



INTERNATIONAL CENTRE FOR
CRIMINAL LAW REFORM
AND CRIMINAL JUSTICE POLICY

Restorative Justice Note # 1

The Use of Restorative Justice Approaches in Criminal Matters

There is not necessarily agreement on what constitutes restorative justice or what its foundational principles are. What exists is a broad range of definitions and applications of restorative justice. Some definitions focus on programs while others focus on process or on outcomes. This occasionally leads to debates about its legitimate use and discussions about what truly distinguishes restorative justice from other approaches.

Definitional Issues

The United Nations *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* provide operational definitions of restorative justice programs, processes, and outcomes, but do not provide a broader definition of restorative justice. They define a restorative justice program as “any program that uses restorative processes and seeks to achieve restorative outcomes”. However, the implementation of restorative justice processes do not necessarily involve, as might be implied by the Basic Principles, the implementation of specific programs. Restorative justice principles can indeed find their way into and influence various aspect of the criminal justice process and contribute in various manners to crime prevention. The European Union defines restorative justice as “any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party”.¹ Unlike the *Basic Principles*, that definition focuses on “processes” as opposed to “programs”.

Although some observers emphasize the differences between the core principles of restorative justice and those of the conventional criminal justice system, others argue that the two approaches are complementary and compatible, incorporating elements of retribution, rehabilitation as well as more unique elements. The focus is sometimes placed on restorative justice outcomes. What is meant, however, by a “restorative outcome” is also the subject of much discussion. The *Basic Principles* define it as “an agreement reached as a result of a restorative process”, such as mediation, conciliation, conferencing and sentencing circles. Such agreements should be aimed at meeting individual needs and responsibilities of victims, offenders, and any other individual affected by the crime.

¹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 2 (d).

Controversies

Other issues are also controversial. They include whether there is a role for punishment in restorative justice; whether all forms of victim compensation and reparation actually constitute restorative justice; whether restorative justice process are possible without the active participation of the direct victim of the crime; whether programs that are not victim-centered or those that are primarily focused on the offender rehabilitation and reintegration belong to the category of restorative justice programs; and, whether restorative justice is appropriate for all forms of crime.

However, in a manner that was perhaps not initially foreseen, restorative justice principles have begun to transform various other parts of the justice process, from the initial prosecution decision, to sentencing, the administration of the sentence, and the reintegration of the offender.

Many States are trying to expand the use of restorative justice and make it available at every stage of the criminal justice process. In France, for example, restorative justice can now be used at every stage of the criminal procedures, as long as the facts of the case have been recognized and both the victim and the offender consent to participate. It is left to judicial and penitentiary authorities to decide how and when to make that possibility available and they are advised to be very cautious, particularly when dealing with offences involving children. The measure is to be applied parallelly and independently of the criminal procedure, but it may positively influence the execution of the sentence.²

It is important to acknowledge and understand the different approaches through which restorative justice is being delivered. The definition of a restorative justice program found in the *Basic Principles* must therefore be understood broadly to include various initiatives to infuse restorative justice principles into all aspects of the criminal justice system's response to criminal incidents. Consider for example the frequent conflation of restorative justice and therapeutic justice values, thinking and processes. Although therapeutic jurisprudence and restorative justice operate as two distinct legal theories, they share common foundational principles, and each retains elements of traditional theories of justice, while emphasizing problem solving rather than punishment.³ This is evident in some of the "problem solving" courts that have emerged in the last decade or two, many of which have elements of a restorative justice process. Greater clarity and transparency should be sought about the goals and specific approaches to restorative justice that are applied through various initiatives.

Implementation Issues

Several program evaluations identified recurring issues in the implementation of restorative justice programs⁴. They include the low level of referrals to programs, hesitation or resistance

² Loi No 2014-896 du 15 août 2014 (créant l'article 10-1 du code de procédure pénale). See also: Le garde des Sceaux, ministre de la justice (2017). Circulaire SG-17-007/13.03.2017 sur la Mise en œuvre de la justice restaurative applicable immédiatement suite aux articles 10-1 et 10-2 du code de procédure pénale.

³ Johnsen, P., & Robertson, E. (2016). Protecting, restoring, improving: Incorporating therapeutic jurisprudence and restorative justice concepts into civil domestic violence cases, *University of Pennsylvania Law Review*, 164 (6). 1557-1586.

⁴ For example: Kirby, A. & Jacobson, J. (2015). *Evaluation of the pre-sentence RJ pathfinder*. London: Institute for Criminal Policy research, University of London; Meadows, A., Albertson, K.,

on the part of justice and other professionals; the attrition in the number of cases referred to a restorative justice programs; victims' difficulty in accessing restorative justice; the protection of confidential information (including information about the victims); community resistance and the need to develop local awareness and support for programs; the need to manage participants' perceptions and expectations; difficulties in linking restorative justice programs to other essential services and interventions for either the victims and the offenders; difficulties involved in monitoring offenders' compliance with a restorative justice agreement; issues relating to the governance and to the funding of the program; the need for specific guidance for police and prosecution; and, the need for suitable training for facilitators and other program personnel.

Several guides and tools were developed to help practitioners anticipate, address and resolve these challenges.⁵ The Association of Chief Police Officers of England, Wales & Northern Ireland adopted a set of guidelines and minimum standards to assist police departments in their introduction and management of restorative justice processes as a diversion mechanism.⁶ The European Forum on Restorative Justice also published useful guides⁷, with a primary focus on mediation programs, which offers practical advice on program-related elements that may increase (or prevent) the use of restorative justice practices. These elements include spreading the message about restorative justice, raising awareness among referral bodies, increasing cooperation between referral bodies and restorative justice practitioners, and launching a public awareness campaign. Although it is sometimes assumed that the lack of referrals to restorative justice programs is due to the poor awareness of the program among referral bodies, it is becoming clear that awareness alone is not sufficient and that other measures are required to increase these referrals.⁸

In 2014, the European Council for Juvenile Justice undertook the task of creating a European Model for Restorative Justice with Juveniles in order to diffuse and advocate the advantages of a restorative approach.⁹

Ellingworth, E. & Senior, P. (2012). *Evaluation of the South Yorkshire Restorative Justice Programme*. Sheffield: Sheffield Hallam University.

- ⁵ E.g., United Nations Office on Drugs and Crime (UNODC) (2006). *Handbook on restorative justice programmes*. New York: United Nations; Mercer, V. & Madsen, K. (2015). *Doing restorative justice in cases of sexual violence*. Leuven: Leuven Institute of Criminology.
- ⁶ Association of Chief Police Officers (2011). *Restorative justice guidance and minimum standards*. Greater Manchester: Association of Chief Police Officers.
- ⁷ Biffi, E. & Laxminarayan (2014). *Accessibility and initiation of restorative justice – A practical guide*. Leuven: European Forum for Restorative Justice. Also: Biffi, E. (2016). *Practice guide for RJ services. The victims' directive: Challenges and opportunities for restorative justice*. Leuven: European Forum for Restorative Justice; Laxminarayan, M. & Wolthuis, A. (2015). Accessibility of restorative justice: Attitudes as barriers to greater referrals. *Social Work Review / Revista De Asistenta Sociala*, 14(4), 35-45; Fellegi, B. & Szegő (2013). *Handbook for facilitating peacemaking circles*. Foresee Research group.
- ⁸ For example, Sherman, L. & Strang, H. (2007). *Restorative justice: The evidence*. London: The Smith Institute.
- ⁹ Chapman, T., et al. (2015). *Protecting rights, restoring respect and strengthening relationships: A European model for restorative justice with children and young people, Vol.2; and Toolkit for professionals: Implementing a European model for restorative justice with children and young people, Vol. 3*, European Research on Restorative Justice. Leuven: International Juvenile Justice Observatory & European Council on Juvenile Justice

Implementing Fundamental Procedural Safeguards

The strength of the *Basic Principles* is that they put forward a set of procedural conditions and guarantees that can be upheld to ensure the proper application of restorative justice principles and avoid practices that might be counter to the rights of participants in a restorative justice process. Unfortunately, the Basic Principles are not as well-known as they should be and they are probably ignored at least as often as they are respected.

The procedural safeguards (paras, 14 to 17 of the Basic Principles) include:

- The participation of an offender in a restorative justice process should not be used as evidence of admission of guilt in subsequent legal proceedings (para. 8).
- Agreements arising out of a restorative process should be arrived at voluntarily and should contain only reasonable and proportionate obligations (para. 7).
- Discussions in restorative justice processes that are not conducted in public should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by national law (para. 14).
- The results of agreements arising out of restorative justice programs should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgements” (para. 15).
- Failure to reach an agreement should not be used against the offender in subsequent criminal justice proceedings (para. 16).
- Failure to implement an agreement made during a restorative justice process (other than a judicial decision or judgement) should not be used as justification for a more severe sentence in subsequent criminal proceedings (para. 17).

Although the implementation of these safeguards makes a lot of sense for restorative justice programs operating as alternatives to the criminal justice process or in the context of diversion programs, they are not easily applied in all contexts.

The Basic Principles (para 10) emphasize that “the safety of the parties shall be considered in referring any case to, and in conducting, a restorative process”. The European Union Directive emphasizes the importance of safeguards to prevent secondary and repeat victimization, intimidation and retaliation. It states, accordingly, that restorative justice services should have as a primary consideration the interests and needs of the victim, repairing the harm done to the victim and avoiding further harm. Its states that:

Factors such as the nature and severity of the crime, the ensuing degree of trauma, the repeat violation of a victim's physical, sexual, or psychological integrity, power imbalances, and the age, maturity or intellectual capacity of the victim, which could limit or reduce the victim's ability to make an informed choice or could prejudice a positive outcome for the victim, should be taken into consideration in referring a case to the restorative justice services and in conducting a restorative justice process.¹⁰

¹⁰ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 46.

The Directive also states, that notwithstanding the desirability of protecting the confidentiality of the restorative justice process, factors such as threats made or any forms of violence committed during the process may be considered as requiring disclosure in the public interest.¹¹

Legislative Frameworks

Absence of legislation is not necessarily an obstacle to the implementation of restorative justice programs. There is considerable variation worldwide in the legal standing of restorative justice processes, with some programs enshrined in law and others operating without a formal legal status. Numerous programs were successfully established without any new legislation. A legal framework can be an essential asset in developing new restorative justice programs, but the existence of a well formulated legal basis alone does not necessarily guarantee an even and generalized application of restorative justice practices.¹²

As noted in the UNODC *Handbook on Restorative Justice Programmes*, restorative justice programs generally operate within the context of or alongside the larger criminal justice system. As such, these programs must negotiate a substantive role in, or as an alternative to, the formal justice system or otherwise risk being marginalized and underutilized. In the absence of statutory requirements, it is sometimes difficult for a restorative justice program to insert itself into the routines of the criminal justice system. Legislation may be useful in providing the impetus for a more frequent use of the restorative justice process. It can also be used to promote predictability and certainty in the use of the restorative process as well as to establish all the necessary legal safeguards.¹³

A review of legislation in the American States shows that restorative justice is referenced broadly in State codes across the United States, but with few mandates and little structure to support systemic use.¹⁴ The situation is similar in most other countries.

Importance of Community Engagement and Support

A crime is a social issue, not just a private conflict. Community engagement is therefore crucial for the success of restorative justice programs and it can take many forms, including some that may be problematic.¹⁵

The concept of “community” is central in both the restorative justice and the social reintegration fields. How a restorative justice program defines “community” is a critical factor in determining the nature and extent of citizen ownership of and participation in the process. Most restorative processes involve communities of interest around the victims. However, program aspirations with respect to community engagement are not always fully realized. As one observer noted, the rhetoric of restorative justice often bypasses the “incontrovertible fact

¹¹ Idem.

¹² Coronas, C. (2006). *Restorative justice: An agenda for Europe. Supporting the implementation of restorative justice in the South of Europe, role of EU*. Leuven: European Forum for Restorative Justice, p.153.

¹³ UNODC (2006). *Handbook on restorative justice programmes*. New York: United Nations, p. 51.

¹⁴ Sliva, S. M. & Lambert, C. G. (2015). Restorative justice legislation in the American States: A statutory analysis of emerging legal doctrine, *Journal of Policy Practice*, 77-95. p.14.

¹⁵ Rosenblatt, F. (2015). *The role of community in restorative justice*. London: Routledge.

that harmony, mutuality, equality, reciprocity and respect are hard won even in our most significant and well-intentioned relationships".¹⁶

Another harsh reality is that many of the communities who embrace the promise of restorative justice are among the least able to mobilize the agency necessary to make it work. Ironically, some observers have concluded, "restorative justice requires successful communities."¹⁷ It is a sad truth that many offenders neither come from nor are returning to a "successful community". In fact, they are more likely to come from communities which are themselves already challenged by poverty, unemployment, social exclusion, alienation and criminality.

Restorative justice programs were first proposed as a means to put the concerns and issues of victims at the centre of the social response to crime. They are now increasingly valued for their participatory characteristics and their ability to involve a few members of the community and various stakeholders in finding an appropriate response to individual crimes. The promise of participatory justice is a powerful one and is gaining support. Together with problem solving courts and community courts, restorative justice programs offer communities some means of resolving conflicts. A fundamental challenge for participatory justice is, however, to find ways to effectively mobilize the involvement of civil society, while at the same time protecting the rights and interests of victims and offenders.¹⁸

Even for those forms of restorative justice processes where members of the community are involved, for example peace-making and sentencing circles, there are still practical questions to be addressed about involving community members who feel affected by the offence or are otherwise interested.¹⁹ For example, this may include determining who is affected by the crime, identifying people who can be party to the resolution of the conflict, finding ways to reach out to them, and protecting the privacy of all those involved in the situation. The question of who are the "stakeholders" in restorative justice programs rarely finds an easy or definitive answer.²⁰

Community engagement is related to public awareness and support for restorative justice in general. Research in many countries shows that public knowledge of restorative justice is limited, but that public attitudes about it are quite positive, especially as they relate to the core elements of restorative justice, namely reparation and active participation.²¹ Public opinion surveys have found that large segments of the population are unaware of restorative justice and

¹⁶ Acorn, A. (2004). *Compulsory compassion – A critique of restorative justice*. Vancouver: UBC Press, p. 9.

¹⁷ Dickson-Gilmore, J. & La Prairie, C. (2005). *Will the circle be unbroken? Aboriginal communities, restorative justice, and the challenges of conflict and change*. Toronto: University of Toronto Press.

¹⁸ Dandurand, Y. (2016). "Alternative approaches to preventing recidivism: Restorative justice and the social reintegration of offenders". In Kury, H, Redo, S. & E. Shea (Eds.), *Women and children as victims and offenders: Background, prevention, reintegration*. Zurich: Springer, 283-299.

¹⁹ Ehret, B., Szego, D. & Dhondt, D. (2016). Peacemaking circles, their restorative and crime prevention capacities for women and children. In Kury, H, Redo, S. and E. Shea (Eds.), *Women and children as victims and offenders: Background, prevention, reintegration*. Zurich: Springer, 341-365.

²⁰ Crawford, A. & Clear, T. (2001). Community justice: Transforming communities through restorative justice. In Bazemore, G. & Schiff, M. (Eds.), *Restorative community justice: Repairing harm and transforming communities*. Cincinnati (OH): Anderson, 127-149.

²¹ Pali, B. & Pelikan, C. (2010). *Building social support for restorative justice: Media, civil society and citizens*. Leuven: European Forum for Restorative Justice.

what it involves, but also that there is strong support for making restorative justice available to all victims and offenders, provided that they are willing to participate.²² Yet, support for restorative justice programs is not universal. In a recent Canadian survey, over one-third of respondents expressed concerns about the use of restorative justice processes in the criminal justice system. These concerns were mostly related to the types of crimes and offenders considered eligible for restorative justice, and accountability among offenders and the criminal justice system.²³ In subsequent focus groups, many participants expressed views about conditions, limitations or considerations for restorative justice. In particular, many felt that this type of process cannot work for violent crimes, or repeat offenders, expressing concerns about revictimization.²⁴

Improving the Participation of Victims in Restorative Justice

The benefits of restorative justice to victims who agree to participate can be substantial. They include supporting victims, giving them a voice, encouraging them to express their needs, enabling them to participate in the resolution process and offering them assistance, and healing. There is clear evidence that these programs can also alleviate the emotional effects of crime on the victims.²⁵ Victim satisfaction with the process, overall, tends to be very high.²⁶ Various program evaluations have demonstrated that victims of crime are satisfied, for various reasons, with their participation in a restorative justice process.²⁷

Research consistently shows relatively high degrees of victim willingness to participate in mediation.²⁸ Yet, data from the Crime Survey for England and Wales show that in instances where there was a victim of crime, only 7.2% of victims were offered the opportunity to meet with the offender; of the remaining 92.8% of victims who said they were not offered the opportunity to meet with the offender, 24.7% would have accepted if offered.²⁹ Victims want to know about their restorative options sooner rather than later.³⁰ Information and the

²² For example, the 2016 Ipsos MORI poll on public awareness and attitudes to restorative justice, U.K., Restorative Justice Council.

²³ EKOS (2017). *National Justice Survey: Canada's Criminal Justice System* (Synthesis Report). Ottawa: Department of Justice Canada.

²⁴ Idem.

²⁵ Bolitho, J. (2017). Inside the restorative justice black box: The role of memory reconsolidation in transforming the emotional impact of violent crime on victims, *International Review of Victimology*, 23(3), 233–255.

²⁶ See for example: Vanfraechem, I., Bolivar Fernandez, D., & Aertsen, I. (Eds.) (2015). *Victims and restorative justice*. London: Routledge. Also: Ministry of Justice (2016). *Restorative justice victim satisfaction survey*. Research and Evaluation, Ministry of Justice. Wellington: New Zealand.

²⁷ These reasons are complex. They include a perception of procedural fairness or justice, sense of closure, ability to express emotions, and the possibility of addressing pro-social motives. See for example: Van Camp, T. & Wemmers, J.-A. (2013). Victim satisfaction with restorative justice: More than procedural justice, *International Review of Victimology*, 19 (2), 117-143.

²⁸ Bolívar, D., Aertsen, I. & Vanfraechem, I. (2015). Victims and restorative justice: An empirical study of the needs, experiences and position of victims within restorative justice practices. Leuven: European Forum for Restorative Justice.

²⁹ Victims' Commissioner (2016). *A question of quality: A review of restorative Justice - Part 1 - Service providers*. London: Victims' Commissioner's Office.

³⁰ Shapland, J., Robinson, G. & Sorsby, A. (2011). *Restorative justice in practice*. London: Routledge.

opportunity for choice are empowering and give them a sense of control.³¹ The victims' right to be informed about the possibility of restorative justice can be included in national legislation. Article 4(j) of the 2012 E.U. Directive relating to victims of crime requires Member States to ensure that victims are offered information about the available restorative justice services, "without unnecessary delay, from their first contact with a competent authority".³² In the United Kingdom, statutory guidance is provided by the *Code of Practice for Victims of Crime* (2015). Generally, whether victims hear about the possibility of restorative justice usually depends of the availability of victim services. In general, victim take-up of restorative justice is very low.

The question, some observers have concluded, is not whether restorative justice should be offered to victims but how this should be done.³³ Restorative justice may not be appropriate in all cases, but victim engagement in a restorative justice process needs to be addressed on a case by case basis, in a way that ensures that victims are always safe and properly prepared if they participate. Not every victim is interested in restorative justice. Victims' wishes must be respected. There are potential risks and drawbacks for the victims who agree to participate. Although it is generally understood that the victim must consent to participate and cannot be forced to do so, it is not necessarily agreed that victims can also prevent a restorative justice process from proceeding without their consent. In a few jurisdictions, victims are given more control on the process. For example, the victim may have a veto power, by not consenting to a conference to go forward, but this remains quite rare.

Practitioners have identified different ways to promote the participation of victims, including: allowing or promoting victim self-referrals to restorative justice services; increasing public awareness of restorative justice; raising victim awareness of restorative justice soon after their victimization; and, addressing the problem of lack of victim referrals by front line justice officials.³⁴

Only a small number of cases are referred to restorative justice and victim self-referrals remain exceptional. It is important to improve the ways in which cases are identified by restorative justice service providers. These include referrals from front line law enforcement and partner agencies, self-referrals from victims or offenders, and case extraction, whereby potential cases are identified from administrative casefile data. The case extraction model, with access to police and court data on offences, offenders and victims, is often presented as the most effective approach.³⁵ There are also potential issues with the way referrals take place by placing undue pressure on the victims, "selling" the process to them through unrealistic claims and promises, or assuring them that the process will take place with or without them and that they may be left out of it. There are also issues when practitioners are overly protective of victims and prevent them from making their own decisions about participation in a restorative justice process. There

³¹ Van Camp, T. & Wemmers, J.A. (2016). Victims' reflections on the protective approaches to the offer of restorative justice: The importance of information, Canadian *Journal of Criminology and Criminal Justice*, 58 (3), 415-442.

³² Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 4.

³³ Van Camp, T. & Wemmers, J.A. (2016).

³⁴ Bright, J. (2017). *Improving victim take-up of restorative justice*. Restorative Justice Council, U.K.

³⁵ Idem.

are still many unresolved questions about the factors that explain the lack of case referrals to restorative justice programs.

There are also issues about the timing of the involvement of victims and whether interventions should allow for sufficient time to elapse since the offence.³⁶ It is sometimes argued that the involvement of victims at the pre-sentence stage may be too soon, particularly for victims who have sustained physical injury or emotional trauma.³⁷ It is also important for practitioners to be able to rely, when necessary, on a professional assessment of the victim's readiness to participate.

In addition, it is suggested that offence-specific exclusions from access to restorative justice services should be removed. Finally, for victims to participate in restorative justice, offenders must also agree to participate and barriers to their participation must be removed.

Most proponents of restorative justice see the centrality of the victim's concerns as its main defining characteristic. For them "victim concerns and issues should be at the centre of work for restorative justice, and not ancillary".³⁸ Many observers deplore the fact that most restorative justice programs tend to be primarily offender oriented.³⁹ Some doubts are sometimes also expressed about the capacity of restorative justice programs to be responsive to victims' needs due to their frequent implementation under the umbrella of the criminal justice system and their lack of support and follow-up assistance for victims.

In recent years, noticeable progress has been made in understanding the impact of trauma on victims and new more trauma-informed or trauma-sensitive methods of interventions and interaction with victims have been developed. This new knowledge needs to be integrated into the training of restorative justice professionals and facilitators.

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³⁶ Zebel, S., Schreurs, W. & Ufkes, E. G. (2017). Crime seriousness and participation in restorative justice: The role of time elapsed since the offense. *Law and Human Behavior*, 41 (4), 385-397.

³⁷ Kirby, A. & Jacobson, J. (2015). *Evaluation of the pre-sentence r.j pathfinder*. London: Institute for Criminal Policy Research, University of London.

³⁸ Van Ness, D. W. & Heetderks Strong, K. (2010). *Restoring justice – An introduction to restorative justice*. (3rd Ed). New Providence (N.J.): LexisNexis, p. 141.

³⁹ Dignan, J. (2007). The victim in restorative justice. In Walklate, S. (Ed), *Handbook of victims and victimology*. Cullompton: Willan Publishing, 309-332. Also: Pemberton, A. & Vanfraechem, I. (2015). Victims' victimization experiences and their need for justice. In Vanfraechem, I., Bolivar, D. & Aertsen, I. (Eds.), *Victims and restorative justice: Needs, experiences and policy challenges*. London: Routledge, 15-47.