

Restorative Justice: Domestic and International Perspectives

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Abstract

Over the past few decades, a novel approach to crime and conflict resolution has been gaining ground around the world. Known as ‘restorative justice’, it revolves around the notions that crime is primarily a violation human relationships; that the chief aim of the justice process should be to reconcile those most directly affected by the offending behaviour while addressing the injuries they suffered; and that the resolution of crime-related conflicts demands a positive effort on the part of victims and offenders and the assumption of responsibility by the community. Restorative justice is both a way of thinking about crime and a process for responding to the problems that crime poses for contemporary societies. The essence of restorative justice is not the adoption of a particular form of process rather than another; it is the adoption of any form of process embodying restorative values and aiming to achieve restorative goals and outcomes. This paper outlines the broad philosophy of restorative justice, comments on the differences between restorative justice and other prevailing conceptions of justice, and identifies the constitutive elements necessary for a restorative justice practice. The paper then considers contemporary restorative justice practices, presenting information on guiding principles, procedures and goals and identifying some concerns that need to be addressed in the development and implementation of such practices.

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Restorative Justice: Philosophy, Guiding Principles and Goals

Restorative justice may be described as a victim-centred response to crime that provides opportunities for those most directly affected by the crime – the victim, the offender, their families and the community – to be directly involved in responding to the harm caused by the offence.¹⁾ According to a well-known definition by Tony Marshall, “restorative justice is a process whereby all the parties with a stake in a particular offence [victims, offenders and their ‘communities of care’] come together to resolve collectively how to deal with the

aftermath of the offence and its implications for the future.”²⁾ The UN also adopted its own and rather all-encompassing definition of restorative justice as “any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.”³⁾ Restorative justice is generally viewed as a way of humanizing justice, of bringing victims and offenders together in ways that provide opportunity for victims to receive explanation and reparation and for offenders to be accountable to the victim and the community. It draws on a philosophy that gives priority to reconciliation over punishment, to healing for victims over vengeance against offenders, to community and wholeness over alienation, to forgiveness and mercy over negativity and harshness. This shift in thinking away from retributive or punitive justice is sometimes referred to as community justice.⁴⁾

Restorative justice is both a new and an old concept. While the modern articulation has emerged in the past forty years,⁵⁾ the underlying philosophy and ethos played a central role in ancient Greek, Roman and Asian civilizations, which all recognized the importance of compensation for the victims of wrongdoing.⁶⁾ Furthermore, restorative justice was prominent among various indigenous cultures across the world, such as Native American, Canadian Aboriginal/First Nation, Australian Aborigine, New Zealand/Aotearoa Maori and African indigenous people. Indigenous justice systems gave special attention to the needs of the victims of crime, and reconciliation and restitution were considered crucial to right the wrong caused by the offending behaviour. Such systems allowed the victim, the offender, the families concerned and members of the community to actively participate in the reconciliation process.⁷⁾ The recent rediscovery of such practices in different parts of the world has stimulated and informed the development of restorative programmes and enriched criminal justice philosophy. Western countries re-discovered restorative justice in the 1974 with the establishment of an experimental victim-offender reconciliation programme in Kitchener, Ontario, Canada,⁸⁾ and by the end of the 1990s most Western countries had embraced restorative justice programmes.

Restorative justice revolves around the recognition that crime is a violation of the relationships that bind community members together and aims to restore the wellbeing of the victim, the offender and the community through a consensus approach based on dialogue and mutual respect.⁹⁾ Its hallmark is collaboration among all parties affected by criminal wrongdoing. It is thus said to restore the deliberative control of justice by citizens by transforming those concerned from passive spectators in an impersonal process to active participants. It prevents the closed shop of the legal expert and, by infusing non-legal moral values into the justice system, constitutes a constraint on legalism, arbitrariness and bureaucracy.¹⁰⁾ Restorative justice aspires to achieve the following outcomes: (a) to attend fully to the material, emotional and social needs of the victim and those individuals personally related to him or her who may have been affected; (b) to provide the victim the opportunity to view the offender as a person rather than as a faceless criminal; (c) to allow all parties affected by an offence the opportunity to contribute to the decision-making about what needs to be done; (d) to enable offenders to fully appreciate the nature and consequences of their actions and to give them the opportunity to make amends for the harm caused; (e) to

denounce the offending behaviour and prevent re-offending by integrating the offender into the community; (f) to create communities that would support the rehabilitation of offenders and victims and would actively contribute to the prevention of anti-social behaviour through positive interventions; and, (g) to provide a means of avoiding the escalation of legal justice and the associated costs.

Restorative justice focuses on the harms suffered rather than the laws broken; shows a balanced concern for the victim and the offender; works towards assisting victims through empowerment and making amends; supports the offender and simultaneously encourages him or her to understand, accept and carry out his or her commitments to repair the harm. Willingness to participate and truth telling are essential elements of any restorative justice process – participation cannot be the result of fear, coercion or manipulation brought to bear on either the offender or the victim. In this respect, allowing the parties to play a role in setting the ground rules governing the process is of particular importance, as it offers the parties a feeling of empowerment and strengthens their commitment to the restorative justice process, its objectives and outcomes.¹¹⁾ The victim's involvement is essential in defining the harm and how it might be repaired,¹²⁾ while offenders must be held accountable for their actions by accepting responsibility for their behaviour and making reparation. Reparation can be made in a variety of ways, such as a verbal or written apology,¹³⁾ financial compensation or work carried out for the victim or the community (e.g. work at a school, old age home or hospital).

The growing interest in restorative justice in recent years and the related movement for justice reform reflect a dissatisfaction with mainstream justice processes and a reaction to what is perceived as a failure of these processes to significantly reduce crime, as well as to meet the needs of the individuals and communities affected by it. The mainstream justice system, with its emphasis on established norms of legal rationality and procedural formalism, leaves little room for victims, offenders and the communities concerned to actively participate in the justice process and the impersonality of the proceedings tends to dehumanise both the wrongful act and its consequences. In this setting, the offender often fails to realise the actual impact of his or her conduct, and the victim remains just that, a victim, knowing only that the offender serves whatever sentence was imposed on him or her.¹⁴⁾ Furthermore, the restoration of social equality, that is relationships of equal respect, dignity and concern, cannot be achieved when priority is given to stigmatic punishment, for such punishment is inherently isolating, removing the offender from the relationship and thereby precluding relationship altogether, let alone equality of relationship. The restoration of social equality can best be achieved by practices capable of promoting the reintegration of the offender in the community through a process to which the offender, the victim and other parties concerned submit voluntarily.¹⁵⁾ Restorative justice scholars argue that victims, offenders and their communities can come up with more meaningful solutions than those devised by judges and other legal experts who lack knowledge of, and connection to, the parties impacted by the offence, and therefore are incapable of adequately addressing the real needs created by the crime.

Scholars who contrast restorative justice to the institution of punishment do not deny that wrongdoers may experience some restorative sanctions as unpleasant or painful. They

point out, however, that it is the perspective of the person who imposes pain, not the person who receives pain, that defines punishment. As Walgrave remarks, "...if [an offender] feels the obligation to repair as being hard and calls it 'a punishment', it actually is no punishment if the intention of the judge was not to make [the offender] suffer, but rather to request from him a reasonable contribution to reparation."¹⁶⁾ As restorative sanctions do not involve the deliberate infliction of pain but focus on reparation, they cannot be regarded as punishments. In this respect, there is a critical ethical difference between restorative justice and punishment because "the intentional obligation to make up is ethically superior to the intentional infliction of pain."¹⁷⁾ It is therefore wrong to equate painful or unpleasant obligations imposed with a view of repairing the harm caused by the offence with punishment. Against this view, scholars who do not regard punishment as incompatible with restorative justice have argued that punishment should not be defined by reference to the intentions of the agent who imposes it but by reference to the element of hard treatment, so that it would embrace "anything that is unpleasant, a burden, or an imposition of some sort on an offender."¹⁸⁾ Irrespective of the view one takes on this issue, the fundamental difference between restorative justice and retributive justice should not be overlooked. As Howard Zehr points out in his articulation of the restorative paradigm: "With crime, the starting point must be the needs of those violated. When a crime occurs (regardless of whether an 'offender' is identified) the first questions ought to be, 'Who has been harmed?' 'How have they been harmed?' 'What are their needs?' Such an approach would, of course, be far from that of retributive justice which first asks, 'Who did it?' 'What should be done to them?' and then rarely moves beyond that point"¹⁹⁾

Whilst according to the traditional criminal justice theory responsibility for crime control lies with the state and state-run institutions, restorative justice seeks to transfer such responsibility to the particular community concerned. Restorative justice proponents assert that the community is in a better position to effectively deal with the problems caused by the offending behaviour, having regard to the needs of the individuals involved as well as cultural and circumstantial requirements.²⁰⁾ Restorative justice entails a relocation of authority in responses to crime away from the state since from this viewpoint the state no longer has a monopoly over decision-making, the principal decision makers being the parties themselves. The state's role is restricted to providing information, delivering services and supplying resources.²¹⁾ Furthermore, an important feature of restorative justice is a shift away from the retributive paradigm pervading the traditional criminal justice system.²²⁾ Rather than merely ensuring that the offender pays his or her debt to society through punishment, the chief priority of restorative justice is to ensure that the offender is held accountable for his or her actions and repairs the harm, both material and symbolic, he or she has caused.²³⁾ In this context, accountability means understanding what one did and then taking responsibility for it.²⁴⁾ According to Johnstone, "instead of isolating offenders and seeking to deter them through threats of punishment, [we should aim to] hold the offender accountable, subject them to the disapproval of those who care about them, establish circles of support and accountability around them and attempt to restore repentant offenders to full membership of the community."²⁵⁾ The above statement highlights a further feature of restorative justice, namely the desire to rehabilitate the offender with a view to preventing

recidivism and returning the offender to the community. The reintegration of the offender is facilitated by the participation of the community in the restorative justice process and the removal of barriers to active involvement of offenders in the community life. Furthermore, reintegration into the community is an important need of crime victims, as often the very fact of being a victim can lead to further victimization by society.²⁶⁾

In this connection some reference should be made to the notion of 'reintegrative shaming', an idea that has played an important part in the restorative justice movement. According to John Braithwaite, the type of social shaming that is generated and perpetuated by the traditional criminal justice system through its formal processes and punitive measures entails the stigmatisation of the offender. Such stigmatization tends to create outcasts who reject community values and consequently makes recidivism and crimes rates worse. As the offender's role in society is undermined by stigmatisation, deviance for him or her then becomes a way of life that is difficult to change and is rationalized as a defensive lifestyle within the deviant subculture.²⁷⁾ The challenge for the restorative justice approach is to develop ways of responding to offenders that would counter the naturally occurring stigmatizing processes and provide mechanisms for the reintegration of offenders into community life. As Braithwaite has remarked, communities characterized by high levels of cohesion and low delinquency rates make substantial use of practices in which young people who violate social norms are 'shamed' and then 'reintegrated' into the community. A reintegrative process grounded on restorative justice would normally begin with a confrontation that empathetically involves the offender, affirms norms and engages family and community input and support. Then, community forgiveness of the offender occurs through a process of earned redemption as the offender makes amends to those he or she has harmed. Successful reintegration presupposes that the disapproval of the offending behaviour is accompanied by the re-affirmation of the offender's status in the community as a good and respected person. Of particular importance is whether the procedure adopted succeeds in invoking feelings of genuine remorse in the offender. In this respect, choosing the right participants to be present in supporting roles is crucial. If the process is to have a reintegrative effect the offender must be made powerfully aware of the disapproval of his or her wrongful conduct by persons for whom he or she maintains maximum respect. In the words of Braithwaite, "the discussion of the consequences of the crime for victims (or consequences for the offender's family) structures shame into the [restorative justice] conference; the support of those who enjoy the strongest relationships of love or respect with the offender structures reintegration into the ritual. It is not the shame of police or judges or newspapers that is most able to get through to us; it is shame in the eyes of those we respect and trust."²⁸⁾

Restorative justice processes can be applied in a variety of contexts at a formal or informal level. Formal restorative justice processes are usually initiated by criminal justice organs, while informal restorative justice processes are initiated by community groups and organizations.²⁹⁾ At a formal level, the criminal justice system can employ restorative justice during the pre-trial phase, during the pre-sentencing process as a condition of the sentence, or in pre-release programmes. At an informal level, restorative justice can be utilized to resolve a variety of conflicts and disputes such as, for example, neighbourhood conflicts, family conflicts and conflicts arising from bullying in schools. Although guided by common

underlying principles, restorative justice programmes vary considerably from country to country and region to region, depending on local cultural norms, needs and customs. Examples include victim-offender mediation; family group conferencing; sentencing circles; peace-making circles; healing circles; victim intervention programmes; victim panels; and community reparative boards.³⁰⁾ Most countries have developed standards and ethical guidelines for restorative justice practitioners, which address aspects such as the education and training of practitioners; the conduct of the restorative justice process; the victims' and offenders' safety and freedom of thought and choice; the impartiality and neutrality of practitioners; confidentiality and the disclosure and exchange of information; expert advice and assistance; how to detect and avoid manipulative or intimidating negotiating techniques; costs and fees; media policy; informed negotiations and dialogue, especially when different cultural and racial groups are involved; the screening of cases; and follow-up procedures and quality control through programme assessment and evaluation.

Some Examples of Restorative Justice Practices

Victim-Offender Mediation

Although practices associated with the idea of restorative justice can be found in many indigenous as well as pre-industrial Western justice traditions, the term 'restorative justice' is currently understood as referring to programs implemented since the mid-1970s, based on mediated meetings between victims and offenders and aiming at reparation and reconciliation. Reference should be made in this connection to the victim-offender reconciliation programs³¹⁾ – also referred to in some communities as 'victim-offender mediation programs' or 'victim-offender dialog programs'.³²⁾ These programs seek to mediate between victims and offenders with a view to providing an opportunity for the offender and the victim to develop a mutually acceptable plan on how to deal with the harm caused by the offence.³³⁾ The plan may involve the offender making monetary restitution, carrying out work for the victim or the community, undertaking to behave in a particular way or attending an educational or rehabilitation program.

During the mediation process victims and offenders come together in a safe, controlled setting and engage in a discussion of the crime and the circumstances in which it was committed. With the assistance of a neutral third party – a trained mediator – the parties are provided an opportunity to talk about what has happened and express their feelings.³⁴⁾ The victim describes the physical, emotional and financial impact of the crime, asks questions about the offender and his or her motive and proposes a plan for restoring losses. The offender is given the opportunity to learn about the impact of the crime on the victim, describe what happened from his or her point of view and take direct responsibility for his or her conduct. Paying close attention to the needs of the victim is of vital importance here, and the mediator is expected to do everything possible to ensure that the victim will not be harmed in any way during the process. Moreover, both the victim's and the offender's participation must be voluntary – the parties should never be coerced into taking part in the process – and cases should be carefully screened regarding the readiness of the parties to participate.

Furthermore, it is important that the parties are given choices, whenever possible, about procedural matters, such as when and where the mediation session will take place, who will be present and who will speak first.

Cases may be referred to victim-offender mediation programs by judges, probation officers, prosecutors, victim or defence lawyers and law enforcement agents. In some programs, cases are referred as a diversion from prosecution, on the understanding that any agreement reached during the mediation process is to be successfully implemented; in other programs, cases are referred after the offender has been found guilty by the court, with the mediation being a condition of probation or other disposition, if the victim has agreed to participate. Mediation can take place at any time during the criminal justice process, or outside the system altogether, but only after the offender's guilt has been established as a result of a conviction or an admission of responsibility by the offender. In many countries, such as the US, Canada, England, Belgium and the Netherlands, victim-offender meetings are held in prison, usually after sentencing (even when mediation will have no effect on the sentence imposed). In some countries, moreover, meetings are organized which involve groups of unrelated victims and offenders.³⁵⁾

In most countries, victim-offender mediation programs have been incorporated into the justice process and are run by police and other law enforcement agents (e.g. the Thames Valley project in England, the Leuven mediation project in Belgium) or probation officers (e.g. in Austria and the Czech Republic). The great majority of cases involve offences of a less serious nature, such as property offences committed by young people, although the number of cases involving serious and violent crimes committed by both juveniles and adults is increasing. It should be noted that in some European countries the mediation process does not always involve a direct meeting between the victim and the offender. Instead, the mediator meets separately with each party, conducting shuttle negotiation, until an agreement on the appropriate form of restitution is reached. Although this form of mediation satisfies some restorative principles, it usually achieves less than a direct meeting between the parties can accomplish.

A large number of studies on victim-offender mediation programs have been carried out and their findings have been for the most part positive.³⁶⁾ A high level of satisfaction and perception of fairness with the mediation process and its outcomes for both victims and offenders has been reported by researchers. It has been found that the process has a significant impact on the likelihood of offenders carrying out their restitution obligations, as compared with similar offenders who completed court-imposed restitution orders. Moreover, it has been reported that victim-offender mediation tends to lead to a reduction of anxiety and fear in crime victims.

Conferencing

Many restorative justice scholars have drawn attention to issues concerning the nature and extent of the community's role in a restorative justice process. In this respect, a practice that has attracted much attention is conferencing. Conferencing is essentially an extension of the victim - offender mediation process involving not only offenders and victims but also

their wider communities of care, such as their respective families and other community members who may be able to play a part in the reconciliation process. It aims to involve the offender, the victim and their families in a decision-making process with the objective of reaching a group-consensus on a just outcome. At the same time, it seeks to increase the offender's awareness of the human impact of his or her wrongful behaviour and to allow both offender and victim to reconnect to key community support systems. Conferencing is being used or experimented on in many countries, and there are now several versions of conferencing found in New Zealand, Australia, Asia, Southern Africa, North America and Europe. The way in which conferencing operates in different countries varies considerably.³⁷ The relevant process has been implemented in schools, police departments, probation agencies, community mediation programs, residential programs and neighbourhood groups. In general, however, conferencing is most often relied upon as a diversion from the court process for juvenile offenders or used after adjudication to address unresolved matters or to determine appropriate forms of restitution. Cases dealt with through conferencing involve a variety of offences, including property and drug offences, minor assaults, vandalism and, in a number of countries, domestic violence. A brief overview of restorative justice conferencing as it operates in New Zealand would be instructive at this point.

The turning-point in the recognition of restorative justice in New Zealand was the enactment of the Children, Young Persons and their Families Act 1989 (CYPFA). Although modern restorative justice theory was at an early stage of development when the 1989 legislation was enacted, it is obvious that the core restorative values of participation, negotiation, repair, healing and the reintegration of those affected have supplied the foundations of the new youth justice system. Under the new statutory regime, primary responsibility for decisions concerning child abuse and neglect and youth offending is placed with extended families, which are given support in their role through services and other appropriate aid to respond to needs. The key element in the decision-making process is the family group conference, which includes all those directly concerned together with representatives of the responsible state agencies, i.e. child welfare for care and protection cases and the police in the case of offending.

A family group conference may be convened by a youth justice coordinator following a referral by the police or the Youth Court in three situations: (a) where a young person has allegedly committed an offence and has not been arrested, but the police are contemplating criminal proceedings (this is the most common trigger for a conference); (b) where a young person has been arrested and charged in the Youth Court, and he or she has not denied guilt; and (c) where the Court has issued an initial finding of guilt.³⁸ When convening a conference, the youth justice coordinator is expected to consult with the families and individuals concerned as to the time, place and date of the conference, as well as the procedure to be followed. The coordinator is expected to implement the wishes of the parties, so far as this is practicable and consistent with the principles of the CYPFA. The CYPFA sets out the categories of persons who are entitled to attend a youth justice family group conference. These include: (a) the child or young person in respect of whom the conference is held; (b) every parent, guardian or other person who has care of that child or young person, or a member of the family or family group of that child or young person; (c) the youth justice

coordinator;³⁹⁾ (d) the informant in the proceedings for the offence or alleged offence to which the conference relates (usually a representative of the Police Youth Aid Section or some other law enforcement agency); (e) any victim of the offence or alleged offence to which the conference relates, or a representative of that victim; (f) the victim's support group (members of his or her family or family group, or any other persons); (g) any legal counsel, barrister or solicitor representing the child or young person;⁴⁰⁾ (h) a social worker; and (i) a probation officer, if the young person is subject to a community-based sentence.⁴¹⁾ It must be remembered that attendance at a conference is voluntary; it is sufficient compliance under the CYPFA that the individuals concerned had the opportunity to attend the conference through a proper invitation.⁴²⁾

Occasionally, if it is appropriate, the family group conference proceedings are opened by a community elder or pastor with a greeting or prayer. The youth justice coordinator will then introduce those present or ask them to introduce themselves. Next, the youth justice coordinator will inform the participants of the matters that have brought the young person to the attention of the law enforcement authorities, explain the purpose of the conference and advise the participants on the decisions and recommendations that can be devised and the methods for their implementation. The law enforcement officer will then supply the conference with detailed information about the alleged offending. The conference must ascertain whether the young person admits the offence, unless the conference has been convened after the charge was proved at court. No decisions, plans or recommendations can be formulated if the young person does not admit the offence or if the conference cannot ascertain an admission of guilt; should this be the case, the matter must be transferred back to the referring agency. No pressure should be exerted on the young person to admit the offence. After the young person has admitted responsibility for the offence, the victim or his or her representative will be invited to speak about the personal impact of the offender's misconduct. Next, all the participants will discuss the causes, circumstances and effects of the young person's wrongdoing and share their views about how to set matters right. At this stage, the coordinator will clarify the procedures that will apply if the young person's family makes a recommendation that the conference as a whole is prepared to accept and the consequences that will ensue if an agreed decision proves impossible. The young offender, his or her family and other support persons will then deliberate privately with a view to formulating a plan. When the family has finished its deliberations, the young person and his or her support group will return to the conference and put forward their recommendations. These recommendations will then be presented to the victim, his or her support group and the law enforcement agent. The consensus of opinion is that any decisions made at a family group conference are binding only if they are unanimous and supported by all those participants entitled to attend and who actually participated in the conference.

The conference has the flexibility to make any decision or recommendation it chooses but, in particular, it can recommend that: (a) any proceedings commenced against the young person should progress or be discontinued; (b) a formal police caution should be issued; (c) an application for a declaration that the young person requires care or protection should be initiated; (d) appropriate penalties should be imposed on the young person; and (e) the young person should make reparation to any victim. Although the CYPFA explicitly refers

to the above five recommendations, they are not intended to limit the discretion of the conference. For instance, the conference could recommend that the young offender should write a letter of apology to the victim;⁴³⁾ perform community service; or be placed under appropriate supervision. Where the young person has been detained in custody pending the determination of the charge, the conference can make a recommendation regarding custody; where proceedings in relation to a charge have commenced, it can recommend to the court whether the court or an alternative body should deal with the young person. Where the court has issued an initial finding of guilt, the conference can recommend how the young person should be treated. The CYPFA makes no provision for an appeal against the decision, recommendation or plan formulated by a family group conference. Any participant who is dissatisfied with a proposed decision, recommendation or plan can refuse to agree and this will prevent the achievement of a binding decision.

The intended effect of family group conferencing on a young offender is guided by the statutory principles enacted by the CYPFA. These principles support both accountability and welfare goals within the youth justice context.⁴⁴⁾ An emphasis on accountability enhances a young person's development by encouraging him or her to critically evaluate their behaviour, assume responsibility for his or her life and achieve cognitive self-change. Identifying and addressing the needs of juveniles is a key objective of the restorative justice approach, and this is achieved in the family group conferencing process largely through the participation of the young offender and his or her family in the formulation of the conference plan. Furthermore, the participation and empowerment of young offenders are important elements for the success of a reintegrative shaming ceremony – a process recognized as capable of engendering positive and rehabilitative results. The dynamics of the family group conference are extremely relevant from a reintegrative shaming perspective: as Braithwaite points out, the family unit is the ideal forum to realize the potential of reintegrative shaming.⁴⁵⁾ The centrality of the family is linked to the fact that families often exhibit the essential features of communitarianism and interdependency. These features invoke personal obligations that provide the essential foundations for cognitive self-change. The role of the family is also related to the observation that the family is most likely to exist as the key social unit that takes responsibility for reintegrating the young offender. Reintegration is achieved in the family group conference process through the formulation of a plan aimed at healing the injury caused by the offending behaviour as well as dealing with the underlying causes of that behaviour. By agreeing to the plan, the young person is thought to disassociate himself or herself from the shamed behaviour. Furthermore, the victim's involvement in the process is said to empower the victim in his or her search for healing.⁴⁶⁾ The commonly cited benefits of victim participation include having one's views heard; meeting with the offender to express one's anger and emotions directly; assessing the offender's attitude; and understanding why the offence occurred. Research suggests that the provision of information to victims about both the procedure and the range of emotions they may experience can enhance their well-being.⁴⁷⁾ Finally, the CYPFA is explicit in its intent to empower and strengthen the family by vesting with the family the responsibility to respond to their young members' offending. The restorative potential of the family's increased role lies not only in its responsibility to deal with the offending, but most importantly in the legislature's objective to

strengthen the family as a valuable institution in its own right. The family group conference process presents an opportunity for the family to understand the nature and causes of the offending behaviour and to seek ways to help the young person. The wider family may learn about problems within the nuclear family that are related to the offending and possibly assist in tackling those weaknesses. The process may also initiate better family functioning through communication, co-operation, supervision and proper exercise of authority.⁴⁸⁾ Moreover, when people from outside the family, such as teachers and community elders, are invited to the conference, the process may contribute to the empowerment and well-being of the wider community by enhancing understanding of social realities, reducing stereotypes and fostering bonds of solidarity and cooperation.⁴⁹⁾

A number of research studies have confirmed that, in general, the outcomes of conferences are largely restorative: the majority of the individuals involved participate in the process and subscribe to the decisions reached, which are for the most part concerned with the reparation of the harm and the reintegration of offenders. These studies have also identified several key factors that are associated with crime prevention and positive life outcomes. These include the equitable and respectful treatment of all; the absence of stigmatic or disintegrative shaming; the understanding of the nature and aims of the process by the participants; and the young offender feeling remorseful, forgiven and supported. The studies also found that the costs of restorative justice conferencing are significantly lower than those of the formal sentencing process.⁵⁰⁾

Circle Sentencing

Circle sentencing has its roots in the traditional sanctioning and healing practices of aboriginal peoples in Canada and American Indians in the United States. The first sentencing circles were set up by supportive judges and community justice committees in the early 1990s in the Yukon Territory, Canada, and other northern Canadian communities.⁵¹⁾ In the mid-1990s the use of sentencing circles spread to the United States with the introduction of a pilot project in Minnesota. Circle sentencing is a community-based process conducted in partnership with the criminal justice system. Its aim is to develop an appropriate sentencing plan by taking into account the needs of all the parties involved in or affected by a crime, as well as those of the broader community. The focus of the process is again on reconciliation and the restoration of peace, rather than on retribution and deterrence, although sanctions can play a part if they are deemed necessary for achieving the goal of restoration. Circle sentencing has been used in cases involving a variety of crimes committed by both juvenile and adult offenders. Of course, not all cases can be dealt with through circle sentencing. Community concerns, the expectations of the victim and his family, the victim's and the offender's willingness to participate and the dedication of the parties' support groups are all key factors in determining whether a case is suitable for the circle process.⁵²⁾

A sentencing circle is constructed as an open court. Within the 'circle', crime victims, offenders, family and friends of both, justice and social service personnel, and interested community members talk about the crime and assess its impact freely and openly with a view to arriving at a consensus for a sentencing plan that would address the concerns of all

interested parties. The objective, in other words, is to allow the best information to emerge from all the participants in the process so that a solution can be identified that would assist in healing all affected parties and prevent future crimes. In addition to offender's undertaking to make amends, the relevant plan may incorporate commitments by the justice system, the community and the families concerned. It is important to note here that circle sentencing usually involves a procedure that includes more than one step (application by the offender to participate in the circle process, a healing circle for the victim, a healing circle for the offender, a sentencing circle to reach an agreement on a sentencing plan and subsequent circles to monitor and assess the progress of the offender). The elements of the circle process vary from one community to another depending upon local needs and culture. They also evolve over time based on the community's changing needs, knowledge and experience. The successful implementation of a circle sentencing process presupposes adequate cooperation between the formal criminal justice system and the broader community – between criminal justice professionals and community members. Moreover, participants must be skilful in applying consensus-building techniques and implementation procedures must be flexible and adaptable to the requirements of the individual case. A brief overview of the circle sentencing process as it operates in Canada is offered below.

In Canada circle sentencing is employed largely in cases involving offences of a serious nature or where the circumstances of the offender warrant such intervention.⁵³⁾ It is utilized by judges as an alternative to hearing formal sentencing submissions from defence attorneys and the prosecution. It is therefore required that the offender must enter a plea of guilty in the opening stage of the process accepting full responsibility for the offence.⁵⁴⁾ Usually between 15 and 50 members of the community concerned are in attendance. Media representatives are allowed to attend and to report on the proceedings, although certain restrictions as to the content of their reports may be imposed. Seats are arranged in a circle and the procedure is chaired either by a judge or a respected community member (sometimes referred to as 'keeper of the circle'). After the participants introduce themselves, the charges are read and the prosecution and defence lawyers deliver short opening remarks on the case. The community members then present their views. Unlike a regular court-based sentencing process, which focuses on the offence and the offender, discussions embrace a variety of topics including: the prevalence of the offence in question and similar crimes in the community; the root causes of such crimes; the impact of such crimes on victims generally, as well as on the families and communities concerned; the impact of the particular crime under consideration on the victim and his or her family; what can be done within the community to prevent this type of offending behaviour; what steps need to be taken to heal the offender, the victim, their respective families and the community; and the requirements of an appropriate sentencing. Throughout the process the victim and his or her support group are active and equal participants in the discussions, which usually take from two to ten hours spread out over two separate hearings. At the end of the first hearing the offender is given a set of goals and is asked to adopt a plan reasonable to the situation. Several weeks or months later, the circle will reconvene to evaluate the offender's performance and introduce any necessary changes to the plan. At this stage, the judge will determine the final sentence taking into account the recommendations of the circle. The judge's decision is subject to

appeal in the same way as any other court decision. The outcome of a circle sentencing hearing is usually a community-based disposition involving supervision, counselling and guided self-help. The progress of the offender in following the sentencing plan is monitored by a probation officer, a community justice body and his or her support group.

Similar to other restorative justice processes, circle sentencing is based on a partnership between the community and the traditional criminal justice system. Thus, while offenders' due process rights are fully protected, communities are given access to the tools and resources available to the formal justice system. At the same time, victims of crime are given a voice and the opportunity to come face to face with the offender in a safe and supportive environment. As Linker observes, circle sentencing offers the promise of improving the delivery of justice to the community as well as influencing the criminal justice system to become more responsive and fair.⁵⁵⁾ The latter outcome can be accomplished when judges, advocates and other criminal justice agents apply the knowledge and experience they gain from circle sentencing to the formal justice process. However, it should be noted that, as it is the case with victim-offender mediation and conferencing, circle sentencing should still be regarded as a 'work in progress'. Much more needs to be done to enhance offender, victim and community participation and involvement in the process and additional community-based programs for those affected by the offence need to be developed.⁵⁶⁾

Other Applications of Restorative Justice

Besides offering an alternative to ordinary criminal justice processing, restorative justice practices are also relied upon in dealing with a variety of social problems, such as domestic violence, child neglect and school bullying. Evidence suggests that restorative justice programs designed to confront problems of this nature can produce a multiplicity of beneficial outcomes, including enhanced family unity, better parenting, reduced drinking problems and decreased family violence. Moreover, programs combining mediation between victim and offender with meetings of students, teachers and parents to discuss the prevention of violent behaviour in schools are producing promising results.⁵⁷⁾ These programs have proven more effective than simple mediation (through which children resolve individual disputes as they arise) for they view bullying incidents as providing an opportunity for the whole school community to express its disapproval of the offending behaviour.⁵⁸⁾ The knowledge acquired from the application of restorative justice techniques in the fields of justice and education has facilitated the adaptation of restorative interventions in conflicts arising in the workplace as well.⁵⁹⁾

Furthermore, restorative justice methods have been used in a number of countries as a means of resolving conflicts between citizens and their governments.⁶⁰⁾ Reference should be made in this connection to the truth and reconciliation commissions of South and Central America, which have contributed greatly to the resolution of conflicts generated by civil war and government abuses. Another example is offered by the South African Truth and Reconciliation Commission, which has been described as an expression of restorative justice in addressing the injustices committed during the apartheid period. The Commission adopted the view that while the testimonies of the perpetrators of human rights abuses were

central to the proceedings, more important was the fact that victims were given the opportunity to speak openly about their loss and suffering and to ask questions of offenders. The public hearings of the Commission exposed the South African public to this different approach to the nature and function of justice. Besides serving political needs, this type of justice returned power to victims and their families, demanded accountability from offenders and sought to provide some level of reparation to those who had suffered.⁶¹⁾

International Recognition of Restorative Justice

As a result of the growing interest in restorative justice around the world, restorative justice has in recent years attracted a great deal of attention at an international level. Indeed, the UN has long emphasised the increasingly important role of the restorative justice approach in addressing the problems associated with crime. As noted in its Handbook on Justice for Victims, “The framework for restorative justice involves the offender, the victim, and the entire community in efforts to create a balanced approach that is offender-directed and, at the same time, victim-centred. Victim compensation has become a key feature of restorative justice in many developed countries but could well be revived in developing countries, where it has largely been abandoned with the introduction of alien justice systems.”⁶²⁾ In 1999 a resolution was adopted by the United Nation’s Economic and Social Council encouraging member states to make use of the restorative justice approach in appropriate cases. The same resolution invited the Commission on Crime Prevention and Criminal Justice to consider formulating a set of guidelines on the development and implementation of restorative justice programs. Moreover, at the Tenth UN Congress on the Prevention of Crime and Treatment of Offenders, which took place in Vienna in May 2000, restorative justice and the issue of fairness to both victims and offenders were discussed at great length. The Congress endorsed a declaration encouraging governments to develop and expand restorative justice programs.

In April 2002, the UN Commission on Crime Prevention and Criminal Justice passed a draft resolution for adoption by the Economic and Social Council on “Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.” This resolution was based on the work of the Group of Experts on Restorative Justice at their meeting held in Ottawa from October 29 to November 1, 2001. In it the Commission, composed of representatives from all the states present at the session: (1) takes note of the basic principles of restorative justice; (2) encourages Member States to draw on these; (3) requests the Secretary-General of the Commission to ensure the widest possible dissemination of the restorative justice principles among Member States and other institutions; (4) calls upon Member States that have adopted restorative justice practices to make information available to other States on request; (5) calls upon Member States to assist one another with research, training and exchanges of experience; and (6) calls upon Member States to consider, through voluntary contributions, the provision of technical assistance to developing countries, on request, in the development of restorative justice programmes. Notwithstanding its non-mandatory wording, the resolution had a significant effect in encouraging Member States to establish restorative justice programmes.

In a major UN Congress held in April 2005, one of the four official all-day workshops was dedicated to the project of 'enhancing criminal justice reform, including restorative justice'. The workshop surveyed various restorative justice practices around the world, with particular attention on victim-offender mediation, conferencing and circles. As the host country of the Congress, Thailand was eager to demonstrate its commitment to restorative justice, mainly through the utilization of the conferencing model, developed with the assistance of the International Institute for Restorative Practices in the US. Representatives of the countries attending the Congress embraced the view that restorative justice was something worth exploring as a means of systemic criminal justice reform. The Bangkok Declaration, which summed up the conclusions of the Congress, included the following paragraph on restorative justice:

*To promote the interests of victims and the rehabilitation of offenders, we recognize the importance of further developing restorative justice policies, procedures and programmes that include alternatives to prosecution, thereby avoiding possible adverse effects of imprisonment, helping to decrease the caseload of criminal courts and promoting the incorporation of restorative justice approaches into criminal justice systems, as appropriate.*⁶³⁾

It should be noted in this connection that international human rights law could contribute to the development of restorative justice and vice versa. As John Braithwaite observes, "fundamental human rights should set legal limits on what restorative processes are allowed to do. But I also suspect that UN human rights instruments can give quite good guidance on the values restorative justice processes ought to observe. Integrating the rights-constraining and values-guiding requirements for restorative justice ... might make for decent and practical global social movement politics for the movement for restorative justice."⁶⁴⁾ The 1948 Universal Declaration of Human Rights, the first comprehensive agreement among the nations of the world on the rights and freedoms of all human beings, constitutes an articulation of our shared values on a global scale. The rights described in it and subsequent treaties, covenants and declarations, including personal, civil, political, social, cultural and economic rights, reflect broader universalistic values, such as human dignity, equality, justice and freedom, and are meaningful and applicable to every human being, everywhere and at all times. Core values associated with restorative justice include dignity, respect, equality, inclusion, responsibility, honesty, fairness, mutual care and reparation. Some of these values, such as honesty, relate chiefly to the individual participants; others, such as inclusion, pertain to the restorative process; and others, such as respect, relate to both domains. The procedural values encourage or allow the participants to exhibit the individual values, but both are crucial for the transformative outcomes that restorative interactions seek to achieve.⁶⁵⁾ Universally shared values are a powerful and effective means of guiding our actions and changing the world. As Kay Pranis points out, we need to continually keep asking: does this choice of action move us in the direction of our shared values? How can we realize human rights and the transformative potential of restorative justice?⁶⁶⁾

At a European level, the increasing impact of the restorative justice approach is reflected in a number of significant developments, such as the recommendation on the use of

mediation in criminal matters adopted by the Committee of Ministers of the Council of Europe in 1999. In the following year, the European Forum for Victim-Offender Mediation and Restorative Justice was created with the support of the European Union for the purpose of facilitating cooperation between restorative justice experts – scholars, practitioners and policy makers - throughout Europe and promoting international and comparative research in restorative justice. In April 2003 the European Parliament endorsed a proposed European Network of National Contact Points for Restorative Justice.⁶⁷⁾ To be developed in consultation with the European Forum for Victim-Offender Mediation and Restorative Justice, the network is intended to improve the flow of information and exchange of knowledge about restorative justice throughout Europe, promote research on the topic of restorative justice, identify and develop areas for training and evaluation and organize conferences, seminars and other activities to promote restorative justice.

Finally, reference should also be made here to the Rome Statute for an International Criminal Court which contains a number of provisions arguably based on restorative justice principles. Thus, to help victims and witnesses deal with the judicial process the Statute provides for the creation of a victim and witness unit which will provide counselling and other assistance to victims and witnesses and advise the prosecutor and the Court on matters relating to the protection of their rights. It is stated, also, that the Court should take appropriate measures to protect the privacy, dignity and physical and psychological well-being and the security of victims and witnesses. Moreover, the Statute includes a mandate to establish principles relating to restitution, compensation and other reparation to victims, and a mandate to establish a trust fund for the benefit of victims of crime and their families.⁶⁸⁾

Assessing the Effectiveness of Restorative Justice Programs

The growing interest in the restorative justice approach in recent years is so far outpacing empirical research in assessing its effectiveness. Nevertheless, a dynamic research community is emerging whose members recognise that the future of restorative justice will ultimately be determined by how effective restorative justice programs are found to be as compared to conventional criminal justice processing. Comparing restorative justice with mainstream criminal justice processing in reference to types of offences and offenders and considering their respective effectiveness in terms of crime prevention is, of course, important. However, relying on recidivism as the sole measure of success of the restorative justice approach cannot give us the full picture as regards its potential. Besides the issue of recidivism, it is important to consider the other potential benefits of restorative justice programs to victims, offenders and communities. Although a great deal of work still remains to be done, a picture is beginning to emerge about the value that key participants place on the restorative justice approach.

The evidence emerging from a number of studies suggests that victims are in general satisfied with restorative justice processes and their outcomes.⁶⁹⁾ Community members who have participated in such programs in support roles have also expressed high levels of satisfaction with the restorative approach.⁷⁰⁾ Victims are very appreciative of the opportunity

they are given to express their point of view, describe the way in which their lives were affected by crime and take part in the resolution of the problems they experience. They also appreciate the emotional and material reparation which can be directly transacted with the offenders in the restorative justice setting. At the same time, however, there is evidence that the level of engagement expected of a victim taking part in a conference, especially the requirement that he or she deal face-to-face with the offender, involves the risk of further emotional harm. Another significant finding is that not all victims felt that their needs had adequately been addressed by the form of reparation they had received and many felt that the interests of the offenders were considered paramount.⁷¹⁾

As far as offenders are concerned, evidence from a number of studies suggests that participation in restorative justice programs, especially conferencing, leads to desistance from further wrongdoing and a possible decrease in recidivism.⁷²⁾ The relative success of these programs in preventing re-offending has much to do with the fact that offenders are more likely to respond positively to their justice experience when they perceive the relevant process to be equitable and fair.⁷³⁾ And there is clear evidence that offenders view the restorative justice approach as more procedurally fair than the mainstream criminal justice procedure, despite the explicit and formal rules governing the latter.⁷⁴⁾ Another interesting finding is that both offenders and victims tend to display a sense of altruism, with offenders expressing a desire to help victims and victims wanting to help offenders to cease offending.⁷⁵⁾

One should not lose sight of the fact, however, that restorative justice is in many respects an incomplete model of justice and that important issues remain, which are not addressed, or satisfactorily dealt with, by current restorative justice practices. Reference should be made, in this connection, to the problem of inconsistency of outcomes and the fear that the restorative justice approach may deprive offenders of important rights relating to due process. In relation to the latter concern, commentators have remarked that as a restorative justice practice becomes more complex through the introduction of 'due process' requirements and those involved in it become increasingly specialised, it runs the risk of giving rise to a new criminal justice 'industry' which could be as rule-bound and bureaucratic as the mainstream system.⁷⁶⁾ It has been asserted, moreover, that restorative justice programs do not pay sufficient attention to the larger profile of conflict that envelops episodes of crime and delinquency and thus they fail to address the 'big picture' of crime. As scholars have remarked, overly focusing on the process of saving individual victims and offenders could divert attention from the root causes in society that continuously produce a never ending supply of victims and offenders.⁷⁷⁾ A further problem is that in some cases there appears to be a marked imbalance between the gravity of the offence and the obligation imposed on the offender as a result of a restorative justice agreement which, according to some critics, is 'like a slap on the wrist' of the offender. There is also a fear that many offenders do not feel genuine remorse for their wrongful actions, seeking only to gain the advantages which participation in a restorative justice program entails. Commentators remark that restorative justice programs tend to pay more attention to the needs of offenders than those of the victims of crime. It is noted that some victims find it difficult to cope with what takes place in a restorative justice meeting and the range of emotions which they are likely to experience there. They may, therefore, leave the meeting feeling unsupported or, even worse,

re-victimised. Many of these shortcomings, however, are likely to be the result of a defective practice or of differences in the circumstances or dispositions of particular individuals, rather than the result of some inherent defect in the restorative justice approach itself.

With respect to the application of restorative justice questions have been raised regarding the formulation of criteria for determining which cases should be dealt with through conferencing, the effectiveness of shame and reintegration strategies,⁷⁸⁾ the protection of the privacy of those participating in a restorative justice program and the status of the information provided by the participants.⁷⁹⁾ Problems in the application of restorative justice are caused by the inadequacy of preparation prior to a conference resulting in insufficient rapport between the parties, and by the lack of neutrality of officials and conference coordinators encouraging the stigmatisation of offenders and making their reintegration difficult. Moreover, criminologists have been wrestling with the question of whether restorative justice techniques should be limited to juvenile offenders and offences of a less serious nature or expanded to include serious adult offending. Connected with this is the broader question of the potential of such techniques among serious and persistent adult offenders in reducing recidivism and rates of imprisonment generally. The judiciary will no doubt have a major role to play if conferencing or other restorative justice practices are to become mainstream practices for use beyond juveniles and beyond the less serious end of offending behaviours.⁸⁰⁾ Scholars and justice experts have also been working on the issues of adequate training of conference coordinators and the introduction of procedural guarantees to protect offenders and victims from the perils of informal justice and to ensure that the whole process and outcome is fair, equitable and capable of being complied with. These considerations have to be balanced, however, against the risks of denying innovation and of creating an alternative criminal justice system as rule-bound and inflexible as the mainstream one. In this respect it is crucial that participants attend conferences voluntarily, that responsibility is assumed prior to considering conferencing as an option and that outcomes of conferences are based on genuine agreement between the parties concerned.

Concluding Remarks

Over the past few decades restorative justice has been embraced in several countries around the world as a remedy for the shortcomings of mainstream criminal justice processing. The benefits which restorative justice entails for victims, offenders and the communities affected by crime may be sufficient in their own right to justify program development on this basis. Some proponents of restorative justice recommend that restorative justice programs should be independent of mainstream criminal justice because their objectives and guiding principles are different.⁸¹⁾ Others look for ways in which forms of restorative justice might be combined with traditional criminal justice practices so that the latter could be informed and influenced by restorative principles.⁸²⁾ Provided that the evaluative research continues to show encouraging results, the restorative justice approach can become a mainstream alternative to, or complement of, traditional courtroom litigation. This is not likely to happen, however, unless restorative justice is shown to have the capacity to prevent crime. Proving that capacity depends on the effective testing and implementation of restorative justice

programs, and this presupposes government agency cooperation, adequate resourcing and, of course, public support. A general improvement of the justice system through the employment of restorative justice techniques is not an over-optimistic expectation. Restorative justice programs are operating in several countries around the world today and the potential that they offer both for enabling deliberative democracy and for improving the administration of justice has already be shown to be worth pursuing.

Notes

- 1) Roach (2000: 249).
- 2) Marshall (1996: 37). A similar approach to restorative justice is adopted by Zehr. According to this author, restorative justice is “a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible.” Zehr (2002: 37).
- 3) *Handbook on Restorative Justice Programmes, Criminal Justice Handbook Series*, United Nations Office on Drugs and Crime, 2006, p. 7. According to Van Ness, the term restorative justice “is sometimes used narrowly to refer to programmes that bring affected parties together to agree on how to respond to crime (this might be called the *encounter* conception of restorative justice). It is used more broadly by others to refer to a theory of reparation and prevention that would influence all criminal justice (the *reparative* conception). Finally, it is used most broadly to refer to a belief that the preferred response to all conflict – indeed to all of life – is peace-building through dialogue and agreement of the parties (the *transformative* conception). Van Ness (2006: 13).
- 4) According to Braithwaite, the aims and core values of restorative justice are about healing, moral learning, community participation and caring, dialogue, forgiveness, responsibility and making amends. Braithwaite (1999: 5). In a later work, this author cites the following emerging standards for restorative justice: (a) remorse over injustice; (b) apology; (c) censure of the act; (d) forgiveness of the person; and (e) mercy. Braithwaite (2002A: 570).
- 5) The term ‘restorative justice’ was coined by Albert Eglash in a 1977 article. See Eglash (1977: 91-92).
- 6) Braithwaite (1999: 1 ff). As Zehr has remarked, “it is difficult to realize that the paradigm which we consider so natural, so logical (i.e. the one pertaining to the traditional Western criminal justice system), has in fact governed our understanding of crime and justice for only a few centuries. We have not always done it like this. ...Instead, community justice has governed understandings throughout most of our history. ...For most of our history in the West, non-judicial, non-legal dispute resolution techniques have dominated. People traditionally have been very reluctant to call in the state, even when the state claimed a role. In fact, a great deal of stigma was attached to going to the state and asking it to prosecute. For centuries the state’s role in prosecution was quite minimal. Instead it was considered the business of the community to solve its own disputes.” Zehr (1985: 6-7). And see Weitekamp (1999); Johnstone (2002: 36 ff). Consider also Gavrielides (2011).
- 7) It should be noted, however, that reconciliation was not always sought in cases where disputes involved comparative strangers.
- 8) See Peachey (1989). The first victim-offender mediation program in the United States was introduced in Elkart, Indiana, in 1978, and was modeled on the program developed in Kitchener.
- 9) Zehr (1990: 181). And see Roach (2000: 256). According to Kay Pranis, “restorative justice has

at its core the concept of mutual responsibility and interdependence. Individuals are responsible for their impact on others and on the larger whole of which they are a part... The importance of relationships is at the centre of restorative approaches – not just the relationship between a victim and an offender, but all the relationships connected to the victim and offender in the web of life.” Pranis (2002: 25).

- 10) Contemporary justice systems set a great premium on legal certainty: the knowledge that there is a fair process for applying a general rule to a particular case. Special emphasis is placed on professionalism and the professional skills of experts who, working in the system continually, are a guarantee of legal certainty. On this view, lay participation in the administration of justice is anomalous since it disturbs the basis for objectivity and predictability. Here we can see the contradiction in a liberal democratic society underpinned by the rule of law: in order that the main moral imperative of that society, namely the government of laws and not men, flourish, another important value, that of participation, must be sacrificed. One can see this in the tension between efficiency and democracy where efficiency, as relating to reliability, constancy and predictability, is continually subverted by the demands of democratic, and therefore inefficient participation. Restorative justice practices have the potential for managing this tension by providing for a degree of lay participation within the framework of the rule of law.
- 11) According to Mark Chupp, the process of setting ground rules is “a vital part of establishing an atmosphere and state that will be conducive to open communication and reconciliation.” Chupp (1989: 63).
- 12) One of the main criticisms that proponents of restorative justice level against the conventional criminal justice system is that it ignores the needs of the victims of crime. As Cayley puts it, “modern criminal justice has stressed the aggrandizement and edification of the state, rather than the satisfaction of victims”. Cayley (1998: 217). On this issue consider also van Dijk (1988: 124).
- 13) According to Retzinger and Scheff, apology and forgiveness pertain to “symbolic reparation”, a vital element of the restorative process. As they point out “Without [apology and forgiveness] the path towards settlement is strewn with impediments, whatever settlement is reached does not decrease the tension level... and leaves the participants with a feeling of arbitrariness and dissatisfaction. Thus, it is crucially important to give symbolic reparation at least parity with material settlement... Symbolic reparation is the vital element that differentiates [restorative justice] conferences from all other forms of crime control.” Retzinger and Scheff (1996: 317).
- 14) In the words of Nils Christie, “... in a modern criminal trial, two important things have happened. First, the parties are being represented. Secondly, the one party that is represented by the state, namely the victim, is so thoroughly represented that she or he for the most of the proceedings is pushed completely out of the arena, reduced to the trigger-off of the whole thing. She or he is a sort of double-loser; first via-a-vis the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important ritual encounters in life. The victim has lost the case to the state.” Christie (1977: 3).
- 15) As Paul McCold remarks, “For restorative justice to be ‘restorative’ it must involve those most directly affected. Every effort must be made to maximize the involvement and exchange of information between the affected parties ... Neither the state nor any individual or group appointed by the state can restore people by replacing the primary stakeholders, doing things to them or for them. ... The essence of restorative justice is not the end, but the means by which

- resolution is achieved.” McCold (2004: 15).
- 16) Walgrave (2003: 63).
 - 17) Walgrave (2003: 64).
 - 18) Daly (2000: 39).
 - 19) Zehr (1990: 191).
 - 20) A definition of community may be based on geography, relationship, interest, or it may refer to society as a whole. As Paul McCold explains, “there are many different levels of community, as there are different levels of disputes. Each offender and each victim are members of several communities and informal organizations – personal communities – family, friends, neighbourhood and school organizations, churches and community organizations. We are all members of our local community, municipal subdivision, metropolitan area, state, federal and societal level ‘communities’. Ultimately we are all members of the human community.” McCold (1995: 7). Each of these types of community is affected by crime in different ways and it is possible for each to play a part in a restorative justice process, depending on what is required in the particular case. Whilst the type of restorative justice program at work and the different ways in which communities may be affected by criminal wrongdoing leave room for various forms of community involvement, one can make the generalization that communities are harmed when the safety of their members is threatened. Van Ness and Strong (1997: 120).
 - 21) See on this Morris (2002: 597).
 - 22) In this connection, reference should be made to the long-established distinction between theories of justice which hold that the punishment of the offender is required for its own sake and theories offering instrumental or consequentialist justifications for punishment revolving around the notions of general and individual deterrence and rehabilitation. Commentators recognize that deterrence and rehabilitation are desirable goals but maintain that such goals cannot be attained through punishment (or through punishment alone). Being unable to justify the practice of punishment on these grounds, criminal justice theorists have sought to defend punishment by employing the idea of just deserts as a basis of retributivism. Retributivism claims that it is morally right to punish wrongdoers because that is what they deserve, irrespective of whether acts of punishment can protect people from criminal wrongdoing. The shift from instrumentalist or consequentialist justifications of punishment to retributive ones is motivated also by the desire to avoid the injustices occurring in the name of deterrence and rehabilitation, e.g. when offenders are kept in prison indefinitely or for extended periods of time for relatively minor offences contrary to the principle of proportionality. The latter principle is closely connected to the idea of just deserts and requires a correspondence between the relative seriousness of the offence and the relative severity of the punishment imposed on the offender. The perception of retributive justice as being concerned with some abstract ‘evening of scores’ appears to be too simplistic, however. At its basis, retributive justice is concerned with social equality – with making the offender and the victim equal by giving the offender his or her just deserts. The philosophical justification for retribution is essentially social and the state’s power to punish derives from the idea of the social contract to which citizens notionally subscribe (the so-called ‘contractarian thesis’). For a critical look at the retributivist perspective see Braithwaite and Pettit (1990).
 - 23) Although stigmatic punishment is incompatible with restorative justice, a restorative outcome might involve some form of suffering for the wrongdoer - e.g. he or she might be required to work off the damage he or she caused, give up certain activities or compensate the victim for the injury he or she sustained. However, such suffering is not imposed on the wrongdoer from

- without but is the result of a negotiated settlement between all the parties concerned.
- 24) As John Braithwaite has remarked, “retributivists are obsessed with passive responsibility because their priority is to be just in the way they hurt wrongdoers. The shift in the balance towards active responsibility occurs because the priority of the restorativist is to be just in the way they heal.” Braithwaite (2002B: 129). Consider also Graef (2000); Walgrave (2001).
 - 25) Johnstone (2002: 161).
 - 26) Victims often share the offenders’ experience of being stigmatized and isolated. This can happen when a victim’s experience is disregarded or explained away as being the result of the victim’s own acts or omissions. As Daniel Van Ness explains, “because we are afraid of crime, we sometimes have trouble dealing with victims. They remind us of our own vulnerability, in the same way that someone with a terminal disease reminds us of our mortality. So we ignore them, we shun them, we blame them. The victim becomes invisible.” Van Ness (1986: 28).
 - 27) In the words of Gerry Johnstone, “by segregating and ostracising offenders we render them more rather than less of a threat to us. We drive them into criminal subcultures where they become more and more like alien enemies of the community. We lose whatever chance we have of influencing them to behave better and to subject themselves to various forms of supervision and control.” Johnstone (2002: 13). This approach draws support from the so-called ‘labelling theories’ in criminology. Labelling theories focus on the way other people react to offending behaviour and the subsequent effects of those reactions that create or contribute to deviance. It is submitted that when it becomes known that a person has engaged in deviant acts, he or she is then segregated from society and thus labelled, for example, ‘thief’, ‘abuser’, ‘fraudster’ and the like. Once a person has been singled out as a deviant, the label attached can become the dominant label or ‘master status’, which is seen as more important than all the other aspects of the person. This process of segregation creates ‘outsiders’, who are outcast from society, and then begin to associate with other individuals who have also been cast out. When more and more people begin to think of these individuals as deviants, they respond to them as such; thus, the deviant reacts to such a response by continuing to engage in the behaviour society now expects from them. The labelling theories draw on the general sociological perspective known as ‘symbolic interaction theory.’ According to the latter theory, reality is to a large extent defined by shared social symbols: when enough people agree that a certain idea is true then it ‘becomes’ true and is understood as real. On the labelling perspective see, e.g.: Becker (1963); Lemert (1967); Gove (1980).
 - 28) Braithwaite (2002B: 74). For a closer look on the issue of reintegrative shaming see also Braithwaite (1989) & (1993); Masters and Roberts (2000: 145).
 - 29) Restorative justice may be described as embracing a spectrum of practices ranging from serving as a complement to the traditional criminal justice system to being an alternative, community-based, dispute resolution system.
 - 30) McCold distinguishes between mediation models (including community mediation, victim offender reconciliation and victim offender mediation programmes), child welfare conferencing models (including social welfare family group conferences and family group decision-making programmes), community justice conferencing models (including youth justice and police conferences) and circle models (including peace, sentencing and healing circles). See McCold (1999: 1). Umbreit has expressed the view that, notwithstanding the wide diversity of restorative justice programs, these programmes share many common elements. According to this author, the term ‘restorative justice conferencing’ may be used as an umbrella term to cover all forms of direct restorative communication between victims of crime and offenders that are

facilitated by one or more impartial third parties. He has observed, further, that all the diverse models have strengths and weaknesses and that a multi-method approach to the matter will allow one to build on the strengths of the various models while minimizing the limitations. See Umbreit (2001: 33). It is important to note here that restorative justice is also relevant to programmes that do not involve direct contact between victims and offenders but employ shuttle conferencing as the preferred method. The latter method is considered very useful in some cases involving sexual offences where a face-to-face encounter may put the victim at the risk of further emotional harm.

- 31) The term 'reconciliation' has been objected to on the grounds that it implies that victims need to reconcile with their offenders. Today, most programs of this kind are referred to as 'victim-offender mediation'.
- 32) These were first introduced in Kitchener, Ontario, in 1974. See Peachey (1989). The first victim-offender mediation program in the United States was introduced in Elkart, Indiana, in 1978, and was modelled on the program developed in Kitchener. In the UK the first victim-offender mediation project was introduced in South Yorkshire Probation in 1983. In most Continental European countries, victim-offender mediation programs started in the late 1980s and early 1990s. Almost all are concerned with juveniles, and many include provisions also for adults. See Miers & Willemsens (2004); Aertsen, Mackay, Pelikan, Willemsens & Wright (2004).
- 33) For a closer look see Umbreit et al (1994); on the development and effectiveness of victim-offender mediation programs see Umbreit, Coates and Vos (2001).
- 34) The role of the mediator is not to impose his interpretation or solution upon the parties, but to encourage them to tell their stories, express their feelings and work together towards an agreement about what the offender can do to address the harm he caused.
- 35) This is done, for example, with sexual assault victims and offenders in Canada and England.
- 36) Consider, e.g., Coates and Gehm (1985 & 1989); Umbreit and Coates (1992 & 1993); Umbreit (1994 & 1998); Umbreit, Coates and Vos (2001); Marshall and Merry (1990).
- 37) Conferences are referred to by a number of different names, such as Family Group Conferences, Community Action Conferences and Community Accountability Conferences.
- 38) It should be noted, that a court might direct that a conference be convened at any stage of hearing a proceeding if it appears that such a conference is necessary or desirable.
- 39) The CYPFA requires that youth justice coordinators be appointed on the basis that they have the appropriate personality, training and experience to perform their statutory responsibilities. They are expected to have organizational skills and the personal qualities necessary to interact with people from different cultural and socio-economic backgrounds.
- 40) Although the counsel's principal responsibility is to protect the young person's legal rights, it is recognized that the restorative focus of the family group conference process and the clear statutory objectives that direct its operation should guide the counsel away from zealous adversarial representation. The counsel can play an important role in enhancing the well-being of his or her client by supplying information about the conference process and the emotional challenges that the latter may encounter. Consider on this Braithwaite and Mugford (1994).
- 41) For the family group conference to accomplish its restorative aims, it is essential that the professionals participating in it take a 'back-seat' role. When families lack the knowledge or confidence to deal with the issues at hand, there is actually a danger that the professionals may assume control over the decision-making process. The intervention by professionals (whether direct or indirect, conscious or inadvertent) may prevent the attainment of empower-

- ment by the young person, the victim and their respective families.
- 42) If people entitled to appear at the meeting are unable to do so and wish to have their views considered, they must notify the youth justice coordinator of their unavailability. Thereupon, the coordinator has a legal duty to ascertain their views and ensure that these are communicated to the conference.
 - 43) It is important that any apology is personal and sincere, and expresses the true feelings of the person making the apology. A guide to the preparation of an apology letter is helpful but it is important that apology letters do not become formalized. The aim is to elicit a sincere expression of regret for the young person's behaviour and to demonstrate an understanding of the effect of the offending on the victim or victims. The Youth Court Judge may ask a young person to read out the apology letter and, if the letter is inadequate, the Judge may direct that it be rewritten.
 - 44) Section 4 (f) of the CYPFA stipulates that: "The object of this Act is to promote the well-being of children, young persons, and their families and family groups by ... (f) ensuring that where children or young persons commit offences, (i) they are held accountable, and encouraged to accept responsibility, for their behaviour; and (ii) they are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways."
 - 45) Braithwaite (1989: 55-56).
 - 46) As Howard Zehr points out, healing is best achieved when victims are involved in the process with a view to satisfying their need for an experience of justice. See Zehr (1990: 191)
 - 47) Consider, e.g., Morris and Maxwell (2001: 278).
 - 48) See on this issue Hassall (1996: 31-32).
 - 49) Consider on this matter Cunha (1999: 339).
 - 50) For a more detailed account of the New Zealand approach to family group conferencing see Mousourakis (2007); (2010); (2015).
 - 51) See Cayley (1998: 182).
 - 52) See Stuart (1994); LaPrairie (1995: 78 ff); Lilles (2001: 161-179).
 - 53) Circle sentencing has been used for both adult and juvenile offenders, but primarily for offenders belonging to Aboriginal communities. It has not been introduced by statutory enactment but exist chiefly as a result of judicial discretion. Consider *R v Gladue* [1999] 1 S.C.R. 688 (S.C.C.).
 - 54) It is important to note that circle sentencing is not another form of diversion; rather, it is part of the established judicial process and results in convictions for offenders. It is required that any criminal record or other relevant reports are presented in the circle hearing process and that a record is made of the proceedings. A Crown lawyer is present and allowed to speak to the public interest, ensure that the victim's concerns are canvassed and make recommendations with respect to the sentence. Participants in the circle hearing process must be given access to any documentation filed with the court.
 - 55) Linker (1999).
 - 56) For a closer look at the origins, nature and function of circle sentencing in Canada see: Stuart (1994 & 1996); Griffiths and Hamilton (1996); Green (1998: chapter 5); Lilles (2001); McNamara (2000); Roberts and Roach (2003).
 - 57) Consider on this Rigby (1996).
 - 58) See Gottfredson (1997).
 - 59) Restorative justice techniques have been adopted as a means of resolving often complex

- conflicts inside corporations, factories and other work settings. See on this McDonald and Moore (2001).
- 60) For example, Fresno, California has employed dispute resolution techniques to deal with allegations of abuse of power by police. A similar program is being developed by Thames Valley police to deal with citizen complaints against the police misconduct.
 - 61) The following statement from the report of the TRC reflects clearly the Commission's approach: "Given the magnitude of this exercise, the Commission's quest for truth should be viewed as a contribution to a much longer-term goal and vision. Its purpose in attempting to uncover the past had nothing to do with vengeance; it had to do, rather, with helping victims to become more visible and more valuable citizens through the public recognition and official acknowledgement of their experiences... In addition, by bringing the darker side of the past to the fore, those responsible for violations of human rights could also be held accountable for their actions. In the process, they were given the opportunity to acknowledge their responsibility to contribute to the creation of a new South African society." TRC Report, Volume 1, paras 27-28.
 - 62) United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims: On the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Centre for International Crime Prevention, New York, 1999, 42-3.
 - 63) United Nations 11th Congress on Prevention and Criminal Justice 2005, para. 32.
 - 64) Braithwaite (2002B: 13).
 - 65) See on this issue Pranis (2007: 60).
 - 66) See Pranis (2007).
 - 67) The proposal lists several international documents as furnishing a basis for establishing this network. Of particular importance is the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. Article 10 of the decision invited Member States to promote the use of mediation as a response to crime. Article 17 set March 2006 as the deadline for Member States to have enacted legislation for the purpose of implementing article 10. The Network is expected to involve up to three contact points for each Member State, including at least one representative from the national authorities responsible for restorative justice.
 - 68) It should be noted here, however, that certain measures of a restorative nature were considered and ruled out, such as the recognition of restitution as a form of sanction that might be imposed by the Court in appropriate cases.
 - 69) In evaluations of the reactions of victims who had taken part in restorative justice programs using mediation in the US, Canada and England, researchers found higher levels of satisfaction, as compared with victims in unmediated cases. See Umbreit (1992). See also Braithwaite (1999: 20-6).
 - 70) See, e.g., Burford and Pennell (1998); McCold and Wachtel (1998).
 - 71) According to a number of studies carried out in New Zealand and Australia, around a third of victims report feeling worse after the conference See, e.g., Maxwell and Morris (1993); (1998). And see Strang and Sherman (1997). The results of the study carried out in New Zealand showed that 49% of victims were satisfied with Family Group Conference outcomes, whilst 31% were not satisfied at all. Of those who expressed dissatisfaction, most said that they felt worse as a result of attending the conference. It is worth noting here that the relatively low levels of satisfaction expressed by victims (as compared with those expressed by offenders) are somewhat bemusing when viewed in light of the fact that 95% of the Family Group Conferences

in the study were recorded as having concluded with an 'agreed' outcome. Surprisingly, this issue has not been addressed at any length in the literature, although this inconsistency might be taken to indicate that, in practice, the role of victims in Family Group Conferencing is not as important as it appears to be in theory and that the relevant process does not entirely achieve the restorative justice aim of restoring victims. Having said this it cannot be forgotten, however, that nearly 50% of victims did express satisfaction with the outcomes of Family Group Conferencing and this is an improvement on levels of satisfaction expressed by victims following regular court proceedings and sentencing. For a British perspective consider Holdaway et al. (2001: 80 ff).

- 72) Consider on this Braithwaite (1999). And see Maxwell and Morris (1999); Pollard (2000: 17); Morris and Gelsthorpe (2000: 21 ff).
- 73) This position is supported by psychological research in the field of procedural justice. For a closer look see Tyler (1990).
- 74) See, e.g., Umbreit (1992); Sherman, Strang, Barnes, Braithwaite, Inkpen and The (1998). Studies on conferencing in New Zealand have shown that 84% of young offenders and 85% of parents were satisfied with Family Group Conferencing and its outcomes. See Maxwell and Morris (1998).
- 75) See Shapland et al. (2006: 72).
- 76) See LaPrairie (1995).
- 77) McCold (1995).
- 78) See on this White (1994: ch 10).
- 79) Such as, for example, a confession by the offender of a separate crime.
- 80) New Zealand practice provides a useful model for how this could be achieved because of the role of the judiciary both in ordering that a conference be held in certain cases and in ratifying conference outcomes in such cases – a role recently confirmed by the New Zealand legislature. Under s. 8 of the Sentencing Act 2002 'In sentencing or otherwise dealing with an offender the court...must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case.'
- 81) According to Braithwaite, "The most fraught issue in the values debate is whether values such as retribution, just deserts, and fair punishment should be accommodated in a restorative justice framework. Many of the most distinguished restorative justice thinkers think they should. My own inclination is to think they should not ... restorative justice should be explicitly about a values shift from the retributive/punitive to the restorative." Braithwaite (2002B:16). See also Marshall (1990); Zehr (1995: 207); Marshall and Merry (1990).
- 82) See, e.g., Walgrave and Aertsen (1996).

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修復的司法—国内的及び国際的な視点

過去 10 年にわたって、犯罪と非行に対して、いかに考え対応するべきかということについての新しい思考方法が、世界中で広く受け入れられ続け、刑事司法の政策と実践に重大な影響を与えている。犯罪を、本来被害に巻き込まれた個人間の、そして人間関係の紛争であると捉える、修復的司法という考え方が展開しているのである。この司法における手続過程の主要な目的は、加害行為にもとづく被害に対処しながら当事者を和解させようとすることであり、さらにその紛争の解決は、被害者、加害者、双方の積極的な努力と、地域社会の責任の引き受けを要請する。本稿では、修復的司法の広範な原理について概観し、修復的司法と司法において他に広く行われている概念との違いを検討し、さらに修復的司法の実践に必要な且つ本質的な要素を明らかにし、論じるものである。本稿はそれゆえ、現今の修復的司法のプログラムを考察し、その起源に関する情報提供を行い、その原理、手続、目的について案内し、そうしたプログラムを発展させ、実施するうえで対処する必要のある多数の論点や懸念事項を明らかにする。

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