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Jokinen, Heidi

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**Heidi Jokinen, Theol Dr, Åbo Akademi University**

## **Homo Moralis Strikes Back. Risks with Homo Economicus in Restorative Conflict Resolution**

Restorative justice presents a morally relevant method for alternative conflict resolution. However, this potential is not always applied fully. Instead, the practice may be used in ways foreign to it. This claim comes to the fore in the practice of restorative justice in domestic violence cases. Despite the persistent feminist critique of it the practice is widely offered. This suggests that the practice can cater to needs not originally depicted in the rationale of it. This paper works out of a wittgensteinian approach and argues that there is a confusing language use going on around mediation. The argument is based on an analysis of public talk of mediation in Finland which shows that it is predominantly conducted in the light of homo economicus. This is problematic. The paper suggests that instead of referring to mediation in terms of homo economicus, the value of it should be counted in terms of homo moralis. This is what restorative justice originally intended to do. The paper establishes a new perspective on the critique of restorative justice in general and offers a fruitful way forward.

Key words: restorative justice, mediation, homo economicus, homo moralis, domestic violence

### **Introduction**

Restorative justice is an umbrella definition for different methods for alternative conflict resolution outside of the conventional judicial processes. It has been applied to a multitude of conflicts, everything from school bullying to gross violations of human rights. Defined broadly restorative justice is, according to Howard Zehr (2002) a “process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”<sup>1</sup> Restorative justice puts forward a basic moral intuition regarding the wrong done: that it must be put right and that the two parties affected must have a say in the process. Despite this ideological framework, the practical appearances, methods and explicit individual processes remain to be defined contextually. That is the beauty of restorative justice. But it is equally part of the challenges with it. Due to the diversities restorative justice can be used and misused in many ways. Particular concerns are voiced from a feminist perspective.

While not inexistent, the general critique of restorative justice (see eg. Van Ness and Strong 2002; Wood and Suzuki 2016) is nothing compared to the ardour of feminist critique of restorative justice in cases of domestic violence. This feminist critique is usually well motivated and eloquently argued for (eg. the dissertations of Björkgren 2009 and Qvist 2019; and the shorter articles of Stubbs 2008; Jülich & Thorburn 2017). According to Joan Pennel

(2008) feminists don't believe that the complexities of domestic violence could be satisfactorily dealt with during the short restorative meetings.<sup>2</sup> Powerful allies have joined this critique. The Istanbul Convention of Council of Europe prohibits mandatory mediation in cases of violence against women.<sup>3</sup> UN Women goes even further. It recommends that mediation should be prohibited in all cases of violence against women, both before and during legal proceedings.<sup>4</sup> Surprisingly, however, the persistent feminist critique has been of little practical value. Restorative practices are applied generously in domestic violence cases throughout the world, as pointed to among others by Christa Pelikan (2010); Theo Gavrielides & Vasso Artinopoulou (2013); and James Ptacek (2017).<sup>5</sup> This ambiguity is particularly interesting.

Because of the fierce feminist critique, it is striking that restorative justice is so widely practiced in connection to domestic violence cases. The situation seems to suggest that restorative justice is held to have strengths to it that exceed the weaknesses of it. However, because restorative justice presents a substantial anomaly into the conventional judicial conflict resolution, and because of the widely expressed critique so determinately overlooked, the nature of those strengths calls for closer scrutiny. It is possible that the idea and practice of restorative justice is being stretched in unsavoury ways to meet needs not incorporated in the original aims and objectives with it.

The point of departure for this article is the feminist critique of restorative justice in cases of domestic violence. But I will go a step further. My thesis is that feminist perspective applied in a study of restorative justice will bring to the fore challenges attached to restorative justice in general, but in a more complex way that the mainstream feminist critique suggests. This paper seeks to use the feminist perspective as an inspiration and capture how practical appearances of restorative justice portray some problematic characteristics attached to the practice in general, too, beyond the mere context of domestic violence cases. My argument will be sustained by a reference to Ludwig Wittgenstein, who claimed that the meaning of a concept refers to its use in practice.<sup>6</sup> This applies equally to the concept of restorative justice. I will claim that what the original aims and objectives of it may be is irrelevant if these are not reflected in the day to day use of the notion.

To find out about the actual uses of the concept of restorative justice I will lay out some typical patterns attached to public language use around restorative justice in order to see if there are recurring emphases coming to the fore. These typical public patterns are complemented by a review of ways to present restorative justice in literature (among others Mika et al 2004; Stubbs 2008; Geeraets 2016). To unravel the meanings brought forth, I will use the notion of *homo economicus*, similarly to several feminist writers; and complement it with the notion of *homo moralis*. The feminist perspective into them is illuminating (see eg. Ferber and Nelson 2003 & 1993; Jarl 2000; Löfstedt 2005). This article brings these two concepts together in a novel way. It will result in an account on how the mixing of the two concepts can be detrimental to the female victim of domestic violence, quite as the feminist critique suggests. In addition, I will claim that it can be detrimental to the scope of all restorative justice, too.

## **Feminist Perspective on Restorative Justice**

Restorative justice movement started as a grassroots civic activism in the 1970's.<sup>7</sup> A major thought-leader to develop the theory was the Norwegian criminologist, Nils Christie. He

wrote about lawyers and the courts of law as professional thieves having stolen the conflicts from their rightful owners, the two parties. Christie dreamed of the two parties meeting together with lay facilitators in order to decide on the solution to the conflict.<sup>8</sup> Along these lines restorative practices have been developed and re-developed ever since. It works under the assumption that conventional legal conflict resolution does not meet the needs of the two parties (Van Ness and Strong, 2002; Zehr 2002).<sup>9</sup> What the two parties are experiencing after a conflict is anger, fear, sorrow and remorse; and a need to express that, as pointed to by Paul Leer-Salvesen in *Tilgivelse* (1998).<sup>10</sup> Restorative justice is meant to address these needs.

The practice has gotten a strong foothold and important implications. Although restorative justice usually takes place outside the conventional judicial process, it can lead to significant legal consequences in some jurisdictions. According to Daniel Van Ness and Karen Heetderks Strong (2002), as well as Shirley Jülich & Natalie Thorburn (2017), restorative justice might interrupt a pre-trial investigation; lead to a waiver of prosecution; or be taken into consideration in court proceedings.<sup>11</sup> Restorative justice entails a significant intertwining of legal and moral considerations. Its official status and public and practical appearances are, therefore, in no way irrelevant questions. Participating in an open-ended restorative process that hardly has any procedural guarantees, the two parties can risk their fundamental legal protection. For feminists this forms a major obstacle for the use of restorative justice in cases involving domestic violence.

Feminists claim that the female victim of domestic violence is not in the position to discuss the crime as an equal to her abusive partner, like the restorative theory would assume. In a recent dissertation Tiina Qvist (2019) argued that the female victim might be under pressure from the side of the perpetrator seeking personal gains from settling the crime outside courtrooms. That's why it's unacceptable to make her participate in restorative meetings.<sup>12</sup> The abused woman cannot and would not want to either join a restorative process. Annalise Acorn (2004) claims that the basic set-up of restorative justice, that she calls for compulsory compassion, is all wrong: "[Female victims] don't want right-relation [to their abusive partners]. They want no relation."<sup>13</sup> That's why the cornerstone of restorative justice, the interconnectedness of the two parties, is all wrong according to the feminist critique.

There is a special twist in the feminist critique of restorative justice in domestic violence cases. As highlighted by both Nicole Westmarland et al (2018) and Jülich and Thorburn (2017), it is directed explicitly and exclusively against the use of restorative justice in domestic violence cases.<sup>14</sup> It is not directed at restorative justice in general. It is only directed at practices where the vulnerable situation of the female victim is accentuated. As such, the critique is situated in the long tradition of feminisms that, in the words of Judith Lorber (1998), was developed to explain reasons for pervasive gender inequality in the world. Along the course of the twentieth century this variety of feminisms has developed into several gender-based battles pointing to gender equalities and aiming to eradicate them.<sup>15</sup> Feminist critique of restorative justice in domestic violence cases is one such battle.

While the feminist critique against the use of restorative justice in domestic violence cases has been abundant, so has the practice of it. Restorative justice has been applied to domestic violence cases in many parts of the world.<sup>16</sup> It all seems somewhat of a contradiction. The question must be put forward whether restorative justice in domestic violence cases keeps on being practiced because the feminist critique is ultimately incongruous. Or, if indeed

restorative justice has been stretched to serve needs beyond the scope of the original idea with it.

It is here that the aims of this paper and of the feminist theory align. The feminist inquiry can serve as an inspiration in an attempt to capture some practical characteristics of restorative justice in general. A central contribution of the feminist theory in the 21<sup>st</sup> century is still its ability to offer a new lens to observe and interpret the world through. Robin May Schott described in *Feministisk filosofi. En introduktion* (2004) how the focus and interests of the feminist work has developed along the past decades. Moving beyond the mere dichotomy of women and men, feminists have started posing critical questions about most processes that are usually taken for granted in the societies.<sup>17</sup>

Feminist inquiry sustains that there might be other relevant questions to the reality, to history, and to philosophy than the traditional stories that men have been putting forward. The feminist point-of-view insists that any story should be looked at from a different angle than usually. Schott underlines that a central feminist inquiry in philosophy is about unmasking the ways to divert attention from the weaknesses of the argumentation; and in finding out which metaphors are being used to symbolize the masculine and the feminine genders.<sup>18</sup>

There is, as argued by Judith Lorber, a strong conviction that gender equality is not only an individual matter but grained into the structure of societies: into the organisation of marriage and families, work and economy, politics, religions, the arts and the very language we speak.<sup>19</sup> That's why I argue that feminist theory offers a fruitful lens even in connection to restorative justice.

The contribution of feminist theory is not only limited to the realm of restorative justice in domestic violence cases. The ability to take a step back and not to settle with the usual answers proves to be important even in connection to a more general perspective into restorative justice. With a feminist approach a multitude of questions with regards to restorative justice come to the fore. These are not only about the original aims and objectives of restorative justice in general but more so with the actual characteristics of it. How exactly restorative justice is portrayed in the public reveals a great deal of the meanings given to it. One such meaning is about the economic implications of restorative conflict resolution.

### **Homo Economicus Tries to Take Over**

In seeking to interpret and understand some central characteristics of restorative justice I will now turn to a very special perspective, to economics. Economic considerations make an integral part of many phenomena today. In *Flipping Markets to Virtue with Qui Tam and Restorative Justice* (2013) John Braithwaite emphasizes the triumph of the contemporary capitalism by pointing out how economies today are characterised by a regulatory capitalism in which both markets and regulation extend their sway.<sup>20</sup> Brian Fikkert and Michael Rhodes underline in *Homo Economicus versus Homo Imago Dei* (2017) how expanding market-based economies create globally economic narratives, institutions, policies, and practices common for all.<sup>21</sup> Economic theory has become somewhat of an overarching theory in societies globally.

Economic theory offers a very interesting model to explain the behaviour of large numbers of people. The model has been discussed in several feminist works, e. g. by Marianne Ferber and

Julie Nelson in the ground-breaking *Beyond Economic Man* in 1993 and again in 2003 in *Feminist Economics Today*; by Ann-Cathrin Jarl in her dissertation *Women and Economic Justice* (2000); by Malin Löfstedt in the dissertation *Modell, människa eller människosyn* (2005); and by Katrine Kielos in *Det enda könet* in 2012 representing more popular science. The model assumes that people in general are very rational, that they are well informed, and that they seek to maximize their own utility. These three characteristics intertwine in the model, quite as Jarl sustains: it is vital for people to be well informed because it is on the basis of rational choices that they develop their preferences.<sup>22</sup> This economic model-man is often referred to as the economic man, or *homo economicus*.

To make the point of *homo economicus* more tangible, Jarl puts forward examples of the works of *homo economicus*. One such is attached to the central position that statistics and evidence-based experiments have gained today. They are assumed to be the objective methods for gaining new knowledge due to their impersonal and formalized character.<sup>23</sup> For *homo economicus* economic markers provide an important and rational basis for decision-making. The so-called evidence-based policymaking is an example of this. It is about an endeavour to make public policy in a reflective manner, based on consistent, reliable and helpful scientific data, and it has made its way to the judiciary in general and to restorative justice in particular.<sup>24</sup> It is believed that good governance could and should be based on hard evidence and rational calculation.

There is more to *homo economicus* in the neoclassical economic theory than this tendency to value high (economic) rationality. The description of the model is completed by Malin Löfstedt who sustains that the economic man seeks to be socially isolated. His actions are free from interpersonal comparison and he is independent from all others. That's why he acts in the public sphere without any inherent moral considerations. His choice is based solely on rational calculation that is assumed to supersede individual tastes and preferences.<sup>25</sup> The rational calculation pervades even all interaction between individuals.

Although the model of *homo economicus* has its origins in the economic theory, it has proven to be a useful model in other areas, too. It is these other ways that feminist theory has been particularly successful in discovering. Inspired by those arguments, I will, in the following, let the model highlight some typical characteristics of restorative justice.

### **Homo Economicus and Restorative Justice**

Despite the usual story of restorative justice being about the interconnectedness of the two parties, there are also other undercurrents to feed into the practice. For example, economic benefits motivate the general use of restorative justice and impact the scope of it. When looking at it, *homo economicus* is not foreign at all to restorative justice.

According to David O. Friedrichs (2008) financial considerations have fuelled the restorative movement from the start. He sustains that restorative justice has been inspired by the "disenchantment with the costs and the failures of adversarial justice and retributive justice."<sup>26</sup> Consequently, restorative justice has been developed precisely as the more affordable method for conflict resolution. Financial considerations have continued to play a role in the development of restorative justice further on.

In a study round the roles accorded to victims within restorative conflict resolution Harry Mika et al (2004) acknowledge promptly that “some mediation groups appear to have turned their attention to violent crime largely due to the financial incentives [...]”<sup>27</sup> This suggests that it would not be so much the needs of the two parties that direct the practice, but sheer money. Restorative justice is simply cheaper from the more conventional judicial conflict resolution.

The tendency to emphasize restorative justice as an affordable method for conflict resolution is highlighted also by Julie Stubbs (2008) who turns the whole question into a gendered one. She claims that massive public cuts to legal aid have pushed many women into informal processes.<sup>28</sup> Restorative justice keeps on being offered rightly as the cheaper alternative as public resources become more scarce. These needs to cut down public spending affect particularly women. Being the ones with less resources they cannot afford to have their cases dealt with in courts. Instead they are diverted into, among others, restorative processes. In these cases restorative justice is not promoted because it gives the two parties added chances to have a say in the process. Rather it is promoted as the only way for the victims to have any access to justice.

In my opinion, the point that Stubbs here makes is applicable beyond the scope of gender. For sure the female victim of domestic violence, quite as the feminist critique suggests, is impacted by the general approach towards restorative justice. But if restorative justice in general becomes the preferred method for conflict resolution mainly because of economic considerations the rights of all victims are put at risk.

Homo economicus is not only about plain money. It is also about a tendency to adopt a very rational approach to actions taken, like to a choice of the preferred method of conflict resolution. Such a rational approach can be discovered in connection to restorative justice. In an appraisal of restorative methods, Kathleen Daly (2008) has recognized that it seems to be easier to receive fairness than restorativeness in a restorative process.<sup>29</sup> This means that restorative justice might not be so restorative after all. Instead it is mainly fair. Fairness of course is a critical requirement for any conflict resolution with potentially judicial consequences. The economic rational reasoning therefore concludes that restorative justice is the preferred method for conflict resolution because it is safe to use as it meets the requirements for fairness. In this equation it does not matter if the process is not quite as restorative as hoped for. Homo economicus is not interested in such considerations. Instead he is after fair conflict resolution, preferably at a lower cost. Restorative justice becomes the ideal method as it is both cheap and fair. In the long run an emphasis on economic reasoning gives new meanings to restorative justice.

In addition to restorative justice being promoted as cheaper than the conventional judicial methods, homo economicus comes up also in another way of talking about it. This point is directed into the actual contents of restorative justice. In “Fictions of Restorative Justice” (2016) Geeraets, much similar to Acorn in *Compulsory Compassion* (2004), reprimands restorative justice for making the two parties base their decisions on emotive rather than on rational arguments.<sup>30</sup> Here restorative justice is being criticized for evoking moral sentiments of the two, rather than rational judgment. Put in a different way, the claim seems to be that restorative justice could potentially have a chance if it was more about rationality and less about emotions and considerations that cannot be measured nor objectified. Such an inclination to deny the possibility of the two parties having any other needs than the strictly

rational ones is typical for homo economicus. It, however, makes the point presented no less problematic for the whole notion of restorative justice.

In order to deepen this presentation of the ways in which homo economicus appears in restorative justice I will now turn to discovering some typical ways to refer to mediation, a particular method for restorative justice, in public language use. The presentation feeds into my argument about the problems of letting homo economicus dominate restorative justice. With the Wittgensteinian approach used in this article it is assumed that the shape a phenomenon takes in normal language use will have an impact on the future shaping of the said phenomenon. It becomes the true content of the concept, regardless of what the original aims of it were.

### **Homo Economicus in the Public Talk of Mediation, Case Finland**

In Finland mediation<sup>31</sup> was originally introduced in the beginning of the 1980's as a means to deal with petty crimes, especially among young people. Step by step the practice was implemented on ever more complex crimes, even with adult perpetrators.<sup>32</sup> The agreements between the two parties started to affect the judicial system.<sup>33</sup> It became imperative to have a proper legislation on mediation in order to clarify its judicial status and to render the service available for all citizens in the country.<sup>34</sup> This initial trigger for the new legislation seemed to consolidate the form of public discourse on mediation even for the future. Much of the public debate has been centring on the financial and judicial aspects of it, rather than discussing any moral value that the practice might offer, something that Malena Björkgren pointed to in her dissertation in 2009.<sup>35</sup> This continues to be the case today.

Firstly, economic benefits make an object for many studies conducted around mediation. This has been the case from the very early years onwards. At the end of 1990s a study was conducted on the benefits of mediation with regards to both the victim, the offender, the police, the courts, crimes and sanctions. A central conclusion was that mediation adds to the efficiency of public resource distribution, and that mediation, therefore, should be a preferential method for conflict resolution.<sup>36</sup> Similar conclusion was drawn a few years later in 2001 in a report regarding the national organisation of mediation. Mediation was depicted as a clearly cost saving method for conflict resolution.<sup>37</sup> Even today economic aspects play a key role when mediation is presented officially. The yearly statistics published by the national authorities around mediation make clear how economically affordable the practice is. “[T]he average cost of mediating one criminal or civil case was EUR 430”<sup>38</sup>, the statistics underline. Financial affordability is acknowledged as a central success factor of mediation.

Secondly, economic aspects put a stamp on the political debates around mediation in the Finnish Parliament. The introduction of a mediation law into the legislation was discussed at the Parliament in the early 2000's. The debate seemed to focus exclusively on economic matters, such as the just financial compensation from the state to the municipality responsible for organising the mediation services.<sup>39</sup> References to any potential moral merits of mediation were virtually inexistent during the debates.<sup>40</sup> The situation has not changed. Only a few references have been made to mediation after the law had been passed, with its financial aspects still occupying a central interest. A written question submitted in 2012 touched explicitly the adequate funding of mediation services and presented mediation as a cost-effective and therefore convenient conflict resolution method.<sup>41</sup>



Thirdly, economic benefits have been a driving factor to support mediation also on a governmental level. Programme for Prime Minister Antti Rinne's government from June 2019 mentions mediation as an area of development within the strategic theme of safe and secure Finland built on the rule of law. The rationale behind this support to mediation is very clearly stated. The reference to mediation is made exclusively in terms of economic benefits: "The Government will promote the use of mediation in order to reduce the number of trials."<sup>42</sup> Here the scope of economic aspects is broadened. It is no longer only the direct financial benefits that are discussed but economic aspects have an indirect influence as well, through reducing the workload of the courts.

The same point, the workload of the courts in connection to mediation has preoccupied also public prosecutors, but from a different perspective. For them, referring a case to mediation breaks the smooth workflow of the conventional judicial process and hence in fact adds to their workload.<sup>43</sup> The main benefits that public prosecutors associate with mediation refer to the usability of the agreement between the parties in the actual criminal proceedings.<sup>44</sup> The prosecutors consider the usefulness of restorative justice in the light of the conventional judicial process. Despite the slightly differing perspectives of the Government and the prosecutors, the first sees mediation as easing the workload and the latter as expanding it, both views support the argument of this paper: mediation is presented in the public in terms of homo economicus.

Studies show that this tendency to centre around a few clear markers, such as the financial, judicial and time-saving benefits of mediation, is strengthened by the behaviour of the two parties during the mediation meeting. It appears that during the individual mediation meetings, the dialogue between the two parties tends to concentrate on the contents of the agreement. Discussing the amount of the financial compensation often takes the majority of time during the mediation meetings, rather than any dealing with moral sentiments of the two parties.<sup>45</sup> Moreover, despite the fact that mediation could result in a number of ways to compensate for the damage caused, financial compensation was the chosen way in 32% of the cases in 2018 and the total amount of these monetary compensations is in the statistics presented as a central success of mediation in general.<sup>46</sup>

The public debate on mediation is largely uniform but one-sided: there is a generally positive attitude towards mediation. But any moral benefits of it are hardly used as public selling points. It is economic aspects that dominate the talk. This narrow public view of mediation is problematic. It is likely that a wide-ranging talk of mediation in terms of homo economicus makes mediation just that: a cheap and quick second alternative to the conventional judicial conflict resolution. Letting homo economicus permeate the public talk on mediation leads to a risk that the cost saving potential becomes the main benefit of mediation. Feminist critique of restorative justice can thus be expanded. In a strong drive to attain economic benefits there is a risk that it is done at the cost of any two parties, and not just of the female victim of domestic violence. This is problematic. Moreover, it is unfortunate as homo economicus is not the whole story of restorative justice.

### **Homo Moralis Strikes Back**

In 1993 Ferber and Nelson published *Beyond Economic Man: Feminist Theory and Economics*, a collection of essays to challenge the masculine bias of economic theory and to discuss what is there beyond the economic man. The essays sustained that economics is no

ahistorical and disembodied discipline. Instead, it has been developed by particular human actors. It is, therefore, critically influenced by the limitations of the human cognition and by the social, cultural, economic and political milieu in which it has been created. The obvious claim of the anthology is that it is men that have dominated in the creation of the discipline of economics. That's why activities and experiences that are historically of greater concern to women than to men have been much neglected in economics. Even when economists have attempted to understand phenomena from such traditionally feminine realms as the home and family, the results are often judged as unsatisfactory by feminists who believe that the analysis of women's experiences is inadequate or even biased, it is claimed.<sup>47</sup> The general conclusion of the book was that the economic man has permeated the scene, but that feminists come with a new story, a story that sustains that there is something beyond.

Feminist critique of homo economicus claims that he is not representative for all the complexities of human life. Katrine Kielos points out that by being a strong and rational person pursuing wealth and immediate gains, homo economicus becomes the antithesis of a set of other features that are equally true to human beings: the body, emotions, dependence, uncertainty and vulnerability. These characteristics are those that our western societies have learned to associate with female behaviour. Therefore, homo economicus is in fact the opposite of the female; and consequently, promoting homo economicus is a way to keep the woman excluded from the public, Kielos sustains.<sup>48</sup> Elsewhere Malin Löfstedt has also characterised this opposite of homo economicus: the opposite is the altruistic, relational, emotional person who is often found in the private sphere.<sup>49</sup> For the purpose of this paper, I choose to call this figure for *homo moralis*.

It must be acknowledged that the explicit term homo moralis is no established concept as the counterpart of homo economicus in feminist theory. Neither Löfstedt nor Kielos use it. Ferber and Nelson do not give any account of it. Neither does Jarl, who equally refer to homo economicus and the alternatives, mention homo moralis. Further on it must be acknowledged that the term is no established concept in any general sense either. Nevertheless, it does pop-up every now and then, sometimes quite expectedly even. In 2013 Ingela Alger and Jörgen Weibull made it the title of their article in econometrics, aiming at contributing to the understanding of causes for human motivation by laying out a theoretical model for the evolution of preferences.<sup>50</sup> However, this way of approaching moral behaviour does not resonate with the way I'm intending to use the concept here. Then again, Reinhold Niebuhr, decades ago in his *Moral man and immoral society* put forward another way of using the term, insisting on the difference between individuals and groups of individuals as moral actors.<sup>51</sup> As relevant as that description is as a portrayal of group thinking, even this escapes my intentions in this article.

For me homo moralis is rather something that Tage Kurtén and Joakim Molander bring forward when allowing for a critical discussion on connections between legal thinking and human moral behaviour in their edited collection *Homo moralis: människan och rättssamhället* (2005). The essays suggest that ethics and law are closely tied together and that moral inquiries are inherent in many legal themes. However, the authors don't really elaborate on the term of homo moralis, at least not sufficiently for my needs here. I shall therefore suggest such an argument myself and show that homo moralis is a most helpful term in clarifying some of the challenges with homo economicus, in particular in the context of restorative justice.

To make a point in this article, I will be inspired by what feminist theory has for years been arguing for: a distinction between the female and male experiences and elaborate on the notion of homo moralis to support the claim. In this text I shall use homo moralis as the antithesis of homo economicus, similarly to how feminist theory describes the opposite of it. Homo moralis entails, therefore, a model man that, in line with Löfstedt appreciates human beings as social creatures that have very moral needs.<sup>52</sup>

Additional light into the distinction between homo economicus and homo moralis that I intend to argue for is shed by the way Daryl Koehn in *Rethinking Feminist Ethics* (1998) claims that political and legal contexts typically maintain the image of a self-supporting subject who needs no emotional relations. Yet human beings are in countless ways involved in relationships through which they define themselves, she contends.<sup>53</sup>

The idea that the political and legal contexts typically portray homo economicus whereas the more relational contexts bring forth homo moralis is a fruitful description for the sake of this paper. With the introduction of the notion of homo moralis, it will be possible to show what is at stake when restorative justice is portrayed in terms of homo economicus. Quite as feminist theory has assumed, I'm, too, claiming that human existential needs rely ultimately on homo moralis and not on homo economicus. And quite as feminist theory has assumed, I'm also claiming that homo moralis suggests an alternative way of interpreting human actions and reality. Precisely that's why homo moralis is a fruitful model when capturing some original aims and objectives of restorative justice, an alternative way of solving conflicts.

Moreover, in my opinion the concept of homo moralis fits this context of restorative justice better than mere feminist theory. Homo moralis transcends any connotations of gender binaries that a use of feminist theory as such would entail. Typically, namely, the feminist critique of restorative justice focuses solely on the relations between the female victim and the abusive male partner within domestic violence cases. I want to elevate the critical discussion into another level.

In this paper it is not only restorative justice in domestic violence cases nor only the rights of the female victim of domestic violence that are at stake. My discussion reaches out to all restorative justice. I want to problematize some current ways of portraying restorative methods in general and critically discuss the risks that homo economicus presents it with. To this purpose the concept of homo moralis is well fitted as it suggests an alternative to the prevailing concept of homo economicus, quite as restorative justice suggests an alternative to the prevailing retributive, legal thinking around conflict resolution.

### **Homo Moralis and Restorative Justice**

The core values of restorative justice exhibit characteristics typical to homo moralis. Since the beginning, this method for conflict resolution has been presented as a new way of doing justice between the two parties, as opposed to the retributive, punishing models of the conventional judicial conflict resolution. To emphasize this important difference, Howard Zehr in *Changing Lenses* (1995) described restorative justice as the new lens for doing justice.<sup>54</sup> The changed perspective entails that restorative justice comes with a whole new perspective and foundation for justice making and conflict resolution. Restorative justice suggests a method that promotes, as Van Ness & Strong (2002) argue, healing, vindication

and redress.<sup>55</sup> These are hardly typical notions in conventional judicial processes. But these notions resonate with the moral needs of two parties, the victim and the offender.

The deeply moral queries that the two parties involved in a crime are experiencing have been recorded in several studies. In a presentation of correctional treatment of offenders in Sweden, Ove Rosengren and Martin Viredius (2005) expressed several weaknesses in the penal system and sustained that offenders more often than not want a chance to tell why they did what they did. Similar moral needs are ascribed to the victim. Priscilla Hayner (2000) underlined that existing judicial systems don't necessarily allow for the victim to get what she needs, as she is often looking for an opportunity to express her feelings on what has happened, and to hear why it happened.<sup>56</sup> As the legal dispute resolution concentrates on facts around what has happened, restorative justice has the ability to account for why it has happened. Restorative justice is more concerned about needs of the two than of accurate process descriptions.

An elementary point of departure for restorative justice is the open-ended and undefined individual process. It is based on a bottom-up rather than a top-down approach to the two parties and their involvement in the process. The two are empowered to shape the process according to their particular needs. Zehr underlines that restorative justice prefers processes that are collaborative and inclusive and outcomes that are mutually agreed upon rather than imposed.<sup>57</sup> Restorative justice is very particular, rather than universal to its foundations. No external and universal assumptions of the needs of the two are made, but one remains open to their subjective views. As such, restorative ideology differs greatly from the conventional judicial process.

Criticising the prevailing rights-based ethics that has reduced ethical issues to quasi-legal, Daryl Koehn manages to capture a point relevant to restorative justice, too. She argues that it is generally believed that basic rights can be guaranteed by the exercise of power. Because law is the widely accepted way to enforce rights and obligations, the rights discourse has gotten much space. But, she concludes, relationships with people especially in a near proximity are unique in the sense that legal language is misplaced in them. It's the terms of care and love that are more appropriate.<sup>58</sup> In a world marked by *homo economicus*, *homo moralis* strikes back.

Koehn's remark fits well in exemplifying the moral meanings of restorative justice in general. Legal language is simply unsuitable in capturing any deep meanings of human relationships as it's the more ethical themes that are brought forward in these. Obviously, in a relationship marked by domestic violence it is not love and care that are at stake but fear and terror. Nevertheless, even these sentiments exhibit moral considerations that do not fully translate into legal language. *Homo moralis* is far better equipped than *homo economicus* in dealing with them. *Homo moralis* suggests an alternative way of grasping the meaningful in conflict resolution. And restorative justice can be the place where *homo moralis* comes to the fore.

Moral relationships are better served by restorative conflict resolution than by the conventional justice system. Mediation can provide a space for moral insights to emerge and to be expressed. The restorative encounter between the victim and the offender can provide the victim with answers to questions she holds for meaningful. The perpetrator for his part can get an opportunity to take responsibility for the violence occurred and for its ending. This exchange is not easy for the two parties and it requires close monitoring and facilitation by the attending mediator. But there is a great chance for this type of exchange being the morally

relevant and satisfying conflict resolution for the two parties – if only restorative justice lives up to the expectations.

While *homo moralis* has an important position to bring forward in conflict resolution, *homo economicus*, the seemingly preferred type today, does not make it easy on him. For *homo economicus*, any moral consideration is unfamiliar and is considered less valuable, even embarrassing. This can be observed in the general attitude towards restorative justice and mediation. As presented above, some current characteristics of public talk of mediation seem to have distanced the uses of the notion today from the original aims. Considerations relevant for *homo moralis* are not the ones that make appealing strategic priorities or convincing budget lines. Promoting mediation for its moral relevance does not seem like a thing done in public today. Yet these considerations are of utmost value for human well-being and for the moral validity of interaction between people. That is where the point of this article is clarified: rightly because *homo economicus* is not the whole story of human beings, *homo moralis* is needed – and so is restorative justice, even in cases of domestic violence.

## Summary

A central point of departure for this article has been the feminist perspective in the context of restorative justice. I have claimed that it can serve as an inspiration to highlight challenges attached to restorative justice in general. The paper argued that the notions of *homo moralis* and *homo economicus* are helpful in clarifying some of these.

With a reading inspired by Wittgenstein key features of public talk on victim-offender mediation were laid out and typical patterns attached to it were identified. Based on this presentation, I concluded that a disturbing way of talking about mediation in public has become prevalent. The language used is often linked with *homo economicus* and with principles of economic rationality. Mediation is presented in seemingly unambiguous quantitative terms, rather than through any moral benefits that it might hold for the two parties. Quite as Wittgenstein has pointed out, the paper maintained that no language use is merely descriptive. Instead, language shapes our understanding of a phenomenon. That's why *homo economicus* risks becoming the governing content of restorative justice. As such the feminist critique of restorative justice in domestic violence cases becomes valid. But whereas the feminist critique usually stops here, in restorative justice in domestic violence cases, I went a step further and pointed to risks that *homo economicus* creates to the entire concept of restorative justice.

Inspired by feminist theory I claimed that *homo economicus* is only part of the story of restorative justice. Presenting mediation and restorative justice permeated by *homo economicus* does not fulfil the whole potential of them. Restorative justice proposes moral values that cannot be measured or are only with great difficulty suitable for calculation. To get an understanding of the scope of restorative justice, it is important to look at the promises it can make. I argued that these can be described in terms of *homo moralis*. From its early days onwards, restorative justice has aimed at providing a morally satisfying method for conflict resolution for the two parties. That objective is relevant still today.

Because of the shifts in the meaning and use of the concept of restorative justice, any assessment of it based on the appearance of *homo economicus* partly misses its point. Restorative justice offers a feasible method for conflict resolution and can serve the two

parties in a meaningful way, if only its origins and aims and objectives as expressions of homo moralis are revisited over and over again. It is concluded that restorative justice should not be so much driven by homo economicus but in fact be shaped by homo moralis.

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## Notes

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- <sup>1</sup> Zehr, *The Little Book of Restorative Justice*, 37. Gavrielides, *Restorative Justice Theory and Practice*, 139.
- <sup>2</sup> Pennel, "Stopping Domestic Violence," 289.
- <sup>3</sup> Council of Europe, *Convention on Preventing and Combating Violence*, article 48.
- <sup>4</sup> UN Women, *Handbook for Legislation on Violence*, 38.
- <sup>5</sup> Pelikan, "On the Efficacy of," 51 – 52.; Ptacek, "Research on Restorative Justice"; Gavrielides & Artinopoulou, "Restorative Justice and Violence Against Women." See also eg. Sitarz, Bek & Jaworska-Wieloch, "Mediation and Domestic Violence"; and Qvist, *Parisuhdeväkivallan sovittelu*.
- <sup>6</sup> Wittgenstein, *Philosophical Investigations*, §1; §43.
- <sup>7</sup> Zehr, *The Little Book of Restorative Justice*, 11-12; Van Ness and Strong, *Restoring Justice*, 21-22.
- <sup>8</sup> Christie, "Conflicts as Property," 3 – 4, 11.
- <sup>9</sup> Van Ness and Strong, *Restoring Justice*, 129-132; Zehr, *The Little Book of Restorative Justice*, 16, 24.
- <sup>10</sup> Leer-Salvesen, *Tilgivelse*, 149. See also Daly, "What is Restorative Justice," 21.
- <sup>11</sup> Van Ness and Strong, *Restoring Justice*, 32-35; Jülich and Thorburn, "Sexual Violence and Substantive Equality," 39.
- <sup>12</sup> Qvist, *Parisuhdeväkivallan Sovittelu*, 143 – 145.
- <sup>13</sup> Acorn, *Compulsory Compassion*, 116.
- <sup>14</sup> See Westmarland, McGlynn, Humphreys, "Using Restorative Justice Approaches," Introduction; Jülich & Thorburn, "Sexual Violence and Substantive Equality," 39.
- <sup>15</sup> Lorber, "The Variety of Feminisms," 1 – 5.
- <sup>16</sup> See note 5 above.
- <sup>17</sup> Schott, *Feministisk filosofi*, 17.
- <sup>18</sup> *Ibid.*, 41.
- <sup>19</sup> Lorber, "The Variety of Feminisms," 7.
- <sup>20</sup> Braithwaite, "Flipping Markets," 458.
- <sup>21</sup> Fikkert and Rhodes, "Homo Economicus versus Homo Imago Dei," 101.
- <sup>22</sup> Jarl, *Women and Economic Justice*, 49 – 51.
- <sup>23</sup> *Ibid.*, 56.

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<sup>24</sup> Bogenschneider and Corbett, *Evidence-Based Policymaking*; Umbreit, Coates and Vos, "Victim Offender Mediation"; and Ervasti, *Lakimies, Oikeus, Yhteiskunta*, 15.

<sup>25</sup> Löfstedt, *Modell, människa eller människosyn?* 13, 168. See also Fikkert and Rhodes, "Homo Economicus versus Homo Imago Dei," 108.

<sup>26</sup> Friedrichs, "RJ and the Criminological Enterprise," 449.

<sup>27</sup> Mika et al, "Listening to Victims," 33.

<sup>28</sup> Stubbs, "Domestic Violence and Women's Safety," 19.

<sup>29</sup> Daly, "The Limits of Restorative Justice," 138.

<sup>30</sup> Geeraets, "Fictions of Restorative Justice," 273-274; Acorn, *Compulsory Compassion*.

<sup>31</sup> In Finland the restorative practice used in connection to crimes is translated into Conciliation in Criminal and certain Civil Cases. See The Unofficial Translation of 1015/2005. However, the term mediation is also widely used.

<sup>32</sup> Järvinen, *Rikosten sovittelu Suomessa*, 30-32, 83; Iivari, *Nationell organisering av medling vid brott*, 17.

<sup>33</sup> See note 11 above.

<sup>34</sup> Iivari, *Nationell organisering av medling vid brott*, 102.

<sup>35</sup> Björkgren, *Våld i parrelationer*, 131.

<sup>36</sup> Aaltonen, *Sovittu juttu*, 51.

<sup>37</sup> Iivari, *Nationell organisering av medling vid brott*, 8.

<sup>38</sup> National Institute for Health and Welfare, *Statistical Report*, English Summary.

<sup>39</sup> Björkgren, *Våld i parrelationer*, 131; Uotila and Sambou, "Victim-Offender Mediation in Finland," 191.

<sup>40</sup> Björkgren, *Våld i parrelationer*, 131.

<sup>41</sup> Written Question 453/2012.

<sup>42</sup> Programme of Prime Minister Antti Rinne's Government, 92. Interestingly, the statement continues with "Mediation will not be used in situations where it could compromise the legal protection of the victim. The possibility to continue mediation in cases of intimate partner violence will be assessed."

<sup>43</sup> Uotila and Sambou, "Victim-Offender Mediation in Finland," 199.

<sup>44</sup> Iivari, *Oikeutta oikeuden varjossa*, 37, 69.

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- <sup>45</sup> Elonheimo, *Nuorisrikollisuuden esiintyvyys ja taustatekijät*, 54; Iivari, *Oikeutta oikeuden varjossa*, 119.
- <sup>46</sup> National Institute for Health and Welfare, *Statistical Report*, 8, 14.
- <sup>47</sup> Ferber and Nelson, *Beyond Economic Man*, 1 – 2.
- <sup>48</sup> Kielos, *Det enda könet*, 33 – 37; 57 – 58.
- <sup>49</sup> Löfstedt, *Modell, människa eller människosyn?*, 109.
- <sup>50</sup> Alger and Weibull, “Homo Moralis.”
- <sup>51</sup> See eg. Niebuhr, *Moral Man and Immoral Society*, 35.
- <sup>52</sup> *Ibid.*, 169.
- <sup>53</sup> Koehn, *Rethinking Feminist Ethics*, 5.
- <sup>54</sup> Zehr, *Changing Lenses*.
- <sup>55</sup> Van Ness and Strong, *Restoring Justice*, 49.
- <sup>56</sup> Rosengren and Viredius, *I huvudet på en 'tjuv'*, 73; Hayner, *Unspeakable Truths*, 81 – 85. See also Leer-Salvesen, *Tilgivelse*, 149.
- <sup>57</sup> Zehr, *The Little Book of Restorative Justice*, 25.
- <sup>58</sup> Koehn, *Rethinking Feminist Ethics*, 6 – 7.