

NOTES FROM THE FIELD

Restorative approaches to environmental harm: shifting the levers of power

*Lawrence Kershen**

1 Introduction

'Working at the coal face' is not the best metaphor for those working with environmental harm and restorative justice. But there is a sense of being in the front line when exploring how to apply restorative justice principles to address environmental harm.

Many of the diverse readership of this international journal may have far more experience of this topic than I do. However, I can report on two recent initiatives aiming to implement restorative principles in environmental contexts. One relates to the Bhopal disaster in India, the catastrophic poison gas leak in 1984 that killed thousands, with consequences that continue to this day. The other concerns Extinction Rebellion, the environmental movement launched in 2018 that has galvanised public awareness of climate change and environmental harm.

2 Action for Bhopal

The poison gas leak from the Union Carbide pesticide factory in Bhopal on the night of 2 December 1984 has been described as the world's worst industrial disaster. Up to 10,000 men, women and children are estimated to have been killed in the first 72 hours. To date, more than 20,000 people have died, and half a million more have suffered chronic and continuing health problems and crippling medical bills. In February 1989, Union Carbide agreed to pay a compensation of USD 470 million. The average amount paid to the families of the dead was USD 2,200. More than 30 years after the event, the groundwater is still toxic and the issue of the continued contamination of drinking water has still not been resolved. The US multinational Union Carbide was taken over in 1999 by Dow Chemical Company, which in turn merged with DuPont in 2017 (since split into three corporations). This not only made it the biggest chemical conglomerate in the world but obscured the chain of corporate responsibility.

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In addition to five survivors' organisations,¹ a number of voluntary groups seeking justice for the victims have been formed, e.g. the International Campaign for Justice in Bhopal and the Bhopal Medical Appeal. One such organisation in the UK is Action for Bhopal (AfB),² led by our much-respected colleague Martin Wright. Its specific objective is to have Dow clean up and remediate the toxic soil and water and prevent further damage to health. To this end – and while recognising that it only partly meets many survivors' need for justice – its aim is to engage Dow in a restorative process.

If a corporate entity refuses to acknowledge the harm caused, how might it be persuaded to engage in a restorative dialogue, given that participation is voluntary, i.e. how to get them to the table? Inspired by Theodore Roosevelt's precept 'speak softly but carry a big stick', three approaches suggest themselves – litigation, education and motivation. Having written on this theme in the European Forum for Restorative Justice (EFRJ) booklet 'Environmental Justice: Restoring the Future' edited by Emanuela Biffi and Brunilda Pali (see Kershen, 2019), I was asked to participate in an AfB strategy group looking at ways to achieve this objective. What follows is a summary of their emergent strategy.

2.1 Litigation

While litigation is ongoing – e.g. the Indian government is seeking to reopen an USD 8.1 billion claim in the Constitutional Court – all summonses and orders to appear in the Indian courts have so far been brushed aside. Martin Wright describes:

attempts to secure redress through the courts which have been met by denials of responsibility, claims that the compensation already paid was adequate, and by simply refusing to appear in an Indian court (personal email).

Further litigation does not currently seem a productive use of AfB's limited resources.

2.2 Education

AfB's intention has been to confront the directors of Dow with the consequences of the disaster and apply moral and commercial pressure to put things right. Their preferred method has always been by promoting a facilitated survivor-offender dialogue, although they have been clear about not calling it restorative justice. Supporters have been encouraged to write to directors to point out the suffering and abuse of human rights and the effect this may have on the company's business. Another approach has been to look for individuals or organisations who could influence those who direct the company, such as asset

1 The Bhopal Gas Peedit Mahila Stationery Karmchhari Sangh, the Bhopal Gas Peedit Mahila Purush Sangharsh Morcha, the Bhopal Gas Peedit Nirashrit Pension Bhogi Sangharsh Morcha, the Bhopal Group for Information and Action and Children against Dow Carbide.

2 See <https://actionforbhopal.org> (last accessed 15 December 2020).

managers and pension funds. The intention has been to develop awareness on the part of Dow, while warning them of the effect of continuing reputational damage on stock prices and future business.

A further aim is to offer Dow an opportunity to avoid a charge of hypocrisy. Of late, Dow has been highlighting its green credentials, and in November 2019, agreed to fund thirteen environmental restoration projects worth around USD 77 million (albeit in the USA, and in settlement of government agencies' charges that over decades its Michigan plant poisoned two major rivers and their natural life). Again, all such appeals to corporate social responsibility have been brushed aside. But even if not yet effective, this approach to develop understanding on the part of the 'directing minds' of Dow seems an important component of a wider strategy.

2.3 Motivation

What remains as a means of persuasion is something that is a key consideration for corporates – shareholder value. It seems clear that today the public mood – including that of institutional investors³ – is shifting in favour of concern for the environment. The Pope has called for legislation for an international crime of ecocide and President Macron has promised to champion it.⁴ BP's new CEO has declared his commitment to 'decarbonise' the company.⁵ Environmental, social and governance (ESG) concerns are increasingly being seen by investors, at least in the developed world, as necessary constituents in making money.

So reputational challenges to investment in companies like Dow also become financial challenges as they impact their share price. Dow's market growth in India is said to be small, due to the damage to their reputation from Bhopal. As investors are increasingly aware of investment risks, shareholder activism and the threat of divestment have the potential to act as increasingly effective motivators.

2.4 Strategy

AfB's provisional strategy that has emerged has multiple strands. As yet, there is no knowing how successful they will be, but they have the potential to help start the restorative conversation. Key to all of this is timing. A campaign to influence investors and build critical mass requires preparation and coordination. To be most effective, the different elements need to operate together, at a time of maximum impact. The strands include:

- building the supporter base;
- campaigning to heighten awareness of the unresolved humanitarian crisis and the financial and reputational risks for current and potential investors;

3 For example, Institutional Investors Group on Climate Change (www.iigcc.org), Global Sustainable Investment Alliance (www.gsi-alliance.org) (both last accessed 15 December 2020).

4 See www.connexionfrance.com/French-news/French-president-backs-creation-of-ecocide-crime (last accessed 20 December 2020).

5 See www.businesswire.com/news/home/20200611005498/en/BP-CEO-Bernard-Looney-Creating-Lighter-Agile (last accessed 20 December 2020).

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- having available the numerous adverse reports, research papers and articles to be publicised/re-published when appropriate;
- adopting other approaches in conjunction with business strategies, e.g. personal approaches to individual directors who may have a social conscience and/or are alert to the business' long-term risks;
- focusing these public efforts and private approaches to coordinate around a high-profile event such as a Bhopal anniversary, or broadcast of a TV documentary.

This strategy is of course a work in progress and whether it will achieve the objectives is yet to be seen. But in the unlikely event that any Dow executives read this, they should know that the issue is not going away.

3 Extinction Rebellion – XR

XR is a global environmental movement that wants governments to declare a 'climate and ecological emergency'. It uses Non-Violent Direct Action (NVDA) to achieve this. Anyone who follows the principles and values of XR can act in its name, and each XR group is autonomous. This decentralised structure means that decision-making within XR is by consensus.

However, in November 2019, the German magazines *Die Zeit* and *Der Spiegel* published an interview with Roger Hallam, one of XR's founders. In it he said that, seen in the context of 'millions of people hav[ing] been killed in vicious circumstances on a regular basis throughout history', the Holocaust was 'almost a normal event ... just another fuckery in human history'.⁶

As well as adverse responses from German politicians, historians and his publishers, there were many in XR who expressed very strong views in response. A heated debate opened up within the movement.⁷ The German branch of Extinction Rebellion stated that Hallam 'is no longer welcome in XR Germany' and XR UK 'unreservedly denounced' his comments. They said that 'internal conversations have begun with the XR conflict team about how to manage the conflict process'. On 4 December 2019, XR announced that a facilitated process was to take place to 'restore balance in the XR body',⁸ to be completed by 16 December. It was to consider the impact of Hallam's comments on individuals and the wider movement, and also a wider exploration of power within XR UK. The context was that 'we have a responsibility to treat each other with love, respect and kindness at all times'.

It was against this background that I was asked to facilitate a restorative meeting with Hallam and others affected by his comments. It was specifically

6 www.zeit.de/wirtschaft/2019-11/roger-hallam-extinction-rebellion-mitgruender-klimawandel-holocaust?utm_referrer=https%3A%2F%2Fnews.co.uk%2F (last accessed 23 February 2021).

7 www.theguardian.com/environment/2019/nov/20/extinction-rebellion-founders-holocaust-remarks-spark-fury (last accessed 20 December 2020).

8 <https://rebellion.earth/2019/12/04/update-on-process-regarding-roger-hallam/> (last accessed 20 December 2020).

framed as a restorative meeting, as distinct from a restorative justice process where there would be acknowledged victims and offenders. In the three or four days before the meeting, I was able to have preparatory phone conversations with each of the twelve participants. With invaluable support from a restorative justice facilitator from within XR, I facilitated a five-hour meeting on 15 December 2019. The participants included Roger Hallam and a person in support and others from XR groups including XR Germany and XR Jews, as well as XR Guardianship and Visioning. One of the agreed ground rules was that the content of the meeting was confidential. Publicly it was reported on 23 December that agreement had not yet been reached, but that the restorative process was continuing. Meanwhile Hallam published an apology and eight personal commitments.⁹ A further meeting with nine participants took place remotely on Zoom on 16 January, and by March 2020 it was announced that the restorative process was at an end.¹⁰

3.1 Some reflections on the XR restorative process

These events raised questions both for XR and for me as facilitator. A principal issue arose from XR's structure and the decision-making process. If an agreed outcome was reached, who had the responsibility for putting it into action and following up on its implementation, and with what authority? And in the event that the restorative process did not have an agreed outcome, what next steps could be taken and by whom?

Transparency and autonomy are highly valued principles for XR. At the same time, my pragmatic take was that if such an autonomous community is to resolve divisive and painful issues and reach closure openly and swiftly, the wider community needed a decision-making group to act on its behalf. And if in the absence of an agreed way forward, sanctions were to be considered, e.g. suspending or excluding an individual, a group was needed that was mandated to exercise that authority. In fact, since the restorative process, XR has announced that its Care Councils are being developed to help decide what to do in difficult conflict situations. Such decisions might include, for example, an immediate pause to an individual's involvement with XR UK.

There are other, wider issues in relation to restorative processes in this context, such as whether environmental harms to the whole earth and future generations justify the smaller harms to others that result from NVDA. And to what extent is it possible for XR to engage in restorative dialogue with governments and corporates? These are questions that require further thought and discussion, and perhaps action.

From a personal perspective, such an intense process has also given rise to new learnings and some reminders. They include:

9 https://docs.google.com/document/d/1f-_1a-zbcY5Jf7qDtI1FtTvwKMsy2ETMRKAKLIprS8g/edit (last accessed 20 December 2020).

10 <https://rebellion.earth/2020/03/01/update-about-situations-and-processes-involving-roger-hallam-from-the-xr-uk-transformative-conflict-justice-systems-tcj-team/> (last accessed 20 December 2020).

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- The process is not only the meeting itself, but also the steps leading up to and following it. So urgency has to be balanced against the need for careful and sensitive preparation. A longer period of preparation, including actual or virtual meetings with the participants, might be necessary to give them their best prospect of successful outcomes.
- The timing and length of the meeting(s), as well as who should participate, is ideally decided in collaboration with the facilitator.
- If a participant is to represent a group, (s)he should have the authority to negotiate and, if appropriate, reach agreement on behalf of the wider group.
- Describing such a process as restorative justice might suggest to some that they are seen as perpetrators and deter them from taking part. To avoid this hurdle, the description of the process, as well as the process itself, may need to be adapted to being a ‘restorative meeting’ or ‘dialogue’ or even ‘conversation’.

3.2 Follow-up

XR is open and willing to learn from feedback and develop appropriate new approaches. Following the restorative process, I was asked to take part in two such initiatives. One was to support the Transformative Conflict team to strengthen XR Care Councils as described above, to empower them to make decisions in difficult conflict situations. This is not to replace conflict transformation processes, but to help if a conflict process breaks down and dialogue becomes impossible. The intention is to provide a clearer and agreed way of dealing with conflict in XR. The second was an initiative to adapt the XR People’s Assembly Manual for community assemblies, to add guidance about conflict resolution pathways through the assembly process and elsewhere.

4 Drawing the threads together

It is a tribute to the versatility and flexibility of restorative justice that it can be applied in such disparate contexts, aiming in one case to enhance dialogue with others outside the organisation, and in another to resolve an internal conflict. In addition, the organisations’ aims and processes are quite different. AfB seeks to establish a dialogue using existing mechanisms to find a collaborative outcome. XR aims for systemic change by challenging and disrupting the status quo to set up a new system of governance including, for example, citizens’ assemblies. At the same time, there are some apparent commonalities between them such as:

- concern for the environment;
- valuing individual and collective well-being over economic growth;
- concern for individuals and communities before corporations;
- a role in championing individuals and communities against more powerful entities such as governments and corporates.

This last point seems to me to highlight the central issue and the pivotal question in the context both of AfB and XR – that of power imbalance.

4.1 *Speaking truth to power*

On 30 April 2019, representatives of XR met Michael Gove, the then UK Environment Secretary,¹¹ (with a follow-up meeting on 26 June). The meeting produced pledges to reduce carbon emissions to net zero, and indeed on 27 June, the government committed to increase its reduction target from 80 per cent to net zero by 2050. While one XR representative described the meeting as ‘less s**t than I thought it would be, but only mildly’, it seems likely that it has been effective in helping the evolution of the government’s attitude to climate change.

Valuable as they were, the meetings were not, of course, facilitated restorative dialogues. However, it cannot be too long before a restorative process will be initiated that brings those who have the power to address climate change to the negotiating table. Given that at the end of 2019 there were estimated to be some 355 environmental court cases in 36 jurisdictions worldwide (Eskander, Fankhauser & Setzer, 2020), this might well be through the pressure of climate change-related litigation.

How can such a restorative dialogue be made more effective, so that a less powerful individual or organisation can influence one that is more powerful, to have them listen and hopefully address manifest inequities?

In mediation and restorative processes, mitigating power imbalance is a familiar challenge. For example, an individual may be pitted against a corporation; a party with limited resources may be facing one whose resources are more or less unlimited; a woman may feel herself at a disadvantage in challenging a man; unrepresented parties may be lined up against an array of lawyers. In litigation these can be decisive factors. In dispute resolution there are strategies for making the playing field more level.

The facilitator can take steps to ensure that parties have ample time for preparation, so that a meeting between them will not be set up until both or all parties are ‘ready’. Parties may be encouraged to bring others who can support and empower them, whether or not they speak for them. And it is a primary concern for many facilitators to ensure that each party has an opportunity to be heard, whether or not they have representatives who can speak on their behalf.

Indeed, XR speaks of the need to ‘mitigate for power’, which is defined as ‘actively ... breaking down hierarchies of power for more equitable participation’.¹² They ‘aim to centre voices that are normally the most marginalised, by allowing space for them to speak and encouraging those who normally wouldn’t take leadership ... positions’.

4.2 *The power of principled negotiation*

Another critical element in redressing power imbalance is the use of principled negotiation. It could be said that at the heart of a restorative or mediated process is a negotiation between the parties to reach a resolution. Both theory and

11 www.theguardian.com/environment/2019/apr/30/extinction-rebellion-tells-politicians-to-declare-emergency (last accessed 20 December 2020).

12 Principle 7 of XR’s 10 principles and values <https://extinctionrebellion.uk/the-truth/about-us/> (last accessed 20 December 2020).

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experience suggest that parties who adopt a principled negotiation stance, rather than negotiating from positions, achieve outcomes that are at least as good as, and often better than, positional agreements, i.e. those produced by zero sum, 'win as much as you can' negotiations.

In addition, principled negotiations often foster and enhance relationships between the protagonists. The 'victim' of crime who at the end of a restorative process offers the offender work, or the parties in a contractual dispute who resolve their differences and also plan further deals, are examples of the ways in which relationships can flourish through principled negotiation.

So a facilitator who can encourage parties to adopt a more principled approach can help them to establish more fruitful and enduring agreements, however much it may test the skill and imagination of the facilitator. It would take a book, and indeed there are quite a few, to develop these ideas. However, the Harvard Negotiation Project has summarised this principled approach in four points (see Fisher & Ury, 2012):

- First and foremost, separate the people from the problem.
- Focus on interests, not positions.
- Invent multiple options looking for mutual gains before deciding what to do.
- Require that the resulting agreement be based on some objective standard, e.g. custom, expert opinion, law, even tossing a coin.

Rather than a confrontative stance, this approach seeks a collaborative outcome where each party's needs are acknowledged and as far as possible factored into the eventual settlement or accord. It implicitly means that instead of demonising the 'other', a protagonist in a restorative process recognises that the other party(s) is/are doing their imperfect best, in an imperfect world, to protect and advance their interests and/or those they represent.

Looking for mutual gains may also require that the facilitator helps a party to identify the positive benefits of the current way of acting and look for ways in which those benefits are built into any new paradigm that is developed. When the environmentalists who objected to pollution from a local authority's air show achieved settlement, they were keen to help the town record and analyse traffic patterns. A fossil fuel company that is concerned about job losses if their business is wound down may appreciate expert input on employment opportunities in environmental protection initiatives.

It will not be long, I believe, before litigants in a particular climate change-related litigation agree to pause the court process to seek resolution through a facilitated dialogue. Restorative processes potentially offer far more options than litigation for participants and those they represent to get their needs met. It will take time, patience and flexibility, but all of us familiar with restorative processes know that it is possible.

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