify deeply his or her behaviours if the opportunity to take criminal action arises in the future.<sup>54</sup> Once the criminal has understood this and has therefore repaired the injury, s/he 'can be brought back into society'.<sup>55</sup>

### Community(ies)

In restorative justice theory, the crime is more than simply law-breaking and more than an offence to the government authority; the crime produces moral pain to the victims, to the offender, and even to the community,<sup>56</sup> and for this reason restorative justice tries to deconstruct the idea of punishment by replacing it with the need for community healing. Restorative justice engages those that are harmed and the wrongdoers 'in search of solutions that promote repair, reconciliation, and the rebuilding of relationships'.<sup>57</sup>

This model of justice has a proactive rather than a reactive approach by giving 'a voice in the criminal process'<sup>58</sup> to the community affected by the crime, thereby enabling it to understand the underlying causes of a crime and to promote the reinstatement of the community's well-being.

## Restorative justice and environmental law

After the analysis of restorative justice and the positive outcomes that such a model of justice can bring to the people involved in the process, the question that should now be asked is whether restorative justice could be employed in the field of the environment. The answer is clearly 'yes'. The principal reason why it would work is because the idea that corporate and individual crimes are committed not just against individuals but can cause the victimisation of a community as a whole in the environmental field is central.<sup>59</sup>

Therefore, the use of the restorative process is easier when applied to crimes resulting in identifiable harms within a specific community or to crimes that are

*Death Penalty* (McFarland & Company Inc Publishers 2009) 116.

48 K Sloan McCabe 'The environment on our doorsteps: community restorative justice and the roots of sustainability' University of Michigan unpublished thesis (December 2009) 80.

49 K van Wormer 'Restorative justice: a model for social work with families: families in societies' (2003) 84(3) *Journal of Contemporary Human Services* 441.

50 M M O'Hear 'Is restorative justice compatible with sentencing uniformity?' (2005) 89 *Marquette Law Review* 305.

51 See n 31.

52 Restorative justice is a process of bringing together all the stakeholders (offenders, victims, communities) in pursuit of 'a justice that heals the hurt of crime, instead of responding to the hurt of the crime by using punishment to hurt the offender'. See Dorpat (n 47) 236.

53 The Select Committee's commentary to the Sentencing and Parole Reform Bill included a description of restorative justice provided by the Restorative Justice Network (a New Zealand association). See McElrea (n 44).

54 C Boyd 'Expanding the arsenal for sentencing environmental

crimes: would therapeutic jurisprudence and restorative justice work?' (2008) 32 *William & Mary Environmental Law & Policy Review* 483, 506 <http://scholarship.law.wm.edu/wmelpr/vol32/iss2/6>.

55 Gade (n 31) 32.

56 D W van Ness 'New wine and old wineskins: four challenges of restorative justice' (1993) 4 *Criminal Law Forum* 251.

57 J B Olson-Buchanan and W R Boswell *Mistreatment in the Workplace: Prevention and Resolution for Managers and Organizations* (Blackwell Publishers 2009) 168.

58 E W Nicastro 'Confronting the neighbors: community impact panels in the realm of restorative justice and punishment theory' (2003) 9 *Roger Williams University Law Review* 261.

59 *ibid* 261.

60 E B Weiss 'Intergenerational equity: a legal framework for

committed by a specific individual rather than to crimes not concerning specific victims or communities or involving the environment itself. This model of justice is flexible and, consequently, with regard to damage to future generations or to the environment itself, can be applied to the judicial process towards a 'representation of future generations' and/or a 'representation of nature'.

Concerning the first representation, when among victims there are only, or are also, unborn children, some authors, and also the World Commission on Environment and Development, have suggested setting up an ombudsman for future generations<sup>60</sup> and giving non-living people a voice by standing with a representative in judicial or administrative proceedings.<sup>61</sup> Thus, restorative justice could adopt this suggestion and allow a 'representative for future generations' to take part in the trial on behalf of the victims.

Moreover, if the victim is the environment itself the restorative justice process can also recognise nature's right of standing to a 'representative of nature'. The above-mentioned concept of nature's rights has been well documented since its rise to prominence in 1972, following the publication of Christopher Stone's article 'Should trees have standing?'<sup>62</sup>. For almost 40 years the concept has been debated amongst lawyers, philosophers, theologians and sociologists. This debate has led to advocacy for a wide variety of rights-based approaches, including legally enforceable rights for nature as envisaged by Stone. The point they have in common is an attempt to give concrete and legal recognition to the intrinsic value of nature. The attribution of rights to the natural environment by means of a representative of the interest of nature itself is a clear acknowledgement that the environment has intrinsic value.

Another reason to use restorative justice in the environmental field concerns the general purpose of restorative justice, as discussed above, that is, the healing and the modification of the consciousness of the participants in the process. In the field of the environment, especially in the field of ecological duties, the ultimate aim is also to change the consciousness of the individuals, because legal environmental reform alone will not be sufficient without a radical shift in human feeling about the place of man in the context of nature.

## Restorative justice as a legal mechanism to implement ecological duties

Many of the features that are central to the restorative justice process are also central to ecological duties, and I will now describe three of these aspects in particular.

### *The focus of restorative justice*

A valuable reason to favour restorative justice as a tool to implement ecological duties is that restorative justice excludes restriction of personal freedom or fines<sup>63</sup> because the possibility of being incarcerated or to receive fines and administrative penalties are insufficient to deter the offender from the bad conduct.<sup>64</sup> Indeed, both imprisonment and punishment violence in any form can cause the offender to self-harm or continue to commit crimes, rather than to take responsibility for his or her actions. In other words, restorative justice attempts 'to find a solution that will hold the individual accountable for their actions, will allow him or her to acknowledge responsibility for the crime and seek to repair any damage, and offers a way to return to and assume a meaningful role in the community in the future'.<sup>65</sup>

These peculiar characteristics of the restorative justice process can also help to develop an ecological responsibility, because supporting offender rehabilitation<sup>66</sup> involves the possibility of a growth in the ecological awareness of the offender and exhorts him or her to transform his or her behaviours into ecological behaviours.

Adopting the model of restorative justice aims at repairing, *through legally binding instruments*, the harm caused by a criminal act and at the same time at restoring the balance in the environment and in the community affected by the criminal act.

### *'Creative' restitution*

In the restorative justice process the restitution that the perpetrator should offer to the victim may be achieved through the instrument of 'creative' restitution. The term 'restitution' in any ordinary process is mostly used to refer to money; however, the concept of 'creative' restitution may consist in many different things. Albert Eglash was the first author who introduced this term by giving the following example: 'If a car thief, for instance, decides to wash his victim's car every Sunday for a month, doing so

global environmental change' (1992). in E B Weiss (ed) *Environmental Change and International Law* (United Nations University 1992).

61 E B Weiss 'Conservation and equity between generations' (1984) *Contemporary Issues in International Law* 119.

62 C Stone 'Should trees have standing? Towards legal rights for natural objects' (1972) 45 *Southern California Law Review* 450.

63 Boyd 'Expanding the arsenal for sentencing environmental crimes'

(n 55) 507.

64 J M Bradford 'Environmental Crimes' (2003) 45 *South Texas Law Review* 5, 7.

65 Sloan McCabe (n 49).

66 D Dolinko 'Restorative justice and the justification of punishment' (2003) *Utah Law Review* 319.

67 A Eglash 'Creative restitution: a broader meaning for an old term'

could be a form of restitution'.<sup>67</sup> Furthermore, he explains that 'in creative restitution, an offender, under appropriate supervision, is helped to find a way to make amends to those he has hurt, making good the damage or harm he has caused, and going a second mile whenever possible, e.g. by going beyond simple repair, by offering restitution despite punishment, or helping others like himself'.<sup>68</sup>

In the environmental crime context, 'creative' restitution should be adopted because it may deter environmental criminals from recidivism and adequately seek to address the root causes of environmental law violations.

Furthermore, this idea of creative restitution can be employed in the environmental field because the search for alternative creative restitution can stimulate the offender to go beyond the mere reparation of the damaged environment and it can help him to become aware about what s/he has done and how difficult –if not impossible –it is completely to repair any environmental loss. So, if the implementation of an ecological duty focuses on development of ecological accountability, then creative restitution can be a legally binding tool to implement the ecological duty to repair the damage done by the ecological footprint.

### **The restorative justice process**

It has been underlined that the participation of all the affected parties in the restorative justice process is fundamental to reach the goals of restorative justice and also to educate people to understand the crime from a non-retributive angle.<sup>69</sup> First of all, for the victim, participation can help to heal his or her moral offence and, secondly, for the community, participation is beneficial because the community works to produce a non-violent solution.

Public participation is also an essential element for the implementation of ecological duties because all of the stakeholders in restorative justice have not only an environmental right to participate in the restorative justice process but also a duty to participate for the protection and for the restoration of the environment. The underlying idea behind ecological duties is that, on the one hand, in the public sphere ecological problems are not resolved without participation and without 'virtuous citizens checking their government, and stimulating it'; on the other hand, in the private sphere these problems cannot be resolved 'without popular support'.<sup>70</sup>

The participation of the community in restorative justice interventions regarding environmental crime can also be seen as an application of broader principles of the public's right to access to justice in environmental matters provided by the Aarhus Convention.<sup>71</sup> That international treaty calls for the recognition of the largest procedural standing in judicial procedure as possible for the individual and for organisations.<sup>72</sup>

In conclusion, it is necessary to increase the use of restorative justice because it is compatible with the principles of environmental law. Greater application would allow restorative justice to be used as a legal tool to implement ecological duties, to help to transform them in legally binding obligations and, finally, to transform not only the offender into an ecological citizen but also all of the individuals affected by the environmental crime.

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decision-making and access to justice in environmental matters 1998.

<sup>72</sup> It represents the first international convention dedicated to creating trans-boundary environmental rights of individuals in the move towards an environmental democracy. The starting point of access to justice in environmental matters is Principle 10 of the Rio Declaration, which stipulates 'effective access to judicial and administrative proceedings, including redress and remedy, shall be provided'. This provision has been implemented by the Aarhus Convention, which is a unique Convention setting out minimum standards of access to legal review procedures. Article 9(1) and (2) covers the third pillar of the Convention, access to justice. It deals with access to justice in two situations: first, it protects the other two pillars, access to review procedures in relation to information and access to review procedures to challenge decisions, acts, or omissions subject to the public participation provisions of art 6. Secondly, because it helps fulfil the duty of protecting the environment for future generations. Article 9(3) has been considered the fourth pillar of the Aarhus Convention, because it provides access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which breach environmental law (see F Marshall 'Two years in the life: the pioneering Aarhus Convention Compliance Committee 2004–2006' (2006) 8 *International Community Law Review* 123). Before the Aarhus Convention, most national and international law systems featured laws generally allowing only the individual to use the justice system to seek a remedy for his grievance; those who were not personally affected were 'unable to go before courts as proxies for the victim or aggrieved party'. Hence, if there was no personally affected individual at all, as a general rule, there would be nobody to remedy certain actions, even if these actions were in violation of a law (see C Schall 'Public interest litigation concerning environmental matters before human rights courts: a promising future concept?' (2008) *Journal of Environmental Law* 417). But now, in accordance with art 9, the access to justice pillar not only underpins the first two pillars but also 'points the way to empowering citizens and NGOs to assist in the enforcement of the law' and also helps to overcome difficulties 'such as the non-transposition into domestic law of international treaty obligations which are of a non-self-executing character' (see C Redgwell 'Access to environmental justice' in F Francioni (ed) *Access to Justice as a Human Right* (Oxford University Press 2007) 153). See Convention on Access to information, public participation in decision-making and access to justice in environmental matters (25 June 1998) 38 ILM 517 (1999), entered into force 30 October 2001. See also E J Lohse, M Poto and G Parola *Participatory Rights in the Environmental Decision-making Process and the Implementation of the Aarhus Convention: A Comparative Perspective* (Duncker & Humblot 2015).

(1957) 48(6) *Journal of Criminal Law, Criminology and Police Science* 619.

<sup>68</sup> Eglash, A. (1957). Creative Restitution: A Broader Meaning for an Old Term', *Journal of Criminal Law, Criminology and Police Science* 48(6), p. 117.

<sup>69</sup> Sloan McCabe (n 49).

<sup>70</sup> M Wissenburg 'Fragmented citizenship in a global environment' in J Barry, B Baxter and R Dunphy (eds) *Europe, Globalisation and Sustainable Development* (Routledge 2004) 73.

<sup>71</sup> Aarhus Convention on Access to information, public participation in