Justiça Ambiental Restaurativa: uma maneira de implementar os deveres ecológicos

Restorative Environmental Justice: a way to implement the Ecological Duties

Profa. Dra. Giulia Parola[1]

Summary: While an increasing cycle of environmental disaster and degradation, loss of ecological integrity and environmental damage and pollution from humans seem to be the general rule for a world gone astray, at the same time there are emerging signs that many individuals and different groups of people are trying to find a "way out" from the environmental unfriendly manner to live and use the Planet Earth.

The researches on Ecological Duties, on the ways to implement them and on how to construct an ecological society are some examples of this emerging effort. The emphasis of the mentioned studies is upon the adoption and exercise of human responsibilities towards all forms of life, including non-human life, and a special duty to "care for the planet".

This paper suggests that the Restorative Justice might be considered as one tool to implement the Ecological duties and to push individual to feel responsible for the Environment adopting environmental friendly behaviours. Indeed, the fundamental aim of the Ecological Duties is to modify the consciousness of the individual and move towards a construction of an ecological civilisation.

To date, unfortunately, Restorative Justice (RJ) has been used only occasionally by the national and international courts to deal with environmental crime. On the contrary, the growth of the employment of this model of Justice, to restore the damage done to the environment, could aim to bring a fundamental change in the modern western culture and consciousness and respond to the urgent need to transform our unsustainable society into a sustainable and ecological society.

Key-words: Restorative Environmental Justice, Ecological Citizen. Rio de Janeiro.

Introduction

While an increasing cycle of environmental disaster and degradation, loss of ecological integrity and environmental damage and pollution from humans seem to be the general rule for a world gone astray, at the same time there are emerging signs that many individuals and different groups of people are trying to find a "way out" from the environmental unfriendly manner to live and use the Planet Earth.

[1] Pós-doutoranda de Direito Ambiental da UFF no Programa PPGDC (Mestrado em Direito Constitucional, UFF Rio de Janeiro). Professora permanente no Programa PPGDC. Doutora em Direito pela Université Paris V René Descartes (França) e Università degli Studi di Torino (Italia), LLM em Direito internacional do Meio Ambiente pela University of Iceland (Islândia) e mestre em direito pela Università degli Studi di Torino (Italia) graduada em Direito pela Università degli Studi di Torino (Italia). Autora das obras: Democracia Ambiental Global. Direitos e Deveres para uma nova Cidadania. Rio de Janeiro : Multifoco, 2017; ?Environmental Democracy at Global Level. Rights and Duties for a new citizenship?, Versita, London, 2013; "Europe in Green: European Environmental Democracy", Versita, London, 2013; ?Participatory rights in the environmental decision making process and the implementation of the Aarhus Convention: a comparative perspective on the German and the Italian system?. E. Loose, G. Parola, M. Poto ed., Duncker & Humblot, Berlino, 2015. Recentemente AVZARADEL, Pedro Curvello Saavedra; PAROLA, Giulia.; VAL, Eduardo. M. Democracia Ambiental na América Latina: uma abordagem comparada. Rio de Janeiro : Multifoco, 2016, v.1; AVZARADEL, Pedro Curvello Saavedra; PAROLA, Giulia.; VAL, Eduardo. M. Questões Socioambientais na América Latina. Rio de Janeiro : Multifoco, 2016, v.1. E-mail: giuliaparola.law@gmail.com

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Part I of this paper provides an overview of Ecological Duties with a brief analysis on the concept of Ecological Citizen.

Part II focuses on Restorative Justice as such: the study on the origin, nature, aims and players of the RJ are necessary to understand the reasons why, in the Part III, is affirmed that the employment of the RJ in the field of environmental crime can help the individuals to be more ecological responsible.

Finally in Part III, the analysis of RJ is carried further to include its application in the field of environmental. This last section of the article explains how "Restorative Environmental Justice" can be an alternative and useful way to favour the implementation of the Ecological Duties with an emphasis on how Restorative Environmental Justice works in the community, how it contributes to citizen empowerment, local peace-building, and more important, how it helps to develop an ecological consciousness in all parties affected by an environmental crime.

I. Ecological Duties of the Ecological Citizens: some core ideas

1. Ecological Citizens

The original meaning of the term ''ecological citizen''[5] is ''citizen of the world'', rather than with regard to a particular *polis*, nation, or bioregion.[6] Several theorists have looked at the role of obligations in citizenship in an attempt to identify agents for the transformation of existing socio-

2 Taylor, 2009, p. 89.
3 Weiss, 1990, p. 199 and Weiss, 1989; 1992, p. 385.
4 For more in-depth analysis, see, Parola, 2013a.
5 Bell, 2005, p. 179; Christoff, 1996; Clarke, 1999; Dean, 2001, p. 490; Drevensek, 2005, p. 226; Luque, 2005, p. 211-225; Sáiz, 2005, p. 163; Seyfang, 2005, p. 290; G. Smith, 2005, p. 273; M.J. Smith, 1998; Stephenson, 1978, p. 21; Thomas, & Twyman, 2005, p. 115.

[6] The first conceptualisation of this citizenship is from an article in Dobson, 2000; Dobson, 2003, p. 67; J. Barry, 2006, p. 21.

ecological orders[7].

Saiz 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[8].

This citizenship can be also a non-territorial form of citizenship, due to the fact that it extends beyond territorial boundaries, and second, because it embraces both the private and public sphere.[9] Concerning the first characteristic, it is worth noting that the dimension inside which citizens operate is the planet as a whole et not just at national level. This is especially due to the circumstance that numerous environmental problems are trans- or international in scale[10].

The second characteristic of Environmental Citizenship is the emphasis on ecological obligations and responsibilities rather than on environmental rights[11] in the private and public sphere. Moreover, an Ecological citizen aspires to the promotion of global and environmental justice,[12] in fact, foresees a different society that is not only sustainable but also just where the fulfilment of duties is a way of assuring justice[13].

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"[14]. 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"[15].

Thus, there are two fundamental obligations, one *to present and future generations*, and another to *Nature*.

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[7] J. Barry, 2002, p. 133.

[8] Latta, 2007, p. 381.

[9] Dobson, 2003, p. 82. Dobson: Thus the typical characteristics of the ecological, also post-cosmopolitan, citizenship are the "non-reciprocal nature of the obligations associated with it, the non-territorial yet material nature of its sense of political space, its recognition that this political space should include the private as well as the public realm, its focus on virtue and its determination to countenance the possibility of private virtues being virtues of citizenship"; Melo-Escrihuela, 2008, p. 113.

[10] Dobson, & Bell, 2006, p. 5-6.

[11] It must be noted that the individuals have those rights and responsibilities 'as residents of planet Earth' vis-à-vis the future generations, as we will see in detail later, and Nature. Draft declarations of human responsibilities such as the Earth Charter focus on duties toward the environment. See The Earth Charter, princs. pp. 4-5, Mar. 2000, available at www.earthcharter.org/files/charter/charter. pdf (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. P. Taylor, 1998, p. 309-310; Mank, 1996, p. 445.

[12] 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 decision", Bullard, 1996.

[13] Melo-Escrihuela, 2008, p.113.

[14] Christoff, 1996, p. 159.

[15] Hay, 2002.

2. Ecological Duties

The ecological duties have its 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"[16]. Therefore the indispensable element of the new categorical imperative is *responsibility for the community of life*[17].

Increasingly, indeed, it is being pointed out that in the westerns societies, the duty-approach has a subordinated prospective to the right-approach, whereas in many traditional cultures, as in the indigenous populations, individuals have duties and responsibilities towards others and the wider community which included also the 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.

Evermore, using this approach, if an individual has committed an environmental crime, he cannot stay in a prison or just pay a fine, but he has first of all to understand that the damage that he committed brings negative consequences to the environment and to the present and future generations and then, he has to actively repair and restore the injury.

Concerning the first ecological duty *to protect and restore the Environment for present and future generation*, also called *intra-inter generational equity*, it is useful to remember that all decisions taken today will affect the quality of life for generations to come. In others worlds, future peoples will suffer from the ways in which the environment is degraded and the extent to which the earth's resources are wasted[18].

Philosophy, religion, green political thought and some legal traditions from diverse cultural traditions have already pointed out such principle and that man is trustee or steward of the natural environment and from this arises man's duty to conserve the planet for present and future generations.[19]

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[16] Jonas, 1979, p. 36.

[17] Bosselmann, 2008.

[18] Beckman, 2007.

[19] "There are roots in the common and the civil law traditions, in Islamic law, in African customary law, and in Asian non-theistic traditions. The proposed theory of intergenerational equity finds deed roots in the Islamic attitude toward the relation between man and nature". (Islamic Principles for the Conservation of the Natural Environment, 13-14

Moreover, such ecological duties emerges 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. In Dobson' 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".

Merely the individuals who currently leave inordinately large ecological footprints are obliged to act by decreasing their consumption of earth's resources[20]. It is worth to note 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 ecological footprints and therefore they just have the 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[21].

Furthermore, the ecological footprint increases exponentially in case of an environmental damage is cased by crime: who has committed this kind of crime has put down large footprints and

(IUCN and Saudi Arabia 1983). Islamic law gives to man all the resources of life and nature; each generation is entitled to use the resources but must care for them and pass them to future generations. "In the Judeo-Christian tradition, God gave the earth to his people and their offspring as an everlasting possession, to be cared for and passed on to each generation (Genesis 1:1-31, 17: 7-8 "I will maintain my Covenant between Me and you, and your offspring to come, as an everlasting covenant throughout the ages, to be God to you and to your offspring to come. I give the land you sojourn in to you and to your offspring to come all the land of Caan, as an everlasting possession. I will be their God".). This has been carried forward in both the common law and the civil law tradition. The English philosopher John Locke, for example, asserts that, whether by the dictates of natural reason or by God's gift "to Adam and his posterity", mankind holds the world in common. Man may only appropriate as much as leaves enough, and as good for others. He has an obligation not to take more fruits of nature than he can use, so that they do not spoil and become unavailable to someone else – e.g., an obligation not to waste the fruit of nature (Locke, 1968). To be sure, there are many instances where law has been used to authorise the destruction of our environment, but the basic thesis that we are trustees or stewards of our planet is deeply imbedded. In the civil law tradition, this recognition of the community interest in natural property appears in Germany in the form of social obligations that are inherent in the ownership of private property (Dozer, 1976). Rights of ownership can be limited for the public good, without the necessity to provide compensation to the owners. Thus legislatures can ban the disposal of toxic wastes in ecologically sensitive areas and invoke the social obligation inherent in property to avoid monetary compensation to the owner of the land. In common law countries such as the United States, local governments can do this through the exercise of the police power- the power to protect the health and welfare of its citizens – or the public trust doctrine. The social legal tradition also has tools which recognise that we are only stewards of the earth. Karl Marx states that all communities [...] are only possessors or users of the earth, not owners, with an obligation to protect the earth for future generations. According to African customary law we are only tenants on Earth with obligations to past and future generations. Under the principles of customary land law Ghana, land is owned by a community that goes on from one generation to the next. A distinguished Ghanaian chief said " I conceive that land belongs to a vast family of whom many are dead, a few are living, and a countless host are still unborn" (Ollennu,1962). Land thus belongs to the community, not to the individual. The Chief of the community or head of the family is like a trustee who holds it for the use of the community. Members of the community can use the property, but cannot alienate it. Customary laws and practices of other African communities, and indeed of peoples in other areas of the world, also view natural resources as held in common with the community promoting responsible stewardship and imposing restrictions on rights of use (Blanc-Jouvan, 1971). The non theistic traditions of Asia and South Asia, such as Shintoism, also stress a respect for nature and our responsibilities to future generations as stewards of this planet, in most instances they call for living in harmony with nature. Moreover, Hinduism, Buddhism and Jainism indirectly support the conservation of our diverse cultural resource in their acceptance of the legitimacy of other religious groups. Weiss, 1989.

[20] Latta, 2007, p. 377.

[21] Dobson, 2003, p. 82.

consequently he has leaved less ecological space for others to inhabit, thereby excluding them from their rightful share of the basic ecological necessities that make a dignified life possible to live. One possible way to reduce the mentioned footprint, made by an individual who committed environmental crime, is to use the Restorative Justice process and the tool so called "Creative Restoration", that it will be better explained in the Part III.

The second obligation is the *duty to protect the environment, e.g.* the living and non-living creatures. This duty is reflected in the principle of sustainability, *responsibility for the community of life,* that cannot be confused with shallow versions of sustainable development.

The key definition of sustainable development, registered 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".[22]

Despite this document adds an argument about future situations and generations "Sustainable development" still seems to be a contradiction in terms[23]; indeed it neglects other environmental aspects like 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".[24] The last definition leads to emphasise on "sustainability" and on the principle behind sustainability, in others words, in the idea that the environment has a value in itself and it exists an human responsibility to protect, restore or repairer the Nature.

Consequently, there is a necessity to recognise an obligation of man towards all non-human elements of the planet and to the environment itself.

3. Implementation of Ecological Duties

Given the analysed duties, it is imperative to develop a strategy for fulfilling ecological responsibilities. 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 exists and encompass the following legal instruments: first,

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[22] World Commission On Environment and Development, 1987.
[23] Attfield, 2003, p. 181.
[24] UNEP, 1991.

codification of obligations and drafting of rules to sanction the violations[25]; then, representation of future generations in decision-making processes[26]; giving a voice to nature, in other words, giving also to nature the right to representation as for future generation[27] and finally implementation through Ecological Limitations[28].

To the above.mentioned list of legal tools to implement ecological duties, it is possible to add also Restorative Justice for two main reasons: first of all, because RJ is a process that can help to effectively repair the damaged environment and second because it can be a way to push the offender to leave the ecological unfriendly criminal behaviour and become an environmental responsible citizen.

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[25] There are a number of ways of achieving this legal implementation. It has been suggested to use international agreements or regional legislations or constitutions, containing provisions for the protection of environmental rights. This could include solemn provisions creating collective and individual responsibilities for the protection and restoration of the ecological basis of all life (Barresi, 1997, p. 3). The suggestion is not just the codification of ecological duties but also the development of particular regulations that may have the effects of influencing people to change their beliefs and, in turn, to act more sustainably (Davis, 2007; Geisinger, 2002, p. 35; 2009).
Indeed, law can "teach" individuals how to change their behaviour in order to act more sustainably. Traditionally, law does not teach. In fact, traditional views consider law to be an "exogenous force" (MacGregor, 2004, p. 85) which influences an individual by making a desired behaviour either less or more costly to undertake. More recently, however, scholars have begun to consider ways in which law may actually have "endogenous" (MacGregor, 2004, p. 85) force on individuals. In such cases, law affects individuals' beliefs in a way that, even if the legal restraints were removed, the individual would continue to act in accordance with the prior legal command.
This last way should surpass the so called "command and control regulation" which consists of a mechanism that includes a wide range of regulatory techniques sharing the basic characteristic that central government regulation dictates a particular end and requires individuals or industry to meet it (Lee, 2002a, p. 114). In fact, a state telling industry and individuals what to do is simply not the most efficient way of achieving social objectives. Thus there are alternative mechanisms whereby financial incentives are used to encourage the desired behaviour.Finally, another way could be to set up an environmental liability regime which could implement the duties and at the same time modify the behaviours. See Parola, 2013a.

[26] This tool will be explore in the following part.

[27] This tool will be explore in the following part.

[28] See Parola, 2013a, Another way to implement the ecological duties towards the earth is to introduce ecological limitations in the human rights approach. The scope of these ecological limitations is to implement ecocentric ethics in a way that grants responsibilities and duties upon humankind and takes intrinsic values and the interests of the natural community into account when exercising human rights (P. Wissenburg, 2004, p. 73, 2009, p. 100).
Each human right has some boundaries created to protect the rights of others and common interest. One is to prescribe a right together with duties, so that the limits of the right will be determined by the duties. Another boundary is to prescribe specific boundaries around specific rights.
Sieghart (Sieghart, 1985, p. 80) states that the limitation must protect one or more of a restricted set of public interests such as national security, public safety, public order, public health, public morals and the rights and freedoms of others. It should give to these limitations a narrow interpretation. Moreover, there is a burden to demonstrate that the law is necessary and that it protects the specified interest or interests. These restrictions might be extended to include ecological limitations consistent with recognition of an ecocentric approach (P. Taylor, 2009, p. 101).
Indeed, this idea of ecological limitations goes beyond environmental protection for the sake of human interests. Ecological limitations could be implemented following the standard formulations for boundaries to rights and freedoms. Several possibilities exist, including: imposing "the right to the use and enjoyment of property, together with a duty not to cause harm to the ecological integrity of the natural environment, prescribing the right to the use and enjoyment of property, together with responsibilities to protect and enhance the ecological integrity of the natural environment; prescribing the right to the use and enjoyment of property, subject to a specific, or general, limitation in the interests of the general welfare of both nature and humanity" (P. Taylor, 2009, p. 103). Such limitations could apply to a number of other human rights.
Moreover, reinterpreting or extending phrases such as "general welfare" (used in Article 29 (2) of the Universal Declaration) should include respect for ecological integrity; or reinterpreting or extending phrases such as "duties to the community" (used in Article 29(1) should also include duties to the natural and human communities.

II. Restorative Justice: some core ideas

This second Part will explore the RJ's background, paying close attention to the origin of the term, the nature, aims and players of the RJ. Such a research will provide a strong basis for a study in the Part III about the possibility to apply this model of justice to environmental crimes.

1. The origin of the Term RJ and the definition

The RJ became an official legal instrument only in 2002 by the United Nations Resolution 2002/12 of the Economic and Social Council (ECOSOC) called "The United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matter".

However RJ has roots that extend far back in history[29]: the use of this model of justice has been the dominating form of criminal justice for most of human existence[30] and the modern "retributive justice" has been the dominating criminal justice paradigm only in recent centuries[31].

Moreover, it is worth noting that indigenous practices of justice are often described as examples of restorative justice process and such traditional mechanisms of justice can be find in the practices of indigenous people across the globe, from Africa to New Zealand[32]. 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[33]. Interesting to note that there is also an emerging field of study called Indigenous Dispute Resolution (IDR) that catalogues and analyses these culturally relevant approaches[34].

The ECOSOC has also remarked this genealogy saying: "there is worldwide, a significant

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[29] John Braithwaite affirms also "Restorative justice has been the dominant model of criminal justice throughout most of human history for all the world's people": Braithwaite 1998: 323.

[30] Elmar G.M. Weitekamp affirms "humans have used forms of restorative justice for the larger part of their existence": Elmar G.M. Weitekamp 1999, 97.

[31] This was already formulated by Howard Zehr in 1985. He claims: "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".

[32] Some example: 1) in Alaska: "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: Jarre & Hyslop, 2014. In Africa "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)." Gade, 2013, p. 32. 3) In New Zealand: In New Zealand, the government equates the Mãori approach to doing justice with family group conferences (FGC); a restorative justice mechanism which it claims embodies Mãori values and preferences. See Vieille, 2013, 174. 4). In Australia see: Ciftci, & Howard-Wagner, 2012.

[33] Short, Lindsay, 2014, 376.

[34] See, for example, the Program on Dispute Resolution in the Department of Communication at the University of Alaska for its course and associated materials on Indigenous Dispute Resolution, htt p://www.uaf.edu/com.

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 RJ itself, has been underlined by Christopher Marshall, 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 wellbeing of all those involved"[35].

Nevertheless, recently, in 2013, Christian Gade was more concrete in terms of origin of this expression and stated that the name "RJ" was not coined during the second half of the twentieth century, but he has been able to find the term in six texts from the pre-1950 period[36]. 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 RJ as an act that restores, or aim to restore, a state of justice"[37].

In recent years a large number of authors have been writing about the meaning and today the concept RJ 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[38]: RJ 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 the future"[39]. Also Fish adopted this concept underlining that RJ "is a systematic response to wrongdoing that emphasises healing the wounds of victims, offenders and communities caused or revealed by the criminal behaviour"[40].

Moreover, as it has been said above, the term of RJ has been become legal instrument in 2002 when it was supported by the UN. Therefore today we have not just a definition made by the doctrine but also an official definition of such 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

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[35] Marshall 2011: dictionary entry 'Justice, Restorative'.

[36] 1) Members of the Church of Ireland 1834. 'View of Public Affairs for the Year 1834', Christian Examiner and Church of Ireland Magazine 3(27), 1–11; 2) Armstrong, L. 1848. 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. New York: Robert Carter; 3) Stow, J. 1856. Thoughts on a Continuation of the Book of Common Prayer Used in the Church of England. London: Printed at the School-Press; 4) Abbots, B. 1863. A Woman's Story. Vol. 2. London: T. Cautley Newby; 5) Mechem, F.R. 1916. 'An Inquiry Concerning Justice', Michigan Law Review 14(5), 361–382; 6) Fourcade, M. 1924. 'Address of Mr. Manuel Fourcade, Bâtonnier of the Order of Advocates, Etc.', American Bar Association Journal 11, 768–769. See Gade, 2013, 14.

[37] Gade, 2013, 14.

[38] United Nations Office on Drugs and Crime (UNODC), Handbook on Restorative Justice Programs, (United Nations, New York, 2006) p 6.

[39] Preston, 2011.

[40] Fisher & Verry, (2005) 48.

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"[41].

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"[42].

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

2 The Nature, the Aims and the Players of the RJ

a. The Nature

Concerning the *Nature* of the RJ, it can be affirmed that RJ is a "process" that includes two aspects: the first one, a technical and practical aspect, which involves the idea that the RJ shall follow procedural rules, for example the rule that all the parties affected by the 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"[43]. Nevertheless, the "process" has also a second aspect, an ethical one: in other words it contains the idea that RJ is a way, a process, to change the consciousness of all the stakeholders. In this last sense such a model of justice has a relevent link to the aim of the Ecological duties and the *principle of responsibility* and it has just a little 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"[44].

b. The Aims

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

The second aim is to reach the moral healing of the players[45] and the peace in communities

[41] ECOSOC Resolution 2002/12 *Basic principles on the use of restorative justice programmes in criminal matters*
[42] ECOSOC Resolution 2002/12.
[43] Marshall 1996, p. 37; Marshall 1999, p. 5.
[44] Zehr 2002, p. 37.
[45] "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). McElrea 2004; se also Lawrence, Lovell, & Helfgott, 2003.

by reconciling the parties and repairing the injuries caused by the crime[46]. 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[47]. 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"[48].

c. The Players

To achieve restoration the best way is accomplished through a cooperative process that includes all the stakeholders[49]. 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 one lives[50].

c.1) Victim(s)

RJ focuses on the victim and allows her/him a more active role by inviting her/him into the heart of the criminal justice process. This process provides an occasion for victims to obtain reparation, and give them a positive, safe environment in which key questions can be answered and healing can begin. Then RJ 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"[51]. 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"[52].

c.2) Offender(s)

As it happens in all the traditional indigenous systems of justice[53], also RJ believes that instead of a society punishing criminal by putting her/him in "prison", the criminal should have the chance to correct the wrong that s/he has done[54]. This approach allows the offender to gain insight into the

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46 Galaway & Hudson, 1996, p. 2.

47 Galaway & Hudson, 1996, p. 2.

48 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" Dorpat 2007, 236.

49 See Burkhead 2009, 116.

50 Sloan McCabe, 2009, pp. 80-83.

51 Van Wormer 2003, 448.

52 O'Hear, 2005, pp. 305-306.

53 See footnote n. 31.

54 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" Dorpat 2007, p. 236.

causes and provide a forum in which the offender can take personal responsibility for her/his offence a meaningful way[55].

The goal of the RJ process, is also to bring out the best in the offender and to allow the change into the offender's consciousness, to make her/him fully appreciate the human side of the harm that s/he has done and to deeply modify her/his behaviours if the opportunity to take criminal action arises in the future[56]. Once the criminal has understood this and has therefore repaired the injury, s/he "can be brought back into society"[57].

c.3) Community(ies)

In the RJ theory, the crime is more than simply lawbreaking and more than an offence to the government authority; the crime produces numerous moral pains to the victims, to the offender, and even to the community,[58] and for this reason RJ tries to deconstruct the idea of punishment by replacing it with the need for a community healing. Restorative justice engages those that are harmed and the wrongdoers "in search for solutions that promote repair, reconciliation, and the rebuilding of relationships"[59].

This model of Justice has a proactive rather than reactive approach by giving "a voice in the criminal process"[60] to the community affected by the crime, and enables it to understand the underlying causes of a crime and to promote the reinstatement of the community wellbeing.

III. Restorative Environmental Justice (REJ)

This last Part will attempt to open up new discussions of RJ by showing that the model of restorative justice can be employed in the environmental crime process, in order to implement the ecological duties as well.

1. RJ in the Environmental Field

After the analysis of the RJ and the positive outcomes that such a model of justice can bring into the people involved in the process, the question that should be answered is whether the RJ could be employed in the field of the environment. The answer is "yes!". The RJ could work in the context of environmental crimes for the following reason: first of all because in the environmental field is central the idea that corporate and individual crimes are committed not just against individuals but

[55] 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). McElrea 2004.
[56] Boyd, 2008, p. 507.
[57] Gade 2013, p. 32.
[58] Van Ness, 1993, 259.
[59] Olson-Burchanan & Boswell 2009, 168.
[60] Nicastro, 2003, p. 261.

can cause the victimisation of a community as a whole[61].

Therefore, the use of restorative process is easier when applied to crimes resulting in identifiable harms within a specific community or to crimes that are committed by a specific individual rather than to crimes not concerning specific victims or community or involving the environment itself. Nevertheless this model of justice is flexible, consequently, in the case of damage to the future generation or to the environment itself, can be admitted to participate to the judicial process to a Representation of Future Generations and/or a Representation of Nature.

Concerning the first Representation, when among victims there are only, or also, unborn, some authors, and also the World Commission on Environment and Development, have suggested to set up an *ombudsman* for future generations[62] and give to non living people voice by standing with a representative in judicial or administrative proceedings[63] . Consequently the RJ could adopt this suggestion and could allow a Representative for future generations to take part to the trial among the victims.

Moreover if the victim is the Environment itself the RJ 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 it rises to prominence in 1972, following the publication of Christopher Stone's article "Should trees have Standing?"[64]. For almost 40 years the concept has been debated amongst lawyers, philosophers, theologians and sociologists. This debate has led to an advocacy of a wide variety of rights approaches including legally enforceable rights for nature as envisaged by Stone. The point they have in common is an attempt to give concrete and meaningful recognition to the intrinsic value of nature. The attribution of rights to the natural environment by means of a representative of the interest of the Nature itself, it is the expressed acknowledgement that the environment has an intrinsic value.

Another reason to use the RJ in environmental field concerns the general purpose of RJ, as seen in Part II, that is the healing and the modification of the consciousness of the participants in the process. In the field of environment, especially in the field of ecological duties, the ultimate aim is also to change the consciousness of the individuals because the legal environmental reform alone, will be insufficient without a radical shift in human feeling about 'human' place in the rest of Nature.

2. Restorative Environmental Justice as a way to implement Ecological Duties

Many of the features that are central to the RJ process are also central to the ecological duties, to the extent that these elements can help to achieve the main goal of the ecological duties that concern

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[61] Nicastro, note 177, at 261.
[62] Weiss, 1992, p. 25; L. Westra, 2006.
[63] Weiss, 1984, p. 272.
[64] Stone, 1972, p. 450.

the modification of the consciousness of the individual.
Below I will describe three of these aspects.

a. The focus of RJ is not on punishment but on the development of the sense of responsibility

A valuable reason to favour restorative justice as a tool to implement ecological duties is that RJ excludes restriction of personal freedom or fines[65] because the possibility to be incarcerated, or to receive fines and administrative penalties are insufficient to deter the offender from the bad conduct[66]. Indeed, both imprisonment and punishment violence in any form can cause the offender to self-harm or continue to commit crimes, rather than take responsibility for her/his actions. In other words RJ 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"[67].

The mentioned peculiar characteristics of the RJ process, can also help to develop an ecological responsibility, because supporting offender rehabilitation[68], involves the possibility of a growth in the ecological awareness into the offender and exhort her/him to transform her/his behaviours into ecological behaviours.

Adopting the model of RJ aims at repairing 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.

b. The "Creative Restitution"

The restitution that the perpetrator should offer to the victim, in the RJ process, may be done through the instrument of "Creative Restitution". The term 'restitution' in an ordinary process is most of the times used to refer to money, otherwise the concept of a "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 could be a form of restitution"[69]. 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"[70].

In the environmental crime the "creative restitution" should be adopted because it may deter

[65] Boyd, 2008, p. 507.
[66] Bradford, 2003, p. 7.
[67] Sloan McCabe, 2009.
[68] Dolinko, 2003, p. 319.
[69] Eglash 1957.
[70] Eglash 1959, p. 117.

the 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 restitutions 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 –when not is impossible- is to repair completely an environmental loss. So if the implementation of the ecological duty focuses on a development of ecological accountability, consequently the creative restitution can be a tool to implement the ecological duty to repair the damage derived from the ecological footprint.

c. The RJ process should include the active participation of all affected parties

It has been underlined that the participation of all the affected parties in the RJ process is fundamental to reach the goals of the RJ and also to educate people to understand the crime from a not retributive angle[71]. First of all, for the victim, the participation can help to heal her/his moral offence and second, for the community, the participation is beneficial because, the community works to produce a non-violent solution. .

The public participation is also an essential element for the implementation of the ecological duties because it might involve a change in the individuals' behaviour. The underlying idea in the ecological duties is that on the one hand, in the public sphere ecological problems do not get solved without participation and without "virtuous citizens checking their government, stimulating it", on the other hand, in the private sphere these problems do not get solved "without popular support"[72].

The participation of the community in RJ interventions for environmental crime, can be also seen as an application of broader principles of the public's right to access to justice in environmental matters provides by the Aarhus Convention (on *Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*): that International Treaty calls for the recognition of the largest procedural standing in judicial procedure as possible for the individual and organisations[73].

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[71] Sloan McCabe, 2009.

[72] Wissenburg, 2004, p. 73.

[73] 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 Article 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

To sum up all the stakeholders in the RJ have an environmental right to participate in a RJ process but also a duty to participate for the protection and for the restoration of the environment. This aspect is a fundamental to go towards a creation of an ecological society build by ecological citizens.

Conclusion

Since our age is characterised by a global ecological crisis and humanity is both the cause and the victim of environmental degradation, this contribution has suggested the introduction of RJ as one of the ways to modifying human behaviour towards environmentally benign practices and to increasing the awareness of each individual of the incredibly powerful role that s/he can have in this crisis. Indeed, only when people will have the opportunity to understand their potentials to solve the ecological crisis they will be able to drive true transformative change at the grassroots.

In conclusion, it is necessary to increase the employment of RJ because it is compatible with the principles of environmental field, then it can be used as a tool to implement ecological duties, to develop a ecologic consciousness and finally to transform not only the offender into a ecological citizen but also all the individuals affected by the environmental crime and to encourage the transformation toward an ecological society.

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and public authorities which breach environmental law (Marshall, 2006, p. 126). 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" (Schall, 2008, p. 417). But now, in accordance with Article 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" (Redgwell, 2007, p. 159). See Convention on Access to Information, Public Participation in Decision- Making and Access to Justice in environmental Matters, Participants, June 25, 1998, 38 I.L.M. 517 (1999), entered into force Oct. 30, 2001.
See also Lohse, Poto & Parola 2015.

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